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CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1946

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS.

FRED M. VINSON, Chief Justice.
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.
WILEY RUTLEDGE, Associate Justice.
HAROLD H. BURTON, Associate Justice.

RETIRED

CHARLES EVANS HUGHES, Chief Justice.

TOM C. CLARK, Attorney General.
GEORGE T. WASHINGTON, Acting Solicitor Gen.[1]
CHARLES ELMORE CROPLEY, Clerk.
THOMAS ENNALLS WAGGAMAN, Marshal.

[1] During the vacancy in the office of Solicitor General, the duties of the office were performed, at the direction of the Attorney General, by the Honorable George T. Washington, Assistant Solicitor General, who signed government briefs and appeared as "Acting Solicitor General."

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, Robert H. Jackson, Associate Justice.

For the Third Circuit, Harold H. Burton, Associate Justice.

For the Fourth Circuit, Fred M. Vinson, 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, Fred M. Vinson, Chief Justice.

October 14, 1946.

(For next previous allotment, see 328 U. S. p. iv.)

DEATH OF LIBRARIAN AND APPOINTMENT OF SUCCESSOR.

SUPREME COURT OF THE UNITED STATES.

MONDAY, MARCH 3, 1947.

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

The CHIEF JUSTICE said:

It is my sad duty to announce that on February 22, during the recess of the Court, its Librarian, Mr. Oscar D. Clarke, died.

Forty-seven years ago this month Mr. Clarke entered the service of this Court as an assistant in its Library and in 1915 he succeeded Mr. Frank K. Green as Librarian. In this post he followed in the footsteps of his father who had been the first Librarian of the Court. His long service, together with that formerly rendered by his father, indicates a traditional family devotion to loyal and efficient discharge of public duty.

To every undertaking Mr. Clarke brought precise knowledge and broad experience in library science; he was courteous and helpful beyond the scope of prescribed duty. The severance of this long association brings to us a sense of deep sorrow for he had endeared himself to many Justices during the years of his close relationship with the Court.

The Court records its appreciation of Mr. Clarke's high character and of the effective aid he long rendered to it and expresses its sincere sympathy to his widow and the members of his family.

On Monday, March 31, 1947, THE CHIEF JUSTICE announced the following Order of the Court:

IT IS ORDERED by the Court that Miss Helen Newman be, and she is hereby, appointed Librarian of this Court in the place of Oscar D. Clarke, deceased.

The oaths of office were administered to Miss Newman on the same day.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1946.

EVERSON *v.* BOARD OF EDUCATION OF THE TOWNSHIP OF EWING ET AL.

APPEAL FROM THE COURT OF ERRORS AND APPEALS OF NEW JERSEY.

No. 52. Argued November 20, 1946.—Decided February 10, 1947.

Pursuant to a New Jersey statute authorizing district boards of education to make rules and contracts for the transportation of children to and from schools other than private schools operated for profit, a board of education by resolution authorized the reimbursement of parents for fares paid for the transportation by public carrier of children attending public and Catholic schools. The Catholic schools operated under the superintendency of a Catholic priest and, in addition to secular education, gave religious instruction in the Catholic Faith. A district taxpayer challenged the validity under the Federal Constitution of the statute and resolution, so far as they authorized reimbursement to parents for the transportation of children attending sectarian schools. No question was raised as to whether the exclusion of private schools operated for profit denied equal protection of the laws; nor did the record show that there were any children in the district who attended, or would have attended but for the cost of transportation, any but public or Catholic schools. *Held:*

1. The expenditure of tax-raised funds thus authorized was for a public purpose, and did not violate the due process clause of the Fourteenth Amendment. Pp. 5–8.

2. The statute and resolution did not violate the provision of the First Amendment (made applicable to the states by the Fourteenth Amendment) prohibiting any "law respecting an establishment of religion." Pp. 8–18.

133 N. J. L. 350, 44 A. 2d 333, affirmed.

In a suit by a taxpayer, the New Jersey Supreme Court held that the state legislature was without power under the state constitution to authorize reimbursement to parents of bus fares paid for transporting their children to schools other than public schools. 132 N. J. L. 98, 39 A. 2d 75. The New Jersey Court of Errors and Appeals reversed, holding that neither the statute nor a resolution passed pursuant to it violated the state constitution or the provisions of the Federal Constitution in issue. 133 N. J. L. 350, 44 A. 2d 333. On appeal of the federal questions to this Court, *affirmed*, p. 18.

Edward R. Burke and *E. Hilton Jackson* argued the cause for appellant. With *Mr. Burke* on the brief were *Challen B. Ellis, W. D. Jamieson* and *Kahl K. Spriggs.*

William H. Speer argued the cause for appellees. With him on the brief were *Porter R. Chandler* and *Roger R. Clisham.*

Briefs of *amici curiae* in support of appellant were filed by *E. Hilton Jackson* for the General Conference of Seventh-Day Adventists et al.; by *Harry V. Osborne, Kenneth W. Greenawalt* and *Whitney N. Seymour* for the American Civil Liberties Union; and by *Milton T. Lasher* for the State Council of the Junior Order of United American Mechanics of New Jersey.

Briefs of *amici curiae* in support of appellees were filed by *George F. Barrett,* Attorney General of Illinois, *William C. Wines,* Assistant Attorney General of Illinois, and *James A. Emmert,* Attorney General of Indiana, for the States of Illinois and Indiana; by *Fred S. LeBlanc,* Attorney General, for the State of Louisiana; by *Clarence A. Barnes,* Attorney General, for the Commonwealth of Massachusetts; by *Edmund E. Shepherd,* Solicitor General, and *Daniel J. O'Hara,* Assistant Attorney General, for the

State of Michigan; by *Nathaniel L. Goldstein,* Attorney General, and *Wendell P. Brown,* Solicitor General, for the State of New York; and by *James N. Vaughn* and *George E. Flood* for the National Council of Catholic Men et al.

MR. JUSTICE BLACK delivered the opinion of the Court.

A New Jersey statute authorizes its local school districts to make rules and contracts for the transportation of children to and from schools.[1] The appellee, a township board of education, acting pursuant to this statute, authorized reimbursement to parents of money expended by them for the bus transportation of their children on regular busses operated by the public transportation system. Part of this money was for the payment of transportation of some children in the community to Catholic parochial schools. These church schools give their students, in addition to secular education, regular religious instruction conforming to the religious tenets and modes of worship of the Catholic Faith. The superintendent of these schools is a Catholic priest.

The appellant, in his capacity as a district taxpayer, filed suit in a state court challenging the right of the Board to reimburse parents of parochial school students. He

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[1] "Whenever in any district there are children living remote from any schoolhouse, the board of education of the district may make rules and contracts for the transportation of such children to and from school, including the transportation of school children to and from school other than a public school, except such school as is operated for profit in whole or in part.

"When any school district provides any transportation for public school children to and from school, transportation from any point in such established school route to any other point in such established school route shall be supplied to school children residing in such school district in going to and from school other than a public school, except such school as is operated for profit in whole or in part." New Jersey Laws, 1941, c. 191, p. 581; N. J. R. S. Cum. Supp., tit. 18, c. 14, § 8.

contended that the statute and the resolution passed pursuant to it violated both the State and the Federal Constitutions. That court held that the legislature was without power to authorize such payment under the state constitution. 132 N. J. L. 98, 39 A. 2d 75. The New Jersey Court of Errors and Appeals reversed, holding that neither the statute nor the resolution passed pursuant to it was in conflict with the State constitution or the provisions of the Federal Constitution in issue. 133 N. J. L. 350, 44 A. 2d 333. The case is here on appeal under 28 U. S. C. § 344 (a).

Since there has been no attack on the statute on the ground that a part of its language excludes children attending private schools operated for profit from enjoying State payment for their transportation, we need not consider this exclusionary language; it has no relevancy to any constitutional question here presented.[2] Furthermore, if the exclusion clause had been properly challenged, we do not know whether New Jersey's highest court would construe its statutes as precluding payment of the school

[2] Appellant does not challenge the New Jersey statute or the resolution on the ground that either violates the equal protection clause of the Fourteenth Amendment by excluding payment for the transportation of any pupil who attends a "private school run for profit." Although the township resolution authorized reimbursement only for parents of public and Catholic school pupils, appellant does not allege, nor is there anything in the record which would offer the slightest support to an allegation, that there were any children in the township who attended or would have attended, but for want of transportation, any but public and Catholic schools. It will be appropriate to consider the exclusion of students of private schools operated for profit when and if it is proved to have occurred, is made the basis of a suit by one in a position to challenge it, and New Jersey's highest court has ruled adversely to the challenger. Striking down a state law is not a matter of such light moment that it should be done by a federal court *ex mero motu* on a postulate neither charged nor proved, but which rests on nothing but a possibility. *Cf. Liverpool, N. Y. & P. S. S. Co.* v. *Comm'rs of Emigration,* 113 U. S. 33, 39.

transportation of any group of pupils, even those of a private school run for profit.[3] Consequently, we put to one side the question as to the validity of the statute against the claim that it does not authorize payment for the transportation generally of school children in New Jersey.

The only contention here is that the state statute and the resolution, insofar as they authorized reimbursement to parents of children attending parochial schools, violate the Federal Constitution in these two respects, which to some extent overlap. *First.* They authorize the State to take by taxation the private property of some and bestow it upon others, to be used for their own private purposes. This, it is alleged, violates the due process clause of the Fourteenth Amendment. *Second.* The statute and the resolution forced inhabitants to pay taxes to help support and maintain schools which are dedicated to, and which regularly teach, the Catholic Faith. This is alleged to be a use of state power to support church schools contrary to the prohibition of the First Amendment which the Fourteenth Amendment made applicable to the states.

First. The due process argument that the state law taxes some people to help others carry out their private

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[3] It might hold the excepting clause to be invalid, and sustain the statute with that clause excised. N. J. R. S., tit. 1, c. 1, § 10, provides with regard to any statute that if "any provision thereof, shall be declared to be unconstitutional . . . in whole or in part, by a court of competent jurisdiction, such . . . article . . . shall, to the extent that it is not unconstitutional, . . . be enforced . . . ." The opinion of the Court of Errors and Appeals in this very case suggests that state law now authorizes transportation of *all* pupils. Its opinion stated: "Since we hold that the legislature may appropriate general state funds or authorize the use of local funds for the transportation of pupils to *any* school, we conclude that such authorization of the use of local funds is likewise authorized by *Pamph. L.* 1941, *ch.* 191, and *R. S.* 18:7–78." 133 N. J. L. 350, 354, 44 A. 2d 333, 337. (Italics supplied.)

purposes is framed in two phases. The first phase is that a state cannot tax A to reimburse B for the cost of transporting his children to church schools. This is said to violate the due process clause because the children are sent to these church schools to satisfy the personal desires of their parents, rather than the public's interest in the general education of all children. This argument, if valid, would apply equally to prohibit state payment for the transportation of children to any non-public school, whether operated by a church or any other non-government individual or group. But, the New Jersey legislature has decided that a public purpose will be served by using tax-raised funds to pay the bus fares of all school children, including those who attend parochial schools. The New Jersey Court of Errors and Appeals has reached the same conclusion. The fact that a state law, passed to satisfy a public need, coincides with the personal desires of the individuals most directly affected is certainly an inadequate reason for us to say that a legislature has erroneously appraised the public need.

It is true that this Court has, in rare instances, struck down state statutes on the ground that the purpose for which tax-raised funds were to be expended was not a public one. *Loan Association* v. *Topeka,* 20 Wall. 655; *Parkersburg* v. *Brown,* 106 U. S. 487; *Thompson* v. *Consolidated Gas Utilities Corp.,* 300 U. S. 55. But the Court has also pointed out that this far-reaching authority must be exercised with the most extreme caution. *Green* v. *Frazier,* 253 U. S. 233, 240. Otherwise, a state's power to legislate for the public welfare might be seriously curtailed, a power which is a primary reason for the existence of states. Changing local conditions create new local problems which may lead a state's people and its local authorities to believe that laws authorizing new types of public services are necessary to promote the general well-being

of the people. The Fourteenth Amendment did not strip the states of their power to meet problems previously left for individual solution. *Davidson* v. *New Orleans,* 96 U. S. 97, 103–104; *Barbier* v. *Connolly,* 113 U. S. 27, 31–32; *Fallbrook Irrigation District* v. *Bradley,* 164 U. S. 112, 157–158.

It is much too late to argue that legislation intended to facilitate the opportunity of children to get a secular education serves no public purpose. *Cochran* v. *Louisiana State Board of Education,* 281 U. S. 370; Holmes, J., in *Interstate Ry.* v. *Massachusetts,* 207 U. S. 79, 87. See opinion of Cooley, J., in *Stuart* v. *School District No. 1 of Kalamazoo,* 30 Mich. 69 (1874). The same thing is no less true of legislation to reimburse needy parents, or all parents, for payment of the fares of their children so that they can ride in public busses to and from schools rather than run the risk of traffic and other hazards incident to walking or "hitchhiking." See *Barbier* v. *Connolly, supra,* at 31. See also cases collected 63 A. L. R. 413; 118 A. L. R. 806. Nor does it follow that a law has a private rather than a public purpose because it provides that tax-raised funds will be paid to reimburse individuals on account of money spent by them in a way which furthers a public program. See *Carmichael* v. *Southern Coal & Coke Co.,* 301 U. S. 495, 518. Subsidies and loans to individuals such as farmers and home-owners, and to privately owned transportation systems, as well as many other kinds of businesses, have been commonplace practices in our state and national history.

Insofar as the second phase of the due process argument may differ from the first, it is by suggesting that taxation for transportation of children to church schools constitutes support of a religion by the State. But if the law is invalid for this reason, it is because it violates the First Amendment's prohibition against the establishment of religion

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by law. This is the exact question raised by appellant's second contention, to consideration of which we now turn.

Second. The New Jersey statute is challenged as a "law respecting an establishment of religion." The First Amendment, as made applicable to the states by the Fourteenth, *Murdock* v. *Pennsylvania,* 319 U. S. 105, commands that a state "shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." These words of the First Amendment reflected in the minds of early Americans a vivid mental picture of conditions and practices which they fervently wished to stamp out in order to preserve liberty for themselves and for their posterity. Doubtless their goal has not been entirely reached; but so far has the Nation moved toward it that the expression "law respecting an establishment of religion," probably does not so vividly remind present-day Americans of the evils, fears, and political problems that caused that expression to be written into our Bill of Rights. Whether this New Jersey law is one respecting an "establishment of religion" requires an understanding of the meaning of that language, particularly with respect to the imposition of taxes. Once again,[4] therefore, it is not inappropriate briefly to review the background and environment of the period in which that constitutional language was fashioned and adopted.

A large proportion of the early settlers of this country came here from Europe to escape the bondage of laws which compelled them to support and attend government-favored churches. The centuries immediately before and contemporaneous with the colonization of America had been filled with turmoil, civil strife, and persecutions, generated in large part by established sects determined to

[4] See *Reynolds* v. *United States,* 98 U. S. 145, 162; *cf. Knowlton* v. *Moore,* 178 U. S. 41, 89, 106.

maintain their absolute political and religious supremacy. With the power of government supporting them, at various times and places, Catholics had persecuted Protestants, Protestants had persecuted Catholics, Protestant sects had persecuted other Protestant sects, Catholics of one shade of belief had persecuted Catholics of another shade of belief, and all of these had from time to time persecuted Jews. In efforts to force loyalty to whatever religious group happened to be on top and in league with the government of a particular time and place, men and women had been fined, cast in jail, cruelly tortured, and killed. Among the offenses for which these punishments had been inflicted were such things as speaking disrespectfully of the views of ministers of government-established churches, non-attendance at those churches, expressions of non-belief in their doctrines, and failure to pay taxes and tithes to support them.[5]

These practices of the old world were transplanted to and began to thrive in the soil of the new America. The very charters granted by the English Crown to the individuals and companies designated to make the laws which would control the destinies of the colonials authorized these individuals and companies to erect religious establishments which all, whether believers or non-believers, would be required to support and attend.[6] An exercise of

[5] See *e. g.* Macaulay, History of England (1849) I, cc. 2, 4; The Cambridge Modern History (1908) V, cc. V, IX, XI; Beard, Rise of American Civilization (1933) I, 60; Cobb, Rise of Religious Liberty in America (1902) c. II; Sweet, The Story of Religion in America (1939) c. II; Sweet, Religion in Colonial America (1942) 320–322.

[6] See *e. g.* the charter of the colony of Carolina which gave the grantees the right of "patronage and advowsons of all the churches and chapels . . . together with licence and power to build and found churches, chapels and oratories . . . and to cause them to be dedicated and consecrated, according to the ecclesiastical laws of our kingdom of England." Poore, Constitutions (1878) II, 1390, 1391. That of Maryland gave to the grantee Lord Baltimore "the Patronages, and

this authority was accompanied by a repetition of many of the old-world practices and persecutions. Catholics found themselves hounded and proscribed because of their faith; Quakers who followed their conscience went to jail; Baptists were peculiarly obnoxious to certain dominant Protestant sects; men and women of varied faiths who happened to be in a minority in a particular locality were persecuted because they steadfastly persisted in worshipping God only as their own consciences dictated.[7] And all of these dissenters were compelled to pay tithes and taxes [8] to support government-sponsored churches whose ministers preached inflammatory sermons designed to strengthen and consolidate the established faith by generating a burning hatred against dissenters.

Advowsons of all Churches which . . . shall happen to be built, together with Licence and Faculty of erecting and founding Churches, Chapels, and Places of Worship . . . and of causing the same to be dedicated and consecrated according to the Ecclesiastical Laws of our Kingdom of *England*, with all, and singular such, and as ample Rights, Jurisdictions, Privileges, . . . as any Bishop . . . in our Kingdom of *England*, ever . . . hath had . . . ." MacDonald, Documentary Source Book of American History (1934) 31, 33. The Commission of New Hampshire of 1680, Poore, *supra*, II, 1277, stated: "And above all things We do by these presents will, require and comand our said Councill to take all possible care for ye discountenancing of vice and encouraging of virtue and good living; and that by such examples ye infidle may be invited and desire to partake of ye Christian Religion, and for ye greater ease and satisfaction of ye sd loving subjects in matters of religion, We do hereby require and comand yt liberty of conscience shall be allowed unto all protestants; yt such especially as shall be conformable to ye rites of ye Church of Engd shall be particularly countenanced and encouraged." See also *Pawlet* v. *Clark*, 9 Cranch 292.

[7] See *e. g.* Semple, Baptists in Virginia (1894); Sweet, Religion in Colonial America, *supra* at 131–152, 322–339.

[8] Almost every colony exacted some kind of tax for church support. See *e. g.* Cobb, op. cit. *supra, note* 5, 110 (Virginia); 131 (North Carolina); 169 (Massachusetts); 270 (Connecticut); 304, 310, 339 (New York); 386 (Maryland); 295 (New Hampshire).

These practices became so commonplace as to shock the freedom-loving colonials into a feeling of abhorrence.[9] The imposition of taxes to pay ministers' salaries and to build and maintain churches and church property aroused their indignation.[10] It was these feelings which found expression in the First Amendment. No one locality and no one group throughout the Colonies can rightly be given entire credit for having aroused the sentiment that culminated in adoption of the Bill of Rights' provisions embracing religious liberty. But Virginia, where the established church had achieved a dominant influence in political affairs and where many excesses attracted wide public attention, provided a great stimulus and able leadership for the movement. The people there, as elsewhere, reached the conviction that individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or otherwise to assist any or all religions, or to interfere with the beliefs of any religious individual or group.

The movement toward this end reached its dramatic climax in Virginia in 1785–86 when the Virginia legislative body was about to renew Virginia's tax levy for the support of the established church. Thomas Jeffer-

[9] Madison wrote to a friend in 1774: "That diabolical, hell-conceived principle of persecution rages among some . . . This vexes me the worst of anything whatever. There are at this time in the adjacent country not less than five or six well-meaning men in close jail for publishing their religious sentiments, which in the main are very orthodox. I have neither patience to hear, talk, or think of anything relative to this matter; for I have squabbled and scolded, abused and ridiculed, so long about it to little purpose, that I am without common patience. So I must beg you to pity me, and pray for liberty of conscience to all." I Writings of James Madison (1900) 18, 21.

[10] Virginia's resistance to taxation for church support was crystallized in the famous "Parsons' Cause" argued by Patrick Henry in 1763. For an account see Cobb, *op. cit., supra,* note 5, 108–111.

son and James Madison led the fight against this tax. Madison wrote his great Memorial and Remonstrance against the law.[11] In it, he eloquently argued that a true religion did not need the support of law; that no person, either believer or non-believer, should be taxed to support a religious institution of any kind; that the best interest of a society required that the minds of men always be wholly free; and that cruel persecutions were the inevitable result of government-established religions. Madison's Remonstrance received strong support throughout Virginia,[12] and the Assembly postponed consideration of the proposed tax measure until its next session. When the proposal came up for consideration at that session, it not only died in committee, but the Assembly enacted the famous "Virginia Bill for Religious Liberty" originally written by Thomas Jefferson.[13] The preamble to that Bill stated among other things that

> "Almighty God hath created the mind free; that all attempts to influence it by temporal punishments or burthens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, and are

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[11] II Writings of James Madison, 183.

[12] In a recently discovered collection of Madison's papers, Madison recollected that his Remonstrance "met with the approbation of the Baptists, the Presbyterians, the Quakers, and the few Roman Catholics, universally; of the Methodists in part; and even of not a few of the Sect formerly established by law." Madison, *Monopolies, Perpetuities, Corporations, Ecclesiastical Endowments,* in Fleet, *Madison's "Detached Memorandum,"* 3 William and Mary Q. (1946) 534, 551, 555.

[13] For accounts of background and evolution of the Virginia Bill for Religious Liberty see *e. g.* James, The Struggle for Religious Liberty in Virginia (1900); Thom, The Struggle for Religious Freedom in Virginia: The Baptists (1900); Cobb, *op. cit., supra,* note 5, 74–115; Madison, *Monopolies, Perpetuities, Corporations, Ecclesiastical Endowments, op. cit., supra,* note 12, 554, 556.

> a departure from the plan of the Holy author of our religion, who being Lord both of body and mind, yet chose not to propagate it by coercions on either . . .; that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical; that even the forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor, whose morals he would make his pattern . . . ."

And the statute itself enacted

> "That no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief . . . ."[14]

This Court has previously recognized that the provisions of the First Amendment, in the drafting and adoption of which Madison and Jefferson played such leading roles, had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute. *Reynolds* v. *United States, supra* at 164; *Watson* v. *Jones,* 13 Wall. 679; *Davis* v. *Beason,* 133 U. S. 333, 342. Prior to the adoption of the Fourteenth Amendment, the First Amendment did not apply as a restraint against the states.[15] Most of them did soon provide similar constitutional protections

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[14] 12 Hening, Statutes of Virginia (1823) 84; Commager, Documents of American History (1944) 125.

[15] *Permoli* v. *New Orleans,* 3 How. 589. *Cf. Barron* v. *Baltimore,* 7 Pet. 243.

for religious liberty.[16] But some states persisted for about half a century in imposing restraints upon the free exercise of religion and in discriminating against particular religious groups.[17] In recent years, so far as the provision against the establishment of a religion is concerned, the question has most frequently arisen in connection with proposed state aid to church schools and efforts to carry on religious teachings in the public schools in accordance with the tenets of a particular sect.[18] Some churches have either sought or accepted state financial support for their schools. Here again the efforts to obtain state aid or acceptance of it have not been limited to any one particular faith.[19] The state courts, in the main, have remained faithful to the language of their own constitutional provisions designed to protect religious freedom and to separate religions and governments. Their decisions, however, show the difficulty in drawing the line between tax legislation which provides funds for the welfare of the general public and that which is designed to support institutions which teach religion.[20]

The meaning and scope of the First Amendment, preventing establishment of religion or prohibiting the free exercise thereof, in the light of its history and the evils it

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[16] For a collection of state constitutional provisions on freedom of religion see Gabel, Public Funds for Church and Private Schools (1937) 148–149. See also 2 Cooley, Constitutional Limitations (1927) 960–985.

[17] Test provisions forbade officeholders to "deny . . . the truth of the Protestant religion," *e. g.* Constitution of North Carolina (1776) § XXXII, II Poore, *supra,* 1413. Maryland permitted taxation for support of the Christian religion and limited civil office to Christians until 1818, *id.,* I, 819, 820, 832.

[18] See Note 50 Yale L. J. (1941) 917; see also cases collected 14 L. R. A. 418; 5 A. L. R. 879; 141 A. L. R. 1148.

[19] See cases collected 14 L. R. A. 418; 5 A. L. R. 879; 141 A. L. R. 1148.

[20] *Ibid.* See also Cooley, *op. cit., supra,* note 16.

was designed forever to suppress, have been several times elaborated by the decisions of this Court prior to the application of the First Amendment to the states by the Fourteenth.[21] The broad meaning given the Amendment by these earlier cases has been accepted by this Court in its decisions concerning an individual's religious freedom rendered since the Fourteenth Amendment was interpreted to make the prohibitions of the First applicable to state action abridging religious freedom.[22] There is every reason to give the same application and broad interpretation to the "establishment of religion" clause. The interrelation of these complementary clauses was well summarized in a statement of the Court of Appeals of South Carolina,[23] quoted with approval by this Court in *Watson* v. *Jones,* 13 Wall. 679, 730: "The structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference. On the other hand, it has secured religious liberty from the invasion of the civil authority."

The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertain-

[21] *Terrett* v. *Taylor,* 9 Cranch 43; *Watson* v. *Jones,* 13 Wall. 679; *Davis* v. *Beason,* 133 U. S. 333; *Cf. Reynolds* v. *United States, supra,* 162; *Reuben Quick Bear* v. *Leupp,* 210 U. S. 50.

[22] *Cantwell* v. *Connecticut,* 310 U. S. 296; *Jamison* v. *Texas,* 318 U. S. 413; *Largent* v. *Texas,* 318 U. S. 418; *Murdock* v. *Pennsylvania, supra; West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624; *Follett* v. *McCormick,* 321 U. S. 573; *Marsh* v. *Alabama,* 326 U. S. 501. *Cf. Bradfield* v. *Roberts,* 175 U. S. 291.

[23] *Harmon* v. *Dreher,* Speer's Equity Reports (S. C., 1843), 87, 120.

ing or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa.* In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State." *Reynolds* v. *United States, supra* at 164.

We must consider the New Jersey statute in accordance with the foregoing limitations imposed by the First Amendment. But we must not strike that state statute down if it is within the State's constitutional power even though it approaches the verge of that power. See *Interstate Ry.* v. *Massachusetts,* Holmes, J., *supra* at 85, 88. New Jersey cannot consistently with the "establishment of religion" clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church. On the other hand, other language of the amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it,* from receiving the benefits of public welfare legislation. While we do not mean to intimate that a state could not provide transportation only to children attending public schools, we must be careful, in protecting the citizens of New Jersey against state-established churches, to be sure that we do not inadvertently prohibit New Jersey from extending its general state law benefits to all its citizens without regard to their religious belief.

Measured by these standards, we cannot say that the First Amendment prohibits New Jersey from spending tax-raised funds to pay the bus fares of parochial school pupils as a part of a general program under which it pays the fares of pupils attending public and other schools. It is undoubtedly true that children are helped to get to church schools. There is even a possibility that some of the children might not be sent to the church schools if the parents were compelled to pay their children's bus fares out of their own pockets when transportation to a public school would have been paid for by the State. The same possibility exists where the state requires a local transit company to provide reduced fares to school children including those attending parochial schools,[24] or where a municipally owned transportation system undertakes to carry all school children free of charge. Moreover, state-paid policemen, detailed to protect children going to and from church schools from the very real hazards of traffic, would serve much the same purpose and accomplish much the same result as state provisions intended to guarantee free transportation of a kind which the state deems to be best for the school children's welfare. And parents might refuse to risk their children to the serious danger of traffic accidents going to and from parochial schools, the approaches to which were not protected by policemen. Similarly, parents might be reluctant to permit their children to attend schools which the state had cut off from such general government services as ordinary police and fire protection, connections for sewage disposal, public

[24] New Jersey long ago permitted public utilities to charge school children reduced rates. See *Public S. R. Co.* v. *Public Utility Comm'rs*, 81 N. J. L. 363, 80 A. 27 (1911); see also *Interstate Ry.* v. *Massachusetts*, *supra*. The District of Columbia Code requires that the new charter of the District public transportation company provide a three-cent fare "for school children . . . going to and from public, parochial, or like schools . . . ." 47 Stat. 752, 759.

highways and sidewalks. Of course, cutting off church schools from these services, so separate and so indisputably marked off from the religious function, would make it far more difficult for the schools to operate. But such is obviously not the purpose of the First Amendment. That Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them.

This Court has said that parents may, in the discharge of their duty under state compulsory education laws, send their children to a religious rather than a public school if the school meets the secular educational requirements which the state has power to impose. See *Pierce* v. *Society of Sisters,* 268 U. S. 510. It appears that these parochial schools meet New Jersey's requirements. The State contributes no money to the schools. It does not support them. Its legislation, as applied, does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools.

The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach. New Jersey has not breached it here.

Affirmed.

MR. JUSTICE JACKSON, dissenting.

I find myself, contrary to first impressions, unable to join in this decision. I have a sympathy, though it is not ideological, with Catholic citizens who are compelled by law to pay taxes for public schools, and also feel constrained by conscience and discipline to support other schools for their own children. Such relief to them as

this case involves is not in itself a serious burden to taxpayers and I had assumed it to be as little serious in principle. Study of this case convinces me otherwise. The Court's opinion marshals every argument in favor of state aid and puts the case in its most favorable light, but much of its reasoning confirms my conclusions that there are no good grounds upon which to support the present legislation. In fact, the undertones of the opinion, advocating complete and uncompromising separation of Church from State, seem utterly discordant with its conclusion yielding support to their commingling in educational matters. The case which irresistibly comes to mind as the most fitting precedent is that of Julia who, according to Byron's reports, "whispering 'I will ne'er consent,'—consented."

I.

The Court sustains this legislation by assuming two deviations from the facts of this particular case; first, it assumes a state of facts the record does not support, and secondly, it refuses to consider facts which are inescapable on the record.

The Court concludes that this "legislation, as applied, does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools," and it draws a comparison between "state provisions intended to guarantee free transportation" for school children with services such as police and fire protection, and implies that we are here dealing with "laws authorizing new types of public services . . . ." This hypothesis permeates the opinion. The facts will not bear that construction.

The Township of Ewing is not furnishing transportation to the children in any form; it is not operating school busses itself or contracting for their operation; and it is not performing any public service of any kind with this

taxpayer's money. All school children are left to ride as ordinary paying passengers on the regular busses operated by the public transportation system. What the Township does, and what the taxpayer complains of, is at stated intervals to reimburse parents for the fares paid, provided the children attend either public schools or Catholic Church schools. This expenditure of tax funds has no possible effect on the child's safety or expedition in transit. As passengers on the public busses they travel as fast and no faster, and are as safe and no safer, since their parents are reimbursed as before.

In addition to thus assuming a type of service that does not exist, the Court also insists that we must close our eyes to a discrimination which does exist. The resolution which authorizes disbursement of this taxpayer's money limits reimbursement to those who attend public schools and Catholic schools. That is the way the Act is applied to this taxpayer.

The New Jersey Act in question makes the character of the school, not the needs of the children, determine the eligibility of parents to reimbursement. The Act permits payment for transportation to parochial schools or public schools but prohibits it to private schools operated in whole or in part for profit. Children often are sent to private schools because their parents feel that they require more individual instruction than public schools can provide, or because they are backward or defective and need special attention. If all children of the state were objects of impartial solicitude, no reason is obvious for denying transportation reimbursement to students of this class, for these often are as needy and as worthy as those who go to public or parochial schools. Refusal to reimburse those who attend such schools is understandable only in the light of a purpose to aid the schools, because the state might well abstain from aiding a profit-making private enterprise. Thus, under the Act

and resolution brought to us by this case, children are classified according to the schools they attend and are to be aided if they attend the public schools or private Catholic schools, and they are not allowed to be aided if they attend private secular schools or private religious schools of other faiths.

Of course, this case is not one of a Baptist or a Jew or an Episcopalian or a pupil of a private school complaining of discrimination. It is one of a taxpayer urging that he is being taxed for an unconstitutional purpose. I think he is entitled to have us consider the Act just as it is written. The statement by the New Jersey court that it holds the Legislature may authorize use of local funds "for the transportation of pupils to any school," 133 N. J. L. 350, 354, 44 A. 2d 333, 337, in view of the other constitutional views expressed, is not a holding that this Act authorizes transportation of *all* pupils to *all* schools. As applied to this taxpayer by the action he complains of, certainly the Act does not authorize reimbursement to those who choose any alternative to the public school except Catholic Church schools.

If we are to decide this case on the facts before us, our question is simply this: Is it constitutional to tax this complainant to pay the cost of carrying pupils to Church schools of one specified denomination?

II.

Whether the taxpayer constitutionally can be made to contribute aid to parents of students because of their attendance at parochial schools depends upon the nature of those schools and their relation to the Church. The Constitution says nothing of education. It lays no obligation on the states to provide schools and does not undertake to regulate state systems of education if they see fit to maintain them. But they cannot, through school policy any more than through other means, invade rights secured

to citizens by the Constitution of the United States. *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624. One of our basic rights is to be free of taxation to support a transgression of the constitutional command that the authorities "shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U. S. Const., Amend. I; *Cantwell* v. *Connecticut,* 310 U. S. 296.

The function of the Church school is a subject on which this record is meager. It shows only that the schools are under superintendence of a priest and that "religion is taught as part of the curriculum." But we know that such schools are parochial only in name—they, in fact, represent a world-wide and age-old policy of the Roman Catholic Church. Under the rubric "Catholic Schools," the Canon Law of the Church, by which all Catholics are bound, provides:

> "1215. Catholic children are to be educated in schools where not only nothing contrary to Catholic faith and morals is taught, but rather in schools where religious and moral training occupy the first place. . . . (Canon 1372.)"
>
> "1216. In every elementary school the children must, according to their age, be instructed in Christian doctrine.
>
> "The young people who attend the higher schools are to receive a deeper religious knowledge, and the bishops shall appoint priests qualified for such work by their learning and piety. (Canon 1373.)"
>
> "1217. Catholic children shall not attend non-Catholic, indifferent, schools that are mixed, that is to say, schools open to Catholics and non-Catholics alike. The bishop of the diocese only has the right, in harmony with the instructions of the Holy See, to decide under what circumstances, and with what safe-

guards to prevent loss of faith, it may be tolerated that Catholic children go to such schools. (Canon 1374.)"

"1224. The religious teaching of youth in any schools is subject to the authority and inspection of the Church.

"The local Ordinaries have the right and duty to watch that nothing is taught contrary to faith or good morals, in any of the schools of their territory.

"They, moreover, have the right to approve the books of Christian doctrine and the teachers of religion, and to demand, for the sake of safeguarding religion and morals, the removal of teachers and books. (Canon 1381.)" (Woywod, Rev. Stanislaus, The New Canon Law, under imprimatur of Most Rev. Francis J. Spellman, Archbishop of New York and others, 1940.)

It is no exaggeration to say that the whole historic conflict in temporal policy between the Catholic Church and non-Catholics comes to a focus in their respective school policies. The Roman Catholic Church, counseled by experience in many ages and many lands and with all sorts and conditions of men, takes what, from the viewpoint of its own progress and the success of its mission, is a wise estimate of the importance of education to religion. It does not leave the individual to pick up religion by chance. It relies on early and indelible indoctrination in the faith and order of the Church by the word and example of persons consecrated to the task.

Our public school, if not a product of Protestantism, at least is more consistent with it than with the Catholic culture and scheme of values. It is a relatively recent development dating from about 1840.[1] It is organized on

[1] See Cubberley, Public Education in the United States (1934) ch. VI; Knight, Education in the United States (1941) ch. VIII.

the premise that secular education can be isolated from all religious teaching so that the school can inculcate all needed temporal knowledge and also maintain a strict and lofty neutrality as to religion. The assumption is that after the individual has been instructed in worldly wisdom he will be better fitted to choose his religion. Whether such a disjunction is possible, and if possible whether it is wise, are questions I need not try to answer.

I should be surprised if any Catholic would deny that the parochial school is a vital, if not the most vital, part of the Roman Catholic Church. If put to the choice, that venerable institution, I should expect, would forego its whole service for mature persons before it would give up education of the young, and it would be a wise choice. Its growth and cohesion, discipline and loyalty, spring from its schools. Catholic education is the rock on which the whole structure rests, and to render tax aid to its Church school is indistinguishable to me from rendering the same aid to the Church itself.

III.

It is of no importance in this situation whether the beneficiary of this expenditure of tax-raised funds is primarily the parochial school and incidentally the pupil, or whether the aid is directly bestowed on the pupil with indirect benefits to the school. The state cannot maintain a Church and it can no more tax its citizens to furnish free carriage to those who attend a Church. The prohibition against establishment of religion cannot be circumvented by a subsidy, bonus or reimbursement of expense to individuals for receiving religious instruction and indoctrination.

The Court, however, compares this to other subsidies and loans to individuals and says, "Nor does it follow that a law has a private rather than a public purpose because

it provides that tax-raised funds will be paid to reimburse individuals on account of money spent by them in a way which furthers a public program. See *Carmichael* v. *Southern Coal & Coke Co.*, 301 U. S. 495, 518." Of course, the state may pay out tax-raised funds to relieve pauperism, but it may not under our Constitution do so to induce or reward piety. It may spend funds to secure old age against want, but it may not spend funds to secure religion against skepticism. It may compensate individuals for loss of employment, but it cannot compensate them for adherence to a creed.

It seems to me that the basic fallacy in the Court's reasoning, which accounts for its failure to apply the principles it avows, is in ignoring the essentially religious test by which beneficiaries of this expenditure are selected. A policeman protects a Catholic, of course—but not because he is a Catholic; it is because he is a man and a member of our society. The fireman protects the Church school—but not because it is a Church school; it is because it is property, part of the assets of our society. Neither the fireman nor the policeman has to ask before he renders aid "Is this man or building identified with the Catholic Church?" But before these school authorities draw a check to reimburse for a student's fare they must ask just that question, and if the school is a Catholic one they may render aid because it is such, while if it is of any other faith or is run for profit, the help must be withheld. To consider the converse of the Court's reasoning will best disclose its fallacy. That there is no parallel between police and fire protection and this plan of reimbursement is apparent from the incongruity of the limitation of this Act if applied to police and fire service. Could we sustain an Act that said the police shall protect pupils on the way to or from public schools and Catholic schools but not

while going to and coming from other schools, and firemen shall extinguish a blaze in public or Catholic school buildings but shall not put out a blaze in Protestant Church schools or private schools operated for profit? That is the true analogy to the case we have before us and I should think it pretty plain that such a scheme would not be valid.

The Court's holding is that this taxpayer has no grievance because the state has decided to make the reimbursement a public purpose and therefore we are bound to regard it as such. I agree that this Court has left, and always should leave to each state, great latitude in deciding for itself, in the light of its own conditions, what shall be public purposes in its scheme of things. It may socialize utilities and economic enterprises and make taxpayers' business out of what conventionally had been private business. It may make public business of individual welfare, health, education, entertainment or security. But it cannot make public business of religious worship or instruction, or of attendance at religious institutions of any character. There is no answer to the proposition, more fully expounded by MR. JUSTICE RUTLEDGE, that the effect of the religious freedom Amendment to our Constitution was to take every form of propagation of religion out of the realm of things which could directly or indirectly be made public business and thereby be supported in whole or in part at taxpayers' expense. That is a difference which the Constitution sets up between religion and almost every other subject matter of legislation, a difference which goes to the very root of religious freedom and which the Court is overlooking today. This freedom was first in the Bill of Rights because it was first in the forefathers' minds; it was set forth in absolute terms, and its strength is its rigidity. It was intended not only to keep the states' hands out of religion, but to

keep religion's hands off the state, and, above all, to keep bitter religious controversy out of public life by denying to every denomination any advantage from getting control of public policy or the public purse. Those great ends I cannot but think are immeasurably compromised by today's decision.

This policy of our Federal Constitution has never been wholly pleasing to most religious groups. They all are quick to invoke its protections; they all are irked when they feel its restraints. This Court has gone a long way, if not an unreasonable way, to hold that public business of such paramount importance as maintenance of public order, protection of the privacy of the home, and taxation may not be pursued by a state in a way that even indirectly will interfere with religious proselyting. See dissent in *Douglas* v. *Jeannette,* 319 U. S. 157, 166; *Murdock* v. *Pennsylvania,* 319 U. S. 105; *Martin* v. *Struthers,* 319 U. S. 141; *Jones* v. *Opelika,* 316 U. S. 584, reversed on rehearing, 319 U. S. 103.

But we cannot have it both ways. Religious teaching cannot be a private affair when the state seeks to impose regulations which infringe on it indirectly, and a public affair when it comes to taxing citizens of one faith to aid another, or those of no faith to aid all. If these principles seem harsh in prohibiting aid to Catholic education, it must not be forgotten that it is the same Constitution that alone assures Catholics the right to maintain these schools at all when predominant local sentiment would forbid them. *Pierce* v. *Society of Sisters,* 268 U. S. 510. Nor should I think that those who have done so well without this aid would want to see this separation between Church and State broken down. If the state may aid these religious schools, it may therefore regulate them. Many groups have sought aid from tax funds only to find that it carried political controls with it. Indeed this Court has

declared that "It is hardly lack of due process for the Government to regulate that which it subsidizes." *Wickard* v. *Filburn*, 317 U. S. 111, 131.

But in any event, the great purposes of the Constitution do not depend on the approval or convenience of those they restrain. I cannot read the history of the struggle to separate political from ecclesiastical affairs, well summarized in the opinion of MR. JUSTICE RUTLEDGE in which I generally concur, without a conviction that the Court today is unconsciously giving the clock's hands a backward turn.

MR. JUSTICE FRANKFURTER joins in this opinion.

MR. JUSTICE RUTLEDGE, with whom MR. JUSTICE FRANKFURTER, MR. JUSTICE JACKSON and MR. JUSTICE BURTON agree, dissenting.

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U. S. Const., Amend. I.

"Well aware that Almighty God hath created the mind free; . . . that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical; . . . .

"*We, the General Assembly, do enact,* That no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer, on account of his religious opinions or belief . . . ." [1]

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[1] "A Bill for Establishing Religious Freedom," enacted by the General Assembly of Virginia, January 19, 1786. See 1 Randall, The Life of Thomas Jefferson (1858) 219–220; XII Hening's Statutes of Virginia (1823) 84.

I cannot believe that the great author of those words, or the men who made them law, could have joined in this decision. Neither so high nor so impregnable today as yesterday is the wall raised between church and state by Virginia's great statute of religious freedom and the First Amendment, now made applicable to all the states by the Fourteenth.[2] New Jersey's statute sustained is the first, if indeed it is not the second breach to be made by this Court's action. That a third, and a fourth, and still others will be attempted, we may be sure. For just as *Cochran* v. *Board of Education,* 281 U. S. 370, has opened the way by oblique ruling [3] for this decision, so will the two make wider the breach for a third. Thus with time the most solid freedom steadily gives way before continuing corrosive decision.

This case forces us to determine squarely for the first time [4] what was "an establishment of religion" in the First Amendment's conception; and by that measure to decide whether New Jersey's action violates its command. The facts may be stated shortly, to give setting and color to the constitutional problem.

By statute New Jersey has authorized local boards of education to provide for the transportation of children "to and from school other than a public school" except one

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[2] *Schneider* v. *State,* 308 U. S. 147; *Cantwell* v. *Connecticut,* 310 U. S. 296; *Murdock* v. *Pennsylvania,* 319 U. S. 105; *Prince* v. *Massachusetts,* 321 U. S. 158; *Thomas* v. *Collins,* 323 U. S. 516, 530.

[3] The briefs did not raise the First Amendment issue. The only one presented was whether the state's action involved a public or an exclusively private function under the due process clause of the Fourteenth Amendment. See Part IV *infra.* On the facts, the cost of transportation here is inseparable from both religious and secular teaching at the religious school. In the *Cochran* case the state furnished secular textbooks only. But see text *infra* at note 40 *et seq.,* and Part IV.

[4] Cf. note 3 and text Part IV; see also note 35.

operated for profit wholly or in part, over established public school routes, or by other means when the child lives "remote from any school." [5] The school board of Ewing Township has provided by resolution for "the transportation of pupils of Ewing to the Trenton and Pennington High Schools and Catholic Schools by way of public carrier . . . ." [6]

Named parents have paid the cost of public conveyance of their children from their homes in Ewing to three public high schools and four parochial schools outside the district.[7] Semiannually the Board has reimbursed the parents from public school funds raised by general taxation. Religion is taught as part of the curriculum in each

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[5] The statute reads: "Whenever in any district there are children living remote from any schoolhouse, the board of education of the district may make rules and contracts for the transportation of such children to and from school . . . other than a public school, except such school as is operated for profit in whole or in part.

"When any school district provides any transportation for public school children to and from school, transportation from any point in such established school route to any other point in such established school route shall be supplied to school children residing in such school district in going to and from school other than a public school, except such school as is operated for profit in whole or in part." Laws of New Jersey (1941) c. 191.

[6] The full text of the resolution is given in note 59 *infra*.

[7] The public schools attended were the Trenton Senior High School, the Trenton Junior High School and the Pennington High School. Ewing Township itself provides no public high schools, affording only elementary public schools which stop with the eighth grade. The Ewing school board pays for both transportation and tuitions of pupils attending the public high schools. The only private schools, all Catholic, covered in application of the resolution are St. Mary's Cathedral High School, Trenton Catholic Boys High School, and two elementary parochial schools, St. Hedwig's Parochial School and St. Francis School. The Ewing board pays only for transportation to these schools, not for tuitions. So far as the record discloses, the board does not pay for or provide transportation to any other elementary school, public or private. See notes 58, 59 and text *infra*.

of the four private schools, as appears affirmatively by the testimony of the superintendent of parochial schools in the Diocese of Trenton.

The Court of Errors and Appeals of New Jersey, reversing the Supreme Court's decision, 132 N. J. L. 98, 39 A. 2d 75, has held the Ewing board's action not in contravention of the state constitution or statutes or of the Federal Constitution. 133 N. J. L. 350, 44 A. 2d 333. We have to consider only whether this ruling accords with the prohibition of the First Amendment implied in the due process clause of the Fourteenth.

I.

Not simply an established church, but any law respecting an establishment of religion is forbidden. The Amendment was broadly but not loosely phrased. It is the compact and exact summation of its author's views formed during his long struggle for religious freedom. In Madison's own words characterizing Jefferson's Bill for Establishing Religious Freedom, the guaranty he put in our national charter, like the bill he piloted through the Virginia Assembly, was "a Model of technical precision, and perspicuous brevity." [8] Madison could not have confused "church" and "religion," or "an established church" and "an establishment of religion."

The Amendment's purpose was not to strike merely at the official establishment of a single sect, creed or religion, outlawing only a formal relation such as had prevailed in England and some of the colonies. Necessarily it was to uproot all such relationships. But the object was broader than separating church and state in this narrow sense. It was to create a complete and permanent separation of the

[8] IX Writings of James Madison (ed. by Hunt, 1910) 288; Padover, Jefferson (1942) 74. Madison's characterization related to Jefferson's entire revision of the Virginia Code, of which the Bill for Establishing Religious Freedom was part. See note 15.

spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion. In proof the Amendment's wording and history unite with this Court's consistent utterances whenever attention has been fixed directly upon the question.

"Religion" appears only once in the Amendment. But the word governs two prohibitions and governs them alike. It does not have two meanings, one narrow to forbid "an establishment" and another, much broader, for securing "the free exercise thereof." "Thereof" brings down "religion" with its entire and exact content, no more and no less, from the first into the second guaranty, so that Congress and now the states are as broadly restricted concerning the one as they are regarding the other.

No one would claim today that the Amendment is constricted, in "prohibiting the free exercise" of religion, to securing the free exercise of some formal or creedal observance, of one sect or of many. It secures all forms of religious expression, creedal, sectarian or nonsectarian, wherever and however taking place, except conduct which trenches upon the like freedoms of others or clearly and presently endangers the community's good order and security.[9] For the protective purposes of this phase of the basic freedom, street preaching, oral or by distribution of

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[9] See *Reynolds* v. *United States,* 98 U. S. 145; *Davis* v. *Beason,* 133 U. S. 333; *Mormon Church* v. *United States,* 136 U. S. 1; *Jacobson* v. *Massachusetts,* 197 U. S. 11; *Prince* v. *Massachusetts,* 321 U. S. 158; also *Cleveland* v. *United States,* 329 U. S. 14.

Possibly the first official declaration of the "clear and present danger" doctrine was Jefferson's declaration in the Virginia Statute for Establishing Religious Freedom: "That it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order." 1 Randall, The Life of Thomas Jefferson (1858) 220; Padover, Jefferson (1942) 81. For Madison's view to the same effect, see note 28 *infra.*

literature, has been given "the same high estate under the First Amendment as . . . worship in the churches and preaching from the pulpits." [10] And on this basis parents have been held entitled to send their children to private, religious schools. *Pierce* v. *Society of Sisters,* 268 U. S. 510. Accordingly, daily religious education commingled with secular is "religion" within the guaranty's comprehensive scope. So are religious training and teaching in whatever form. The word connotes the broadest content, determined not by the form or formality of the teaching or where it occurs, but by its essential nature regardless of those details.

"Religion" has the same broad significance in the twin prohibition concerning "an establishment." The Amendment was not duplicitous. "Religion" and "establishment" were not used in any formal or technical sense. The prohibition broadly forbids state support, financial or other, of religion in any guise, form or degree. It outlaws all use of public funds for religious purposes.

II.

No provision of the Constitution is more closely tied to or given content by its generating history than the religious clause of the First Amendment. It is at once the refined product and the terse summation of that history. The history includes not only Madison's authorship and the proceedings before the First Congress, but also the long and intensive struggle for religious freedom in America, more especially in Virginia,[11] of which the Amend-

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[10] *Murdock* v. *Pennsylvania,* 319 U. S. 105, 109; *Martin* v. *Struthers,* 319 U. S. 141; *Jamison* v. *Texas,* 318 U. S. 413; *Marsh* v. *Alabama,* 326 U. S. 501; *Tucker* v. *Texas,* 326 U. S. 517.

[11] Conflicts in other states, and earlier in the colonies, contributed much to generation of the Amendment, but none so directly as that in Virginia or with such formative influence on the Amendment's

ment was the direct culmination.[12] In the documents of the times, particularly of Madison, who was leader in the Virginia struggle before he became the Amendment's sponsor, but also in the writings of Jefferson and others and in the issues which engendered them is to be found irrefutable confirmation of the Amendment's sweeping content.

For Madison, as also for Jefferson, religious freedom was the crux of the struggle for freedom in general. Remonstrance, Par. 15, Appendix hereto. Madison was coauthor with George Mason of the religious clause in Virginia's great Declaration of Rights of 1776. He is credited with changing it from a mere statement of the principle of tolerance to the first official legislative pronouncement that freedom of conscience and religion are inherent rights of the individual.[13] He sought also to have the Declara-

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content and wording. See Cobb, Rise of Religious Liberty in America (1902); Sweet, The Story of Religion in America (1939). The Charter of Rhode Island of 1663, II Poore, Constitutions (1878) 1595, was the first colonial charter to provide for religious freedom.

The climactic period of the Virginia struggle covers the decade 1776–1786, from adoption of the Declaration of Rights to enactment of the Statute for Religious Freedom. For short accounts see Padover, Jefferson (1942) c. V; Brant, James Madison, The Virginia Revolutionist (1941) cc. XII, XV; James, The Struggle for Religious Liberty in Virginia (1900) cc. X, XI; Eckenrode, Separation of Church and State in Virginia (1910). These works and Randall, see note 1, will be cited in this opinion by the names of their authors. Citations to "Jefferson" refer to The Works of Thomas Jefferson (ed. by Ford, 1904–1905); to "Madison," to The Writings of James Madison (ed. by Hunt, 1901–1910).

[12] Brant, cc. XII, XV; James, cc. X, XI; Eckenrode.

[13] See Brant, c. XII, particularly at 243. Cf. Madison's Remonstrance, Appendix to this opinion. Jefferson of course held the same view. See note 15.

"Madison looked upon . . . religious freedom, to judge from the concentrated attention he gave it, as the fundamental freedom." Brant, 243; and see Remonstrance, Par. 1, 4, 15, Appendix.

tion expressly condemn the existing Virginia establishment.[14] But the forces supporting it were then too strong.

Accordingly Madison yielded on this phase but not for long. At once he resumed the fight, continuing it before succeeding legislative sessions. As a member of the General Assembly in 1779 he threw his full weight behind Jefferson's historic Bill for Establishing Religious Freedom. That bill was a prime phase of Jefferson's broad program of democratic reform undertaken on his return from the Continental Congress in 1776 and submitted for the General Assembly's consideration in 1779 as his proposed revised Virginia code.[15] With Jefferson's departure for Europe in 1784, Madison became the Bill's prime

[14] See Brant, 245–246. Madison quoted liberally from the Declaration in his Remonstrance and the use made of the quotations indicates that he considered the Declaration to have outlawed the prevailing establishment in principle, if not technically.

[15] Jefferson was chairman of the revising committee and chief draftsman. Corevisers were Wythe, Pendleton, Mason and Lee. The first enacted portion of the revision, which became known as Jefferson's Code, was the statute barring entailments. Primogeniture soon followed. Much longer the author was to wait for enactment of the Bill for Religious Freedom; and not until after his death was the corollary bill to be accepted in principle which he considered most important of all, namely, to provide for common education at public expense. See V Jefferson, 153. However, he linked this with disestablishment as corollary prime parts in a system of basic freedoms. I Jefferson, 78.

Jefferson, and Madison by his sponsorship, sought to give the Bill for Establishing Religious Freedom as nearly constitutional status as they could at the time. Acknowledging that one legislature could not "restrain the acts of succeeding Assemblies . . . and that therefore to declare this act irrevocable would be of no effect in law," the Bill's concluding provision as enacted nevertheless asserted: "Yet we are free to declare, and do declare, that the rights hereby asserted are of the natural rights of mankind, and that if any act shall be hereafter passed to repeal the present or to narrow its operation, such act will be an infringement of natural right." 1 Randall, 220.

sponsor.[16] Enactment failed in successive legislatures from its introduction in June, 1779, until its adoption in January, 1786. But during all this time the fight for religious freedom moved forward in Virginia on various fronts with growing intensity. Madison led throughout, against Patrick Henry's powerful opposing leadership until Henry was elected governor in November, 1784.

The climax came in the legislative struggle of 1784–1785 over the Assessment Bill. See Supplemental Appendix hereto. This was nothing more nor less than a taxing measure for the support of religion, designed to revive the payment of tithes suspended since 1777. So long as it singled out a particular sect for preference it incurred the active and general hostility of dissentient groups. It was broadened to include them, with the result that some subsided temporarily in their opposition.[17] As altered, the bill gave to each taxpayer the privilege of designating which church should receive his share of the tax. In default of designation the legislature applied it to pious uses.[18] But what is of the utmost significance here, "in

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[16] See I Jefferson, 70–71; XII Jefferson, 447; Padover, 80.

[17] Madison regarded this action as desertion. See his letter to Monroe of April 12, 1785; II Madison, 129, 131–132; James, cc. X, XI. But see Eckenrode, 91, suggesting it was surrender to the inevitable.

The bill provided: "That for every sum so paid, the Sheriff or Collector shall give a receipt, expressing therein to what society of Christians the person from whom he may receive the same shall direct the money to be paid . . . ." See also notes 19, 43 *infra*.

A copy of the Assessment Bill is to be found among the Washington manuscripts in the Library of Congress. Papers of George Washington, Vol. 231. Because of its crucial role in the Virginia struggle and bearing upon the First Amendment's meaning, the text of the Bill is set forth in the Supplemental Appendix to this opinion.

[18] Eckenrode, 99, 100.

its final form the bill left the taxpayer the option of giving his tax to education." [19]

Madison was unyielding at all times, opposing with all his vigor the general and nondiscriminatory as he had the earlier particular and discriminatory assessments proposed. The modified Assessment Bill passed second reading in December, 1784, and was all but enacted. Madison and his followers, however, maneuvered deferment of final consideration until November, 1785. And before the Assembly reconvened in the fall he issued his historic Memorial and Remonstrance.[20]

This is Madison's complete, though not his only, interpretation of religious liberty.[21] It is a broadside attack upon all forms of "establishment" of religion, both general and particular, nondiscriminatory or selective. Reflecting not only the many legislative conflicts over the Assessment Bill and the Bill for Establishing Religious Freedom but also, for example, the struggles for religious incorporations and the continued maintenance of the glebes, the Remonstrance is at once the most concise and the most accurate statement of the views of the First Amendment's author concerning what is "an establishment of religion." Because it behooves us in the dimming distance of time not

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[19] *Id.*, 100; II Madison, 113. The bill directed the sheriff to pay "all sums which . . . may not be appropriated by the person paying the same . . . into the public Treasury, to be disposed of under the direction of the General Assembly, for the encouragement of seminaries of learning within the Counties whence such sums shall arise, and to no other use or purpose whatsoever." Supplemental Appendix.

[20] See generally Eckenrode, c. V; Brant, James, and other authorities cited in note 11 above.

[21] II Madison, 183; and the Appendix to this opinion. Eckenrode, 100 ff. See also Fleet, Madison's "Detached Memoranda" (1946) III William & Mary Q. (3d Series) 534, 554–562.

to lose sight of what he and his coworkers had in mind when, by a single sweeping stroke of the pen, they forbade an establishment of religion and secured its free exercise, the text of the Remonstrance is appended at the end of this opinion for its wider current reference, together with a copy of the bill against which it was directed.

The Remonstrance, stirring up a storm of popular protest, killed the Assessment Bill.[22] It collapsed in committee shortly before Christmas, 1785. With this, the way was cleared at last for enactment of Jefferson's Bill for Establishing Religious Freedom. Madison promptly drove it through in January of 1786, seven years from the time it was first introduced. This dual victory substantially ended the fight over establishments, settling the issue against them. See note 33.

The next year Madison became a member of the Constitutional Convention. Its work done, he fought valiantly to secure the ratification of its great product in Virginia as elsewhere, and nowhere else more effectively.[23] Madison was certain in his own mind that under the Constitution "there is not a shadow of right in the general government to intermeddle with religion" [24] and that "this subject is, for the honor of America, perfectly free and

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[22] The major causes assigned for its defeat include the elevation of Patrick Henry to the governorship in November of 1784; the blunder of the proponents in allowing the Bill for Incorporations to come to the floor and incur defeat before the Assessment Bill was acted on; Madison's astute leadership, taking advantage of every "break" to convert his initial minority into a majority, including the deferment of action on the third reading to the fall; the Remonstrance, bringing a flood of protesting petitions; and the general poverty of the time. See Eckenrode, c. V, for an excellent short, detailed account.

[23] See James, Brant, *op. cit. supra* note 11.

[24] V Madison, 176. Cf. notes 33, 37.

unshackled. The government has no jurisdiction over it . . . ." [25] Nevertheless he pledged that he would work for a Bill of Rights, including a specific guaranty of religious freedom, and Virginia, with other states, ratified the Constitution on this assurance.[26]

Ratification thus accomplished, Madison was sent to the first Congress. There he went at once about performing his pledge to establish freedom for the nation as he had done in Virginia. Within a little more than three years from his legislative victory at home he had proposed and secured the submission and ratification of the First Amendment as the first article of our Bill of Rights.[27]

All the great instruments of the Virginia struggle for religious liberty thus became warp and woof of our constitutional tradition, not simply by the course of history, but by the common unifying force of Madison's life, thought and sponsorship. He epitomized the whole of that tradition in the Amendment's compact, but nonetheless comprehensive, phrasing.

As the Remonstrance discloses throughout, Madison opposed every form and degree of official relation between religion and civil authority. For him religion was a wholly private matter beyond the scope of civil power

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[25] V Madison, 132.

[26] Brant, 250. The assurance made first to his constituents was responsible for Madison's becoming a member of the Virginia Convention which ratified the Constitution. See James, 154–158.

[27] The amendment with respect to religious liberties read, as Madison introduced it: "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed." 1 Annals of Congress 434. In the process of debate this was modified to its present form. See especially 1 Annals of Congress 729–731, 765; also note 34.

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either to restrain or to support.[28] Denial or abridgment of religious freedom was a violation of rights both of conscience and of natural equality. State aid was no less obnoxious or destructive to freedom and to religion itself than other forms of state interference. "Establishment" and "free exercise" were correlative and coextensive ideas, representing only different facets of the single great and fundamental freedom. The Remonstrance, following the Virginia statute's example, referred to the history of religious conflicts and the effects of all sorts of establishments, current and historical, to suppress religion's free exercise. With Jefferson, Madison believed that to tolerate any fragment of establishment would be by so much to perpetuate restraint upon that freedom. Hence he sought to tear out the institution not partially but root and branch, and to bar its return forever.

In no phase was he more unrelentingly absolute than in opposing state support or aid by taxation. Not even "three pence" contribution was thus to be exacted from any citizen for such a purpose. Remonstrance, Par. 3.[29]

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[28] See text of the Remonstrance, Appendix; also notes 13, 15, 24, 25 *supra* and text.

Madison's one exception concerning restraint was for "preserving public order." Thus he declared in a private letter, IX Madison, 484, 487, written after the First Amendment was adopted: "The tendency to a usurpation on one side or the other, or to a corrupting coalition or alliance between them, will be best guarded agst. by an entire abstinance of the Govt. from interference in any way whatever, beyond the necessity of preserving public order, & protecting each sect agst. trespasses on its legal rights by others." Cf. note 9.

[29] The third ground of remonstrance, see the Appendix, bears repetition for emphasis here: "Because, it is proper to take alarm at the first experiment on our liberties . . . The freemen of America did not wait till usurped power had strengthened itself by exercise, and entangled the question in precedents. They saw all the consequences in the principle, and they avoided the consequences by denying the principle. We revere this lesson too much, soon to forget it. Who

Tithes had been the lifeblood of establishment before and after other compulsions disappeared. Madison and his coworkers made no exceptions or abridgments to the complete separation they created. Their objection was not to small tithes. It was to any tithes whatsoever. "If it were lawful to impose a small tax for religion, the admission would pave the way for oppressive levies." [30] Not the amount but "the principle of assessment was wrong." And the principle was as much to prevent "the interference of law in religion" as to restrain religious intervention in political matters.[31] In this field the authors of our freedom would not tolerate "the first experiment on our liberties" or "wait till usurped power had strengthened itself by exercise, and entangled the question in precedents." Remonstrance, Par. 3. Nor should we.

In view of this history no further proof is needed that the Amendment forbids any appropriation, large or small, from public funds to aid or support any and all religious exercises. But if more were called for, the debates in the First Congress and this Court's consistent expressions, whenever it has touched on the matter directly,[32] supply it.

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does not see that . . . the same authority which can force a citizen to *contribute three pence* only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?" (Emphasis added.) II Madison 183, 185–186.

[30] Eckenrode, 105, in summary of the Remonstrance.

[31] "Because the bill implies either that the Civil Magistrate is a competent Judge of Religious truth; or that he may employ Religion as an engine of Civil policy. The first is an arrogant pretention falsified by the contradictory opinions of Rulers in all ages, and throughout the world: The second an unhallowed perversion of the means of salvation." Remonstrance, Appendix, Par. 5; II Madison 183, 187.

[32] As is pointed out above, note 3, and in Part IV *infra*, *Cochran* v. *Board of Education*, 281 U. S. 370, was not such a case.

By contrast with the Virginia history, the congressional debates on consideration of the Amendment reveal only sparse discussion, reflecting the fact that the essential issues had been settled.[33] Indeed the matter had become so well understood as to have been taken for granted in all but formal phrasing. Hence, the only enlightening reference shows concern, not to preserve any power to use public funds in aid of religion, but to prevent the Amendment from outlawing private gifts inadvertently by virtue of the breadth of its wording.[34] In the

[33] See text *supra* at notes 24, 25. Madison, of course, was but one of many holding such views, but nevertheless agreeing to the common understanding for adoption of a Bill of Rights in order to remove all doubt engendered by the absence of explicit guaranties in the original Constitution.

By 1791 the great fight over establishments had ended, although some vestiges remained then and later, even in Virginia. The glebes, for example, were not sold there until 1802. Cf. Eckenrode, 147. Fixing an exact date for "disestablishment" is almost impossible, since the process was piecemeal. Although Madison failed in having the Virginia Bill of Rights declare explicitly against establishment in 1776, cf. note 14 and text *supra,* in 1777 the levy for support of the Anglican clergy was suspended. It was never resumed. Eckenrode states: "This act, in effect, destroyed the establishment. Many dates have been given for its end, but it really came on January 1, 1777, when the act suspending the payment of tithes became effective. This was not seen at the time. . . . But in freeing almost half of the taxpayers from the burden of the state religion, the state religion was at an end. Nobody could be forced to support it, and an attempt to levy tithes upon Anglicans alone would be to recruit the ranks of dissent." P. 53. See also pp. 61, 64. The question of assessment however was revived "with far more strength than ever, in the summer of 1784." *Id.*, 64. It would seem more factual therefore to fix the time of disestablishment as of December, 1785–January, 1786, when the issue in large was finally settled.

[34] At one point the wording was proposed: "No religion shall be established by law, nor shall the equal rights of conscience be infringed." 1 Annals of Congress 729. Cf. note 27. Representative Huntington of Connecticut feared this might be construed to prevent

margin are noted also the principal decisions in which expressions of this Court confirm the Amendment's broad prohibition.[35]

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judicial enforcement of private pledges. He stated "that he feared . . . that the words might be taken in such latitude as to be extremely hurtful to the cause of religion. He understood the amendment to mean what had been expressed by the gentleman from Virginia; but others might find it convenient to put another construction upon it. The ministers of their congregations to the Eastward were maintained by the contributions of those who belonged to their society; the expense of building meeting-houses was contributed in the same manner. These things were regulated by by-laws. If an action was brought before a Federal Court on any of these cases, the person who had neglected to perform his engagements could not be compelled to do it; for a support of ministers or building of places of worship might be construed into a religious establishment." 1 Annals of Congress 730.

To avoid any such possibility, Madison suggested inserting the word "national" before "religion," thereby not only again disclaiming intent to bring about the result Huntington feared but also showing unmistakably that "establishment" meant public "support" of religion in the financial sense. 1 Annals of Congress 731. See also IX Madison, 484–487.

[35] The decision most closely touching the question, where it was squarely raised, is *Quick Bear* v. *Leupp,* 210 U. S. 50. The Court distinguished sharply between appropriations from public funds for the support of religious education and appropriations from funds held in trust by the Government essentially as trustee for private individuals, Indian wards, as beneficial owners. The ruling was that the latter could be disbursed to private, religious schools at the designation of those patrons for paying the cost of their education. But it was stated also that such a use of public moneys would violate both the First Amendment and the specific statutory declaration involved, namely, that "it is hereby declared to be the settled policy of the Government to hereafter make no appropriation whatever for education in any sectarian school." 210 U. S. at 79. Cf. *Ponce* v. *Roman Catholic Apostolic Church,* 210 U. S. 296, 322. And see *Bradfield* v. *Roberts,* 175 U. S. 291, an instance of highly artificial grounding to support a decision sustaining an appropriation for the care of indigent patients pursuant to a contract with a private hospital. Cf. also the authorities cited in note 9.

III.

Compulsory attendance upon religious exercises went out early in the process of separating church and state, together with forced observance of religious forms and ceremonies.[36] Test oaths and religious qualification for office followed later.[37] These things none devoted to our great tradition of religious liberty would think of bringing back. Hence today, apart from efforts to inject religious training or exercises and sectarian issues into the public schools, the only serious surviving threat to maintaining that complete and permanent separation of religion and civil power which the First Amendment commands is through use of the taxing power to support religion, religious establishments, or establishments having a religious foundation whatever their form or special religious function.

Does New Jersey's action furnish support for religion by use of the taxing power? Certainly it does, if the test remains undiluted as Jefferson and Madison made it, that money taken by taxation from one is not to be used or given to support another's religious training or belief, or indeed one's own.[38] Today as then the furnishing of "con-

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[36] See text at note 1.

[37] ". . . but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." Const., Art. VI, § 3. See also the two forms prescribed for the President's Oath or Affirmation. Const., Art. II, § 1. Cf. *Ex parte Garland,* 4 Wall. 333; *Cummings* v. *Missouri,* 4 Wall. 277; *United States* v. *Lovett,* 328 U. S. 303.

[38] In the words of the Virginia statute, following the portion of the preamble quoted at the beginning of this opinion: ". . . even the forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor, whose morals he would make his pattern, and whose powers he feels most persuasive to righteousness, and is withdrawing from the ministry those temporary rewards, which pro-

tributions of money for the propagation of opinions which he disbelieves" is the forbidden exaction; and the prohibition is absolute for whatever measure brings that consequence and whatever amount may be sought or given to that end.

The funds used here were raised by taxation. The Court does not dispute, nor could it, that their use does in fact give aid and encouragement to religious instruction. It only concludes that this aid is not "support" in law. But Madison and Jefferson were concerned with aid and support in fact, not as a legal conclusion "entangled in precedents." Remonstrance, Par. 3. Here parents pay money to send their children to parochial schools and funds raised by taxation are used to reimburse them. This not only helps the children to get to school and the parents to send them. It aids them in a substantial way to get the very thing which they are sent to the particular school to secure, namely, religious training and teaching.

Believers of all faiths, and others who do not express their feeling toward ultimate issues of existence in any creedal form, pay the New Jersey tax. When the money so raised is used to pay for transportation to religious schools, the Catholic taxpayer to the extent of his proportionate share pays for the transportation of Lutheran, Jewish and otherwise religiously affiliated children to receive their non-Catholic religious instruction. Their parents likewise pay proportionately for the transportation of Catholic children to receive Catholic instruction. Each thus contributes to "the propagation of opinions which he disbelieves" in so far as their religions differ, as do others who accept no creed without regard to those differences. Each

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ceeding from an approbation of their personal conduct, are an additional incitement to earnest and unremitting labours for the instruction of mankind . . . ." Cf. notes 29, 30, 31 and text *supra*.

thus pays taxes also to support the teaching of his own religion, an exaction equally forbidden since it denies "the comfortable liberty" of giving one's contribution to the particular agency of instruction he approves.[39]

New Jersey's action therefore exactly fits the type of exaction and the kind of evil at which Madison and Jefferson struck. Under the test they framed it cannot be said that the cost of transportation is no part of the cost of education or of the religious instruction given. That it is a substantial and a necessary element is shown most plainly by the continuing and increasing demand for the state to assume it. Nor is there pretense that it relates only to the secular instruction given in religious schools or that any attempt is or could be made toward allocating proportional shares as between the secular and the religious instruction. It is precisely because the instruction is religious and relates to a particular faith, whether one or another, that parents send their children to religious schools under the *Pierce* doctrine. And the very purpose of the state's contribution is to defray the cost of conveying the pupil to the place where he will receive not simply secular, but also and primarily religious, teaching and guidance.

Indeed the view is sincerely avowed by many of various faiths,[40] that the basic purpose of all education is or should be religious, that the secular cannot be and should not be separated from the religious phase and emphasis. Hence,

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[39] See note 38.

[40] See Bower, Church and State in Education (1944) 58: ". . . the fundamental division of the education of the whole self into the secular and the religious could not be justified on the grounds of either a sound educational philosophy or a modern functional concept of the relation of religion to personal and social experience." See also Vere, The Elementary School, in Essays on Catholic Education in the United States (1942) 110–111; Gabel, Public Funds for Church and Private Schools (1937) 737–739.

the inadequacy of public or secular education and the necessity for sending the child to a school where religion is taught. But whatever may be the philosophy or its justification, there is undeniably an admixture of religious with secular teaching in all such institutions. That is the very reason for their being. Certainly for purposes of constitutionality we cannot contradict the whole basis of the ethical and educational convictions of people who believe in religious schooling.

Yet this very admixture is what was disestablished when the First Amendment forbade "an establishment of religion." Commingling the religious with the secular teaching does not divest the whole of its religious permeation and emphasis or make them of minor part, if proportion were material. Indeed, on any other view, the constitutional prohibition always could be brought to naught by adding a modicum of the secular.

An appropriation from the public treasury to pay the cost of transportation to Sunday school, to weekday special classes at the church or parish house, or to the meetings of various young people's religious societies, such as the Y. M. C. A., the Y. W. C. A., the Y. M. H. A., the Epworth League, could not withstand the constitutional attack. This would be true, whether or not secular activities were mixed with the religious. If such an appropriation could not stand, then it is hard to see how one becomes valid for the same thing upon the more extended scale of daily instruction. Surely constitutionality does not turn on where or how often the mixed teaching occurs.

Finally, transportation, where it is needed, is as essential to education as any other element. Its cost is as much a part of the total expense, except at times in amount, as the cost of textbooks, of school lunches, of athletic equipment, of writing and other materials; indeed of all other

items composing the total burden. Now as always the core of the educational process is the teacher-pupil relationship. Without this the richest equipment and facilities would go for naught. See *Judd* v. *Board of Education*, 278 N. Y. 200, 212, 15 N. E. 2d 576, 582. But the proverbial Mark Hopkins conception no longer suffices for the country's requirements. Without buildings, without equipment, without library, textbooks and other materials, and without transportation to bring teacher and pupil together in such an effective teaching environment, there can be not even the skeleton of what our times require. Hardly can it be maintained that transportation is the least essential of these items, or that it does not in fact aid, encourage, sustain and support, just as they do, the very process which is its purpose to accomplish. No less essential is it, or the payment of its cost, than the very teaching in the classroom or payment of the teacher's sustenance. Many types of equipment, now considered essential, better could be done without.

For me, therefore, the feat is impossible to select so indispensable an item from the composite of total costs, and characterize it as not aiding, contributing to, promoting or sustaining the propagation of beliefs which it is the very end of all to bring about. Unless this can be maintained, and the Court does not maintain it, the aid thus given is outlawed. Payment of transportation is no more, nor is it any the less essential to education, whether religious or secular, than payment for tuitions, for teachers' salaries, for buildings, equipment and necessary materials. Nor is it any the less directly related, in a school giving religious instruction, to the primary religious objective all those essential items of cost are intended to achieve. No rational line can be drawn between payment for such larger, but not more necessary, items and payment for transportation. The only line that can be so drawn is one between more dollars and less. Certainly in this

realm such a line can be no valid constitutional measure. *Murdock* v. *Pennsylvania,* 319 U. S. 105; *Thomas* v. *Collins,* 323 U. S. 516.[41] Now, as in Madison's time, not the amount but the principle of assessment is wrong. Remonstrance, Par. 3.

IV.

But we are told that the New Jersey statute is valid in its present application because the appropriation is for a public, not a private purpose, namely, the promotion of education, and the majority accept this idea in the conclusion that all we have here is "public welfare legislation." If that is true and the Amendment's force can be thus destroyed, what has been said becomes all the more pertinent. For then there could be no possible objection to more extensive support of religious education by New Jersey.

If the fact alone be determinative that religious schools are engaged in education, thus promoting the general and individual welfare, together with the legislature's decision that the payment of public moneys for their aid makes their work a public function, then I can see no possible basis, except one of dubious legislative policy, for the state's refusal to make full appropriation for support of private, religious schools, just as is done for public

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[41] It would seem a strange ruling that a "reasonable," that is, presumably a small, license fee cannot be placed upon the exercise of the right of religious instruction, yet that under the correlative constitutional guaranty against "an establishment" taxes may be levied and used to aid and promote religious instruction, if only the amounts so used are small. See notes 30–31 *supra* and text.

Madison's objection to "three pence" contributions and his stress upon "denying the principle" without waiting until "usurped power had . . . entangled the question in precedents," note 29, were reinforced by his further characterization of the Assessment Bill: "Distant as it may be, in its present form, from the Inquisition it differs from it only in degree. The one is the first step, the other the last in the career of intolerance." Remonstrance, Par. 9; II Madison 183, 188.

instruction. There could not be, on that basis, valid constitutional objection.[42]

Of course paying the cost of transportation promotes the general cause of education and the welfare of the individual. So does paying all other items of educational expense. And obviously, as the majority say, it is much too late to urge that legislation designed to facilitate the opportunities of children to secure a secular education serves no public purpose. Our nation-wide system of public education rests on the contrary view, as do all grants in aid of education, public or private, which is not religious in character.

These things are beside the real question. They have no possible materiality except to obscure the all-pervading, inescapable issue. *Cf. Cochran* v. *Board of Education, supra.* Stripped of its religious phase, the case presents no substantial federal question. *Ibid.* The public function argument, by casting the issue in terms of promoting the general cause of education and the welfare of the individual, ignores the religious factor and its essential connection with the transportation, thereby leaving out the only vital element in the case. So of course do the "public welfare" and "social legislation" ideas, for they come to the same thing.

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[42] If it is part of the state's function to supply to religious schools or their patrons the smaller items of educational expense, because the legislature may say they perform a public function, it is hard to see why the larger ones also may not be paid. Indeed, it would seem even more proper and necessary for the state to do this. For if one class of expenditures is justified on the ground that it supports the general cause of education or benefits the individual, or can be made to do so by legislative declaration, so even more certainly would be the other. To sustain payment for transportation to school, for textbooks, for other essential materials, or perhaps for school lunches, and not for what makes all these things effective for their intended end, would be to make a public function of the smaller items and their cumulative effect, but to make wholly private in character the larger things without which the smaller could have no meaning or use.

1 RUTLEDGE, J., dissenting.

We have here then one substantial issue, not two. To say that New Jersey's appropriation and her use of the power of taxation for raising the funds appropriated are not for public purposes but are for private ends, is to say that they are for the support of religion and religious teaching. Conversely, to say that they are for public purposes is to say that they are not for religious ones.

This is precisely for the reason that education which includes religious training and teaching, and its support, have been made matters of private right and function, not public, by the very terms of the First Amendment. That is the effect not only in its guaranty of religion's free exercise, but also in the prohibition of establishments. It was on this basis of the private character of the function of religious education that this Court held parents entitled to send their children to private, religious schools. *Pierce* v. *Society of Sisters, supra.* Now it declares in effect that the appropriation of public funds to defray part of the cost of attending those schools is for a public purpose. If so, I do not understand why the state cannot go farther or why this case approaches the verge of its power.

In truth this view contradicts the whole purpose and effect of the First Amendment as heretofore conceived. The "public function"—"public welfare"—"social legislation" argument seeks, in Madison's words, to "employ Religion [that is, here, religious education] as an engine of Civil policy." Remonstrance, Par. 5. It is of one piece with the Assessment Bill's preamble, although with the vital difference that it wholly ignores what that preamble explicitly states.[43]

[43] "Whereas the general diffusion of Christian knowledge hath a natural tendency to correct the morals of men, restrain their vices, and preserve the peace of society; which cannot be effected without a competent provision for learned teachers, who may be thereby enabled to devote their time and attention to the duty of instructing such citizens, as from their circumstances and want of education, cannot otherwise attain such knowledge; and it is judged that such pro-

Our constitutional policy is exactly the opposite. It does not deny the value or the necessity for religious training, teaching or observance. Rather it secures their free exercise. But to that end it does deny that the state can undertake or sustain them in any form or degree. For this reason the sphere of religious activity, as distinguished from the secular intellectual liberties, has been given the twofold protection and, as the state cannot forbid, neither can it perform or aid in performing the religious function. The dual prohibition makes that function altogether private. It cannot be made a public one by legislative act. This was the very heart of Madison's Remonstrance, as it is of the Amendment itself.

It is not because religious teaching does not promote the public or the individual's welfare, but because neither is furthered when the state promotes religious education, that the Constitution forbids it to do so. Both legislatures and courts are bound by that distinction. In failure to observe it lies the fallacy of the "public function"—"social legislation" argument, a fallacy facilitated by easy transference of the argument's basing from due process unrelated to any religious aspect to the First Amendment.

By no declaration that a gift of public money to religious uses will promote the general or individual welfare, or the cause of education generally, can legislative bodies overcome the Amendment's bar. Nor may the courts sustain their attempts to do so by finding such consequences for appropriations which in fact give aid to or promote religious uses. Cf. *Norris* v. *Alabama,* 294 U. S. 587, 590; *Hooven & Allison Co.* v. *Evatt,* 324 U. S. 652, 659; *Akins* v. *Texas,* 325 U. S. 398, 402. Legislatures are free to make,

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vision may be made by the Legislature, without counteracting the liberal principle heretofore adopted and intended to be preserved by abolishing all distinctions of pre-eminence amongst the different societies of communities of Christians; . . . ." Supplemental Appendix; Foote, Sketches of Virginia (1850) 340.

and courts to sustain, appropriations only when it can be found that in fact they do not aid, promote, encourage or sustain religious teaching or observances, be the amount large or small. No such finding has been or could be made in this case. The Amendment has removed this form of promoting the public welfare from legislative and judicial competence to make a public function. It is exclusively a private affair.

The reasons underlying the Amendment's policy have not vanished with time or diminished in force. Now as when it was adopted the price of religious freedom is double. It is that the church and religion shall live both within and upon that freedom. There cannot be freedom of religion, safeguarded by the state, and intervention by the church or its agencies in the state's domain or dependency on its largesse. Madison's Remonstrance, Par. 6, 8.[44] The great condition of religious liberty is that it be maintained free from sustenance, as also from other interferences, by the state. For when it comes to rest upon that secular foundation it vanishes with the resting. *Id.*, Par. 7, 8.[45] Public money devoted to payment of religious costs, educational or other, brings the quest for more. It brings too the struggle of sect against sect for the larger share or for any. Here one by numbers alone will benefit most, there another. That is precisely the history of societies which have had an established religion and dissident

[44] "Because the establishment proposed by the Bill is not requisite for the support of the Christian Religion. To say that it is, is a contradiction to the Christian Religion itself; for every page of it disavows a dependence on the powers of this world . . . . Because the establishment in question is not necessary for the support of Civil Government. . . . What influence in fact have ecclesiastical establishments had on Civil Society? . . . in no instance have they been seen the guardians of the liberties of the people." II Madison 183, 187, 188.

[45] "Because experience witnesseth that ecclesiastical establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary operation." II Madison 183, 187.

groups. *Id.*, Par. 8, 11. It is the very thing Jefferson and Madison experienced and sought to guard against, whether in its blunt or in its more screened forms. *Ibid.* The end of such strife cannot be other than to destroy the cherished liberty. The dominating group will achieve the dominant benefit; or all will embroil the state in their dissensions. *Id.*, Par. 11.[46]

Exactly such conflicts have centered of late around providing transportation to religious schools from public funds.[47] The issue and the dissension work typically, in Madison's phrase, to "destroy that moderation and harmony which the forbearance of our laws to intermeddle with Religion, has produced amongst its several sects." *Id.*, Par. 11. This occurs, as he well knew, over measures

[46] "At least let warning be taken at the first fruits of the threatened innovation. The very appearance of the Bill has transformed that 'Christian forbearance, love and charity,' which of late mutually prevailed, into animosities and jealousies, which may not soon be appeased." II Madison 183, 189.

[47] In this case briefs *amici curiae* have been filed on behalf of various organizations representing three religious sects, one labor union, the American Civil Liberties Union, and the states of Illinois, Indiana, Louisiana, Massachusetts, Michigan and New York. All these states have laws similar to New Jersey's and all of them, with one religious sect, support the constitutionality of New Jersey's action. The others oppose it. Maryland and Mississippi have sustained similar legislation. Note 49 *infra*. No state without legislation of this sort has filed an opposing brief. But at least six states have held such action invalid, namely, Delaware, Oklahoma, New York, South Dakota, Washington and Wisconsin. Note 49 *infra*. The New York ruling was overturned by amendment to the state constitution in 1938. Constitution of New York, Art. XI, 4.

Furthermore, in this case the New Jersey courts divided, the Supreme Court holding the statute and resolution invalid, 132 N. J. L. 98, 39 A. 2d 75, the Court of Errors and Appeals reversing that decision, 133 N. J. L. 350, 44 A. 2d 333. In both courts, as here, the judges split, one of three dissenting in the Supreme Court, three of nine in the Court of Errors and Appeals. The division is typical. See the cases cited in note 49.

at the very threshold of departure from the principle. *Id.*, Par. 3, 9, 11.

In these conflicts wherever success has been obtained it has been upon the contention that by providing the transportation the general cause of education, the general welfare, and the welfare of the individual will be forwarded; hence that the matter lies within the realm of public function, for legislative determination.[48] State courts have divided upon the issue, some taking the view that only the individual, others that the institution receives the benefit.[49] A few have recognized that this dichotomy is false, that both in fact are aided.[50]

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[48] See the authorities cited in note 49; and see note 54.

[49] Some state courts have sustained statutes granting free transportation or free school books to children attending denominational schools on the theory that the aid was a benefit to the child rather than to the school. See *Nichols* v. *Henry*, 301 Ky. 434, 191 S. W. 2d 930, with which compare *Sherrard* v. *Jefferson County Board of Education*, 294 Ky. 469, 171 S. W. 2d 963; *Cochran* v. *Board of Education*, 168 La. 1030, 123 So. 664, aff'd, 281 U. S. 370; *Borden* v. *Board of Education*, 168 La. 1005, 123 So. 655; *Board of Education* v. *Wheat*, 174 Md. 314, 199 A. 628; *Adams* v. *St. Mary's County*, 180 Md. 550, 26 A. 2d 377; *Chance* v. *State Textbook R. & P. Board*, 190 Miss. 453, 200 So. 706. See also *Bowker* v. *Baker*, 73 Cal. App. 2d 653, 167 P. 2d 256. Other courts have held such statutes unconstitutional under state constitutions as aid to the schools. *Judd* v. *Board of Education*, 278 N. Y. 200, 15 N. E. 2d 576, but see note 47 *supra*; *Smith* v. *Donahue*, 202 App. Div. 656, 195 N. Y. S. 715; *State ex rel. Traub* v. *Brown*, 36 Del. 181, 172 A. 835; *Gurney* v. *Ferguson*, 190 Okla. 254, 122 P. 2d 1002; *Mitchell* v. *Consolidated School District*, 17 Wash. 2d 61, 135 P. 2d 79; *Van Straten* v. *Milquet*, 180 Wis. 109, 192 N. W. 392. And cf. *Hlebanja* v. *Brewe*, 58 S. D. 351, 236 N. W. 296. And since many state constitutions have provisions forbidding the appropriation of public funds for private purposes, in these and other cases the issue whether the statute was for a "public" or "private" purpose has been present. See Note (1941) 50 Yale L. J. 917, 925.

[50] *E. g.*, *Gurney* v. *Ferguson*, 190 Okla. 254, 255, 122 P. 2d 1002, 1003; *Mitchell* v. *Consolidated School District*, 17 Wash. 2d 61, 68,

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The majority here does not accept in terms any of those views. But neither does it deny that the individual or the school, or indeed both, are benefited directly and substantially.[51] To do so would cut the ground from under the public function—social legislation thesis. On the contrary, the opinion concedes that the children are aided by being helped to get to the religious schooling. By converse necessary implication as well as by the absence of express denial, it must be taken to concede also that the school is helped to reach the child with its religious teaching. The religious enterprise is common to both, as is the interest in having transportation for its religious purposes provided.

Notwithstanding the recognition that this two-way aid is given and the absence of any denial that religious teaching is thus furthered, the Court concludes that the aid so given is not "support" of religion. It is rather only support of education as such, without reference to its religious content, and thus becomes public welfare legislation. To this elision of the religious element from the case is added gloss in two respects, one that the aid extended partakes of the nature of a safety measure, the other that failure to provide it would make the state unneutral in religious matters, discriminating against or hampering such children concerning public benefits all others receive.

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135 P. 2d 79, 82; *Smith* v. *Donahue*, 202 App. Div. 656, 664, 195 N. Y. S. 715, 722; *Board of Education* v. *Wheat*, 174 Md. 314, dissenting opinion at 340, 199 A. 628 at 639. This is true whether the appropriation and payment are in form to the individual or to the institution. *Ibid.* Questions of this gravity turn upon the purpose and effect of the state's expenditure to accomplish the forbidden object, not upon who receives the amount and applies it to that end or the form and manner of the payment.

[51] The payments here averaged roughly $40.00 a year per child.

As will be noted, the one gloss is contradicted by the facts of record and the other is of whole cloth with the "public function" argument's excision of the religious factor.[52] But most important is that this approach, if valid, supplies a ready method for nullifying the Amendment's guaranty, not only for this case and others involving small grants in aid for religious education, but equally for larger ones. The only thing needed will be for the Court again to transplant the "public welfare—public function" view from its proper nonreligious due process bearing to First Amendment application, holding that religious education is not "supported" though it may be aided by the appropriation, and that the cause of education generally is furthered by helping the pupil to secure that type of training.

This is not therefore just a little case over bus fares. In paraphrase of Madison, distant as it may be in its present form from a complete establishment of religion, it differs from it only in degree; and is the first step in that direction. *Id.*, Par. 9.[53] Today as in his time "the same authority which can force a citizen to contribute three pence only . . . for the support of any one [religious] establishment, may force him" to pay more; or "to conform to any other establishment in all cases whatsoever." And now, as then, "either . . . we must say, that the will of the Legislature is the only measure of their authority; and that in the plenitude of this authority, they may sweep away all our fundamental rights; or, that they are bound to leave this particular right untouched and sacred." Remonstrance, Par. 15.

The realm of religious training and belief remains, as the Amendment made it, the kingdom of the individual

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[52] See Part V.

[53] See also note 46 *supra* and Remonstrance, Par. 3.

man and his God. It should be kept inviolately private, not "entangled . . . in precedents" [54] or confounded with what legislatures legitimately may take over into the public domain.

V.

No one conscious of religious values can be unsympathetic toward the burden which our constitutional separation puts on parents who desire religious instruction mixed with secular for their children. They pay taxes for others' children's education, at the same time the added cost of instruction for their own. Nor can one happily see benefits denied to children which others receive, because in conscience they or their parents for them desire a different kind of training others do not demand.

But if those feelings should prevail, there would be an end to our historic constitutional policy and command. No more unjust or discriminatory in fact is it to deny attendants at religious schools the cost of their transportation than it is to deny them tuitions, sustenance for their teachers, or any other educational expense which others receive at public cost. Hardship in fact there is which none can blink. But, for assuring to those who undergo it the greater, the most comprehensive freedom, it is one written by design and firm intent into our basic law.

Of course discrimination in the legal sense does not exist. The child attending the religious school has the same right as any other to attend the public school. But he foregoes exercising it because the same guaranty which assures this freedom forbids the public school or any agency of the

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[54] Thus each brief filed here by the supporters of New Jersey's action, see note 47, not only relies strongly on *Cochran* v. *Board of Education,* 281 U. S. 370, but either explicitly or in effect maintains that it is controlling in the present case.

state to give or aid him in securing the religious instruction he seeks.

Were he to accept the common school, he would be the first to protest the teaching there of any creed or faith not his own. And it is precisely for the reason that their atmosphere is wholly secular that children are not sent to public schools under the *Pierce* doctrine. But that is a constitutional necessity, because we have staked the very existence of our country on the faith that complete separation between the state and religion is best for the state and best for religion. Remonstrance, Par. 8, 12.

That policy necessarily entails hardship upon persons who forego the right to educational advantages the state can supply in order to secure others it is precluded from giving. Indeed this may hamper the parent and the child forced by conscience to that choice. But it does not make the state unneutral to withhold what the Constitution forbids it to give. On the contrary it is only by observing the prohibition rigidly that the state can maintain its neutrality and avoid partisanship in the dissensions inevitable when sect opposes sect over demands for public moneys to further religious education, teaching or training in any form or degree, directly or indirectly. Like St. Paul's freedom, religious liberty with a great price must be bought. And for those who exercise it most fully, by insisting upon religious education for their children mixed with secular, by the terms of our Constitution the price is greater than for others.

The problem then cannot be cast in terms of legal discrimination or its absence. This would be true, even though the state in giving aid should treat all religious instruction alike. Thus, if the present statute and its application were shown to apply equally to all religious schools

of whatever faith,[55] yet in the light of our tradition it could not stand. For then the adherent of one creed still would pay for the support of another, the childless taxpayer with others more fortunate. Then too there would seem to be no bar to making appropriations for transportation and other expenses of children attending public or other secular schools, after hours in separate places and classes for their exclusively religious instruction. The person who embraces no creed also would be forced to pay for teaching what he does not believe. Again, it was the furnishing of "contributions of money for the propagation of opinions which he disbelieves" that the fathers outlawed. That consequence and effect are not removed by multiplying to all-inclusiveness the sects for which support is exacted. The Constitution requires, not comprehensive identification of state with religion, but complete separation.

VI.

Short treatment will dispose of what remains. Whatever might be said of some other application of New Jersey's statute, the one made here has no semblance of bearing as a safety measure or, indeed, for securing expeditious conveyance. The transportation supplied is by public conveyance, subject to all the hazards and delays of the highway and the streets incurred by the public generally in going about its multifarious business.

Nor is the case comparable to one of furnishing fire or police protection, or access to public highways. These things are matters of common right, part of the general

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[55] See text at notes 17–19 *supra* and authorities cited; also Foote, Sketches of Virginia (1850) c. XV. Madison's entire thesis, as reflected throughout the Remonstrance and in his other writings, as well as in his opposition to the final form of the Assessment Bill, see note 43, was altogether incompatible with acceptance of general and "nondiscriminatory" support. See Brant, c. XII.

need for safety.[56] Certainly the fire department must not stand idly by while the church burns. Nor is this reason why the state should pay the expense of transportation or other items of the cost of religious education.[57]

Needless to add, we have no such case as *Green* v. *Frazier*, 253 U. S. 233, or *Carmichael* v. *Southern Coal Co.*, 301 U. S. 495, which dealt with matters wholly unrelated to the First Amendment, involving only situations where the "public function" issue was determinative.

I have chosen to place my dissent upon the broad ground I think decisive, though strictly speaking the case might be decided on narrower issues. The New Jersey statute might be held invalid on its face for the exclusion of chil-

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[56] The protections are of a nature which does not require appropriations specially made from the public treasury and earmarked, as is New Jersey's here, particularly for religious institutions or uses. The First Amendment does not exclude religious property or activities from protection against disorder or the ordinary accidental incidents of community life. It forbids support, not protection from interference or destruction.

It is a matter not frequently recalled that President Grant opposed tax exemption of religious property as leading to a violation of the principle of separation of church and state. See President Grant's Seventh Annual Message to Congress, December 7, 1875, in IX Messages and Papers of the Presidents (1897) 4288–4289. Garfield, in a letter accepting the nomination for the presidency said: ". . . it would be unjust to our people, and dangerous to our institutions, to apply any portion of the revenues of the nation, or of the States, to the support of sectarian schools. The separation of the Church and the State in everything relating to taxation should be absolute." II The Works of James Abram Garfield (ed. by Hinsdale, 1883) 783.

[57] Neither do we have here a case of rate-making by which a public utility extends reduced fares to all school children, including patrons of religious schools. Whether or not legislative compulsion upon a private utility to extend such an advantage would be valid, or its extension by a municipally owned system, we are not required to consider. In the former instance, at any rate, and generally if not always in the latter, the vice of using the taxing power to raise funds for the support of religion would not be present.

dren who attend private, profit-making schools.[58] I cannot assume, as does the majority, that the New Jersey courts would write off this explicit limitation from the statute. Moreover, the resolution by which the statute was applied expressly limits its benefits to students of public and Catholic schools.[59] There is no showing that there are no other private or religious schools in this populous district.[60] I do not think it can be assumed there were none.[61] But in the view I have taken, it is unnecessary to limit grounding to these matters.

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[58] It would seem at least a doubtfully sufficient basis for reasonable classification that some children should be excluded simply because the only school feasible for them to attend, in view of geographic or other situation, might be one conducted in whole *or in part* for profit. Cf. note 5.

[59] See note 7 *supra*. The resolution was as follows, according to the school board's minutes read in proof: "The transportation committee recommended the transportation of pupils of Ewing to the Trenton and Pennington High Schools *and Catholic Schools* by way of public carrier as in recent years. On Motion of Mr. Ralph Ryan and Mr. M. French the same was adopted." (Emphasis added.) The New Jersey court's holding that the resolution was within the authority conferred by the state statute is binding on us. *Reinman* v. *Little Rock*, 237 U. S. 171, 176; *Hadacheck* v. *Sebastian*, 239 U. S. 394, 414.

[60] The population of Ewing Township, located near the City of Trenton, was 10,146 according to the census of 1940. Sixteenth Census of the United States, Population, Vol. 1, 674.

[61] In *Thomas* v. *Collins*, 323 U. S. 516, 530, it was said that the preferred place given in our scheme to the great democratic freedoms secured by the First Amendment gives them "a sanctity and a sanction not permitting dubious intrusions." Cf. Remonstrance, Par. 3, 9. And in other cases it has been held that the usual presumption of constitutionality will not work to save such legislative excursions in this field. *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152, note 4; see Wechsler, Stone and the Constitution (1946) 46 Col. L. Rev. 764, 795 *et seq.*

Apart from the Court's admission that New Jersey's present action approaches the verge of her power, it would seem that a statute, ordinance or resolution which on its face singles out one sect only by name for enjoyment of the same advantages as public schools or their stu-

1 RUTLEDGE, J., dissenting.

Two great drives are constantly in motion to abridge, in the name of education, the complete division of religion and civil authority which our forefathers made. One is to introduce religious education and observances into the public schools. The other, to obtain public funds for the aid and support of various private religious schools. See Johnson, The Legal Status of Church-State Relationships in the United States (1934); Thayer, Religion in Public Education (1947); Note (1941) 50 Yale L. J. 917. In my opinion both avenues were closed by the Constitution. Neither should be opened by this Court. The matter is not one of quantity, to be measured by the amount of money expended. Now as in Madison's day it is one of principle, to keep separate the separate spheres as the First Amendment drew them; to prevent the first experiment upon our liberties; and to keep the question from becoming entangled in corrosive precedents. We should not be less strict to keep strong and untarnished the one side of the shield of religious freedom than we have been of the other.

The judgment should be reversed.

APPENDIX.

MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS.

To the Honorable the General Assembly
of
the Commonwealth of Virginia.
A Memorial and Remonstrance.

We, the subscribers, citizens of the said Commonwealth, having taken into serious consideration, a Bill printed by order of the last Session of General Assembly, entitled "A

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dents, should be held discriminatory on its face by virtue of that fact alone, unless it were positively shown that no other sects sought or were available to receive the same advantages.

Bill establishing a provision for Teachers of the Christian Religion," and conceiving that the same, if finally armed with the sanctions of a law, will be a dangerous abuse of power, are bound as faithful members of a free State, to remonstrate against it, and to declare the reasons by which we are determined. We remonstrate against the said Bill,

1. Because we hold it for a fundamental and undeniable truth, "that Religion or the duty which we owe to our Creator and the Manner of discharging it, can be directed only by reason and conviction, not by force or violence."[1] The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right. It is unalienable; because the opinions of men, depending only on the evidence contemplated by their own minds, cannot follow the dictates of other men: It is unalienable also; because what is here a right towards men, is a duty towards the Creator. It is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him. This duty is precedent both in order of time and degree of obligation, to the claims of Civil Society. Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governor of the Universe: And if a member of Civil Society, who enters into any subordinate Association, must always do it with a reservation of his duty to the general authority; much more must every man who becomes a member of any particular Civil Society, do it with a saving of his allegiance to the Universal Sovereign. We maintain therefore that in matters of Religion, no man's right is abridged by the institution of Civil Society, and that Religion is wholly exempt from its cognizance.

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[1] Decl. Rights, Art: 16. [Note in the original.]

1 RUTLEDGE, J., dissenting.

True it is, that no other rule exists, by which any question which may divide a Society, can be ultimately determined, but the will of the majority; but it is also true, that the majority may trespass on the rights of the minority.

2. Because if religion be exempt from the authority of the Society at large, still less can it be subject to that of the Legislative Body. The latter are but the creatures and vicegerents of the former. Their jurisdiction is both derivative and limited: it is limited with regard to the coordinate departments, more necessarily is it limited with regard to the constituents. The preservation of a free government requires not merely, that the metes and bounds which separate each department of power may be invariably maintained; but more especially, that neither of them be suffered to overleap the great Barrier which defends the rights of the people. The Rulers who are guilty of such an encroachment, exceed the commission from which they derive their authority, and are Tyrants. The People who submit to it are governed by laws made neither by themselves, nor by an authority derived from them, and are slaves.

3. Because, it is proper to take alarm at the first experiment on our liberties. We hold this prudent jealousy to be the first duty of citizens, and one of [the] noblest characteristics of the late Revolution. The freemen of America did not wait till usurped power had strengthened itself by exercise, and entangled the question in precedents. They saw all the consequences in the principle, and they avoided the consequences by denying the principle. We revere this lesson too much, soon to forget it. Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects? That the same authority which can force a citizen to contribute three pence

only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?

4. Because, the bill violates that equality which ought to be the basis of every law, and which is more indispensible, in proportion as the validity or expediency of any law is more liable to be impeached. If "all men are by nature equally free and independent," [1] all men are to be considered as entering into Society on equal conditions; as relinquishing no more, and therefore retaining no less, one than another, of their natural rights. Above all are they to be considered as retaining an "*equal* title to the free exercise of Religion according to the dictates of conscience" [2] Whilst we assert for ourselves a freedom to embrace, to profess and to observe the Religion which we believe to be of divine origin, we cannot deny an equal freedom to those whose minds have not yet yielded to the evidence which has convinced us. If this freedom be abused, it is an offence against God, not against man: To God, therefore, not to men, must an account of it be rendered. As the Bill violates equality by subjecting some to peculiar burdens; so it violates the same principle, by granting to others peculiar exemptions. Are the Quakers and Menonists the only sects who think a compulsive support of their religions unnecessary and unwarantable? Can their piety alone be intrusted with the care of public worship? Ought their Religions to be endowed above all others, with extraordinary privileges, by which proselytes may be enticed from all others? We think too favorably of the justice and good sense of these denominations, to believe that they either covet pre-eminencies over their fellow citizens, or that they will be seduced by them, from the common opposition to the measure.

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[1] Decl. Rights, Art. 1. [Note in the original.]

[2] Art: 16. [Note in the original.]

5. Because the bill implies either that the Civil Magistrate is a competent Judge of Religious truth; or that he may employ Religion as an engine of Civil policy. The first is an arrogant pretension falsified by the contradictory opinions of Rulers in all ages, and throughout the world: The second an unhallowed perversion of the means of salvation.

6. Because the establishment proposed by the Bill is not requisite for the support of the Christian Religion. To say that it is, is a contradiction to the Christian Religion itself; for every page of it disavows a dependence on the powers of this world: it is a contradiction to fact; for it is known that this Religion both existed and flourished, not only without the support of human laws, but in spite of every opposition from them; and not only during the period of miraculous aid, but long after it had been left to its own evidence, and the ordinary care of Providence: Nay, it is a contradiction in terms; for a Religion not invented by human policy, must have preexisted and been supported, before it was established by human policy. It is moreover to weaken in those who profess this Religion a pious confidence in its innate excellence, and the patronage of its Author; and to foster in those who still reject it, a suspicion that its friends are too conscious of its fallacies, to trust it to its own merits.

7. Because experience witnesseth that ecclesiastical establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary operation. During almost fifteen centuries, has the legal establishment of Christianity been on trial. What have been its fruits? More or less in all places, pride and indolence in the Clergy; ignorance and servility in the laity; in both, superstition, bigotry and persecution. Enquire of the Teachers of Christianity for the ages in which it appeared in its greatest lustre; those of every sect, point to the ages prior

to its incorporation with Civil policy. Propose a restoration of this primitive state in which its Teachers depended on the voluntary rewards of their flocks; many of them predict its downfall. On which side ought their testimony to have greatest weight, when for or when against their interest?

8. Because the establishment in question is not necessary for the support of Civil Government. If it be urged as necessary for the support of Civil Government only as it is a means of supporting Religion, and it be not necessary for the latter purpose, it cannot be necessary for the former. If Religion be not within [the] cognizance of Civil Government, how can its legal establishment be said to be necessary to civil Government? What influence in fact have ecclesiastical establishments had on Civil Society? In some instances they have been seen to erect a spiritual tyranny on the ruins of Civil authority; in many instances they have been seen upholding the thrones of political tyranny; in no instance have they been seen the guardians of the liberties of the people. Rulers who wished to subvert the public liberty, may have found an established clergy convenient auxiliaries. A just government, instituted to secure & perpetuate it, needs them not. Such a government will be best supported by protecting every citizen in the enjoyment of his Religion with the same equal hand which protects his person and his property; by neither invading the equal rights of any Sect, nor suffering any Sect to invade those of another.

9. Because the proposed establishment is a departure from that generous policy, which, offering an asylum to the persecuted and oppressed of every Nation and Religion, promised a lustre to our country, and an accession to the number of its citizens. What a melancholy mark is the Bill of sudden degeneracy? Instead of holding forth an asylum to the persecuted, it is itself a signal

of persecution. It degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority. Distant as it may be, in its present form, from the Inquisition it differs from it only in degree. The one is the first step, the other the last in the career of intolerance. The magnanimous sufferer under this cruel scourge in foreign Regions, must view the Bill as a Beacon on our Coast, warning him to seek some other haven, where liberty and philanthrophy in their due extent may offer a more certain repose from his troubles.

10. Because, it will have a like tendency to banish our Citizens. The allurements presented by other situations are every day thinning their number. To superadd a fresh motive to emigration, by revoking the liberty which they now enjoy, would be the same species of folly which has dishonoured and depopulated flourishing kingdoms.

11. Because, it will destroy that moderation and harmony which the forbearance of our laws to intermeddle with Religion, has produced amongst its several sects. Torrents of blood have been spilt in the old world, by vain attempts of the secular arm to extinguish Religious discord, by proscribing all difference in Religious opinions. Time has at length revealed the true remedy. Every relaxation of narrow and rigorous policy, wherever it has been tried, has been found to assuage the disease. The American Theatre has exhibited proofs, that equal and compleat liberty, if it does not wholly eradicate it, sufficiently destroys its malignant influence on the health and prosperity of the State. If with the salutary effects of this system under our own eyes, we begin to contract the bonds of Religious freedom, we know no name that will too severely reproach our folly. At least let warning be taken at the first fruits of the threatened innovation. The very appearance of the Bill has transformed that "Chris-

tian forbearance,[1] love and charity," which of late mutually prevailed, into animosities and jealousies, which may not soon be appeased. What mischiefs may not be dreaded should this enemy to the public quiet be armed with the force of a law?

12. Because, the policy of the bill is adverse to the diffusion of the light of Christianity. The first wish of those who enjoy this precious gift, ought to be that it may be imparted to the whole race of mankind. Compare the number of those who have as yet received it with the number still remaining under the dominion of false Religions; and how small is the former! Does the policy of the Bill tend to lessen the disproportion? No; it at once discourages those who are strangers to the light of [revelation] from coming into the Region of it; and countenances, by example the nations who continue in darkness, in shutting out those who might convey it to them. Instead of levelling as far as possible, every obstacle to the victorious progress of truth, the Bill with an ignoble and unchristian timidity would circumscribe it, with a wall of defence, against the encroachments of error.

13. Because attempts to enforce by legal sanctions, acts obnoxious to so great a proportion of Citizens, tend to enervate the laws in general, and to slacken the bands of Society. If it be difficult to execute any law which is not generally deemed necessary or salutary, what must be the case where it is deemed invalid and dangerous? and what may be the effect of so striking an example of impotency in the Government, on its general authority.

14. Because a measure of such singular magnitude and delicacy ought not to be imposed, without the clearest evidence that it is called for by a majority of citizens: and no satisfactory method is yet proposed by which the voice of the majority in this case may be determined, or its influence secured. "The people of the respective counties

[1] Art. 16. [Note in the original.]

are indeed requested to signify their opinion respecting the adoption of the Bill to the next Session of Assembly." But the representation must be made equal, before the voice either of the Representatives or of the Counties, will be that of the people. Our hope is that neither of the former will, after due consideration, espouse the dangerous principle of the Bill. Should the event disappoint us, it will still leave us in full confidence, that a fair appeal to the latter will reverse the sentence against our liberties.

15. Because, finally, "the equal right of every citizen to the free exercise of his Religion according to the dictates of conscience" is held by the same tenure with all our other rights. If we recur to its origin, it is equally the gift of nature; if we weigh its importance, it cannot be less dear to us; if we consult the Declaration of those rights which pertain to the good people of Virginia, as the "basis and foundation of Government," [1] it is enumerated with equal solemnity, or rather studied emphasis. Either then, we must say, that the will of the Legislature is the only measure of their authority; and that in the plenitude of this authority, they may sweep away all our fundamental rights; or, that they are bound to leave this particular right untouched and sacred: Either we must say, that they may controul the freedom of the press, may abolish the trial by jury, may swallow up the Executive and Judiciary Powers of the State; nay that they may despoil us of our very right of suffrage, and erect themselves into an independent and hereditary assembly: or we must say, that they have no authority to enact into law the Bill under consideration. We the subscribers say, that the General Assembly of this Commonwealth have no such authority: And that no effort may be omitted on our part against so dangerous an usurpation, we oppose to it, this remonstrance; earnestly praying, as we are in duty

[1] Decl. Rights-title. [Note in the original.]

bound, that the Supreme Lawgiver of the Universe, by illuminating those to whom it is addressed, may on the one hand, turn their councils from every act which would affront his holy prerogative, or violate the trust committed to them: and on the other, guide them into every measure which may be worthy of his [blessing, may re]dound to their own praise, and may establish more firmly the liberties, the prosperity, and the Happiness of the Commonwealth.

II Madison, 183–191.

SUPPLEMENTAL APPENDIX.

A BILL ESTABLISHING A PROVISION FOR TEACHERS OF THE CHRISTIAN RELIGION.

Whereas the general diffusion of Christian knowledge hath a natural tendency to correct the morals of men, restrain their vices, and preserve the peace of society; which cannot be effected without a competent provision for learned teachers, who may be thereby enabled to devote their time and attention to the duty of instructing such citizens, as from their circumstances and want of education, cannot otherwise attain such knowledge; and it is judged that such provision may be made by the Legislature, without counteracting the liberal principle heretofore adopted and intended to be preserved by abolishing all distinctions of pre-eminence amongst the different societies or communities of Christians;

Be it therefore enacted by the General Assembly, That for the support of Christian teachers, per centum on the amount, or in the pound on the sum payable for tax on the property within this Commonwealth, is hereby assessed, and shall be paid by every person chargeable with the said tax at the time the same shall become due; and the Sheriffs of the several Counties shall have power to levy and collect the same in the same manner and under

the like restrictions and limitations, as are or may be prescribed by the laws for raising the Revenues of this State.

And be it enacted, That for every sum so paid, the Sheriff or Collector shall give a receipt, expressing therein to what society of Christians the person from whom he may receive the same shall direct the money to be paid, keeping a distinct account thereof in his books. The Sheriff of every County, shall, on or before the day of in every year, return to the Court, upon oath, two alphabetical lists of the payments to him made, distinguishing in columns opposite to the names of the persons who shall have paid the same, the society to which the money so paid was by them appropriated; and one column for the names where no appropriation shall be made. One of which lists, after being recorded in a book to be kept for that purpose, shall be filed by the Clerk in his office; the other shall by the Sheriff be fixed up in the Court-house, there to remain for the inspection of all concerned. And the Sheriff, after deducting five per centum for the collection, shall forthwith pay to such person or persons as shall be appointed to receive the same by the Vestry, Elders, or Directors, however denominated of each such society, the sum so stated to be due to that society; or in default thereof, upon the motion of such person or persons to the next or any succeeding Court, execution shall be awarded for the same against the Sheriff and his security, his and their executors or administrators; provided that ten days previous notice be given of such motion. And upon every such execution, the Officer serving the same shall proceed to immediate sale of the estate taken, and shall not accept of security for payment at the end of three months, nor to have the goods forthcoming at the day of sale; for his better direction wherein, the Clerk shall endorse upon every such execution that no security of any kind shall be taken.

And be it further enacted, That the money to be raised by virtue of this Act, shall be by the Vestries, Elders, or Directors of each religious society, appropriated to a provision for a Minister or Teacher of the Gospel of their denomination, or the providing places of divine worship, and to none other use whatsoever; except in the denominations of Quakers and Menonists, who may receive what is collected from their members, and place it in their general fund, to be disposed of in a manner which they shall think best calculated to promote their particular mode of worship.

And be it enacted, That all sums which at the time of payment to the Sheriff or Collector may not be appropriated by the person paying the same, shall be accounted for with the Court in manner as by this Act is directed; and after deducting for his collection, the Sheriff shall pay the amount thereof (upon account certified by the Court to the Auditors of Public Accounts, and by them to the Treasurer) into the public Treasury, to be disposed of under the direction of the General Assembly, for the encouragement of seminaries of learning within the Counties whence such sums shall arise, and to no other use or purpose whatsoever.

THIS Act shall commence, and be in force, from and after the day of in the year

A Copy from the Engrossed Bill.

JOHN BECKLEY, C. H. D.

*Washington Mss. (Papers of George Washington, Vol. 231); Library of Congress.**

*This copy of the Assessment Bill is from one of the handbills which on December 24, 1784, when the third reading of the bill was postponed, were ordered distributed to the Virginia counties by the House of Delegates. See Journal of the Virginia House of Delegates, December 24, 1784; Eckenrode, 102–103. The bill is therefore in its final form, for it never again reached the floor of the House. Eckenrode, 113.

Syllabus.

UNITED PUBLIC WORKERS OF AMERICA (C. I. O.) ET AL. *v.* MITCHELL ET AL.

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

No. 20. Argued December 3, 1945. Reargued October 17, 1946.—Decided February 10, 1947.

1. Under § 3 of the Act of August 24, 1937, 50 Stat. 752, 28 U. S. C. § 380a, a direct appeal to this Court was taken from a judgment of a district court of three judges denying an injunction in a case involving the constitutionality of a federal statute. The case was not docketed in this Court until after 60 days from the time the appeal was allowed. The steps prescribed by Rule 11 of this Court for obtaining a dismissal were not taken by the appellees. *Held:* This Court has jurisdiction of the appeal. Pp. 84–86.

   (a) The provision of 28 U. S. C. § 380a requiring an appeal thereunder to be docketed in this Court within 60 days from the time the appeal is allowed was not intended to vary Rule 11 of this Court and does not constitute a limitation on the power of this Court to hear this appeal. Pp. 85–86.

   (b) Rule 47 of this Court requires the same practice for appeals under 28 U. S. C. § 380a that Rule 11 does for other appeals. P. 86.

2. Certain employees of the executive branch of the Federal Government sued for an injunction against the members of the Civil Service Commission to prohibit them from enforcing against such employees § 9 (a) of the Hatch Act, 18 U. S. C. Supp. V § 61h, which forbids such employees from taking "any active part in political management or in political campaigns," and also for a declaratory judgment of the unconstitutionality of this section. They did not allege that they had violated the Act or that they actually were threatened with any disciplinary action, but only that they desire to engage in acts of political management and in political campaigns (specifying the nature of the actions which they wish to take) and are prevented from doing so by fear of dismissal from federal employment. *Held:* Their suit does not present a justiciable case or controversy. Pp. 86–91.

3. Another employee of the executive branch of the Federal Government brought a similar suit, alleging that he actually had committed

specific violations of the Act and that the Commission had charged him with violations and had issued a proposed order for his removal, subject to his right to reply to the charges and to present further evidence in refutation. *Held:* His suit presents a justiciable case or controversy. Pp. 91–94.

(a) Since the employee admits that he violated the Act and that removal from office is therefore mandatory under the Act, there is no question as to exhaustion of administrative remedies. P. 93.

(b) There being no administrative or statutory review for the Commission's order and no prior proceeding pending in the courts, there is no reason why a declaratory judgment action does not lie, even though constitutional issues are involved. P. 93.

4. A person employed as a roller in a United States mint acted outside of working hours as a ward executive committeeman of a political party and was politically active on election day as a worker at the polls and as a paymaster for the services of other workers. The Civil Service Commission found that he had taken an "active part in political management or in political campaigns" in violation of § 9 (a) of the Hatch Act, 18 U. S. C. Supp. V § 61h, and Rule 1 of the Commission and issued an order for his removal from federal employment. *Held:* Such a breach of the Hatch Act and Rule 1 of the Commission can be made the basis for disciplinary action without violating the Constitution. Pp. 94–104.

(a) Congress has the power to regulate, within reasonable limits, the political conduct of federal employees, in order to promote efficiency and integrity in the public service. *Ex parte Curtis,* 106 U. S. 371; *United States* v. *Wurzbach,* 280 U. S. 396. Pp. 96–103.

(b) The fundamental human rights guaranteed by the First, Fifth, Ninth and Tenth Amendments are not absolutes; and this Court must balance the extent of the guarantee of freedom against a congressional enactment to protect a democratic society against the supposed evil of political partisanship by employees of the Government. Pp. 95–96.

(c) The Hatch Act permits full participation by federal employees in political decisions at the ballot box and forbids only the partisan activity deemed offensive to efficiency. P. 99.

(d) It does not restrict public and private expressions on public affairs, personalities and matters of public interest, not an objective of party action, so long as the government employee does not direct his activities toward party success. P. 100.

(e) If political activity by government employees is harmful

to the service, the employees or people dealing with them, it is hardly less so because it takes place after hours. P. 95.

(f) The prohibition of § 9 (a) of the Hatch Act applies without discrimination to all employees of the executive branch of the Government, whether industrial or administrative. P. 102.

(g) Whatever differences there may be between administrative employees of the Government and industrial workers in its employ are differences in detail for the consideration of Congress, so far as the constitutional power here involved is concerned. P. 102.

(h) The determination of the extent to which political activities of government employees shall be regulated lies primarily with Congress; and the courts will interfere only when such regulation passes beyond the generally existing conception of governmental power. P. 102.

5. Acting as ward executive committeeman of a political party and as a worker at the polls is within the prohibitions of § 9 of the Hatch Act and the Civil Service Rules. P. 103.

56 F. Supp. 621, affirmed.

Certain employees of the executive branch of the Federal Government and a union of such employees sued to enjoin the members of the Civil Service Commission from enforcing the provision of § 9 (a) of the Hatch Act, 18 U. S. C. Supp. V § 61h, which forbids such employees to take "any active part in political management or in political campaigns" and for a declaratory judgment holding the Act unconstitutional. The District Court dismissed the suit. 56 F. Supp. 621. A direct appeal to this Court was taken under § 3 of the Act of August 24, 1937, 50 Stat. 752, 28 U. S. C. § 380a. *Affirmed,* p. 104.

Lee Pressman argued the cause for appellants. With him on the brief were *Frank Donner* and *Milton V. Freeman.*

Ralph F. Fuchs argued the cause for appellees. With him on the brief were *Solicitor General McGrath, Assistant Attorney General Sonnett, David L. Kreeger* and *Abraham J. Harris.*

MR. JUSTICE REED delivered the opinion of the Court.

The Hatch Act,* enacted in 1940, declares unlawful certain specified political activities of federal employees.[1] Section 9 forbids officers and employees in the executive branch of the Federal Government, with exceptions, from taking "any active part in political management or in political campaigns." [2] Section 15 declares that the activ-

*Another controversy under the same act is decided today. *Oklahoma* v. *United States Civil Service Commission*, *post*, p. 127.

[1] August 2, 1939, 53 Stat. 1147; July 19, 1940, 54 Stat. 767; 56 Stat. 181, 986; 58 Stat. 136, 148, 727; 59 Stat. 108, 658; 60 Stat. 937. Only the first two are important for consideration of this case.

[2] 18 U. S. C. § 61h, as amended:

"(a) It shall be unlawful for any person employed in the executive branch of the Federal Government, or any agency or department thereof, to use his official authority or influence for the purpose of interfering with an election or affecting the result thereof. No officer or employee in the executive branch of the Federal Government, or any agency or department thereof, except a part-time officer or part-time employee without compensation or with nominal compensation serving in connection with the existing war effort, other than in any capacity relating to the procurement or manufacture of war material shall take any active part in political management or in political campaigns. All such persons shall retain the right to vote as they may choose and to express their opinions on all political subjects and candidates. For the purposes of this section the term 'officer' or 'employee' shall not be construed to include (1) the President and Vice President of the United States; (2) persons whose compensation is paid from the appropriation for the office of the President; (3) heads and assistant heads of executive departments; (4) officers who are appointed by the President, by and with the advice and consent of the Senate, and who determine policies to be pursued by the United States in its relations with foreign powers or in the Nation-wide administration of Federal laws.

"(b) Any person violating the provisions of this section shall be immediately removed from the position or office held by him, and thereafter no part of the funds appropriated by any Act of Congress for such position or office shall be used to pay the compensation of such person." 53 Stat. 1147, 1148; 54 Stat. 767; 56 Stat. 181.

ities theretofore determined by the United States Civil Service Commission to be prohibited to employees in the classified civil service of the United States by the Civil Service Rules shall be deemed to be prohibited to federal employees covered by the Hatch Act.[3] These sections of the Act cover all federal officers and employees whether in the classified civil service or not and a penalty of dismissal from employment is imposed for violation. There is no designation of a single governmental agency for its enforcement.

For many years before the Hatch Act the Congress had authorized the exclusion of federal employees in the competitive classified service from active participation in political management and political campaigns.[4] In June, 1938,

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[3] 18 U. S. C. § 61*o*:

"The provisions of this subchapter which prohibit persons to whom such provisions apply from taking any active part in political management or in political campaigns shall be deemed to prohibit the same activities on the part of such persons as the United States Civil Service Commission has heretofore determined are at the time this section takes effect prohibited on the part of employees in the classified civil service of the United States by the provisions of the civil-service rules prohibiting such employees from taking any active part in political management or in political campaigns." 54 Stat. 767, 771.

[4] See Civil Service Act (1883), § 2, 22 Stat. 403–404:

"SEC. 2. That it shall be the duty of said commissioners:

"FIRST. To aid the President, as he may request, in preparing suitable rules for carrying this act into effect, and when said rules shall have been promulgated it shall be the duty of all officers of the United States in the departments and offices to which any such rules may relate to aid, in all proper ways, in carrying said rules, and any modifications thereof, into effect.

"SECOND. And, among other things, said rules shall provide and declare, as nearly as the conditions of good administration will warrant, as follows:

. . . . .

"Sixth, that no person in said service has any right to use his official

the congressional authorization for exclusion had been made more effective by a Civil Service Commission disciplinary rule.[5] That power to discipline members of the competitive classified civil service continues in the Commission under the Hatch Act by virtue of the present applicability of the Executive Order No. 8705, March 5, 1941. The applicable Civil Service Commission rules are

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authority or influence to coerce the political action of any person or body."

5 U. S. C. § 631:

"The President is authorized to . . . establish regulations for the conduct of persons who may receive appointments in the civil service."

First Annual Report, Civil Service Commission, H. R. Ex. Doc. No. 105, 48th Cong., 1st Sess., p. 45:

"In the exercise of the power vested in the President by the Constitution, and by virtue of the 1753d section of the Revised Statutes, and of the civil service act approved January 16, 1883, the following rules for the regulation and improvement of the executive civil service are hereby amended and promulgated:

RULE I.

"No person in said service shall use his official authority or influence either to coerce the political action of any person or body or to interfere with any election."

Executive Order No. 642, June 3, 1907 (amended to consolidate without changing wording, Executive Order No. 655, June 15, 1907); Twenty-Fourth Annual Report, Civil Service Commission, House Doc. No. 600, 60th Cong., 1st Sess., p. 104:

"Section 1 of Rule I of the civil-service rules is hereby amended to read as follows:

"No person in the Executive civil service shall use his official authority or influence for the purpose of interfering with an election or affecting the result thereof. Persons who, by the provisions of these rules are in the competitive classified service, while retaining the right to vote as they please and to express privately their opinions on all political subjects, shall take no active part in political management or in political campaigns."

[5] Civil Service Rules 15, 3 Fed. Reg. 1525.

printed in the margin.[6] The only change in the Civil Service Rules relating to political activity, caused by the Hatch Act legislation, that is of significance in this case is the elimination on March 5, 1941, of the word "privately" from the phrase "to express privately their opinions." This limitation to private expression had regulated classified personnel since 1907.[7]

The present appellants sought an injunction before a statutory three-judge district court of the District of Co-

[6] 5 C. F. R., Cum. Supp., § 1.1: *"No interference with elections.* No person in the executive civil service shall use his official authority or influence for the purpose of interfering with an election or affecting the results thereof. Persons who by the provisions of the rules in this chapter are in the competitive classified service, while retaining the right to vote as they please and to express their opinion on all political subjects, shall take no active part in political management or in political campaigns."

Section 15.1: *"Legal appointment necessary to compensation.* Whenever the Commission finds, after due notice and opportunity for explanation, that any person has been appointed to or is holding any position, whether by original appointment, promotion, assignment, transfer, or reinstatement, in violation of the Civil Service Act or Rules, or of any Executive order or any regulation of the Commission, or that any employee subject thereto has violated such Act, Rules, orders, or regulations, it shall certify the facts to the proper appointing officer with specific instructions as to discipline or dismissal of the person or employee affected. If the appointing officer fails to carry out the instructions of the Commission within 10 days after receipt thereof, the Commission shall certify the facts to the proper disbursing and auditing officers, and such officers shall make no payment or allowance of the salary or wages of any such person or employee thereafter accruing."

See E. O. 8705, March 5, 1941, 6 Fed. Reg. 1313.

[7] See note 4, *supra*, and 5 C. F R. § 1.1, June 1, 1938.

A change occurred also in Rule 15. This was to comply with a ruling of the Attorney General that the Hatch Act made removal from office a mandatory penalty for forbidden political activity. 40 Op. A. G., Political Activity by Government Employees, January 8, 1941. See note 5, *supra*, for Rule 15 prior to Hatch Act.

lumbia against appellees, members of the United States Civil Service Commission, to prohibit them from enforcing against appellants the provisions of the second sentence of § 9 (a) of the Hatch Act for the reason that the sentence is repugnant to the Constitution of the United States.[8] A declaratory judgment of the unconstitutionality of the sentence was also sought.[9] The sentence referred to reads, "No officer or employee in the executive branch of the Federal Government . . . shall take any active part in political management or in political campaigns."

Various individual employees of the federal executive civil service and the United Public Workers of America,[10] a labor union with these and other executive employees as members, as a representative of all its members, joined in the suit. It is alleged that the individuals desire to engage in acts of political management and in political campaigns. Their purposes are as stated in the excerpt from the complaint set out in the margin.[11] From the

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[8] See 28 U. S. C. § 380 (a); § 11–306 District of Columbia Code.

[9] Judicial Code § 274d; 28 U. S. C. § 400.

[10] No contention that appellant, United Public Workers of America (C. I. O.), lacked capacity to bring this action is made by appellees. We need not consider the question here. *McCandless* v. *Furlaud*, 293 U. S. 67, 73–74. See *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U. S. 275.

[11] "In discharge of their duties of citizenship, of their right to vote, and in exercise of their constitutional rights of freedom of speech, of the press, of assembly, and the right to engage in political activity, the individual plaintiffs desire to engage in the following acts: write for publication letters and articles in support of candidates for office; be connected editorially with publications which are identified with the legislative program of UFWA [former name of the present union appellant] and candidates who support it; solicit votes, aid in getting out voters, act as accredited checker, watcher, or challenger; transport voters to and from the polls without compensation therefor; participate in and help in organizing political parades; initiate petitions, and canvass for the signatures of others on such petitions; serve as party

affidavits it is plain, and we so assume, that these activities will be carried on completely outside of the hours of employment. Appellants challenge the second sentence of § 9 (a) as unconstitutional for various reasons. They are set out below in the language of the complaint.[12]

None of the appellants, except George P. Poole, has violated the provisions of the Hatch Act. They wish to act contrary to its provisions and those of § 1 of the Civil Service Rules and desire a declaration of the legally per-

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ward committeeman or other party official; and perform any and all acts not prohibited by any provision of law other than the second sentence of Section 9 (a) and Section 15 of the Hatch Act, which constitute taking an active part in political management and political campaigns."

[12] "The second sentence of Section 9 (a) of the Hatch Act is repugnant to the Constitution of the United States as a deprivation of freedom of speech, of the press, and of assembly in violation of the First Amendment.

"The second sentence of Section 9 (a) of the Hatch Act is repugnant to the Constitution of the United States as a deprivation of the fundamental right of the people of the United States to engage in political activity, reserved to the people of the United States by the Ninth and Tenth Amendments.

"The second sentence of Section 9 (a) of the Hatch Act is repugnant to the Constitution of the United States, since it unreasonably prohibits Federal employees from engaging in activities which may be lawfully carried on by persons who are not Federal employees, thus constituting a deprivation of liberty in violation of the Fifth Amendment.

"The second sentence of Section 9 (a) of the Hatch Act is repugnant to the Constitution of the United States since it effects an arbitrary and grossly unreasonable discrimination between employees of the Federal Government in the classified civil service subject to its provisions and employees specifically exempted therefrom, in violation of the Fifth Amendment.

"The second sentence of Section 9 (a) of the Hatch Act is repugnant to the Constitution of the United States since it is so vague and indefinite as to prohibit lawful activities as well as activities which are properly made unlawful by other provisions of law, in violation of the Fifth Amendment."

missible limits of regulation. Defendants moved to dismiss the complaint for lack of a justiciable case or controversy. The District Court determined that each of these individual appellants had an interest in their claimed privilege of engaging in political activities, sufficient to give them a right to maintain this suit. *United Federal Workers of America (C. I. O.)* v. *Mitchell,* 56 F. Supp. 621, 624. The District Court further determined that the questioned provision of the Hatch Act was valid and that the complaint therefore failed to state a cause of action. It accordingly dismissed the complaint and granted summary judgment to defendants.

First. The judgment of the District Court was entered on September 26, 1944. An order was duly entered on October 26, 1944, allowing an appeal. 28 U. S. C. § 380a. The same section of the statutes provides: "In the event that an appeal is taken under this section, the record shall be made up and the case docketed in the Supreme Court of the United States within sixty days from the time such appeal is allowed, under such rules as may be prescribed by the proper courts." This appeal was not docketed in this Court until February 2, 1945, a date after the return date of the order under § 380a. Thereafter the Government suggested a lack of jurisdiction in this Court to consider the appeal because of the failure of appellants to docket the appeal in time. We postponed consideration of our jurisdiction over this appeal to the hearing. We proceed now to a disposition of this question.

To comply with the suggestion of § 380a, this Court adopted Rule 47.[13] In other cases of appeals, Rule 11

[13] Rules of the Supreme Court of the United States, Rule 47:

"Appeals to this court under the Act of August 24, 1937, shall be governed, as far as may be, by the rules of this court regulating the procedure on appeal in other cases from courts of the United States; . . . The record shall be made up and the case docketed in this court within sixty days from the time the appeal is allowed."

governs docketing.[14] If Rule 11 applies also to appeals under § 380a, we may hear this appeal, for the steps for dismissal required by Rule 11 were not taken by the appellees. This is because upon the allowance of an appeal by a judge of the district court as here, Supreme Court Rules 10 and 36, the case is transferred from the district court to this Court and subsequent steps for dismissal or affirmance are to be taken here.[15] If, however, the above-quoted provision of § 380a as to docketing is a prerequisite to the power of this Court to review, this appeal must fail.

Prior to the passage of § 380a, appeals docketed after the return day were governed by Rule 11, 275 U. S. 602. In principle it has long been in existence.[16] By the words of the rule, it appears that dismissal for appellant's tardiness in docketing requires a step by the appellee. Even after dismissal for failure to docket, the rule permits this Court to allow the appellant to docket. Noth-

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[14] *Id.*, Rule 11: "1. It shall be the duty of the appellant to docket the case and file the record thereof with the clerk of this court by or before the return day, whether in vacation or in term time. But, for good cause shown, the justice or judge who signed the citation, or any justice of this court, may enlarge the time, before its expiration, the order of enlargement to be filed with the clerk of this court. If the appellant shall fail to comply with this rule, the appellee may have the cause docketed and the appeal dismissed upon producing a certificate, whether in term or vacation, from the clerk of the court wherein the judgment or decree was rendered, stating the case and certifying that such appeal has been duly allowed. And in no case shall the appellant be entitled to docket the cause and file the record after the appeal shall have been dismissed under this rule, unless by special leave of the court."

[15] Steps allowed in the district court after the allowance of appeal, such as preparation of the record, extension of time and cost or supersedeas bonds, are for convenience taken in the court possessed of the record. Rules 10, 11 and 36, Supreme Court; Rule 72, Rules of Civil Procedure.

[16] 3 Cranch 239; *Bingham* v. *Morris*, 7 Cranch 99; *Sparrow* v. *Strong*, 3 Wall. 97, 103. Compare *Grigsby* v. *Purcell*, 99 U. S. 505.

ing in the legislative history which has been called to our attention indicates that Congress intended its docketing provision to vary Rule 11. Direct appeal accomplishes the congressional purpose of expediting review, of course, and is consistent with an unchanged practice as to dismissals. The time to docket may have been enlarged from the conventional return day of Rules 10 and 11 to bring continental uniformity, see Rule 10, or to give time for the preparation of a record which would often be large and not transcribed or printed. It will not expedite determination of constitutional questions to dismiss appeals because of errors of practice. In fact the sentence of § 380a on docketing seems deliberately to leave the practice on failure to docket to rules of court. We do not construe the requirement of docketing within sixty days as a limitation on our power to hear this appeal.

So far as our Rule 47 is concerned, we construe it as requiring in accordance with § 380a the docketing in sixty days from the allowance of the appeal, instead of the forty days of our Rule 10, and that, as to dismissals, the first sentence of Rule 47 requires the same practice for appeals under § 380a that Rule 11 does for other appeals. We think it desirable to have sufficient flexibility in the rule to permit extensions of the time for return in the unusual situations that occur when large records are involved. In view of the recognized congressional purpose to quicken review under § 380a, the discretion to delay final hearing allowed under Rule 11 will be exercised only on a definite showing of need therefor to assure fair review. This leads us to hear this appeal.[17]

Second. At the threshold of consideration, we are called upon to decide whether the complaint states a controversy cognizable in this Court. We defer consideration of the cause of action of Mr. Poole until section *Three* of this

[17] Compare *Georgia Lumber Co.* v. *Compania,* 323 U. S. 334.

opinion. The other individual employees have elaborated the grounds of their objection in individual affidavits for use in the hearing on the summary judgment. We select as an example one that contains the essential averments of all the others and print below the portions with significance in this suit.[18] Nothing similar to the fourth para-

[18] "At this time, when the fate of the entire world is in the balance I believe it is not only proper but an obligation for all citizens to participate actively in the making of the vital political decisions on which the success of the war and the permanence of the peace to follow so largely depend. For the purpose of participating in the making of these decisions it is my earnest desire to engage actively in political management and political campaigns. I wish to engage in such activity upon my own time, as a private citizen.

"I wish to engage in such activities on behalf of those candidates for public office who I believe will best serve the needs of this country and with the object of persuading others of the correctness of my judgments and of electing the candidates of my choice. This objective I wish to pursue by all proper means such as engaging in discussion, by speeches to conventions, rallies and other assemblages, by publicizing my views in letters and articles for publication in newspapers and other periodicals, by aiding in the campaign of candidates for political office by posting banners and posters in public places, by distributing leaflets, by 'ringing doorbells', by addressing campaign literature, and by doing any and all acts of like character reasonably designed to assist in the election of candidates I favor.

"I desire to engage in these activities freely, openly, and without concealment. However, I understand that the second sentence of Section 9 (a) of the Hatch Act and the Rules of the C. S. C. provide that if I engage in this activity, the Civil Service Commission will order that I be dismissed from federal employment. Such deprivation of my job in the federal government would be a source of immediate and serious financial loss and other injury to me.

"At the last Congressional election I was very much interested in the outcome of the campaign and offered to help the party of my choice by being a watcher at the polls. I obtained a watcher's certificate but I was advised that there might be some question of my right to use the certificate and retain my federal employment. Therefore, on November 1, 1943, the day before election, I called the regional office of the Civil Service Commission in Philadelphia and spoke to a

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graph of the printed affidavit is contained in the other affidavits. The assumed controversy between affiant and the Civil Service Commission as to affiant's right to act as watcher at the polls on November 2, 1943, had long been moot when this complaint was filed. We do not therefore treat this allegation separately. The affidavits, it will be noticed, follow the generality of purpose expressed by the complaint. See note 11 *supra*. They declare a desire to act contrary to the rule against political activity but not that the rule has been violated. In this respect, we think they differ from the type of threat adjudicated in *Railway Mail Association* v. *Corsi,* 326 U. S. 88. In that case, the refusal to admit an applicant to membership in a labor union on account of race was involved. Admission had been refused. 326 U. S. at p. 93, note 10. Definite action had also been taken in *Hill* v. *Florida,* 325 U. S. 538. In the *Hill* case an injunction had been sought and allowed against Hill and the union forbidding Hill from acting as the business agent of the union and the union from further functioning as a union until it complied with the state law. The threats which menaced the affiants of these affidavits in the case now being considered are closer to a general threat by officials to enforce those laws which they are charged to administer, compare *Watson* v. *Buck,* 313 U. S. 387, 400, than they are to the direct threat of punishment against a named organization for a completed act that made the *Mail Association* and the *Hill* cases justiciable.

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person who gave his name as . . . Mr. . . . stated that if I used my watcher's certificate, the Civil Service Commission would see that I was dismissed from my job at the . . . for violation of the Hatch Act. I, therefore, did not use the certificate as I had intended.

"I believe that Congress may not constitutionally abridge my right to engage in the political activities mentioned above. However, unless the courts prevent the Civil Service Commission from enforcing this unconstitutional law, I will be unable freely to exercise my rights as a citizen." (Identifying words omitted.)

As is well known, the federal courts established pursuant to Article III of the Constitution do not render advisory opinions.[19] For adjudication of constitutional issues, "concrete legal issues, presented in actual cases, not abstractions," are requisite.[20] This is as true of declaratory judgments as any other field.[21] These appellants seem clearly to seek advisory opinions upon broad claims of rights protected by the First, Fifth, Ninth and Tenth Amendments to the Constitution. As these appellants are classified employees, they have a right superior to the generality of citizens, compare *Fairchild* v. *Hughes,* 258 U. S. 126, but the facts of their personal interest in their civil rights, of the general threat of possible interference with those rights by the Civil Service Commission under its rules, if specified things are done by appellants, does not make a justiciable case or controversy. Appellants want to engage in "political management and political campaigns," to persuade others to follow appellants' views by discussion, speeches, articles and other acts reasonably designed to secure the selection of appellants' political choices. Such generality of objection is really an attack on the political expediency of the Hatch Act, not the presentation of legal issues. It is beyond the competence of courts to render such a decision. *Texas* v. *Interstate Commerce Commission,* 258 U. S. 158, 162.

The power of courts, and ultimately of this Court, to pass upon the constitutionality of acts of Congress arises

[19] Correspondence & Public Papers of John Jay, Vol. 3, p. 486; *Hayburn's Case* and notes, 2 Dall. 409; *Alabama* v. *Arizona,* 291 U. S. 286, 291; *Alabama State Federation of Labor* v. *McAdory,* 325 U. S. 450, 461.

[20] *Electric Bond & Share Co.* v. *Securities and Exchange Commission,* 303 U. S. 419, 443; *United States* v. *Appalachian Electric Power Co.,* 311 U. S. 377, 423; *Alabama State Federation of Labor* v. *McAdory, supra,* 461, and cases cited; *Coffman* v. *Breeze Corporations,* 323 U. S. 316, 324, and cases cited.

[21] *Altvater* v. *Freeman,* 319 U. S. 359, 363.

only when the interests of litigants require the use of this judicial authority for their protection against actual interference. A hypothetical threat is not enough. We can only speculate as to the kinds of political activity the appellants desire to engage in or as to the contents of their proposed public statements or the circumstances of their publication. It would not accord with judicial responsibility to adjudge, in a matter involving constitutionality, between the freedom of the individual and the requirements of public order except when definite rights appear upon the one side and definite prejudicial interferences upon the other.[22]

The Constitution allots the nation's judicial power to the federal courts. Unless these courts respect the limits of that unique authority, they intrude upon powers vested in the legislative or executive branches. Judicial adherence to the doctrine of the separation of powers preserves the courts for the decision of issues, between litigants, capable of effective determination. Judicial exposition upon political proposals is permissible only when necessary to decide definite issues between litigants. When the courts act continually within these constitutionally imposed boundaries of their power, their ability to perform their function as a balance for the people's protection against abuse of power by other branches of government remains unimpaired. Should the courts seek to expand their power so as to bring under their jurisdiction ill-defined controversies over constitutional issues, they would

[22] It has long been this Court's "considered practice not to decide abstract, hypothetical or contingent questions, . . . or to decide any constitutional question in advance of the necessity for its decision, . . . or to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied, . . . or to decide any constitutional question except with reference to the particular facts to which it is to be applied, ..." *Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 450, 461, and cases cited. See *Alma Motor Co.* v. *Timken-Detroit Axle Co.*, 329 U. S. 129.

become the organ of political theories. Such abuse of judicial power would properly meet rebuke and restriction from other branches. By these mutual checks and balances by and between the branches of government, democracy undertakes to preserve the liberties of the people from excessive concentrations of authority. No threat of interference by the Commission with rights of these appellants appears beyond that implied by the existence of the law and the regulations. *Watson* v. *Buck, supra,* p. 400. We should not take judicial cognizance of the situation presented on the part of the appellants considered in this subdivision of the opinion. These reasons lead us to conclude that the determination of the trial court, that the individual appellants, other than Poole, could maintain this action, was erroneous.

Third. The appellant Poole does present by the complaint and affidavit matters appropriate for judicial determination.[23] The affidavits filed by appellees confirm that

[23] "I have for a long time been interested in political activities. Both before and since my employment in the United States Mint, I have taken an active part in political campaigns and political management. In the 28th Ward, 7th Division in the City of Philadelphia I am and have been a Ward Executive Committeeman. In that position I have on many occasions taken an active part in political management and political campaigns. I have visited the residents of my Ward and solicited them to support my party and its candidates; I have acted as a watcher at the polls; I have contributed money to help pay its expenses; I have circulated campaign literature, placed banners and posters in public places, distributed leaflets, assisted in organizing political rallies and assemblies, and have done any and all acts which were asked of me in my capacity as a Ward Executive Committeeman. I have engaged in these activities both before and after my employment in the United States Mint. I intend to continue to engage in these activities on my own time as a private citizen, openly, freely, and without concealment.

"However, I have been served with a proposed order of the United States Civil Service Commission, dated January 12, 1944, which advises me that because of the political activities mentioned above,

Poole has been charged by the Commission with political activity and a proposed order for his removal from his position adopted subject to his right under Commission procedure to reply to the charges and to present further evidence in refutation.[24] We proceed to consider the controversy over constitutional power at issue between Poole and the Commission as defined by the charge and preliminary finding upon one side and the admissions of Poole's affidavit upon the other. Our determination is limited to those facts. This proceeding so limited meets the requirements of defined rights and a definite threat to interfere with a possessor of the menaced rights by a penalty for an act done in violation of the claimed restraint.[25]

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and for no other reason, 'it is, . . ., the opinion of this Commission that George P. Poole, an employee of the United States Mint at Philadelphia, Pennsylvania, has been guilty of political activity in violation of Section 1, Civil Service Rule I' and that unless I can refute the charges that I have engaged in political activity, I will be dismissed from my position as a Roller in the United States Mint at Philadelphia, Pennsylvania."

[24] The tentative charge and finding reads:

I.

"It is charged: That . . .

"The said George P. Poole held the political party office of Democratic Ward Executive Committeeman in the City of Philadelphia, Pennsylvania.

"The said George P. Poole was politically active by aiding and assisting the Democratic Party in the capacity of worker at the polls on general election day, November 5, 1940, and assisted in the distribution of funds in paying party workers for their services on general election day, November 5, 1940."

III.

"The above described activity constitutes taking an active part in political management and in a political campaign in contravention of Section 1, Civil Service Rule I, and the regulations adopted by the Commissioners thereunder."

[25] *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.*, 312 U. S. 270, 273; *Altvater* v. *Freeman*, 319 U. S. 359, 364; *Nashville, C. & St. L. Ry.* v. *Wallace*, 288 U. S. 249, 260.

Because we conclude hereinafter that the prohibition of § 9 of the Hatch Act and Civil Service Rule 1, see notes 2 and 6 above, are valid, it is unnecessary to consider, as this is a declaratory judgment action, whether or not this appellant sufficiently alleges that an irreparable injury to him would result from his removal from his position.[26] Nor need we inquire whether or not a court of equity would enforce by injunction any judgment declaring rights.[27] Since Poole admits that he violated the rule against political activity and that removal from office is therefore mandatory under the act, there is no question as to the exhaustion of administrative remedies. The act provides no administrative or statutory review for the order of the Civil Service Commission. Compare *Stark* v. *Wickard,* 321 U. S. 288, 306–10; *Macauley* v. *Waterman S. S. Corporation,* 327 U. S. 540. As no prior proceeding, offering an effective remedy or otherwise, is pending in the courts, there is no problem of judicial discretion as to whether to take cognizance of this case. *Brillhart* v. *Excess Insurance Co.,* 316 U. S. 491, 496–97, dissent at 500; *Larson* v. *General Motors Corporation,* 134 F. 2d 450, 453. Under such circumstances, we see no reason why a declaratory judgment action, even though constitutional issues are involved, does not lie. See Rules of Civil Procedure, Rule 57. *Steele* v. *Louisville & Nashville Railroad Co.,* 323 U. S. 192, 197, 207; *Tunstall* v. *Brotherhood of*

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[26] 28 U. S. C. § 400: "In cases of actual controversy except with respect to Federal taxes the courts of the United States shall have power upon petition, declaration, complaint, or other appropriate pleadings to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such."

Aetna Life Insurance Co. v. *Haworth,* 300 U. S. 227, 241; *Nashville, C. & St. L. Ry.* v. *Wallace,* 288 U. S. 249, 264.

[27] See *White* v. *Berry,* 171 U. S. 366, 377; *In re Sawyer,* 124 U. S. 200, 212.

Locomotive Firemen & Enginemen, 323 U. S. 210, 212, *et seq.**

Fourth. This brings us to consider the narrow but important point involved in Poole's situation.[28] Poole's stated offense is taking an "active part in political management or in political campaigns." He was a ward executive committeeman of a political party and was politically active on election day as a worker at the polls and a paymaster for the services of other party workers. The issue for decision and the only one we decide is whether such a breach of the Hatch Act and Rule 1 of the Commission can, without violating the Constitution, be made the basis for disciplinary action.

When the issue is thus narrowed, the interference with free expression is seen in better proportion as compared with the requirements of orderly management of administrative personnel. Only while the employee is politically active, in the sense of Rule 1, must he withhold expression of opinion on public subjects. See note 6. We assume that Mr. Poole would be expected to comment publicly as committeeman on political matters, so that indirectly there is an attenuated interference. We accept appellants' contention that the nature of political rights reserved to the people by the Ninth and Tenth Amendments are involved. The right claimed as inviolate may be stated as the right of a citizen to act as a party official or worker to further his own political views. Thus we

*In *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, a declaratory judgment proceeding, p. 46, prior to the adoption of Rule 57, a proceeding before the N. L. R. B. was required. There is statutory judicial review from that Board's decisions, however.

[28] We agree with the Government that the complaint does not fail to state a cause of action against the Commission because it seeks relief against the Commission's action under the Hatch Act instead of Rule 1 of the Commission. So far as Poole's controversy is concerned, the act and the rule are the same.

have a measure of interference by the Hatch Act and the Rules with what otherwise would be the freedom of the civil servant under the First, Ninth and Tenth Amendments. And, if we look upon due process as a guarantee of freedom in those fields, there is a corresponding impairment of that right under the Fifth Amendment. Appellants' objections under the Amendments are basically the same.

We do not find persuasion in appellants' argument that such activities during free time are not subject to regulation even though admittedly political activities cannot be indulged in during working hours.[29] The influence of political activity by government employees, if evil in its effects on the service, the employees or people dealing with them, is hardly less so because that activity takes place after hours. Of course, the question of the need for this regulation is for other branches of government rather than the courts. Our duty in this case ends if the Hatch Act provision under examination is constitutional.

Of course, it is accepted constitutional doctrine that these fundamental human rights are not absolutes. The requirements of residence and age must be met. The essential rights of the First Amendment in some instances are subject to the elemental need for order without which the guarantees of civil rights to others would be a mockery.[30] The powers granted by the Constitution to the

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[29] In labor-management relationships, it has been recognized by this Court that circumstances might justify the prohibition by employers of union activity by employees on the employer's property, even though carried out during non-working hours. *Republic Aviation Corp.* v. *National Labor Relations Board,* 324 U. S. 793, 803.

[30] *Chaplinsky* v. *New Hampshire,* 315 U. S. 568, 571; *Cantwell* v. *Connecticut,* 310 U. S. 296, 304, 310; *Schneider* v. *State,* 308 U. S. 147, 165; *De Jonge* v. *Oregon,* 299 U. S. 353, 364; *Cox* v. *New Hampshire,* 312 U. S. 569, 574; *Prince* v. *Massachusetts,* 321 U. S. 158, 169; *Reynolds* v. *United States,* 98 U. S. 145.

Federal Government are subtracted from the totality of sovereignty originally in the states and the people. Therefore, when objection is made that the exercise of a federal power infringes upon rights reserved by the Ninth and Tenth Amendments, the inquiry must be directed toward the granted power under which the action of the Union was taken. If granted power is found, necessarily the objection of invasion of those rights, reserved by the Ninth and Tenth Amendments, must fail. Again this Court must balance the extent of the guarantees of freedom against a congressional enactment to protect a democratic society against the supposed evil of political partisanship by classified employees of government.

As pointed out hereinbefore in this opinion, the practice of excluding classified employees from party offices and personal political activity at the polls has been in effect for several decades. Some incidents similar to those that are under examination here have been before this Court and the prohibition against certain types of political activity by officeholders has been upheld. The leading case was decided in 1882. *Ex parte Curtis,* 106 U. S. 371. There a subordinate United States employee was indicted for violation of an act that forbade employees who were not appointed by the President and confirmed by the Senate from giving or receiving money for political purposes from or to other employees of the government on penalty of discharge and criminal punishment. Curtis urged that the statute was unconstitutional. This Court upheld the right of Congress to punish the infraction of this law. The decisive principle was the power of Congress, within reasonable limits, to regulate, so far as it might deem necessary, the political conduct of its employees. A list of prohibitions against acts by public officials that are permitted to other citizens was given. This Court said, p. 373:

> "The evident purpose of Congress in all this class of enactments has been to promote efficiency and

integrity in the discharge of official duties, and to maintain proper discipline in the public service. Clearly such a purpose is within the just scope of legislative power, and it is not easy to see why the act now under consideration does not come fairly within the legitimate means to such an end."

The right to contribute money through fellow employees to advance the contributor's political theories was held not to be protected by any constitutional provision. It was held subject to regulation. A dissent by Mr. Justice Bradley emphasized the broad basis of the Court's opinion. He contended that a citizen's right to promote his political views could not be so restricted merely because he was an official of government.[31]

No other member of the Court joined in this dissent. The conclusion of the Court, that there was no constitutional bar to regulation of such financial contributions of public servants as distinguished from the exercise of political privileges such as the ballot, has found acceptance in the subsequent practice of Congress and the growth of the principle of required political neutrality for classified public servants as a sound element for efficiency.[32] The con-

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[31] 106 U. S. 376–77: ". . . every citizen having the proper qualifications has the right to accept office, and to be a candidate therefor. This is a fundamental right of which the legislature cannot deprive the citizen, nor clog its exercise with conditions that are repugnant to his other fundamental rights. Such a condition I regard that imposed by the law in question to be. It prevents the citizen from co-operating with other citizens of his own choice in the promotion of his political views. . . . The whole thing seems to me absurd. Neither men's mouths nor their purses can be constitutionally tied up in that way."

[32] Kaplan, Political Neutrality of the Civil Service, 1 Pub. Pers. Rev. 10; White, Civil Service in the Modern State (1930); Mosher and Kingsley, Public Personnel Administration (1936); White, Government Career Service (1935); Meriam, Public Personnel Problems (1938).

Military personnel is restricted in much the same manner. Army

viction that an actively partisan governmental personnel threatens good administration has deepened since *Ex parte Curtis*. Congress recognizes danger to the service in that political rather than official effort may earn advancement and to the public in that governmental favor may be channeled through political connections.[33]

In *United States* v. *Wurzbach,* 280 U. S. 396, the doctrine of legislative power over actions of governmental officials was held valid when extended to members of Congress. The members of Congress were prohibited from receiving contributions for "any political purpose whatever" from any other federal employees. Private citizens were not affected. The argument of unconstitutionality because of interference with the political rights of a citizen by that time was dismissed in a sentence. Compare *United States* v. *Thayer,* 209 U. S. 39.

The provisions of § 9 of the Hatch Act and the Civil Service Rule 1 are not dissimilar in purpose from the statutes against political contributions of money. The prohibitions now under discussion are directed at political contributions of energy by government employees.

Regulations No. 600–10, p. 5: "6. Political activities of persons in military service.—*a. General.*—No member of the Army, while on active duty, will use his official authority or influence for the purpose of interfering with an election or affecting the course or outcome thereof. Such persons, while on active duty, retain the right to vote, to express their opinions privately and informally on all political subjects and candidates, and to become candidates for public office as permitted in these regulations. They will not be permitted to participate in any way in political management or political campaigns."

An interesting discussion of the general subject of interference by federal officers in elections will be found in the Appendix to the Congressional Globe, Dec. 3, 1838–Feb. 19, 1839, pp. 157, 160 and 409, 411.

[33] 86 Cong. Rec. 2338–2367, 2426–2442, 2696–2723, 2920–2963, 2969–2987, 9360–9380, 9426–9432, 9434–9463.

These contributions, too, have a long background of disapproval.[34] Congress and the President are responsible for an efficient public service. If, in their judgment, efficiency may be best obtained by prohibiting active participation by classified employees in politics as party officers or workers, we see no constitutional objection.[35]

Another Congress may determine that, on the whole, limitations on active political management by federal personnel are unwise. The teaching of experience has evidently led Congress to enact the Hatch Act provisions. To declare that the present supposed evils of political activity are beyond the power of Congress to redress would leave the nation impotent to deal with what many sincere men believe is a material threat to the democratic system. Congress is not politically naive or regardless of public welfare or that of the employees. It leaves untouched full participation by employees in political decisions at the ballot box and forbids only the partisan activity of federal personnel deemed offensive to efficiency. With that limitation only, employees may make their contributions to public affairs or protect their own interests, as before the passage of the Act.

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[34] Richardson, Messages and Papers of the Presidents (1897), Harrison, vol. IV, p. 52; *id.*, Hayes, vol. VII, pp. 450–51. See note 4, *supra.*

When in 1891 New Bedford, Mass., under a rule removed a policeman for political activity, an opinion by Mr. Justice, then Judge, Holmes disposed summarily of McAuliffe's contention that the rule invaded his right to express his political opinion with the epigram, "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." *McAuliffe* v. *New Bedford*, 155 Mass. 216, 220, 29 N. E. 517.

[35] Several states have similar provisions. Ala. Code (1940), Tit. 12, § 157; Conn. Gen. Stat. (Supp. 1939), c. 105a § 698e; Ohio Gen. Code (Page, 1937), § 486–23; Pa. Stat. Ann. (Purdon, 1942), Tit. 71, § 741.904; R. I. Acts & Resolves, 1939, p. 118.

The argument that political neutrality is not indispensable to a merit system for federal employees may be accepted. But because it is not indispensable does not mean that it is not desirable or permissible. Modern American politics involves organized political parties. Many classifications of government employees have been accustomed to work in politics—national, state and local—as a matter of principle or to assure their tenure. Congress may reasonably desire to limit party activity of federal employees so as to avoid a tendency toward a one-party system. It may have considered that parties would be more truly devoted to the public welfare if public servants were not overactive politically.

Appellants urge that federal employees are protected by the Bill of Rights and that Congress may not "enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office, or that no federal employee shall attend Mass or take any active part in missionary work." None would deny such limitations on congressional power but, because there are some limitations, it does not follow that a prohibition against acting as ward leader or worker at the polls is invalid. A reading of the Act and Rule 1, notes 2 and 6, *supra,* together with the Commission's determination [36] shows the wide range of public activities with which there is no interference by the legislation. It is only partisan political activity that is interdicted. It is active participation in political management and political campaigns. Expressions, public or private, on public affairs, personalities and matters of public interest, not an objective of party action, are unrestricted by law so long as the government employee does not direct his activities toward party success.

It is urged, however, that Congress has gone further

[36] United States Civil Service Commission, Political Activity and Political Assessments, Form 1236, January 1944.

than necessary in prohibiting political activity to all types of classified employees. It is pointed out by appellants "that the impartiality of many of these is a matter of complete indifference to the effective performance" of their duties.[37] Mr. Poole would appear to be a good illustration for appellants' argument. The complaint states that he is a roller in the mint. We take it this is a job calling for the qualities of a skilled mechanic and that it does not involve contact with the public. Nevertheless, if in free time he is engaged in political activity, Congress may have concluded that the activity may promote or retard his advancement or preferment with his superiors. Congress may have thought that government employees are handy elements for leaders in political policy to use in building a political machine. For regulation of employees it is not necessary that the act regulated be anything more than an act reasonably deemed by Congress to interfere with the efficiency of the public service. There are hundreds of thousands of United States employees with positions no more influential upon policy determination than that of Mr. Poole. Evidently what Congress feared was the cumulative effect on employee morale of political activity by all employees who could be induced to participate actively. It does not seem to us an unconstitutional basis for legislation.

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[37] "In the light of these wide variations in duties and responsibility for public policy and its fair enforcement, a restriction reasonably designed to preserve the impartiality of a Collector of the Revenue, a U. S. Marshal, an F. B. I. or Treasury agent may be utterly absurd and unjustified when applied to a lens grinder, a stock clerk, a machinist, or an elevator operator. It is therefore impossible both to observe reasonable regard for constitutional rights and to enact sweeping prohibitions as to political rights applicable to all Federal employees whatever the nature of their duties. In dealing with so complicated and varied a subject matter, a hatchet cannot readily be substituted for a scalpel."

There is a suggestion that administrative workers may be barred, constitutionally, from political management and political campaigns while the industrial workers may not be barred, constitutionally, without an act "narrowly and selectively drawn to define and punish the specific conduct." A ready answer, it seems to us, lies in the fact that the prohibition of § 9 (a) of the Hatch Act "applies without discrimination to all employees whether industrial or administrative" and that the Civil Service Rules, by § 15 made a part of the Hatch Act, makes clear that industrial workers are covered in the prohibition against political activity. Congress has determined that the presence of government employees, whether industrial or administrative, in the ranks of political party workers is bad. Whatever differences there may be between administrative employees of the government and industrial workers in its employ are differences in detail so far as the constitutional power under review is concerned. Whether there are such differences and what weight to attach to them, are all matters of detail for Congress. We do not know whether the number of federal employees will expand or contract; whether the need for regulation of their political activities will increase or diminish. The use of the constitutional power of regulation is for Congress, not for the courts.

We have said that Congress may regulate the political conduct of government employees "within reasonable limits," even though the regulation trenches to some extent upon unfettered political action. The determination of the extent to which political activities of governmental employees shall be regulated lies primarily with Congress. Courts will interfere only when such regulation passes beyond the generally existing conception of governmental power. That conception develops from practice, history, and changing educational, social and economic conditions. The regulation of such activities as Poole carried on has

the approval of long practice by the Commission, court decisions upon similar problems and a large body of informed public opinion. Congress and the administrative agencies have authority over the discipline and efficiency of the public service. When actions of civil servants in the judgment of Congress menace the integrity and the competency of the service, legislation to forestall such danger and adequate to maintain its usefulness is required. The Hatch Act is the answer of Congress to this need. We cannot say with such a background that these restrictions are unconstitutional.

Section 15 of the Hatch Act, note 3 above, defines an active part in political management or political campaigns as the same activities that the United States Civil Service Commission has determined to be prohibited to classified civil service employees by the provisions of the Civil Service Rules when § 15 took effect July 19, 1940. 54 Stat. 767. The activities of Mr. Poole, as ward executive committeeman and a worker at the polls, obviously fall within the prohibitions of § 9 of the Hatch Act against taking an active part in political management and political campaigns. They are also covered by the prior determinations of the Commission.[38] We need to examine no fur-

[38] United States Civil Service Commission, Political Activity and Political Assessments, Form 1236, September 1939:

"15. Committees.—Service on or for any political committee or similar organization is prohibited. . . .

. . . . .

"20. Activity at the polls and for candidates.— . . .

. . . . .

"It is the duty of an employee to avoid any offensive activity at primary and regular elections. He must refrain from soliciting votes, assisting voters to mark ballots, helping to get out the voters on registration and election days, acting as the accredited checker, watcher, or challenger of any party or faction, assisting in counting the vote, or engaging in any other activity at the polls except the marking and depositing of his own ballot."

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ther at this time into the validity of the definition of political activity and § 15.[39]

The judgment of the District Court is accordingly

Affirmed.

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

MR. JUSTICE RUTLEDGE dissents as to Poole for the reasons stated by MR. JUSTICE BLACK. He does not pass upon the constitutional questions presented by the other appellants for the reason that he feels the controversy as to them is not yet appropriate for the discretionary exercise of declaratory judgment jurisdiction.

MR. JUSTICE FRANKFURTER, concurring.

The terms of the Act of August 24, 1937, 50 Stat. 751, 752, 28 U. S. C. § 380a, in the light of its history, have convinced me that this case should be dismissed for want of jurisdiction.

In that Act, Congress put a limit to the time within which a case may be docketed here after an appeal below is allowed. Such a limitation by Congress is in the exercise of its power to regulate the appellate jurisdiction of this Court. It is not within our power to enlarge a limit fixed by Congress unless Congress itself gave the Court such dispensing power.

In allowing a direct appeal to this Court from a district court "under such rules as may be prescribed," Congress did not mean to give this Court power to defeat the considerations of speed in the disposition of controversies involving the constitutionality of federal legislation which led to the specific provision that a case be docketed "within sixty days from the time such appeal is allowed."

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[39] *United States* v. *Wurzbach*, 280 U. S. 396, 399.

No rule of this Court could disregard the limitations for perfecting an appeal made by Congress. Nor does Rule 47, which was the rule responsive to the Act of August 24, 1937, purport to do so. It merely reasserts the statutory requirement that in a case like this "The record shall be made up and the case docketed in this court within sixty days from the time the appeal is allowed." The introductory part of Rule 47, whereby the Rules of this Court regulating appellate procedure in other cases are adopted "as far as may be," has ample scope for operation without qualifying the necessity for speedy perfection of an appeal in cases involving constitutionality, so that the validity of acts of Congress may not remain in doubt through protracted litigation. This was a deep concern of Congress and its reason for imposing the sixty-day limitation for perfecting appeals in this class of cases.

But under compulsion of the Court's assumption of jurisdiction, I reach the merits and join in MR. JUSTICE REED'S opinion.

MR. JUSTICE BLACK, dissenting.

The sentence in § 9 of the statute, here upheld, makes it unlawful for any person employed in the executive branch of the Federal Government, with minor numerical exceptions,[1] to "take any active part in political management or in political campaigns." The punishment pro-

[1] Those excepted are "a part-time officer or part-time employee without compensation or with nominal compensation serving in connection with the existing war effort," commonly designated as "Dollar-a-year men" and "(1) the President and Vice President of the United States; (2) persons whose compensation is paid from the appropriation for the office of the President; (3) heads and assistant heads of executive departments; (4) officers who are appointed by the President, by and with the advice and consent of the Senate, and who determine policies to be pursued by the United States in its relations with foreign powers or in the Nation-wide administration of Federal laws." § 9a; 18 U. S. C. 61h (a), as amended.

vided is immediate discharge and a permanent ban against reemployment in the same position.[2] The number of federal employees thus barred from political action is approximately three million. Section 12 of the same Act affects the participation in political campaigns of many thousands of state employees.[3] No one of all these millions of citizens can, without violating this law, "take any active part" in any campaign for a cause or for a candidate if the cause or candidate is "specifically identified with any National or State political party." Since under our com-

[2] "Any person violating the provisions of this section shall be immediately removed from the position or office held by him, and thereafter no part of the funds appropriated by any Act of Congress for such position or office shall be used to pay the compensation of such person." § 9b; 18 U. S. C. 61h (b).

[3] All state employees who work for any state agency financed in whole or in part by federal grants or loans are affected by the Act. Section 12a; 18 U. S. C. 61*l*.

In 1945 the Federal Government paid $865,729,569.15 in grants in aid to states, *Annual Report of the Secretary of the Treasury on the State of the Finances, for the fiscal year ended June 30, 1945* (*1946*) 714, and $688,506,157.11 in direct payments to states for the social security program, public roads and emergency maternity and infant care. *Id.* at 718. Grants to and expenditures within states, providing direct relief, work relief, and other aid such as the Agricultural Adjustment Program, National Housing Agency annual contributions, etc., totaled $1,353,427,735.68. *Id.* at 721.

In July 1946 the number of persons employed by state and local governments totaled approximately 2,754,000 of whom 641,000 were employed in schools and 2,114,000 were non-school employees. *Public Employment in July, 1946, Government Employment,* Dept. of Commerce, Bureau of the Census, Vol. 7, No. 3 (1946) 1. A breakdown of county employees is a sample which suggests the proportion state and local whose salaries may be paid in whole or in part by federal funds thus coming under the provisions of this Act. Of a total of 310,000 non-school county employees in the entire country, 77,000 were employed in highway departments; 4,700 in natural resources; 12,600 in health and sanitation; 40,000 in hospitals; 22,000 in public welfare. *County Employment in 1944, Government Employment, op. cit. supra,* Vol. 5, No. 2 (1944) 7.

mon political practices most causes and candidates are espoused by political parties, the result is that, because they are paid out of the public treasury, all these citizens who engage in public work can take no really effective part in campaigns that may bring about changes in their lives, their fortunes, and their happiness.[4]

We are not left in doubt as to how numerous and varied are the "activities" prohibited. For § 15 sweepingly describes them as "the same activities . . . as the United States Civil Service Commission has heretofore determined are at the time this section takes effect prohibited on the part of employees in the classified civil service of the United States . . . ." Along with the vague and uncertain prior prohibitions of the Commission, are these things which the Commission had clearly prohibited: serving as an election officer; publicly expressing political views at a party caucus or political gathering for or against any candidate or cause identified with a party;

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[4] There are minor exceptions. One concession only is granted those federal employees who live "in the immediate vicinity of the National Capital in the States of Maryland and Virginia or in municipalities the majority of whose voters are employed by the Government of the United States . . . ." The Civil Service Commission may "permit" them to participate in campaigns involving the "municipality or political subdivision" in which they reside "to the extent the Commission deems to be in [their] domestic interest . . . ." Section 16; 18 U. S. C. 61p. A general exception permits participation (1) in an "election and the preceding campaign if none of the candidates is to be nominated or elected . . . as representing a [political] party . . . (2) in connection with any question which is not specifically identified with any National or State political party. For the purposes of this section, questions relating to constitutional amendments, referendums, approval of municipal ordinances, and others of a similar character, shall not be deemed to be specifically identified with any National or State political party." § 18, 18 U. S. C. § 61r. The importance and number of political issues thus excepted, *e. g.* Sunday movies, local school bond issues, location of local parks, election of local officials in whom no political party is interested, are obviously very small.

soliciting votes for a party or candidate; participating in a political parade; writing for publication or publishing any letter or article, signed or unsigned, in favor of or against any political party, candidate, or faction; initiating, or canvassing for signatures on, community petitions or petitions to Congress.

In view of these prohibitions, it is little consolation to employees that the Act contradictorily says that they may "express their opinions on all political subjects and candidates." For this permission to "express their opinions" is, the Commission has rightly said, "subject to the prohibition that employees may not take any active part in . . . political campaigns." The hopeless contradiction between this privilege of an employee to talk and the prohibition against his talking stands out in the Commission's further warning to all employees that they can express their opinions publicly, but "Public expression of opinion in such a way as to constitute taking an active part in political management or in political campaigns is accordingly prohibited." Thus, whatever opinions employees may dare to express, even secretly, must be at their peril. They cannot know what particular expressions may be reported to the Commission and held by it to be a sufficient political activity to cost them their jobs. Their peril is all the greater because of another warning by the Commission that "Employees are . . . accountable for political activity by persons other than themselves, including wives or husbands, if, in fact, the employees are thus accomplishing by collusion and indirection what they may not lawfully do directly and openly." Thus are the families of public employees stripped of their freedom of political action. The result is that the sum of political privilege left to government and state employees, and their families, to take part in political campaigns seems to be this: They may vote in silence; they may carefully and quietly express a political view at

their peril; and they may become "spectators" (this is the Commission's word) at campaign gatherings, though it may be highly dangerous for them to "second a motion" or let it be known that they agree or disagree with a speaker.

All of the petitioners here challenge the constitutional validity of that sentence of § 9 of the statute which prohibits all federal employees from taking "any active part in political management or in political campaigns" and which by reference only sweeps under this prohibition all then-existing civil service regulations. The charge is that this provision, thus supplemented by the regulations, violates the First Amendment by prohibiting freedom of press, speech, and assembly; that it violates the Fifth Amendment because it effects an arbitrary and gross discrimination between government employees covered and those exempted; that it also violates the Fifth Amendment because it is so vague and indefinite as to prohibit lawful activities as well as activities which are properly made unlawful by other provisions of law. Thus, these attacks of Poole and all the other petitioners are identical, namely, that the provision is unconstitutional on its face. The Court decides this question against Poole after holding that his case presents a justiciable controversy. I think Poole's challenge to the constitutionality of the provision should be sustained. And since I agree with MR. JUSTICE DOUGLAS that all the petitioners' complaints state a case or controversy, and show threats of imminent irreparable damages, I think that the contention that the challenged provision is unconstitutional on its face should be sustained as to all of them.

Had this measure deprived five million farmers or a million businessmen of all right to participate in elections, because Congress thought that federal farm or business subsidies might prompt some of them to exercise, or be susceptible to, a corrupting influence on politics or gov-

ernment, I would not sustain such an Act on the ground that it could be interpreted so as to apply only to some of them. Certainly laws which restrict the liberties guaranteed by the First Amendment should be narrowly drawn to meet the evil aimed at and to affect only the minimum number of people imperatively necessary to prevent a grave and imminent danger to the public.[5] Furthermore, what federal employees can or cannot do, consistently with the various civil service regulations, rules, warnings, etc., is a matter of so great uncertainty that no person can even make an intelligent guess. This was demonstrated by the government's briefs and oral arguments in this case. I would hold that the provision here attacked is too broad, ambiguous, and uncertain in its consequences to be made the basis of removing deserving employees from their jobs. See dissenting opinion, *Williams* v. *North Carolina,* 325 U. S. 226, 261, 276–278 and cases collected, note 16.

The right to vote and privately to express an opinion on political matters, important though they be, are but parts of the broad freedoms which our Constitution has provided as the bulwark of our free political institutions. Popular government, to be effective, must permit and encourage much wider political activity by all the people.[6] Real popular government means "that men may speak as they think on matters vital to them and that falsehoods may be exposed through the processes of education and discussion . . . Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political

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[5] *Thornhill* v. *Alabama,* 310 U. S. 88; *Marsh* v. *Alabama,* 326 U. S. 501; *Bridges* v. *California,* 314 U. S. 252, 260, 263.

[6] Some states require that employers pay their employees for the time they spend away from work while voting. See *People* v. *Ford Motor Co.,* 271 App. Div. 141, 63 N. Y. S. 2d 697; Note, *Pay While Voting,* 47 Col. L. Rev. 135 (1947).

and economic truth." *Thornhill* v. *Alabama,* 310 U. S. 88, 95. Legislation which muzzles several million citizens threatens popular government, not only because it injures the individuals muzzled, but also because of its harmful effect on the body politic in depriving it of the political participation and interest of such a large segment of our citizens. Forcing public employees to contribute money and influence can well be proscribed in the interest of "clean politics" and public administration. But I think the Constitution prohibits legislation which prevents millions of citizens from contributing their arguments, complaints, and suggestions to the political debates which are the essence of our democracy; prevents them from engaging in organizational activity to urge others to vote and take an interest in political affairs; bars them from performing the interested citizen's duty of insuring that his and his fellow citizens' votes are counted. Such drastic limitations on the right of all the people to express political opinions and take political action would be inconsistent with the First Amendment's guaranty of freedom of speech, press, assembly, and petition. And it would violate, or come dangerously close to violating, Article I and the Seventeenth Amendment of the Constitution, which protect the right of the people to vote for their Congressmen and their United States Senators and to have their votes counted. See *Ex parte Yarbrough,* 110 U. S. 651; *United States* v. *Mosley,* 238 U. S. 383; *United States* v. *Classic,* 313 U. S. 299, 314.

There is nothing about federal and state employees as a class which justifies depriving them or society of the benefits of their participation in public affairs. They, like other citizens, pay taxes and serve their country in peace and in war. The taxes they pay and the wars in which they fight are determined by the elected spokesmen of all the people. They come from the same homes, communities, schools, churches, and colleges as do the other

citizens. I think the Constitution guarantees to them the same right that other groups of good citizens have to engage in activities which decide who their elected representatives shall be.

No statute of Congress has ever before attempted so drastically to stifle the spoken and written political utterances and lawful political activities of federal and state employees as a class. The nearest approach was the Civil Service Act of 1883, 22 Stat. 403–4, which authorized the President to promulgate rules so that, among other things, no government employee should "use his official authority or influence to coerce the political action of any person or body." In 1907, the Civil Service Commission, purporting to act under authority of the 1883 Act, did, as the Court points out, prohibit civil service employees from taking "an active part in political management or in political campaigns." But this Court has not approved the statutory power of the Commission to promulgate such a rule, nor has it ever expressly or by implication approved the constitutional validity of any such sweeping abridgement of the right of freedom of expression. Neither *Ex parte Curtis,* 106 U. S. 371, nor *United States* v. *Wurzbach,* 280 U. S. 396, lend the slightest support to the present statute. Both of these cases related to statutes which did no more than limit the right of employees to collect money from other employees for political purposes. Indeed, the *Curtis* decision seems implicitly to have rested on the assumption that many political activities of government employees, beyond merely voting and speaking secretly, would not, and could not under the Constitution, be impaired by the legislation there at issue. *Ex parte Curtis, supra,* at 375.

It is argued that it is in the interest of clean politics to suppress political activities of federal and state employees. It would hardly seem to be imperative to muzzle millions

of citizens because some of them, if left their constitutional freedoms, might corrupt the political process. All political corruption is not traceable to state and federal employees. Therefore, it is possible that other groups may later be compelled to sacrifice their right to participate in political activities for the protection of the purity of the Government of which they are a part.

It may be true, as contended, that some higher employees, unless restrained, might coerce their subordinates or that government employees might use their official position to coerce other citizens. But is such a possibility of coercion of a subordinate by his employer limited to governmental employer-employee relationships? [7] The same quality of argument would support a law to suppress the political freedom of all employees of private employers, and particularly of employers who borrow money or draw subsidies from the Government. Nor does it seem plausible that all of the millions of public employees whose rights to free expression are here stifled might, if they participate in elections, coerce other citizens not employed by the Government or the States. Poole, one of the petitioners here, is a roller in a United States mint. His job is about on a par in terms of political influence with that of most other state, federal, and private business employees. Such jobs generally do not give such employees who hold them sufficient authority to enable them to wield a dangerous or coercive influence on the political world. If the possibility exists that some other public employees may, by reason of their more influential positions, coerce other public employees or other citizens, laws can be drawn to punish the coercers.[8] It hardly seems consistent with

[7] Many states have laws protecting non-government employees from employer interference with their voting independence. See Note, *Pay While Voting,* 47 Col. L. Rev. 135, 136, note 9 (1947).

[8] See note 7, *supra.*

our system of equal justice to all to suppress the political and speaking freedom of millions of good citizens because a few bad citizens might engage in coercion.[9]

It may also be true, as contended, that if public employees are permitted to exercise a full freedom to express their views in political campaigns, some public officials will discharge some employees and grant promotion to others on a political rather than on a merit basis. For the same reasons other public officials, occupying positions of influence, may use their influence to have their own political supporters appointed or promoted. But here again, if the practice of making discharges, promotions or recommendations for promotions on a political basis is so great an evil as to require legislation, the law could punish those public officials who engage in the practice. To punish millions of employees and to deprive the nation of their contribution to public affairs, in order to remove temptation from a proportionately small number of public officials, seems at the least to be a novel method of suppressing what is thought to be an evil practice.

Our political system, different from many others, rests on the foundation of a belief in rule by the people—not some, but all the people. Education has been fostered better to fit people for self-expression and good citizenship. In a country whose people elect their leaders and decide great public issues, the voice of none should be suppressed—at least such is the assumption of the First Amendment. That Amendment, unless I misunderstand its meaning, includes a command that the Government must, in order to promote its own interest, leave the people at liberty to speak their own thoughts about government, advocate their own favored governmental causes, and work for their own political candidates and parties.

[9] The Act, in fact, leaves free the higher officials whose positions give them the actual power to coerce subordinates and other citizens not employed by the Government. § 9a; 18 U. S. C. 61h.

The section of the Act here held valid reduces the constitutionally protected liberty of several million citizens to less than a shadow of its substance. It relegates millions of federal, state, and municipal employees to the role of mere spectators of events upon which hinge the safety and welfare of all the people, including public employees. It removes a sizable proportion of our electorate from full participation in affairs destined to mould the fortunes of the nation. It makes honest participation in essential political activities an offense punishable by proscription from public employment. It endows a governmental board with the awesome power to censor the thoughts, expressions, and activities of law-abiding citizens in the field of free expression, from which no person should be barred by a government which boasts that it is a government of, for, and by the people—all the people. Laudable as its purpose may be, it seems to me to hack at the roots of a Government by the people themselves; and consequently I cannot agree to sustain its validity.

MR. JUSTICE DOUGLAS, dissenting in part.

I disagree with the Court on two of the four matters decided.

First. There are twelve individual appellants here asking for an adjudication of their rights.[1] The Court passes on the claim of only one of them, Poole. It declines to pass on the claims of the other eleven on the ground that

[1] Elkin, Senior Economic Statistician, Railroad Retirement Board; Abelson, Associate Financial Analyst, Social Security Board; Phillips, Labor Economist, War Shipping Administration; Mitchell, Wage Analyst, National War Labor Board; Fagan, Area Director, War Manpower Commission; Winegar, Senior Officer, Bureau of Prisons; Hindin, Procedural Assistant, Federal Security Agency; Rieck, Stock Clerk, Veterans Administration; Poole, Roller, United States Mint; Shane, Lens Grinder, Frankford Arsenal; Weber, Machinist Specialist, Frankford Arsenal; Tempest, Electric Welder, Philadelphia Navy Yard.

they do not present justiciable cases or controversies. With this conclusion I cannot agree.

It is clear that the declaratory judgment procedure is available in the federal courts only in cases involving actual controversies and may not be used to obtain an advisory opinion in a controversy not yet arisen. *Coffman* v. *Breeze Corporations,* 323 U. S. 316, 324–325, and cases cited. The requirement of an "actual controversy," which is written into the statute (Judicial Code § 274d, 28 U. S. C. § 400) and has its roots in the Constitution (Article III, § 2), seems to me to be fully met here.

What these appellants propose to do is plain enough. If they do what they propose to do, it is clear that they will be discharged from their positions. The analysis of the situation by the District Court seems to me to be accurate and conclusive:

> "The mere existence of the statute, saying that they shall not engage in political activity, the penalty in the statute that they shall be dismissed if they do, and the warning addressed to them by the Civil Service Commission in their posters certainly prevent them from engaging in such activity, if the statute is constitutional. If the statute is unconstitutional, they are being prevented from things which they have the right to do. If the statute is constitutional, it is mandatory that they be dismissed for doing such things. . . . The provisions of Civil Service Rule XV that in case of any violation of the Civil Service Act or Rules or of any Executive Order or any regulation of the Commission the Commission shall certify the facts to the proper appointing officer with specific instructions as to discipline or dismissal is now controlled by the provisions of the Hatch Act that in case of violation of Section 9 (a) of that Act, dismissal is mandatory." 56 F. Supp. 621, 624.

Their proposed conduct is sufficiently specific to show plainly that it will violate the Act. The policy of the Commission and the mandate of the Act leave no lingering doubt as to the consequences.[2]

On a discharge these employees would lose their jobs, their seniority, and other civil service benefits. They could, of course, sue in the Court of Claims. *United States* v. *Lovett,* 328 U. S. 303. But the remedy there is a money judgment, not a restoration to the office formerly held. Of course, there might be other remedies available in these situations to determine their rights to the offices from which they are discharged. See *White* v. *Berry,* 171 U. S. 366, 377. But to require these employees first to suffer the hardship of a discharge is not only to make them incur a penalty; it makes inadequate, if not wholly illusory, any legal remedy which they may have.[3] Men who must sacrifice their means of livelihood in order to test their rights to their jobs must either pursue prolonged and expensive litigation as unemployed persons or pull up their roots, change their life careers, and seek employment in other fields. At least to the average person in the lower income groups the burden of taking that course

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[2] The case is, therefore, unlike those situations where the Court refused to entertain actions for declaratory judgments, the state of facts being hypothetical in the sense that the challenge was to statutes which had not as yet been construed or their specific application known. See *Electric Bond & S. Co.* v. *Securities and Exchange Commission,* 303 U. S. 419, 443; *Alabama State Federation of Labor* v. *McAdory,* 325 U. S. 450.

[3] Where the legal remedy is adequate, it may be the more appropriate one. Thus in *Coffman* v. *Breeze Corporations, supra,* declaratory relief was denied a licensor of a patent who sued his licensee for an adjudication that the Royalty Adjustment Act was unconstitutional since it appeared that a suit to recover royalties was an adequate legal remedy and that the constitutional issues could be litigated there.

is irreparable injury,[4] cf. *Ex parte Young*, 209 U. S. 123, 165, no matter how exact the required showing. Cf. *Watson* v. *Buck*, 313 U. S. 387, 400.

The declaratory judgment procedure may not, of course, be used as a substitute for other equitable remedies to defeat a legislative policy, *Great Lakes Co.* v. *Huffman*, 319 U. S. 293, 300–301, or to circumvent the necessity of exhausting administrative remedies. *Order of Conductors* v. *Penn. R. Co.*, 323 U. S. 166; *Macauley* v. *Waterman S. S. Corp.*, 327 U. S. 540. But it fills a need and serves a high function previously "performed rather clumsily by our equitable proceedings and inadequately by the law courts." H. R. Rep. No. 1264, 73d Cong., 2d Sess., p. 2.[5]

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[4] If the prayer for declaratory relief be considered separately from the prayer for an injunction, as it may be, allegations of irreparable injury threatened are not required. *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 241.

[5] As stated in the Senate Report:

> "The procedure has been especially useful in avoiding the necessity, now so often present, of having to act at one's peril or to act on one's own interpretation of his rights, or abandon one's rights because of a fear of incurring damages. So now it is often necessary, in the absence of the declaratory judgment procedure, to violate or purport to violate a statute in order to obtain a judicial determination of its meaning or validity . . . So now it is often necessary to break a contract or a lease, or act upon one's own interpretation of his rights when disputed, in order to present to the court a justifiable [sic] controversy. In jurisdictions having the declaratory judgment procedure, it is not necessary to bring about such social and economic waste and destruction in order to obtain a determination of one's rights . . . There seems little question that in many situations in the conduct of business serious disputes occur between parties, where, if there were a possibility of obtaining a judicial declaration of rights in a formal action, much economic waste could be avoided and social peace promoted. Persons now often have to act at their peril, a danger which could be frequently avoided by the ability to sue for a declaratory judgment as to their rights or duties." S. Rep. No. 1005, 73d Cong., 2d Sess., pp. 2–3. And see Borchard, Declaratory Judgments (2d ed.) p. 4.

The declaratory judgment procedure is designed "to declare rights and other legal relations of any interested party . . . whether or not further relief is or could be prayed." Judicial Code § 274d, 28 U. S. C. § 400. The fact that equity would not restrain a wrongful removal of an officeholder but would leave the complainant to his legal remedies, *White* v. *Berry, supra,* is, therefore, immaterial. A judgment which, without more, adjudicates the status of a person is permissible under the Declaratory Judgment Act. *Perkins* v. *Elg,* 307 U. S. 325, 349–350. The "declaration of a status was perhaps the earliest exercise of this procedure." H. R. Rep. No. 1264, 73d Cong., 2d Sess., p. 2. The right to hold an office or public position against such threats is a common example of its use.[6] Borchard, Declaratory Judgments (2d ed.), pp. 858 *et seq.* Declaratory relief is the singular remedy available here to preserve the *status quo* while the constitutional rights of these appellants to make these utterances and to engage in these activities are determined. The threat against them is real not fanciful, immediate not remote. The case is therefore an actual not a hypothetical one.[7]

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[6] The case is therefore unlike one where the moving party shows no invasion of his legal rights but only possible injury to the public (*Perkins* v. *Lukens Steel Co.,* 310 U. S. 113, 125) or one where no judicial remedy for the alleged wrong has been created. *General Committee* v. *Missouri-K.-T. R. Co.,* 320 U. S. 323.

[7] The following are cases in which the Court has allowed actions for declaratory judgments to be entertained: *Aetna Life Ins. Co.* v. *Haworth, supra,* where an insured claimed and the insurance company denied that he had become totally and permanently disabled and hence was relieved of the obligation to continue the payment of premiums; *Currin* v. *Wallace,* 306 U. S. 1, where tobacco warehousemen and auctioneers claimed the Tobacco Inspection Act was unconstitutional; *Perkins* v. *Elg, supra,* where one claiming to be a citizen was threatened with deportation as an alien and had been declined a passport on the same ground; *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.,* 312 U. S. 270, where a third party was suing an insured and the insurer sought a judgment that it was not liable to defend

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And the present case seems to me to be a good example of a situation where uncertainty, peril, and insecurity result from imminent and immediate threats to asserted rights.

Since the Court does not reach the constitutionality of the claims of these eleven individual appellants, a discussion of them would seem to be premature.

Second. Poole is not in the administrative category of civil service. He is an industrial worker—a roller in the mint, a skilled laborer or artisan whose work or functions in no way affect the policy of the agency nor involve relationships with the public. There is a marked difference in the British treatment of administrative and industrial employees under civil service.[8] And the difference between the two is for me relevant to the problem we have here.

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the insured nor to indemnify the insured if the third party recovered; *Altvater* v. *Freeman,* 319 U. S. 359, where royalties were being demanded and paid under protest and by reason of an injunction; *Mercoid Corp.* v. *Honeywell Co.,* 320 U. S. 680, where an alleged patent infringer sought a declaration of the invalidity of the patent; *Tennessee Coal, I. & R. Co.* v. *Muscoda Local,* 321 U. S. 590, where an employer sued representatives of its employees for an adjudication of whether portal-to-portal pay was due under the Fair Labor Standards Act; *Hillsborough* v. *Cromwell,* 326 U. S. 620, where a taxpayer sued in the federal court to have assessments declared invalid on the ground that they violated the Federal Constitution, the state remedy being inadequate to protect the federal right; *Katzinger Co.* v. *Chicago Metallic Mfg. Co.,* 329 U. S. 394, where a licensee sought a declaration that he owed no royalties because of the invalidity of the patent; *Order of Railway Conductors* v. *Swan,* 329 U. S. 520, where it was sought to determine which division of the National Railroad Adjustment Board had jurisdiction over railroad yardmasters. Cf. *Railway Mail Assn.* v. *Corsi,* 326 U. S. 88, where a labor membership corporation, which did not admit negroes and was threatened with enforcement of a state statute declaring that practice of labor organizations unlawful, sued in a state court for an adjudication that the statute could not constitutionally be applied to it.

[8] Report, Committee on Parliamentary, etc., Candidature of Crown Servants (1925), pp. 12, 13.

The civil service system has been called "the one great political invention" of nineteenth century democracy.[9] The intricacies of modern government, the important and manifold tasks it performs, the skill and expertise required, the vast discretionary powers vested in the various agencies, and the impact of their work on individual claimants as well as on the general welfare have made the integrity, devotion, and skill of the men and women who compose the system a matter of deep concern of many thoughtful people.[10] Political fortunes of parties will ebb and flow; top policy men in administrations will come and go; new laws will be passed and old ones amended or repealed. But those who give continuity to administration, those who contribute the basic skill and efficiency to the daily work of government, and those on whom the new as well as the old administration is dependent for smooth functioning of the complicated machinery of modern government are the core of the civil service. If they are beneficiaries of political patronage rather than professional careerists, serious results might follow—or so Congress could reasonably believe. Public confidence in the objectivity and integrity of the civil service system might be so weakened as to jeopardize the effectiveness of administrative government. Or it might founder on the rocks of incompetency, if every change in political fortunes turned out the incumbents, broke the continuity of administration, and thus interfered with the development of expert man-

[9] Wallas, Human Nature in Politics (2d ed.), p. 263.

[10] Fish, The Civil Service and The Patronage (1905); Meriam, Public Personnel Problems (1938), ch. XI; Mosher & Kingsley, Public Personnel Administration (1941), ch. XVIII; Kingsley, Representative Bureaucracy (1944), ch. X; Morstein Marx, Public Management in the New Democracy (1940), ch. XIV; Field, Civil Service Law (1939), p. 196; Dawson, The Principle of Official Independence (1922), pp. 90 *et seq.;* Kaplan, Political Neutrality of the Civil Service, 1 Public Personnel Rev. 10; Chen, The Doctrine of Civil Service Neutrality in Party Conflicts in the United States and Great Britain (1937).

agement at the technical levels. Or if the incumbents were political adventurers or party workers, partisanship might color or corrupt the processes of administration of law with which most of the administrative agencies are entrusted.

The philosophy is to develop a civil service which can and will serve loyally and equally well any political party which comes into power.[11]

Those considerations might well apply to the entire group of civil servants in the administrative category—whether they are those in the so-called expert classification or are clerks, stenographers and the like. They are the ones who have access to the files, who meet the public, who arrange appointments, who prepare the basic data on which policy decisions are made. Each may be a tributary, though perhaps a small one, to the main stream which we call policy making or administrative action. If the element of partisanship enters into the official activities of any member of the group, it may have its repercussions or effect throughout the administrative process. Thus in that type of case there would be much to support the view of the Court that Congress need not undertake to draw the line to include only the more important offices but can take the precaution of protecting the whole by insulating even the lowest echelon from partisan activities.

So, I think that if the issues tendered by Poole were tendered by an administrative employee, we would have quite a different case. For Poole claims the right to work as a ward executive committeeman, *i. e.*, as an officeholder in a political party.

But Poole, being an industrial worker, is as remote from contact with the public or from policy making or from the functioning of the administrative process as a charwoman.

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[11] See Chen, *op. cit. supra* note 10, ch. I; Report of President's Committee on Civil Service Improvement, H. Doc. No. 118, 77th Cong., 1st Sess., ch. III.

The fact that he is in the classified civil service is not, I think, relevant to the question of the degree to which his political activities may be curtailed. He is in a position not essentially different from one who works in the machine shop of a railroad or steamship which the Government runs, or who rolls aluminum in a manufacturing plant which the Government owns and operates. Can all of those categories of industrial employees constitutionally be insulated from American political life? If at some future time it should come to pass in this country, as it has in England, that a broad policy of state ownership of basic industries is inaugurated, does this decision mean that all of the hundreds of thousands of industrial workers affected could be debarred from the normal political activity which is one of our valued traditions?

The evils of the "spoils" system do not, of course, end with the administrative group of civil servants. History shows that the political regimentation of government industrial workers produces its own crop of abuses. Those in top policy posts or others in supervisory positions might seek to knit the industrial workers in civil service into a political machine. As a weapon they might seek to make the advancement of industrial workers dependent on political loyalty, on financial contributions, or on other partisan efforts. Or political activities of these workers might take place on government premises, on government time, or otherwise at government expense. These are specific evils which would require a specific treatment.

There is, however, no showing of any such abuse here. What Poole did, he did on his own without compulsion or suggestion or invitation from any one higher up. Nor does it appear that what he did was done on government time or on government premises. Moreover, as MR. JUSTICE BLACK points out, laws can be drawn to punish those who use such coercion. See *Ex parte Curtis,* 106 U. S. 371. Such activity is more than the exercise of

political prerogatives; it is the use of official power as well, and hence can be restrained or punished. Cf. *Bakery Drivers Local* v. *Wohl*, 315 U. S. 769, 776–777; *Thomas* v. *Collins*, 323 U. S. 516, 543–544.

The question is whether a permissible remedy is complete or partial political sterilization of the industrial group. There is, of course, the possibility of the mobilization, whether voluntary or otherwise, of millions of employees of the Federal Government and federally assisted state agencies for the purpose of maintaining a particular party or group in power. The marked increase in the number of government employees in recent years has accentuated the problem. The difficulty lies in attempting to preserve our democratic way of life by measures which deprive a large segment of the population of all political rights except the right to vote. Absent coercion, improper use of government position or government funds, or neglect or inefficiency in the performance of duty, federal employees have the same rights as other citizens under the Constitution. They are not second-class citizens. If, in the exercise of their rights, they find common political interests and join with each other or other groups in what they conceive to be their interests or the interests of the nation, they are simply doing what any other group might do. In other situations where the balance was between constitutional rights of individuals and a community interest which sought to qualify those rights, we have insisted that the statute be "narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest" of government. *Cantwell* v. *Connecticut*, 310 U. S. 296, 311. And see *Murdock* v. *Pennsylvania*, 319 U. S. 105, 116; *Thornhill* v. *Alabama*, 310 U. S. 88, 104–105.

That seems to me the proper course to follow here. The prohibition in § 9 (a) of the Hatch Act against government employees taking an "active part in political man-

agement or in political campaigns" applies without discrimination to all employees whether industrial or administrative. The same is true of the Civil Service Rules. See Rules I, § 1, XV, 5 C. F. R. Cum. Supp., §§ 1.1, 15.1. But the supposed evils are both different and narrower in case of industrial workers than they are in the case of the administrative group.[12] The public interest in the political activity of a machinist or elevator operator or charwoman is a distinct and different problem.[13] In those cases the public concern is in the preservation of an unregimented industrial group, in a group free from political pressures of superiors who use their official power for a partisan purpose. Then official power is misused,

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[12] See Morstein Marx, *op. cit., supra,* note 10, pp. 205–206; Report of the Committee on Parliamentary, etc., Candidature of Crown Servants, *supra,* note 8, p. 32; Finer, The British Civil Service (1937), pp. 203–204.

[13] As stated in Morstein Marx, *op. cit., supra,* note 10, pp. 205–206:

> "The political neutrality of a postal clerk, of a conductor on the city-owned subway system in New York, of a technician in the Chicago sanitary district, or of an artisan in the labor class, does not have the same significance as the political neutrality of the prominent section chiefs of the Department of State or the political neutrality of an assistant to a commissioner in a New York City department. No discussion of the problem which ignores the *differences between categories of employees* is anything but an academic consideration of the problem. Top officialdom has such marked opportunities of shaping policy that its political behavior must be so neutral as to raise no question of a divergence in point of view between it and the executive officers of government. It is quite proper, therefore, to require the most impeccable political neutrality from such officials. But the average or typical civil servant has no more opportunity in the sphere of policy making than does the average citizen. He is entrusted with a function ministerial in nature, a routine task almost wholly unaffected by his political point of view. This principle is recognized in the English rule that industrial workers in government employment may stand for election, a privilege denied administrative employees."

perverted. The Government is corrupted by making its industrial workers political captives, victims of bureaucratic power, agents for perpetuating one party in power.

Offset against that public concern are the interests of the employees in the exercise of cherished constitutional rights. The nature and importance of those rights have been fully expounded in MR. JUSTICE BLACK'S opinion. If those rights are to be qualified by the larger requirements of modern democratic government, the restrictions should be narrowly and selectively drawn to define and punish the specific conduct which constitutes a clear and present danger to the operations of government. It seems plain to me that that evil has its roots in the coercive activity of those in the hierarchy who have the power to regiment the industrial group or who undertake to do so. To sacrifice the political rights of the industrial workers goes far beyond any demonstrated or demonstrable need. Those rights are too basic and fundamental in our democratic political society to be sacrificed or qualified for anything short of a clear and present danger to the civil service system. No such showing has been made in the case of these industrial workers [14] which justifies their political sterilization as distinguished from selective measures aimed at the coercive practices on which the spoils system feeds.

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[14] Whether the Act, being unconstitutional as applied to Poole, could be separably applied to civil service employees in other categories is a question I do not reach.

Syllabus.

OKLAHOMA *v.* UNITED STATES CIVIL SERVICE COMMISSION.

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

No. 84. Argued October 17, 18, 1946.—Decided February 10, 1947.

A member of the State Highway Commission of Oklahoma, whose principal employment was in connection with an activity financed in part by loans and grants from a federal agency, served at the same time as Chairman of the Democratic State Central Committee. During his service on the Highway Commission, there was no general election in the State; but he advised with the Governor concerning a dinner sponsored by his Committee to raise funds for political purposes, called the meeting to order, and introduced the toastmaster. Pursuant to § 12 of the Hatch Act, 18 U. S. C. § 61*l*, the United States Civil Service Commission determined that these activities constituted taking an "active part in political management or in political campaigns" and that this warranted his removal from the office of Highway Commissioner. It so notified him and the State. Pursuant to § 12 (c) of the Hatch Act, the State instituted proceedings in a federal district court to review this determination. *Held:*

1. In this proceeding, the State may properly challenge the constitutionality of § 12 of the Hatch Act. Pp. 134–142.

(a) Since § 12 (c) authorizes the reviewing court to decide whether any order or determination made under § 12 (b) is "in accordance with law," the State can properly challenge, and the court is authorized to consider and determine, the constitutionality of the law upon which the order under review is predicated. *Massachusetts* v. *Mellon,* 262 U. S. 447; *Perkins* v. *Lukens Steel Co.,* 310 U. S. 113; *Alabama Power Co.* v. *Ickes,* 302 U. S. 464, differentiated. Pp. 135–139.

(b) If the contention that the State has no standing to challenge the constitutionality of the Act be treated as an objection to its capacity to bring the suit, it was waived by failure to object in the trial court. P. 134.

(c) If it be treated as meaning that no justiciable controversy exists as to the constitutionality of § 12, it is timely although first made in this Court. P. 134.

(d) Under § 12 (c), either the state employee or the state may be the party "aggrieved" and may maintain the action for judicial review. P. 137.

(e) Since failure to remove the State Highway Commissioner from office would result under § 12 (b) in interference with payment of the full allotment of federal highway funds to the State, the statutory proceeding to review the order finding that his violation of the Hatch Act warranted his removal from office was a case or controversy between the State and the Civil Service Commission. P. 137.

(f) The rule that one may not in the same proceeding both rely upon and assail a statute is not applicable to this case. P. 139.

(g) Lack of extended discussion of the scope of judicial review during the legislative debates on the Act does not by implication deny to a litigant the right to challenge the constitutionality of the Act. Pp. 140–142.

2. Section 12 of the Hatch Act is not unconstitutional because of its interference with the employee's freedom of expression in political matters. *United Public Workers* v. *Mitchell, ante,* p. 75. P. 142.

3. It does not invade the sovereignty of a state in such a way as to violate the Tenth Amendment. Pp. 142–144.

(a) While the United States is not concerned with, and has no power to regulate, political activities as such of state officials, it does have power to fix the terms upon which its money allotments to states shall be disbursed. P. 143.

(b) The Tenth Amendment does not forbid the exercise of this power in the way that Congress has proceeded in this case. P. 143.

4. The actions of the Highway Commissioner constituted taking an "active part in political management" within the meaning and purpose of § 12 (a). Pp. 142, 144, 146.

5. The Civil Service Commission's determination that his acts constitute such a violation of § 12 (a) as to warrant his removal from office was in accordance with law and was not arbitrary, unreasonable or an abuse of discretion. Pp. 144–146.

153 F. 2d 280, affirmed.

The State of Oklahoma instituted proceedings under § 12 (c) of the Hatch Act, 18 U. S. C. § 61*l* (c), to review an order of the United States Civil Service Commission determining that a State Highway Commissioner had en-

gaged in political activities which warranted his removal from office under that Act. The District Court upheld the action of the Civil Service Commission. 61 F. Supp. 355. The Circuit Court of Appeals affirmed. 153 F. 2d 280. This Court granted certiorari. 328 U. S. 831. *Affirmed,* p. 146.

Mac Q. Williamson, Attorney General of Oklahoma, and *James W. Bounds,* Assistant Attorney General, argued the cause and filed a brief for petitioner.

Ralph F. Fuchs argued the cause for respondent. With him on the brief were *Solicitor General McGrath, Assistant Attorney General Sonnett, Paul A. Sweeney* and *Samuel D. Slade.*

MR. JUSTICE REED delivered the opinion of the Court.

This proceeding brings to this Court* another phase of the Hatch Act. The petitioner, the State of Oklahoma, objects to the enforcement by the United States Civil Service Commission of § 12 (a) of the Act.[1]

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*See *United Public Workers* v. *Mitchell,* decided today, *ante,* p. 75.

[1] 53 Stat. 1147, as amended, 54 Stat. 767:

"SEC. 12. (a) No officer or employee of any State or local agency whose principal employment is in connection with any activity which is financed in whole or in part by loans or grants made by the United States or by any Federal agency shall . . . take any active part in political management or in political campaigns. . . .

"(b) If any Federal agency charged with the duty of making any loan or grant of funds of the United States for use in any activity by any officer or employee to whom the provisions of subsection (a) are applicable has reason to believe that any such officer or employee has violated the provisions of such subsection, it shall make a report with respect thereto to the United States Civil Service Commission (hereinafter referred to as the 'Commission'). Upon the receipt of any such report, or upon the receipt of any other information which seems to the Commission to warrant an investigation, the Commission shall fix a time and place for a hearing, and shall by registered mail

France Paris has been a member of the State Highway Commission of Oklahoma since January 14, 1943. He was elected chairman of the Democratic State Central

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send to the officer or employee charged with the violation and to the State or local agency employing such officer or employee a notice setting forth a summary of the alleged violation and the time and place of such hearing. At such hearing (which shall be not earlier than ten days after the mailing of such notice) either the officer or employee or the State or local agency, or both, may appear with counsel and be heard. After such hearing, the Commission shall determine whether any violation of such subsection has occurred and whether such violation, if any, warrants the removal of the officer or employee by whom it was committed from his office or employment, and shall by registered mail notify such officer or employee and the appropriate State or local agency of such determination. If in any case the Commission finds that such officer or employee has not been removed from his office or employment within thirty days after notice of a determination by the Commission that such violation warrants his removal, or that he has been so removed and has subsequently (within a period of eighteen months) been appointed to any office or employment in any State or local agency in such State, the Commission shall make and certify to the appropriate Federal agency an order requiring it to withhold from its loans or grants to the State or local agency to which such notification was given an amount equal to two years' compensation at the rate such officer or employee was receiving at the time of such violation; except that in any case of such a subsequent appointment to a position in another State or local agency which receives loans or grants from any Federal agency, such order shall require the withholding of such amount from such other State or local agency: . . . .

"(c) Any party aggrieved by any determination or order of the Commission under subsection (b) may, within thirty days after the mailing of notice of such determination or order, institute proceedings for the review thereof by filing a written petition in the district court of the United States for the district in which such officer or employee resides; but the commencement of such proceedings shall not operate as a stay of such determination or order unless (1) it is specifically so ordered by the court, and (2) such officer or employee is suspended from his office or employment during the pendency of such proceedings. A copy of such petition shall forthwith be served upon the Commission, and thereupon the Commission shall certify and file in

Committee for Oklahoma for his third term in February 1942 and he occupied such position continuously until October 18, 1943, when he resigned. On October 12, 1943, the Civil Service Commission issued its letter of charges in the matter of France Paris and the State of Oklahoma, in which it notified Mr. Paris and Oklahoma that information which the Civil Service Commission had received war-

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the court a transcript of the record upon which the determination or the order complained of was made. The review by the court shall be on the record entire, including all of the evidence taken on the hearing, and shall extend to questions of fact and questions of law. . . . The court shall affirm the Commission's determination or order, or its modified determination or order, if the court determines that the same is in accordance with law. If the court determines that any such determination or order, or modified determination or order, is not in accordance with law, the court shall remand the proceeding to the Commission with directions either to make such determination or order as the court shall determine to be in accordance with law or to take such further proceedings as, in the opinion of the court, the law requires. The judgment and decree of the court shall be final, subject to review by the appropriate circuit court of appeals as in other cases, and the judgment and decree of such circuit court of appeals shall be final, subject to review by the Supreme Court of the United States on certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., 1934 edition, title 28, secs. 346 and 347). If any provision of this subsection is held to be invalid as applied to any party with respect to any determination or order of the Commission, such determination or order shall thereupon become final and effective as to such party in the same manner as if such provision had not been enacted.

. . . . . .

"SEC. 15. The provisions of this Act which prohibit persons to whom such provisions apply from taking any active part in political management or in political campaigns shall be deemed to prohibit the same activities on the part of such persons as the United States Civil Service Commission has heretofore determined are at the time this section takes effect prohibited on the part of employees in the classified civil service of the United States by the provisions of the civil-service rules prohibiting such employees from taking any active part in political management or in political campaigns."

ranted an investigation into an alleged improper political activity on the part of France Paris under the provisions of § 12 of the Hatch Act. The charge was that since January 14, 1943, Mr. Paris had been an officer of Oklahoma whose principal employment was and is in connection with an activity financed in whole or in part by loans and grants from a federal agency of the United States and that during such time Mr. Paris also held a political party office, to wit, the chairmanship of the State Central Committee above referred to. It later developed that no general election occurred in Oklahoma in 1943. The State Democratic Headquarters had been closed on January 4, 1943, by Mr. Paris and were later reopened during the year under the direct charge of the vice-chairman of that committee, we assume prior to Mr. Paris' resignation on October 18, 1943. On June 14 the committee sponsored a "Victory Dinner" in Oklahoma City. The trial court found as follows:

> "This dinner was designed to provide the National Democratic Committee and the State Democratic Committee with funds to discharge a deficit incurred by their political activities and to provide funds for contemplated future activities. It also promoted the sale of war bonds and did result in the sale of approximately $14,500,000.00 in war bonds. The dinner netted the Democratic party, which was conceded to be a political party, approximately $30,000.00. The dinner was staged under the general supervision of the Governor of the state and the details were handled by a committee appointed by the Governor. W. G. Johnston was chairman of this committee. France Paris was an ex officio member of the committee and he advised with the Governor concerning the dinner and called the meeting to order and introduced the toastmaster, but he was not active in planning or arranging the dinner."

The Civil Service Commission determined that these facts constituted taking an active part in political management and in political campaigns. It considered that the violation warranted Mr. Paris' removal from the office of Highway Commissioner of Oklahoma. It ordered that notice of the aforesaid determinations be given pursuant to § 12 (b) of the Hatch Act. This order foreshadowed, if Mr. Paris was not removed, a further order by the Commission under § 12 (b) to the appropriate federal agency that certain highway grants to Oklahoma should be withheld "in an amount equal to two years compensation" of Mr. Paris.

Pursuant to § 12 (c) the State of Oklahoma, after having received notice of the Civil Service Commission's determination, instituted these proceedings for the review of the order in the proper district court of the United States. That court upheld the action of the Civil Service Commission, 61 F. Supp. 355, and this action was affirmed by the Circuit Court of Appeals for the Tenth Circuit. *State of Oklahoma* v. *United States Civil Service Commission,* 153 F. 2d 280. Certiorari was sought and allowed because of the importance of the issues involved in the administration of justice, 328 U. S. 831, under § 12 (c), 53 Stat. 1147, as amended, 54 Stat. 767, and § 240a of the Judicial Code.

The state contends that the judgments below are invalid for the following reasons:

"(1) The Hatch Political Activity Act, in so far as it attempts to regulate the internal affairs of a state, is an invasion of the sovereignty of the states in violation of the United States Constitution. It further is invalid as an unlawful delegation of power.

"(2) If valid, the Act applies only to 'active' participation in political management or political campaigns. Such 'active' participation is not shown to be present in this case.

"(3) If valid, the Act did not warrant the United States Civil Service Commission in ordering the removal of a state officer or, alternatively, the application of a penalty to the State of Oklahoma.

"(4) The decisions of the lower courts place an intolerable and unjustified restriction upon the right of an aggrieved person to a complete judicial review under the Hatch Political Activity Act."

First. The Government's first contention is that the petitioner, the State of Oklahoma, has no standing to attack the constitutionality of § 12. It is argued that the state has no legal capacity to question the manner in which the United States limits the appropriation of funds through § 12 (a); that § 12 (b) is merely procedural to assure that the statutory requirements are observed and that § 12 (c) is a safeguard against the exercise of arbitrary power by the Commission, not a permission to wage an attack on the entire arrangement.[2]

If this contention is treated as an objection to the state's capacity to bring this suit, as no objection was made until the memorandum for the respondent on the petition for certiorari, it would be out of time. A failure to object in the trial court to a party's capacity is a waiver of that defect. *Parker* v. *Motor Boat Sales,* 314 U. S. 244, 251. On the other hand, if the contention is treated as meaning that no justiciable controversy as to the constitutionality of § 12 (a) exists because petitioner suffers no injury which it may protect legally from the withdrawal by the United States of a portion of a grant-in-aid, the objection, as it questions judicial power to act on that point, is timely although first made in this Court.[3] We think that the

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[2] *Massachusetts* v. *Mellon,* 262 U. S. 447, 482; *Perkins* v. *Lukens Steel Co.,* 310 U. S. 113; *Alabama Power Co.* v. *Ickes,* 302 U. S. 464, 479, are cited as authority, together with other cases.

[3] A respondent can support his judgment on any ground that appears in the record. *LeTulle* v. *Scofield,* 308 U. S. 415, 421; *Gainesville* v. *Brown-Crummer Co.,* 277 U. S. 54, 59.

latter position more correctly reflects respondent's contention. The Commission urges the cases listed in note 2 above as showing that the relation between the state and federal government arising out of grants-in-aid are political and that the order of the Commission that Paris be removed was not mandatory. We therefore treat the issue as properly before us.

The issue is whether Oklahoma can challenge the constitutionality of § 12 on statutory review of a Commission order. Subsection (c) gives to any party aggrieved a judicial review of the Commission order. The review is on the entire record and extends to questions of fact and questions of law. The order is to be affirmed if the court determines that it is "in accordance with law." If the court determines the order is not in accordance with law, the proceeding is to be remanded to the Commission "with directions either to make such determination or order as the court shall determine to be in accordance with law or to take such further proceedings as, in the opinion of the court, the law requires." [4] We think the challenge can be made in these review proceedings to the constitutionality of the law upon which the order under review is predicated.

The activities of the Highway Commission of Oklahoma were financed in part by loans and grants from a federal agency during all the pertinent times. This was the organization of which Paris was a member. During the period in question, January 15, 1943, to October 18, 1943, while Paris was also Chairman of the Democratic State Central Committee, the United States through allotment by federal statute contributed over $2,000,000 for the highway work of the Oklahoma Commission.[5] Nothing indicates that these sums were to be received by Oklahoma otherwise than in accordance with regular statutory appor-

[4] See note 1, *supra*, § 12 (c).

[5] See Federal Highway Act, 42 Stat. 212, as amended, 23 U. S. C. § 1–117.

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tionment among the states of federal highway funds and we assume the sums were to be so received by Oklahoma. Congress may create legally enforceable rights where none before existed. Payments were not made at the unfettered inclination of a federal disbursing officer or highway agency but according to statutory standards, compliance with which entitled Oklahoma to receive her proper share of the federal appropriations for highway construction through state agencies. If it were not for § 12, Oklahoma would have been legally entitled to receive payment from the federal disbursing office of the sums, including the amount that § 12 (b) authorizes the Civil Service Commission to require the disbursing or allocating federal agency to withhold from its loans or grants.[6] Oklahoma had a legal right to receive federal highway funds by virtue of certain congressional enactments and under the terms therein prescribed. Violation of such a statutory right normally creates a justiciable cause of action even without a specific statutory authorization for review.[7] It may be that before the payment of those funds to Oklahoma Congress could have withdrawn the grant without legal responsibility for such action either in its officers or the National Government. Perhaps, before disbursement, it could add of its own free will any additional requirements but when it erected administrative bars, that is, a condition that a part of the allotment might be withheld by action of the Commission, with judicial review of the Commission's determination, we think those bars left to Oklahoma the right to receive all federal highway funds allotted to that state, subject only to the condition that the limitation on the right to receive the funds complied with the Constitution. Issues presented by this suit, even though

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[6] Cf. *Columbia System* v. *United States*, 316 U. S. 407, 422.

[7] See *Deitrick* v. *Greaney*, 309 U. S. 190, 198, 200–201; *Steele* v. *Louisville & Nashville Railroad Co.*, 323 U. S. 192, 202.

raised by a state, are closely akin to private wrongs.[8] Either the state employee or the state may be the party aggrieved and may maintain the action for judicial review. The power to examine into the constitutionality of the conditions was given the federal courts by the grant of the authority to review the legality of the Civil Service order. Therefore when by § 12 a right of review of the Civil Service Commission's order is given to Oklahoma, we are of the opinion that the constitutionality of the statutory basis, § 12 (a), of the order is open for adjudication.

Congress has power to fix the conditions for review of administrative orders.[9] By providing for judicial review of the orders of the Civil Service Commission, Congress made Oklahoma's right to receive funds a matter of judicial cognizance. Oklahoma's right became legally enforceable. Interference with the payment of the full allotment of federal highway funds to Oklahoma made the statutory proceeding to set aside the order a case or controversy between Oklahoma and the Commission, whose order Oklahoma was authorized to challenge.[10] A reading of § 12 will show the special interest Oklahoma had in preventing the exercise of the Civil Service Commission's power to direct that Oklahoma's funds be withheld.[11] It was named as the employer affected by § 12 (a). Notices were sent to it. Funds allotted to Oklahoma were to be withheld under certain conditions. It was a "party aggrieved." [12] When it brought this suit, under this statu-

[8] See the discussion in *Colegrove* v. *Green*, 328 U. S. 549.

[9] *American Power Co.* v. *S. E. C.*, 325 U. S. 385, 389.

[10] *Federal Power Commission* v. *Pacific Power & Light Co.*, 307 U. S. 156, 159.

[11] *Chicago Junction Case*, 264 U. S. 258, 266 (Second); *Z. & F. Assets Realization Corp.* v. *Hull*, 311 U. S. 470, 485.

[12] *Federal Power Commission* v. *Pacific Power & Light Co.*, 307 U. S. 156, 159; *Federal Communications Commission* v. *Sanders Brothers Radio Station*, 309 U. S. 470, 476; *American Power Co.* v. *S. E. C.*, 325 U. S. 385, 390; *Parker* v. *Fleming*, 329 U. S. 531.

tory authority, Oklahoma was entitled to a judicial determination as to whether the order of the Civil Service Commission was "in accordance with law." Was the order within the competency of the Commission? That question of competency included the issue of the constitutionality of the basis for the order, § 12 (a).[13] Only if the statutory basis for an order is within constitutional limits can it be said that the resulting order is legal. To determine that question, the statutory review must include the power to determine the constitutionality of § 12 (a).

The cases cited by the Government as pointing toward lack of power to adjudicate the constitutionality of § 12

[13] Cf. *Labor Board* v. *Jones & Laughlin*, 301 U. S. 1, 25, 43, 49; *Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S. 294, 321–24; *United States* v. *Ruzicka*, 329 U. S. 287, 294.

Judicial review normally includes issues of the constitutionality of enactments and action thereunder. 60 Stat. 237, 243, § 10 (e):

"Scope of Review.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error."

See the full discussion of the "Scope of Review," Legislative History, Administrative Procedure Act, S. Doc. No. 248, 79th Cong., 2d Sess., p. 213, (e), and p. 278, § 10 (e).

are inapposite. None deny to a court with jurisdiction by statute to review the legality of administrative orders the power to examine the constitutionality of the statute by virtue of which the order was entered. The authorities in note 2 above, relied upon by the Government, do not hold or imply a position contrary to our conclusion. In *Massachusetts* v. *Mellon,* 262 U. S. 447, the Commonwealth and others sought decrees to enjoin the enforcement of the Federal Maternity Act. This Court denied federal jurisdiction, p. 480, because no burden was placed upon a state and no right infringed, p. 482. *Perkins* v. *Lukens Steel Co.,* 310 U. S. 113, denied a manufacturer who desired to sell to the Government the right to question a government official's definition of "locality," which the official was required by statute to make to determine the minimum wages of the "locality" under the Public Contracts Act. The denial of federal jurisdiction to decide the question was because no "litigable rights" to deal with the United States had been bestowed by the statute on the would-be seller, pp. 125 and 127. The prospective seller by statute or otherwise had nothing to do with the conditions of purchase fixed by the United States. *Alabama Power Co.* v. *Ickes,* 302 U. S. 464, denied that the power company had any enforceable legal right to be free of competition, financed by illegal loans, p. 479. This present Oklahoma case is differentiated from each of the foregoing by the authority for statutory review and by the existence of the legally enforceable right to receive allocated grants without unlawful deductions.

We do not think the rule that one may not in the same proceeding both rely upon and assail a statute [14] is applicable to the present situation. In the cases the Govern-

[14] See *Hurley* v. *Commission of Fisheries,* 257 U. S. 223; *United Fuel Gas Co.* v. *Railroad Commission of Kentucky,* 278 U. S. 300; *Great Falls Mfg. Co.* v. *Attorney General,* 124 U. S. 581.

ment cites, the litigants had received or sought advantages from the statute that they wished to attack, advantages other than the mere right to sue. What we are concerned with in this case is not an estoppel to sue but the allowable scope of the statutory jurisdiction.

From this point of view, the respondent urges that the Congress did not intend to create a justiciable right broad enough to include an attack upon the constitutionality of § 12 (a). We think the final sentence of § 12 (c), note 1 *supra*, comes near to demonstrating the unsoundness of such a contention. It reads:

> "If any provision of this subsection is held to be invalid as applied to any party with respect to any determination or order of the Commission, such determination or order shall thereupon become final and effective as to such party in the same manner as if such provision had not been enacted."

We do not see that this sentence can mean anything other than that the invalidity (unconstitutionality) of any provision of subsection 12 (b) should not affect the determination of the Civil Service Commission. In view of our conclusion hereinafter expressed that § 12 (a) is constitutional, whether the Commission's determination would be enforceable without a particular statutory provision is not involved in this case.

The Government urges that the absence of legislative consideration of attacks on the constitutionality of § 12 through the provision for judicial review negatives "the conclusion that Congress intended Section 12 (c) as an avenue of attack on Section 12 (a)." [15] But we do not agree that this lack of extended discussion of the scope of the judicial review by implication denies to a litigant the right to attack constitutionality. The final form of

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[15] It cites 86 Cong. Rec. 2354, 2429, 2440, 2468–2474, 9448, 9452; H. Rep. 2376, 76th Cong., 3d Sess., p. 9.

judicial review is different from that first proposed. 86 Cong. Rec. 2468. No change of purpose, however, appears. The proposer of judicial review feared arbitrary action. *Id.*, 2469. Others a violation of political liberty. It was thought the latter objection might be reached without right of judicial review. No one intimated constitutionality could not be reached with judicial review.[16]

[16] 86 Cong. Rec. 2470:

"Mr. LUCAS. I have great respect for the opinions of the Senator from Nebraska. I rise to ask him a question: Does the Senator from Nebraska believe that the question of political liberty is involved in the pending legislation in any way?

"Mr. NORRIS. I have not thought so.

"Mr. LUCAS. In other words, the Senator does not believe that the political rights of an individual who is charged with violation of the statute are being invaded?

"Mr. NORRIS. Mr. President, I now understand the Senator's question. I do not believe so. Some honest men who are better lawyers than I am believe those rights are invaded. That question can easily be tested, however, without having the amendment adopted and passed upon. If the political rights of an individual were invaded, then the law would be unconstitutional, and one could get into court immediately by various kinds of applications. The question could be placed before a court and carried to the Supreme Court and that Court could pass upon it. The adoption of the particular amendment in question would not assist in that respect. If the law is unconstitutional, it will be so found very soon, even without the adoption of this amendment, and the law will fall.

"Mr. LUCAS. But if the Senator from Nebraska entertains the same view as that entertained by the Senator from Illinois with respect to the invasion of the political rights of an individual, then, I take it, the Senator from Nebraska will agree that in case an individual were charged with violation of the statute he should have his rights determined by the court of last resort?

"Mr. NORRIS. I agree with the Senator. But we do not need this amendment in order to get a decision on the matter. That is my contention. We could not put anything into the law, however ingenious we might be, which would take away the constitutional rights of any citizen, and if such an attempt were made the citizen could go into court and have the question determined, even without the adoption of language such as contained in the pending amendment."

None of the subsequent changes in the bill are effective to modify this construction of the scope of this judicial review.[17]

Second. Petitioner's chief reliance for its contention that § 12 (a) of the Hatch Act is unconstitutional as applied to Oklahoma in this proceeding is that the so-called penalty provisions invade the sovereignty of a state in such a way as to violate the Tenth Amendment [18] by providing for *"possible forfeiture of state office or alternative penalties against the state."* Oklahoma says § 12 (c) "provides that the commencement of an appeal from an order of the Commission: '. . . shall not operate as a stay of such determination or order unless (1) it is specifically so ordered by the court, and (2) such officer or employee is suspended from his office or employment during the pendency of such proceedings. . . .'" The coercive effect of the authorization to withhold sums allocated to a state is relied upon as an interference with the reserved powers of the state.

In *United Public Workers* v. *Mitchell,* decided this day, *ante,* p. 75, we have considered the constitutionality of this provision from the viewpoint of interference with a federal employee's freedom of expression in political matters and as to whether acting as an official of a political party violates the provision in § 12 (a) against taking part in political management or in political campaigns. We do not think that the facts in this case require any further discussion of that angle. We think that acting as chairman of the Democratic State Central Committee and acting, *ex officio,* as a member of the "Victory Dinner" committee for the purpose of raising funds for the Democratic Party and for selling war bonds constitute taking an active

[17] See 86 Cong. Rec. 9446, 9495.

[18] "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

part in political management. While the United States is not concerned with, and has no power to regulate, local political activities as such of state officials, it does have power to fix the terms upon which its money allotments to states shall be disbursed.

The Tenth Amendment does not forbid the exercise of this power in the way that Congress has proceeded in this case. As pointed out in *United States* v. *Darby,* 312 U. S. 100, 124, the Tenth Amendment has been consistently construed "as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end." The end sought by Congress through the Hatch Act is better public service by requiring those who administer funds for national needs to abstain from active political partisanship. So even though the action taken by Congress does have effect upon certain activities within the state, it has never been thought that such effect made the federal act invalid.[19] As nothing in this record shows any attempt to suspend Mr. Paris from his duties as a member of the State Highway Commission, we are not called upon to deal with the assertion of Oklahoma that a state officer may be suspended by a federal court if § 12 is valid. There is an adequate separability clause. No penalty was imposed upon the state. A hearing was had, conformably to § 12, and the conclusion was reached that Mr. Paris' active participation in politics justified his removal from membership on the Highway Commission. Oklahoma chose not to remove him. We do not see any violation of the state's sovereignty in the hearing or order. Oklahoma adopted the "simple expedient" of not yielding to what she urges is

[19] *Veazie Bank* v. *Fenno,* 8 Wall. 533, 547; *Stearns* v. *Minnesota,* 179 U. S. 223, 244; *Florida* v. *Mellon,* 273 U. S. 12; *Helvering* v. *Therrell,* 303 U. S. 218; *Wright* v. *Union Central Ins. Co.,* 304 U. S. 502, 516; *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288, 338.

federal coercion. Compare *Massachusetts* v. *Mellon*, 262 U. S. 447, 482. The offer of benefits to a state by the United States dependent upon cooperation by the state with federal plans, assumedly for the general welfare, is not unusual.[20]

In order to give the Civil Service Commission adequate standards to measure active participation in political activities, Congress adopted § 15 of the Hatch Act, quoted above in note 1. By this section Congress made the test of political activity for state employees the same as the test then in effect for employees in the classified civil service. The Commission had at that time determined that "service on or for any political committee or similar organization is prohibited." This could only mean that service on such a committee was active participation in politics. Such determination was made a matter of record by Senator Hatch in charge of the bill during debate on the scope of political prohibition.[21] Obviously the activities of Mr. Paris were covered by the purpose and language of § 12. The words of § 12 (a) requiring Mr. Paris' abstention from "any active part in political management or political campaigns" are derived from Rule I of the Civil Service Commission and have persisted there since 1907.[22]

Oklahoma also argues that the Civil Service Commission determination that the acts of Mr. Paris constitute such a violation of § 12 (a) as to warrant his removal from his state office is not in accordance with law but arbitrary, unreasonable and an abuse of discretion. The facts of Mr.

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[20] *Steward Machine Co.* v. *Davis*, 301 U. S. 548, 593–98; *United States* v. *Bekins*, 304 U. S. 27, 51–54. A review of grants-in-aid will be found in 8 American Law School Review, Corwin: National-State Cooperation, 687, 698.

[21] 86 Cong. Rec. 2938, § 15 of exhibit.

[22] See *United Public Workers* v. *Mitchell*, *ante*, pp. 79–81, notes 4, 5 and 6.

Paris' activities and his connection with the Democratic State Central Committee during his tenure of office as a member of the Highway Commission of Oklahoma have been stated. The Circuit Court of Appeals said, 153 F. 2d at 284, "Manifestly, the Commission had solid footing in the Act for the conclusion that removal of Paris from office was warranted." We agree.[23]

Finally, petitioner says that § 12 (c), note 1, *supra,* authorizes a review of "every minute detail of the case" to "determine whether sufficient facts exist to support the order of the Commission, decide whether the statute has been reasonably and justly applied, and independently resolve the entire question as though the federal court had been the forum in the first instance." The basis for this argument, in so far as it differs from that referred to in the preceding paragraph, is drawn from the language of § 12 (c) that "The review by the court shall be on the record entire, including all of the evidence taken on the hearing, and shall extend to questions of fact and questions of law. . . . The court shall affirm the Commission's determination or order, or its modified determination or order, if the court determines that the same is in accordance with law." As the facts were stipulated and no objection has been taken to the findings of fact, 61 F. Supp. 355, 357 (5); 153 F. 2d 280, 283, the attack, on this issue, is limited to an examination into whether or not the Commission abused its discretion in the order of removal. As heretofore stated, the provisions for review underwent changes during the passage of the Act.[24] As finally

[23] See *Jacob Siegel Co.* v. *Federal Trade Commission,* 327 U. S. 608.

[24] See 86 Cong. Rec. 2468–2474; S. 3046 in the House of Representatives, Union Calendar No. 924, June 4, 1940, pp. 4 and 17; H. Rep. No. 2376, 76th Cong., 3d Sess., p. 9. The amendment which resulted in the present form of the section appears at 86 Cong. Rec. 9448.

adopted, however, the reviewing court is directed to remand when it determines that the action of the Commission "is not in accordance with law." § 12 (c).[25] The question of "the removal of an officer or employee," § 12 (b), note 1, *supra,* we think is a matter of administrative discretion. Since under Rule I of the Civil Service Commission the taking of "any active part in political management or political campaigns" had been determined by the Commission to include service on a political committee, see notes 37 and 38 of *United Public Workers* v. *Mitchell, ante,* p. 75, it is clear Mr. Paris' position violated § 15 of the Hatch Act. Note 1, *supra.* It could hardly be said that the determination of the Commission in ordering his removal was an abuse of its discretion. See 61 F. Supp. at 357 (6) and (7); 153 F. 2d at 283–84.

Judgment affirmed.

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

MR. JUSTICE BLACK and MR. JUSTICE RUTLEDGE dissent.

MR. JUSTICE FRANKFURTER, concurring.

It is of course settled that this Court must consider, whenever the question is raised or even though not raised by counsel, the jurisdiction of the lower federal courts as well as the jurisdiction of this Court. *Mansfield, C. & L. M. Ry.* v. *Swan,* 111 U. S. 379, 382. But whether a State has standing to urge a claim of constitutionality under a

[25] The following also appears in the section:

"The Commission may modify its findings of fact or its determination or order by reason of the additional evidence so taken and shall file with the court such modified findings, determination, or order, and any such modified findings of fact, if supported by substantial evidence, shall be conclusive." 54 Stat. 767, 769.

Congressional grant-in-aid statute does not involve "jurisdiction" in the sense of a court's power but only the capacity of the State to be a litigant to invoke that power. In this litigation the Government did not challenge the standing of Oklahoma to question the constitutionality of the Act until the case came here. I think it is too late to raise that question at this stage. Assuming that it is here, it is my view that under the Hatch Act, in the legislative and judicial context in which it must be read, the State can question only the correctness of the procedure and the determination of the Civil Service Commission, not the validity of the Act. Section 12 (b), (c), 54 Stat. 767, amending 53 Stat. 1147, 18 U. S. C. § 61*l* (b) and (c).

The Administrative Procedure Act does not apply to the present case. Act of June 11, 1946, 60 Stat. 237, § 12. That Act will, in due course, present problems for adjudication. We ought not to anticipate them when, being irrelevant, they are not before us. The Act ought not to be used even for illustrative purpose because illustrations depend on construction of the Act.

Apart from the foregoing, I agree with MR. JUSTICE REED'S opinion.

WALLING, WAGE AND HOUR ADMINISTRATOR, *v.* PORTLAND TERMINAL CO.

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

No. 336. Argued January 17, 1947.—Decided February 17, 1947.

For many years a railroad has given to prospective yard brakemen a practical course of training lasting seven or eight days. Under the supervision of a yard crew, each trainee first learns routine activities by observation and is then gradually permitted to do actual work under close scrutiny. His activities do not displace any of the regular employees, who do most of the work themselves and must stand immediately by to supervise what the trainee does. The trainee's work does not expedite the railroad's business, but may, and sometimes does, actually impede and retard it. Trainees who complete the course satisfactorily and are certified as competent are listed as eligible for employment when needed. Prior to October 1, 1943, trainees received no pay or allowance of any kind; but, since that date, those who prove their competency and are listed as eligible for employment are given a retroactive allowance of $4 per day for their training period. *Held:*

1. Such a trainee is not an "employee" within the meaning of § 3 (e) of the Fair Labor Standards Act. Pp. 152–153.

2. Section 14, which authorizes the Wage and Hour Administrator to permit the employment of learners and apprentices at less than the minimum wage prescribed by the Act, is inapplicable to such trainees; since it relates only to learners who are in "employment" and carries no implication that all instructors must either get a permit or pay minimum wages to *all* learners. Pp. 151–152.

155 F. 2d 215, affirmed.

The Wage and Hour Administrator sued a railroad to enjoin alleged violations of §§ 15 (a) (2) and 15 (a) (5) of the Fair Labor Standards Act, 52 Stat. 1060. The District Court denied the injunction. 61 F. Supp. 345. The Circuit Court of Appeals affirmed. 155 F. 2d 215. This Court granted certiorari. 329 U. S. 696. *Affirmed,* p. 153.

William S. Tyson argued the cause for petitioner. With him on the brief were *Acting Solicitor General Washington, Stanley M. Silverberg* and *Morton Liftin.*

E. Spencer Miller argued the cause and filed a brief for respondent.

MR. JUSTICE BLACK delivered the opinion of the Court.

This is an action brought by petitioner against respondent in a Federal District Court to enjoin an alleged violation of §§ 15 (a) (2) and 15 (a) (5) of the Fair Labor Standards Act, 52 Stat. 1060, 1068, 29 U. S. C. §§ 215 (a) (2), (5) which requires as to the employees covered by the Act the maintenance of records concerning their wages and the payment to them of minimum wages. The District Court denied the injunction on the ground that the particular persons involved were not employees, 61 F. Supp. 345, and the Circuit Court of Appeals affirmed on the same ground, one judge dissenting. 155 F. 2d 215. See also *Walling* v. *Jacksonville Terminal Co.,* 148 F. 2d 768. Certiorari was granted because of the importance of the questions involved to the administration of the Act. 329 U. S. 696. The findings of fact by the District Court, approved by the Circuit Court of Appeals, and not challenged here, show:

For many years the respondent railroad has given a course of practical training to prospective yard brakemen. This training is a necessary requisite to entrusting them with the important work brakemen must do. An applicant for such jobs is never accepted until he has had this preliminary training, the average length of which is seven or eight days. If accepted for the training course, an applicant is turned over to a yard crew for instruction. Under this supervision, he first learns the routine activities by observation, and is then gradually permitted to do actual work under close scrutiny. His activities do

not displace any of the regular employees, who do most of the work themselves and must stand immediately by to supervise whatever the trainees do. The applicant's work does not expedite the company business, but may, and sometimes does, actually impede and retard it. If these trainees complete their course of instruction satisfactorily and are certified as competent, their names are included in a list from which the company can draw when their services are needed. Unless they complete the training and are certified as competent, they are not placed on the list. Those who are certified and not immediately put to work constitute a pool of qualified workmen available to the railroad when needed. Trainees received no pay or allowance of any kind prior to October 1, 1943. At that time, however, the respondent and the collective bargaining agent, the Brotherhood of Railroad Trainmen, agreed that, for the war period, men who proved their competency and were thereafter listed as accepted and available for work as brakemen should be given a retroactive allowance of $4 per day for their training period. The findings do not indicate that the railroad ever undertook to pay, or the trainees ever expected to receive, any remuneration for the training period other than the contingent allowance.

The Fair Labor Standards Act fixes the minimum wage that employers must pay all employees who work in activities covered by the Act. There is no question but that these trainees do work in the kind of activities covered by the Act. Consequently, if they are employees within the Act's meaning, their employment is governed by the minimum wage provisions. But in determining who are "employees" under the Act, common law employee categories or employer-employee classifications under other statutes are not of controlling significance. See *N. L. R. B.* v. *Hearst Publications,* 322 U. S. 111, 128–129. This Act contains its own definitions, comprehensive enough to require its application to many persons and working rela-

tionships which, prior to this Act, were not deemed to fall within an employer-employee category. See *United States* v. *Rosenwasser,* 323 U. S. 360, 362–363.

Without doubt the Act covers trainees, beginners, apprentices, or learners if they are employed to work for an employer for compensation. This is shown by § 14 of the Act which empowers the Administrator to grant special certificates for the employment of learners, apprentices and handicapped persons at less than the general minimum wage.* The language of this section and its legislative history reveal its purpose. Many persons suffer from such physical handicaps, and many others have so little experience in particular vocations that they are unable to get and hold jobs at standard wages. Consequently, to impose a minimum wage as to them might deprive them of all opportunity to secure work, thereby defeating one of the Act's purposes, which was to increase opportunities for gainful employment. On the other hand, to have written a blanket exemption of all of them from the Act's provisions might have left open a way for wholesale evasions. Flexibility of wage rates for them was therefore provided under the safeguard of administrative permits. This section plainly means that employers who hire beginners, learners, or handicapped persons,

*"The Administrator, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by regulations or by orders provide for (1) the employment of learners, of apprentices, and of messengers employed exclusively in delivering letters and messages, under special certificates issued pursuant to regulations of the Administrator, at such wages lower than the minimum wage applicable under section 6 and subject to such limitations as to time, number, proportion, and length of service as the Administrator shall prescribe, ..." § 14 (1) Fair Labor Standards Act, 52 Stat. 1060, 1068, 29 U. S. C. § 214 (1). See also § 13 (a) (7). § 14 (2) provides that handicapped persons may be employed at less than minimum wages where the Administrator permits. 52 Stat. 1060, 1068, 29 U. S. C. § 214 (2).

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and expressly or impliedly agree to pay them compensation, must pay them the prescribed minimum wage, unless a permit not to pay such minimum has been obtained from the Administrator. On the other hand, the section carries no implication that all instructors must either get a permit or pay minimum wages to *all* learners; the section only relates to learners who are in "employment." And the meaning of that term is found in other sections of the Act.

Section 3 (g) of the Act defines "employ" as including "to suffer or permit to work" and § 3 (e) defines "employee" as "any individual employed by an employer." The definition "suffer or permit to work" was obviously not intended to stamp all persons as employees who, without any express or implied compensation agreement, might work for their own advantage on the premises of another. Otherwise, all students would be employees of the school or college they attended, and as such entitled to receive minimum wages. So also, such a construction would sweep under the Act each person who, without promise or expectation of compensation, but solely for his personal purpose or pleasure, worked in activities carried on by other persons either for their pleasure or profit. But there is no indication from the legislation now before us that Congress intended to outlaw such relationships as these. The Act's purpose as to wages was to insure that every person whose employment contemplated compensation should not be compelled to sell his services for less than the prescribed minimum wage. The definitions of "employ" and of "employee" are broad enough to accomplish this. But, broad as they are, they cannot be interpreted so as to make a person whose work serves only his own interest an employee of another person who gives him aid and instruction. Had these trainees taken courses in railroading in a public or private vocational school, wholly

disassociated from the railroad, it could not reasonably be suggested that they were employees of the school within the meaning of the Act. Nor could they, in that situation, have been considered as employees of the railroad merely because the school's graduates would constitute a labor pool from which the railroad could later draw its employees. The Fair Labor Standards Act was not intended to penalize railroads for providing, free of charge, the same kind of instruction at a place and in a manner which would most greatly benefit the trainees.

Accepting the unchallenged findings here that the railroads receive no "immediate advantage" from any work done by the trainees, we hold that they are not employees within the Act's meaning. We have not ignored the argument that such a holding may open up a way for evasion of the law. But there are neither findings nor charges here that these arrangements were either conceived or carried out in such a way as to violate either the letter or the spirit of the minimum wage law. We therefore have no case before us in which an employer has evasively accepted the services of beginners at pay less that the legal minimum without having obtained permits from the Administrator. It will be time enough to pass upon such evasions when it is contended that they have occurred.

Affirmed.

MR. JUSTICE FRANKFURTER, concurring.

In this case, as well as in the companion case, No. 335, *post,* p. 158, we have a judgment of two courts based on findings with ample evidence to warrant such findings. It was solely on this ground that I agreed to affirmance in *Tennessee Coal Co.* v. *Muscoda Local,* 321 U. S. 590, and on this basis alone I think the judgments in both these cases, Nos. 335 and 336, should be affirmed.

MR. JUSTICE JACKSON, concurring.

I, too, would affirm this judgment. But my reason is not that stated in the Court's opinion.

I have never understood that the Fair Labor Standards Act was intended or fitted to regulate labor relations, except to substitute its own minimum wage rate for any that was substandard and an overtime rate for hours above the number it set. It, of course, like other statutes, can and should be applied to strike down sham and artifice invented to evade its commands.

But the complex labor relations of this country, which vary from locality to locality, from industry to industry, and perhaps even from unit to unit of the same industry, were left to be regulated by collective bargaining under the National Labor Relations Act. It would be easy to demonstrate from the Act's legislative history that such was the intention of Congress and that it had good grounds to believe this the tenor of the legislation. Organized employees on one side, free of employer domination or coercion, and employers on the other side best know the needs and customs of their trades; they know something of the strain their industry can stand; and after all, it is they who feel the effects. Given thus the machinery to change customs that had outlived their time or, in the alternative, to adjust wage rates to take account of those customs, it was, I think, our duty to pay at least some deference to the customs and contracts of an industry and not to apply the Fair Labor Standards Act to put industry and labor in a legal strait jacket of our own design.

From the beginning it was apparent that there were but two ways of giving real force and meaning to this Act without throwing all industry and labor into strife and litigation. One was to give decisiveness and integrity in borderline cases to collective bargaining. *Cf. J. I. Case Co.* v. *N. L. R. B.*, 321 U. S. 332; *Order of Railroad Telegraphers* v. *Railway Express Agency, Inc.*, 321 U. S. 342.

The other was to give strength and, where possible, decisiveness in doubtful cases to the studied rulings of the Administrator, as the Court also at moments seemed inclined to do. *Armour & Co.* v. *Wantock,* 323 U. S. 126; *Skidmore* v. *Swift & Co.,* 323 U. S. 134. Both of these considerations as bases for decision were thrown to the four winds in *Jewell Ridge Corp.* v. *United Mine Workers,* 325 U. S. 161.

This Court has foreclosed every means by which any claim, however dubious, under this statute or under the Court's elastic and somewhat unpredictable interpretations of it, can safely or finally be settled, except by litigation to final judgment. We have held the individual employee incompetent to compromise or release any part of whatever claim he may have. *Brooklyn Savings Bank* v. *O'Neil,* 324 U. S. 697; *cf. D. A. Schulte, Inc.* v. *Gangi,* 328 U. S. 108. Then we refused to follow the terms of agreements collectively bargained. *Jewell Ridge Corp.* v. *United Mine Workers,* 325 U. S. 161. No kind of agreement between the parties in interest settling borderline cases in a way satisfactory to themselves, however fairly arrived at, is today worth the paper it is written on. Interminable litigation, stimulated by a contingent reward to attorneys, is necessitated by the present state of the Court's decisions.

In the view that the judicial function should pay some deference to findings of fact as to customs of industry in applying this Act, I favored affirmance of the award to miners in the case of *Tennessee Coal Co.* v. *Muscoda Local,* 321 U. S. 590, because two lower courts had made findings of fact that under the contracts and conditions in those particular iron mines the employees were entitled to have counted as working time certain periods spent in travel. The judgment was supported, too, by the rulings of the Administrator. Those reasons were rejected by a majority of the Court which went on to lay down rules of decision which take no account of contract or custom.

Then came the case of *Jewell Ridge Corp.* v. *United Mine Workers,* 325 U. S. 161, in which the relationships were fixed by a deep-rooted custom in the industry of which both parties took account and embodied in collective bargaining agreements and which was reflected in the Administrator's rulings made at the request of the very union that was repudiating them. But a majority of the Court again rejected the contention that this Act was not intended to interfere with long-established customs which entered into collective wage agreements, and it reaffirmed a flat declaration as follows:

> "But in any event it is immaterial that there may have been a prior custom or contract not to consider certain work within the compass of the workweek or not to compensate employees for certain portions of their work. The Fair Labor Standards Act was not designed to codify or perpetuate those customs and contracts which allow an employer to claim all of an employee's time while compensating him only for a part of it. Congress intended, instead, to achieve a uniform national policy of guaranteeing compensation for all work or employment engaged in by employees covered by the Act. Any custom or contract falling short of that basic policy, like an agreement to pay less than the minimum wage requirements, cannot be utilized to deprive employees of their statutory rights." 325 U. S. at 167; *Tennessee Coal Co.* v. *Muscoda Local,* 321 U. S. 590, 602.

The same doctrine was then pressed into other fields of industry by the decision in *Anderson* v. *Mt. Clemens Pottery Co.,* 328 U. S. 680, which declared certain time spent on the premises of the Pottery Company must be compensated "regardless of contrary custom or contract." 328 U. S. at 692.

The Court evidently stands upon and reiterates the basic doctrine that the Act is one to regulate industry labor relations, for it says: "This Act contains its own definitions, comprehensive enough to require its application to many persons and working relationships, which prior to this Act, were not deemed to fall within an employer-employee category." [1]

The claimants now before us ask to participate in the judicial largess. They believe that they are entitled to be paid for the time that they spent on the railroad's premises, under the railroad's direction, performing railroad labor, in order to learn to qualify for railroad jobs when the railroad might need them. The Court does not even attempt to distinguish the foregoing cases on which their claim is based.

This case again requires us to make a choice between grounds of decision similar to the choice that was open to us in the cited cases and I think it is timely for the Court to reconsider its approach to cases under this Act. We may purport to find grounds for denying these claims in an interpretation of the Act, although Congress never intended to regulate the subject at all. Or we can use as valid ground for denying these claims the concurrent findings by two lower courts of a good faith understanding of the parties, following a long-established custom of an industry whose labor relations have long been subject to collective bargaining. I concur only on the latter ground.

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[1] I did not understand when I concurred in *United States* v. *Rosenwasser,* 323 U. S. 360, that it so held. It applied the Act to piecework employees. Piecework employment is a well-known form of employment that has existed perhaps as long as employment at a fixed hourly or daily wage. I understood, and still understand, the *Rosenwasser* case to hold only that this form of employment is not excluded from the terms of the Act.

WALLING, WAGE AND HOUR ADMINISTRATOR, *v.* NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY.

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

No. 335. Argued January 17, 1947.—Decided February 17, 1947.

1. The Wage and Hour Administrator sued to enjoin alleged violations of §§ 15 (a) (2) and 15 (a) (5) of the Fair Labor Standards Act, requiring that minimum wages be paid to employees covered by the Act and that appropriate records be kept concerning their employment and pay. The trial court found that, as to one group of alleged employees, the defendant railroad "for several years past has been complying with the Act as to them and apparently intends in good faith to do so in the future," and denied the injunction. That finding was not challenged here; and no argument was made here that it was not adequate to support denial of the relief granted. *Held:* Denial of the injunction as to this group is sustained. P. 159.
2. Under facts practically identical with those involved in *Walling* v. *Portland Terminal Co., ante,* p. 148, and for the reasons there stated, persons in training to become yard and main line firemen, brakemen, and switchmen for a railroad, *held* not to be "employees" within the meaning of § 3 (e) of the Fair Labor Standards Act. P. 160.

155 F. 2d 1016, affirmed.

The Wage and Hour Administrator sued to enjoin alleged violations of §§ 15 (a) (2) and 15 (a) (5) of the Fair Labor Standards Act, 52 Stat. 1060, 1068. The District Court denied the injunction. 60 F. Supp. 1004. The Circuit Court of Appeals affirmed. 155 F. 2d 1016. This Court granted certiorari. 329 U. S. 696. *Affirmed,* p. 160.

William S. Tyson argued the cause for petitioner. With him on the brief were *Acting Solicitor General Washington, Stanley M. Silverberg* and *Morton Liftin.*

Walton Whitwell argued the cause for respondent. With him on the brief were *Edwin F. Hunt* and *Wm. H. Swiggart.*

Lester P. Schoene filed a brief for the Railway Labor Executives' Association, as *amicus curiae,* in support of petitioner.

MR. JUSTICE BLACK delivered the opinion of the Court.

The petitioner, Administrator of the Wage and Hour Division, United States Department of Labor, filed this action in a Federal District Court to enjoin alleged violations by the respondent railroad of §§ 15 (a) (2) and 15 (a) (5) of the Fair Labor Standards Act. 52 Stat. 1060, 1068. These sections require that minimum wages be paid to employees covered by the Act and that appropriate records be kept concerning their employment and pay. The railroad was charged with having violated the Act with regard to two types of alleged employees: First, persons in training to become yard and main line firemen, brakemen, and switchmen; second, others in training to become clerks, stenographers, callers, messengers, and other similar general miscellaneous workers. The District Court held that the first group were not "employees" and therefore were not covered by the Act. On this ground alone the injunction was denied as to them. It also denied relief as to the second group, clerks, etc., partly on this same ground. Another ground for denying relief as to the second group was the court's finding that the railroad "for several years past has been complying with the Act as to them, and apparently intends in good faith to do so in the future." 60 F. Supp. 1004, 1007–1008. The Circuit Court of Appeals affirmed. 155 F. 2d 1016, one judge dissenting. We granted certiorari because of the importance of the questions decided. 329 U. S. 696.

The finding of the District Court that the railroad had been complying with the Act in good faith in its business relations with the trainee clerks, stenographers, etc. is not challenged. No argument is here made that this is not adequate support for denial of the relief granted as to

this second group. Under these circumstances, we affirm the court's action in denying an injunction to enjoin violations of the Act as to these trainees. We therefore do not reach the question as to whether this group as a whole or any of the persons in it were or were not employees under the Act.

The sole ground for denying relief as to the persons training to become firemen, brakemen, and switchmen was that they were not employees. The findings of fact here as to the training of these trainees are in all relevant respects practically identical with the findings of fact in *Walling* v. *Portland Terminal Co.*, this day decided, *ante*, p. 148. These findings of fact are not challenged. For the reasons set out in that opinion we hold that the Circuit Court of Appeals was not in error in holding that the persons receiving training in order to become qualified for employment as firemen, brakemen, and switchmen, are not employees within the meaning of the Fair Labor Standards Act.

Affirmed.

BOZZA *v.* UNITED STATES.

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

No. 190. Argued January 7, 1947.—Decided February 17, 1947.

1. In a trial on an indictment for making and fermenting mash for the production of alcohol in violation of 26 U. S. C. § 2834, the evidence showed that *C* alone handled and mixed the ingredients of the mash and there was no evidence to indicate that *B* ever took any part in, or aided and abetted, this particular part of the process of operating an illicit distillery or that he was ever in the part of the premises where the ingredients were stored and the mash was made, although he helped to operate the still in a different part of the premises and to transport the product. *Held:* The Government's concession that the evidence was insufficient to sustain a conviction of *B* is accepted. P. 163.

2. In a trial on an indictment for having possession and custody of an illicit still in violation of 26 U. S. C. § 2810 (a), the evidence showed that the defendant helped to operate the still; but there was no evidence showing that he ever exercised any control over the still, aided in the exercise of any such control, or acted as a caretaker, watchman, lookout or in any similar capacity calculated to facilitate its custody or possession. *Held:* The Government's concession that the evidence was insufficient to sustain his conviction is accepted. Pp. 163–164.
3. In a trial on an indictment for operating "the business of distiller . . . with intent wilfully to defraud" the Government of taxes in violation of 26 U. S. C. § 2833 (a), the evidence showed that *C* secretly carried on the business of a distiller in an apparently abandoned farmhouse, that *B* assisted him, and that the products were transported to a city in a car which followed another car, sometimes *B's*. *Held:* The evidence was sufficient to sustain *B's* conviction. Pp. 164–165.

   (a) Under 18 U. S. C. § 550, one who aids and abets another to commit a crime is guilty as a principal. P. 164.

   (b) The jury could properly infer that one helping to operate a secret distillery in the manner here shown knew that it was operated with intent to defraud the Government of its taxes. Pp. 164–165.
4. Having been convicted of a crime carrying a mandatory minimum sentence of fine *and* imprisonment, defendant was sentenced to imprisonment only and placed in temporary detention awaiting transportation to a penitentiary. Five hours later, the judge recalled him, called attention to the mandatory provision for fine *and* imprisonment, and sentenced him to both. *Held:* This did not constitute double jeopardy contrary to the Constitution. Pp. 165–167.

155 F. 2d 592, affirmed in part and reversed in part.

Petitioner was convicted on five counts of an indictment for violating the Internal Revenue Laws in connection with the operation of a still. The Circuit Court of Appeals reversed on two counts and affirmed on three counts. 155 F. 2d 592. This Court granted certiorari. 329 U. S. 698. *Reversed* on two counts and *affirmed* on one count, p. 167.

Harold Simandl submitted on brief for petitioner.

W. Marvin Smith argued the cause for the United States. With him on the brief were *Acting Solicitor General Washington, Robert S. Erdahl* and *Philip R. Monahan.*

MR. JUSTICE BLACK delivered the opinion of the Court.

The petitioner and one Chirichillo were convicted in a Federal District Court on all counts of a five-count indictment against them which charged violation of the Internal Revenue laws in connection with the operation of a still. The Court of Appeals reversed petitioner's conviction on counts four and five because of insufficient evidence, but affirmed as to counts one, two, and three. 155 F. 2d 592. We granted certiorari. 329 U. S. 698. Count one charged that the defendants had carried on "the business of distiller . . . with intent wilfully to defraud the . . . United States of the tax on . . . spirits so distilled . . . ." in violation of 26 U. S. C. § 2833 (a). Count two charged them with having had possession and custody of the still in violation of 26 U. S. C. § 2810 (a). Count three charged that they had made and fermented mash for the production of alcohol in violation of 26 U. S. C. § 2834. It is argued that the evidence was insufficient to support any of the three counts here at issue. The Government concedes its insufficiency as to counts two and three.

There was testimony to show the following: Chirichillo rented a farmhouse under an assumed name and installed a 300-gallon still with all equipment necessary to ferment mash and distill alcohol. The still was operated day and night. Chirichillo himself mixed the ingredients to make the mash in the attic of the 2½-story frame building, but the alcohol distillation was carried on in another part of the building. Petitioner was at the house two or three times a week. When there he took instructions from

Chirichillo and helped him in the operation of the still; he helped manufacture the alcohol. When Chirichillo carried his products to Newark, the car in which he carried the illicitly distilled alcohol would follow along behind another car—sometimes petitioner's, sometimes another helper's. The farmhouse where the illicit business was carried on appeared from the outside to be deserted; the windows were without shades and the house had been practically stripped of furniture.

We accept the Government's concession that the evidence fails to show that this petitioner had made, or helped to make, the mash as charged in count three. All of the evidence showed that Chirichillo alone handled and mixed the ingredients of the mash, and there is nothing whatever to indicate that the petitioner ever took any part in, or aided and abetted, this particular part of the unlawful process in any manner, or, indeed, that he was ever in or around the attic where the mash was made from ingredients stored there. The Internal Revenue statutes have broken down the various steps and phases of a continuous illicit distilling business and made each of them a separate offense. Thus, these statutes have clearly carved out the conduct of making mash as a separate offense, thereby distinguishing it from the other offenses involving other steps and phases of the distilling business. Consequently, testimony to prove this separate offense of making mash must point directly to conduct within the narrow margins which the statute alone defines. One who neither engages in the conduct specifically prohibited, nor aids and abets it, does not violate the section which prohibits it.

The sufficiency of the evidence as to count two which charged that the petitioner had custody or possession of the still is a closer question. It might be possible that petitioner's helping to make the alcohol aided and abetted in its "custody or possession." But that would be a very strained inference under any circumstances. Here again

the statutes treat custody or possession as a wholly distinct offense. Yet there was no testimony that the petitioner ever exercised, or aided the exercise of, any control over the distillery. His participation in carrying the finished product by car does not fit the category of "custody and possession" so nearly as it resembles the transportation of illegal liquor, 26 U. S. C. § 2803—an offense which the Circuit Court of Appeals has found the evidence insufficient to prove. Nor was there any testimony that the petitioner acted in any other capacity calculated to facilitate the custody or possession, such as, for illustration, service as a caretaker, watchman, lookout, or in some other similar capacity. Under these circumstances, we accept the Government's concession that a judgment of guilty should not have been rendered on the second count.

We think there was adequate evidence to support a finding of guilt on the first count which charged operation of the business of distilling to defraud the Government of taxes. There was certainly ample evidence to show that Chirichillo carried on the business of a distiller and that the petitioner helped him to do it. 18 U. S. C. § 550 provides that one who aids and abets another to commit a crime is guilty as a principal. Consequently, the jury had a right to find, as it did, that the petitioner and Chirichillo were equally guilty of operating the business of the distillery. See *United States* v. *Johnson,* 319 U. S. 503, 515, 518.

But, it is argued, there was no evidence that the petitioner acted with knowledge that the distillery business was carried on with an intent to defraud the Government of its taxes. The same evidence as to knowledge of this guilty purpose, however, that applied to Chirichillo was almost, if not quite, equally persuasive against both defendants. Petitioner assisted in the manufacture of alcohol in Chirichillo's still which was operated under con-

ditions of secretiveness in an apparently abandoned farmhouse. The finished alcohol was carried to Newark in a car which followed another car, sometimes the petitioner's. The members of the jury could properly draw on their own experience and observations that lawful stills, unlike the still in which petitioner worked, usually are not operated clandestinely and do not deliver their products in the fashion employed here. The members of the jury were not precluded from drawing inferences as to fraudulent purposes from these circumstances, nor were they compelled to believe that this petitioner was oblivious of the purposes of what went on around him. Men in the jury box, like men on the street, can conclude that a person who actively helps to operate a secret distillery knows that he is helping to violate Government revenue laws. That is a well known object of an illicit distillery. Doubtless few who ever worked in such a place, or even heard about one, would fail to understand the cry: "The Revenuers are coming!" We hold that the verdict of guilty on the first count must stand.

The only statute for violation of which petitioner's conviction is sustained by us carries a minimum mandatory sentence of fine of one hundred dollars *and* imprisonment, 26 U. S. C. § 2833 (a). In announcing sentence at a morning session, the trial judge mentioned imprisonment only. Thereafter the petitioner was taken briefly to the U. S. Marshal's office and then to a local federal detention jail awaiting transportation to the penitentiary where he was finally to be confined. But about five hours after the sentence was announced, the judge recalled the petitioner and, according to stipulation, stated in the presence of petitioner and his counsel that "in the imposition of sentence this morning . . . it has been called to my attention that there are certain mandatory fines and penalties which I omitted to impose. For the record now minimum mandatory fines and penalties will be imposed." Thus a one

hundred dollar fine was fixed, as required by law, along with the imprisonment sentence. Petitioner charges that this action constituted double jeopardy forbidden by the Federal Constitution.

It is well established that a sentence which does not comply with the letter of the criminal statute which authorizes it is so erroneous that it may be set aside on appeal, *Reynolds* v. *United States,* 98 U. S. 145, 168–169; *Murphy* v. *Massachusetts,* 177 U. S. 155, 157, or in habeas corpus proceedings. *In re Bonner,* 151 U. S. 242. But in those cases it was recognized that an excessive sentence should be corrected, even though the prisoner had already served part of his term, not by absolute discharge of the prisoner, but by an appropriate amendment of the invalid sentence by the court of original jurisdiction, at least during the term of court in which the invalid sentence was imposed.[1] *Cf. De Benque* v. *United States,* 66 App. D. C. 36, 85 F. 2d 202. In the light of these cases, the fact that petitioner has been twice before the judge for sentencing and in a federal place of detention during the five-hour interim cannot be said to constitute double jeopardy as we have heretofore considered it. Petitioner contends, however, that these cases are inapplicable here because correction of this sentence so as to make it lawful increases his punishment. *Cf. United States* v. *Benz,* 282 U. S. 304, 309. If this inadvertent error cannot be corrected in the manner used here by the trial court, no valid and enforceable sentence can be imposed at all. *Cf. Jordan* v. *United States,* 60 F. 2d 4, 6, with *Barrow* v. *United States,* 54 App. D. C. 128, 295 F. 949. This Court has rejected the "doctrine that a prisoner, whose guilt is established, by a regular verdict, is to escape punishment altogether, because the court committed an error in passing the sentence." *In re Bonner, supra* at 260. The Constitution does not require that sentencing should be a game

[1] Compare Rule 45c, Federal Rules of Criminal Procedure.

in which a wrong move by the judge means immunity for the prisoner. See *King* v. *United States,* 69 App. D. C. 10, 15, 98 F. 2d 291, 296. In this case the court "only set aside what it had no authority to do and substitute[d] directions required by the law to be done upon the conviction of the offender." *In re Bonner, supra* at 260. It did not twice put petitioner in jeopardy for the same offense.[2] The sentence, as corrected, imposes a valid punishment for an offense instead of an invalid punishment for that offense.

Other contentions here do not merit our discussion. The judgment as to count one is affirmed. The judgment is reversed as to counts two and three.

It is so ordered.

MR. JUSTICE DOUGLAS, MR. JUSTICE MURPHY, and MR. JUSTICE RUTLEDGE dissenting as to the affirmance of the judgment on count one.

We are of the view that to convict one as an aider and abetter in engaging in or carrying on a distillery business with intent "to defraud" the United States of the tax on the distilled spirits, 53 Stat. 319, 26 U. S. C. § 2833 (a), evidence is necessary which shows that by some act of concealment he promoted the fraud, or by counsel and advice furthered the unlawful scheme, or in fact had

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[2] In *Ex parte Lange,* 18 Wall. 163, relied on by petitioner here, the defendant had been sentenced to fine *and* imprisonment for violation of a statute which authorized a sentence only of fine *or* imprisonment. Since he had paid his fine and therefore suffered punishment under a valid sentence, it was held that his sentence had been "executed by full satisfaction of one of the alternative penalties of the law . . . ." *Murphy* v. *Massachusetts, supra* at 160. Therefore, Lange's plea, that the trial court could not correct the sentence without causing him to suffer double punishment, was sustained. *Cf. In re Bradley,* 318 U. S. 50. But here the petitioner had not suffered any lawful punishment until the court had announced the full mandatory sentence of imprisonment *and* fine.

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some interest in the project.[1] See *United States* v. *Cooper,* 25 Fed. Cas. 627, 629; *United States* v. *Logan,* 26 Fed. Cas. 990, 992; *Seiden* v. *United States,* 16 F. 2d 197, 199; *Partson* v. *United States,* 20 F. 2d 127, 129; *Anderson* v. *United States,* 30 F. 2d 485, 487. Aiding and abetting in the illicit manufacture of liquor is one thing.[2] Aiding and abetting in carrying on the business with intent to defraud the United States of a tax is quite a different matter, and requires a different test, if the two offenses are not to be blended. The evidence in the case and the instructions given the jury[3] seem to us inadequate to sustain a con-

[1] Judge Learned Hand, after reviewing the various definitions of aiding and abetting, said: "It will be observed that all these definitions have nothing whatever to do with the probability that the forbidden result would follow upon the accessory's conduct; and that they all demand that he in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed. All the words used—even the most colorless, 'abet'—carry an implication of purposive attitude towards it." *United States* v. *Peoni,* 100 F. 2d 401, 402.

[2] Thus § 2833 (a) makes it an offense to "carry on the business of a distiller without having given bond as required by law." Section 2834 makes it unlawful to make or ferment mash, fit for distillation, in any building or on any premises other than an authorized distillery.

[3] ". . . if you find that he was merely an underling, serving at the beck and call of an employer and nothing more than [sic] that would not justify your finding him to be engaged in the business of a distiller. But if from the evidence you conclude logically that he aided and abetted in the carrying on of this business, then he would be chargeable as a principal. . . . Aiding and abetting is something more than merely committing an act which may have the effect of assisting or furthering a criminal transaction. Before a defendant can be held as an aider and abetter the government must prove beyond a reasonable doubt that he committed an act which furthered or assisted the criminal transaction, and at the time he committed the act he knew that a crime was in process of commission, and with that knowledge he acted with intent to aid and abet in the criminal transaction." While the above charges were requested by defendant, we nevertheless feel that the failure of the instructions to satisfy the standard we suggest is an error which we should notice. *Sibbach* v. *Wilson & Co.,* 312 U. S. 1, 16.

viction under count one, charging Bozza with aiding and abetting in a tax fraud scheme.

In view of this conclusion, MR. JUSTICE RUTLEDGE reserves expression of opinion concerning the legality of the sentence.

CONFEDERATED BANDS OF UTE INDIANS *v.* UNITED STATES.

CERTIORARI TO THE COURT OF CLAIMS.

No. 141. Argued January 14, 15, 1947.—Decided February 17, 1947.

By a treaty of 1868 between the United States and the Ute Indians, a reservation was established for the Indians in Colorado. Subsequently, an erroneous survey showed the northern boundary to be south of the true boundary and as excluding the White River Valley lands which actually were in the reservation. Believing the survey to be accurate and desiring to preserve these lands for the use of the Indians, the President, by an Executive Order of 1875, withdrew from sale and "set apart for the use of the . . . Ute Indians, as an addition to the present reservation in said Territory" a strip of land north "of the present Ute Indian Reservation." Later, in order to punish the Indians for a massacre, dispossess them of the reservation, and remove them from Colorado, Congress passed the Act of June 15, 1880, 21 Stat. 199, which ratified and embodied an agreement by their leaders to cede to the United States all territory of "the present Ute Reservation," and provided that all lands so ceded and not allotted specifically to individual Indians would be restored to the public domain for sale as public lands and that, subject to certain conditions, the proceeds of their sale should be distributed to the Indians. An Executive Order of 1882 declared that the lands "set apart for the use of the . . . Ute Indians" by the Executive Order of 1875 is "hereby restored to the public domain." The Indians brought this suit under the Act of June 28, 1938, 52 Stat. 1209, as amended, 55 Stat. 593, to obtain compensation for the lands north of the original reservation made available to them by the Executive Order of 1875. *Held:*

1. Insofar as the claim rests on the Executive Order of 1875, it cannot be sustained. P. 176.

(a) The President had no authority to convey to the Indians a compensable interest in the lands lying north of the true boundary of the reservation created by the treaty of 1868. Pp. 176, 180.

(b) The Executive Order of 1875 made the Indians no more than tenants at will of the Government on that part of the land outside the true treaty reservation. P. 176.

(c) The real purpose of the Executive Order was to protect the Indians' enjoyment of the White River Valley lands conveyed to them by the original treaty; and this purpose has been accomplished. Pp. 177, 180.

2. The Act of June 15, 1880, gives the Indians no right to recover for the land north of the true boundary of the treaty reservation set apart for their use by the Executive Order of 1875. Pp. 177–180.

(a) It contains nothing showing a congressional purpose to convey such lands to the Indians. P. 177.

(b) Nor was it intended to transform the Executive Order into a conveyance of a compensable interest in lands not included in the original treaty reservation. Pp. 178, 180.

(c) It was intended to compensate them only for the lands in the original reservation which they ceded to the United States. P. 178.

(d) The fact that it provided for the cession of the "present Ute Reservation" is not sufficient to attribute to Congress a purpose to treat as part of that reservation lands which never had been legally conveyed to the Indians and had only been made available to them for the sole purpose of making them secure in their possession of the White River Valley. Pp. 178–179.

3. Even if the Indians understood in 1880 that they owned the lands described in the Executive Order of 1875 lying north of the White River Valley, that their "present Ute Reservation" included them, and that Congress undertook by the 1880 Act to sell these lands for their benefit, and, even if Congress was aware of this understanding, this would not require a different result, in view of the fact that the Act neither conveyed nor ratified conveyance of these lands. P. 179.

4. While a treaty with Indians is to be construed so as to carry out the Government's obligations in accordance with the fair understanding of the Indians, this Court cannot, under the guise of interpretation, create presidential authority where there was none or rewrite congressional acts so as to make them mean something they obviously were not intended to mean. P. 179.

106 Ct. Cl. 33, 64 F. Supp. 569, affirmed.

In a suit by the Ute Indians under the Act of June 28, 1938, 52 Stat. 1209, as amended, 55 Stat. 593, to recover compensation for lands made available to them by an 1875 Executive Order of the President and subsequently taken from them by the United States, the Court of Claims held that they had no compensable interest in such lands. 106 Ct. Cl. 33, 64 F. Supp. 569. This Court granted certiorari. 329 U. S. 694. *Affirmed,* p. 180.

Ernest L. Wilkinson argued the cause for petitioners. With him on the brief were *John W. Cragun, Francis M. Goodwin* and *Glen A. Wilkinson.*

Marvin J. Sonosky argued the cause for the United States. With him on the brief were *Acting Solicitor General Washington, Assistant Attorney General Bazelon, Roger P. Marquis* and *Fred W. Smith.*

Mr. Justice Black delivered the opinion of the Court.

Petitioners brought this action in the Court of Claims under the Act of June 28, 1938, 52 Stat. 1209, as amended, 55 Stat. 593, to recover compensation for lands made available to them by an 1875 Executive Order of the President and subsequently taken from them by the United States. Their claim was that by an Act of 1880, Congress had undertaken to sell these lands for the benefit of the petitioners, but that they had never been compensated for them. The Court of Claims, one judge concurring specially, made findings of fact and concluded as a matter of law that petitioners had no compensable interest in the lands because they "never did acquire title to these . . . lands and . . . the Congress never did agree to sell them for the account of" petitioners. 106 Ct. Cl. 33, 51, 64 F. Supp. 569, 571. We granted certiorari, 329 U. S. 694.

The findings of the Court of Claims from official letters, Executive Orders and statutes incorporated in these findings were as follows:

A treaty of 1868, 15 Stat. 619, between the United States and petitioners' ancestors, the Ute Indian tribes, established a reservation for them in Colorado. The northern boundary of the 15 million acres there ceded was described in the treaty as a line fifteen miles north of, and parallel to, the 40th parallel of north latitude. In the 15-mile wide strip north of the 40th parallel lay the White River Valley which had been settled by the Utes as a most suitable place for grazing and cultivation. One of the two Government Indian agencies provided for the reservation by the treaty was established in that strip.

As a result of misunderstandings in 1869 and 1874 between the Utes and white settlers to the north as to the true location of the northern treaty boundary, a survey was made in 1875 by one Miller. Miller's instructions, however, required him to stake out a line which he admitted to the local Indian agent and to the Utes themselves to be fifteen to eighteen miles south of the true boundary described in the treaty. If Miller's line had been correct, it would have excluded from the 1868 reservation the fertile White River Valley, and would have also excluded the agency buildings which had been erected there.

The marking out of the erroneous Miller line greatly upset the Indians because they feared they would be driven from the White River Valley. This embarrassed the local Indian agent who had previously assured the Indians that the White River Valley lay within their reservation. He promptly reported the results of the survey and the reaction of the Indians to the Commissioner of Indian Affairs in Washington, and urged the necessity of a new survey at the earliest practicable date. He stated that if the Miller survey were correct, however, the Indians would be driven from the White River Valley—"the only farming land and . . . stock range . . . in this portion of the Reservation"—and forced to settle on

a river forty miles to the south. The Commissioner, acting on this report and a statement by Miller's attorney that Miller's line was correct, wrote to the Secretary of the Interior that the Miller survey "develops the fact that the White River and surrounding valleys as well as the Agency buildings and improvements at the White River Agency lie north of the . . . boundary and consequently are not within the limits of the . . . Ute Reservation." He therefore recommended to the Secretary that the President be requested to issue an Executive Order to make available to the Utes additional territory north of the 1868 treaty boundary. The President, on the recommendation of the Secretary of the Interior, issued the order.[1] And thereafter the Commissioner wrote the local agent that the order included "all that tract of country lying between the north boundary of the Ute reservation as defined in treaty of March 2, 1868 . . . which was the boundary surveyed by Mr. Miller . . . This action fully protects your Indians in the peaceable possession of their improvements in the White River valley and the Agency buildings, and will enable you to assure the Indians of the exact location of the limits of their reservation as enlarged."

[1] The Executive Order of November 22, 1875, 1 Kappler, Indian Affairs, Laws and Treaties, 834 (1904) is as follows:

"It is hereby ordered that the tract of country in the Territory of Colorado lying within the following-described boundaries, viz: Commencing at the northeast corner of the present Ute Indian Reservation, as defined in the treaty of March 2, 1868 (Stats. at Large, vol. 15, p. 619); thence running north on the 107th degree of longitude to the first standard parallel north; thence west on said first standard parallel to the boundary line between Colorado and Utah; thence south with said boundary to the northwest corner of the Ute Indian Reservation; thence east with the north boundary of the said reservation to the place of beginning, be, and the same hereby is, withdrawn from sale and set apart for the use of the several tribes of Ute Indians, as an addition to the present reservation in said Territory."

In 1879, several years after the Executive Order was issued, hostilities broke out between some of the Utes and Government representatives in which the Indian agent at White River, all the agency's male employees, and a U. S. military detachment were killed in the so-called "Meeker massacre." H. R. Ex. Doc. No. 1, pt. 5, 46th Cong., 2d Sess. (1879) 16–19, 82–97. There have been charges and countercharges as to who was responsible for inciting these hostilities. Whoever was responsible, it is clear that Congress, aroused by the massacre, took steps to punish the Indians who participated in it, to dispossess the Utes of their reservation, and to remove them from Colorado. Congressional action to accomplish this was provided by the Act of June 15, 1880, 21 Stat. 199, which ratified and embodied an agreement reached earlier that year between the Government and the leaders of the Utes who had promised "to use their best endeavors with their people to procure their consent to cede to the United States all the territory of the present Ute Reservation . . . ." This Act authorized specific allotments to individual Indians from the lands so ceded. But § 3 provided that "all the lands not . . . allotted, the title to which is, by the said agreement of . . . the Ute Indians, and this acceptance by the United States, released and conveyed to the United States . . ." would be restored to the public domain for sale as public lands. The proceeds of the sale of the land so conveyed by the Utes to the United States were, upon satisfaction of indemnity conditions imposed because of the massacre, to be distributed to the Indians. Thereafter, in 1882, an Executive Order declared that the lands withdrawn from the public domain by the Executive Order of 1875 and "set apart for the use of the . . . Ute Indians . . . hereby is, restored to the public domain." 1 Kappler, *supra,* 834–835.

Pursuant to an Act of 1909, 35 Stat. 781, petitioners recovered a judgment for the proceeds of certain lands sold

by the Government, as well as the value of certain lands appropriated by the Government to its own use, all of which were part of the 1868 treaty lands. *Ute Indians* v. *United States,* 45 Ct. Cl. 440, 46 Ct. Cl. 225. Thus, except for certain treaty lands not at issue here, litigation concerning which is now pending in the Court of Claims, the only lands in Colorado for which the Indians have not been paid are those to the north of and outside the 1868 treaty reservation which were made available to them by the Executive Order of 1875. In pursuit of compensation for these Executive Order lands, petitioners have brought this action pursuant to the Act of June 28, 1938, *supra.* That Act confers jurisdiction on the Court of Claims to hear, determine, and render final judgment on all legal and equitable claims of the Utes and to award judgment for the Indians where it is found "that any lands formerly belonging" to them "have been taken by the United States without compensation . . . ."

Petitioners contend here that their predecessors understood that they not only owned the White River Valley lands, but that they also owned the Executive Order lands when, in 1880, they agreed to cede their reservation; and that Congress, by incorporating the agreement in the 1880 Act, thereby ratified it along with the Indians' understanding of it. Petitioners further contend that whether or not Congress intended to obligate the Government to account for the Executive Order lands, they knew of the Indians' understanding so that "the understanding of the Indians having been established," their understanding entitles them to recover. Finally they argue that the Executive Order, unlike the one in issue in *Sioux Tribe of Indians* v. *United States,* 316 U. S. 317, conveyed a compensable interest to these Indians. The Government counters that the President had no power to give a compensable interest to the Indians to lands lying outside the true 1868 treaty boundaries; that if the President intended

to make available lands outside the true boundary it was only to give a transitory, possessory, and not a compensable, interest; that his intent was, in fact, only to secure the Indians in their possession of the White River Valley, but no more, on the mistaken assumption that the White River Valley had been cut off from the reservation by the Miller survey; that the 1880 Act, neither by its terms, its legislative history, nor its administrative interpretation, suggests that Congress intended to ratify or expand the Executive Order or to compensate the Indians for the Executive Order lands; that the Indians did not have a contrary understanding; that in the face of such clear legislative language and intent, a contrary understanding of the Indians, even if established, could not justify a holding that the Indians obtained a compensable interest.

It is conceded that the petitioners have either been, or are currently pressing litigation in the Court of Claims by which they seek to be, compensated for the White River Valley lands, and, in fact, for all of the land which was contained in the true boundaries of the 1868 reservation. The additional claim, insofar as it rests on the Executive Order of 1875, cannot be sustained. For the President had no authority to convey to the petitioners a compensable interest in the lands described in the order lying north of the true 1868 boundary. *Sioux Tribe of Indians* v. *United States, supra.*[2] Nor is there any indication in the findings that the President intended to convey more than a transitory, possessory interest by the 1875 Order. That order made the Indians no more than tenants at the will of the Government on that part of the land outside the true treaty reservation. *Id.* at 331. Moreover, the Court of Claims' findings of fact, as emphasized

[2] *Cf.* Executive Order of August 17, 1876, which interpreted a treaty so as to "set apart [certain land] as a part of the Ute Indian Reservation, in accordance with the first article of an agreement made with said Indians and ratified by Congress . . . ." 1 Kappler, *supra,* 834.

by the special concurring opinion, indicate that the Executive Order was promulgated under the mistaken belief that its issuance was necessary in order to give the Indians the use of the White River Valley lands intended to be granted to them by the 1868 treaty and from which they might otherwise have been excluded by the Miller survey. These findings do not indicate that the Commissioner, the Secretary, or the President intended the order to make available the lands it in fact described lying north of the true treaty boundary. The order was designed only to resolve the misunderstanding created by Miller about the White River Valley lands.[3] The fullest possible purpose of the Executive Order has actually been carried out. For the Indians' enjoyment of the White River lands was protected during their stay on the reservation, and the lands have either already been paid for, or are the subject of pending litigation in the Court of Claims whereby the Indians seek payment for them. It is with these things in mind that we must consider petitioners' contention that they have a right to recover compensation because of the 1880 Act.

There is not one word in that Act showing a congressional purpose to convey the Executive Order lands, or any other lands, to the Indians. On the contrary, the Act embodied a transaction whereby the Indians were the transferors and conveyed lands to the Government. For the value of lands so conveyed, and for no other, the Government was to make an account to the Indians after certain deductions had been made.

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[3] The Court of Claims did not find this as an ultimate fact. But the correspondence which plainly shows it was incorporated in the findings. This Court has said with reference to findings of the Court of Claims that the "absence of the finding of an ultimate fact does not require a reversal of the judgment if the circumstantial facts as found are such that the ultimate fact follows from them as a necessary inference." *United States* v. *Wells*, 283 U. S. 102, 120.

Nor is it possible to deduce from the 1880 Act a congressional purpose to transform the Executive Order into a conveyance of something more than a mere temporary and cancellable possessory right to the Indians. Neither the language of the 1880 Act, its legislative history, nor the circumstances which brought it about, justify the claim that Congress intended to expand the Executive Order into a transfer of a compensable interest in lands not included in the original treaty reservation. The Act was an aftermath of the "Meeker massacre." With the massacre in mind, Congress decided to remove the Indians from the Colorado reservation as part of the punishment meted out for this tragedy.[4] The very first section of the 1880 Act prohibited any payments at all to the Indians until the Indians involved had surrendered, been apprehended, or until the President had proof that they were dead or outside the United States. Compensation for the families of the massacre victims was to be deducted from the land sale proceeds payable to the Indians. We cannot find from this background a congressional purpose to make a gift to the Indians of the Executive Order lands for which compensation is here sought. The only lands for which Congress agreed in 1880 to compensate the Indians were those "the title to which" the Indians then "released and conveyed to the United States." They could only release and convey the lands that belonged to them, and only the lands given to them by the original 1868 treaty belonged to them. It was for compensation for such lands only that Congress, in 1938, authorized this action to be maintained. Under all these circumstances, the fact that the 1880 Act required the chiefs and headmen to procure the consent of their people to the cession of "the present Ute Reservation" is not sufficient to attribute to Congress

[4] See S. 772 and S. Res. 51, 10 Cong. Rec. pt. 1 (1879) 30, 77; H. R. 142, 10 Cong. Rec. 44; H. R. 2420, 10 Cong. Rec. 17; H. R. 154, 10 Cong. Rec. 113; H. R. 5092, 10 Cong. Rec. pt. 2 (1880) 1538.

a purpose to treat as a part of that reservation lands which had never been legally conveyed to the Indians and which had only been made available to them by the Executive Order for the sole purpose of making them secure in their possession of the White River Valley.

It is said, however, that the Indians understood in 1880 that they owned the Executive Order lands which lay north of the White River Valley; that they understood their "present Ute Reservation" to include them; that they understood that Congress undertook by the 1880 Act to sell the lands for their benefit; and that Congress was aware of this understanding. The majority opinion of the Court of Claims stated that "in all probability" this was true. The writer of the concurring opinion thought differently. But even if the Indians had believed that they had a compensable interest in the Executive Order lands, this fact would not necessarily have given it to them. Certainly the absence of presidential authority to give them a compensable title could not be supplied by the Indians' understanding that the President had such authority. The Sioux Indians may also have thought the President had authority to convey title to them; but the reasons on which our decision in the *Sioux* case, *supra,* rested do not indicate that our holding depended in any way upon the understanding of the Indians. Nor can this alleged understanding be imputed to Congress in the face of plain language and a rather full legislative history indicating that the 1880 Act neither conveyed nor ratified conveyance of these lands. While it has long been the rule that a treaty with Indians is to be construed so as to carry out the Government's obligations in accordance with the fair understanding of the Indians, we cannot, under the guise of interpretation, create presidential authority where there was none, nor rewrite congressional acts so as to make them mean something they obviously were not intended to mean. *Choctaw Nation* v. *United*

States, 318 U. S. 423, 431–432. We cannot, under any acceptable rule of interpretation, hold that the Indians owned the lands merely because they thought so. Solicitous as the Government is to carry out its promises to the Indians in good faith, we are satisfied from this record that the Government has performed all that it promised.

As we have pointed out, it seems obvious to us from the findings of the Court of Claims that the Executive Order was only intended to secure for these Indians' ancestors possession of the White River Valley lands conveyed to them by the original 1868 treaty, and which was jeopardized by the Miller survey.[5] In fact, the President had no authority to convey a compensable interest in these or other lands to the Utes. Fairly to carry out the 1868 treaty was the order's aim. The 1880 Act, we believe, did not enlarge upon the limited purpose of the Executive Order. To compensate these Indians for lands not intended to be conveyed by the 1868 treaty, the Executive Order, nor the 1880 Act, would be to pay them for lands which neither they nor their ancestors ever owned and to which they had no claim in equity or justice, so far as the transactions here at issue are concerned. No rule of construction justifies such a result.

Affirmed.

MR. JUSTICE MURPHY, dissenting.

The United States, in my opinion, is morally and legally obligated to pay for the land in issue in this case. The Executive Order of 1875 by its terms set aside certain land up to the "first standard parallel north" for the use of the Ute Indians "as an addition to the present reservation." That order alone, of course, could convey no compensable interest to the Indians under the rule of *Sioux Tribe* v. *United States,* 316 U. S. 317. But events subsequent to

[5] See p. 177, *supra.*

the issuance of the Executive Order in this case make inapplicable the principle of the *Sioux* case. In 1880 the United States and the Ute chiefs and headmen entered into an agreement whereby the latter promised "to use their best endeavors with their people to procure their consent to cede to the United States all the territory of the present Ute Reservation in Colorado." Congress thereupon passed the Act of June 15, 1880, which recited in its preamble that the chiefs and headmen had "submitted to the Secretary of the Interior an agreement for the sale to the United States of their present reservation in the State of Colorado." The Act then incorporated the agreement previously made and provided that all unallotted lands should be deemed to be released and conveyed to the United States.

It seems clear to me that by 1880 the term "present reservation" included the land which the Executive Order of 1875 stated had been set aside as an addition to the then present reservation. And when the 1880 agreement and the 1880 Act referred to "present reservation" they must have included that additional land. Adding this informal acknowledgment by Congress of the expanded reservation to the occupation of the land by the Indians and their understanding that it belonged to the reservation, a compensable interest becomes evident. It is immaterial that there were no formal documents conveying a fee simple interest to the Indians; it is likewise irrelevant that there was no formal acknowledgment of the Indian title. *Spalding* v. *Chandler,* 160 U. S. 394; *United States* v. *Alcea Band of Tillamooks,* 329 U. S. 40. It is enough that the Indians had the right to possess and occupy the land and that the Indians fairly understood that to be the case. An acknowledgment by Congress, however informal, then adds a legal obligation to the moral duty of the United States to pay for the land involved. Such is the situation here.

The Court indicates, however, that the Executive Order of 1875 does not mean what it says. It clearly set apart for the use of the Indians "as an addition to the present reservation" all the described land up to the "first standard parallel north." But it is now suggested that those responsible for the promulgation of that order did not really intend to set aside all the land up to the "first standard parallel north," despite the explicit language used. It is said, rather, that the order actually was designed to affect only the White River Valley lands—lands which are some nine miles south of the "first standard parallel north." That interpretation of the intent of the framers of the order would make the northern boundary of the Executive Order land coterminous with the northern boundary of the true treaty reservation.

But there is nothing in the findings of the Court of Claims to justify such an interpretation. To disregard the plain words of the order by subtracting a nine-mile strip from a clearly worded description requires definite findings to that effect which are supported by the record. It is not our function, of course, to supply those findings ourselves. Nor can we infer them from the decision of the Court of Claims. That court alone has the power and the duty to make the necessary findings on material issues. 53 Stat. 752, 28 U. S. C. § 288; *United States* v. *Causby*, 328 U. S. 256, 267–268. If it is material that the framers of the Executive Order intended to set aside less land than that described in the order, the case should be remanded to the Court of Claims so that it can make the necessary findings in this respect.

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

Syllabus.

ANGEL *v.* BULLINGTON.

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

No. 31. Argued March 5, 1946. Reargued November 18, 19, 1946.—Decided February 17, 1947.

A citizen of Virginia sued a citizen of North Carolina in a state court of North Carolina for a deficiency judgment on notes for the purchase price of land in Virginia secured by a deed of trust on the land. The defendant demurred, relying on N. C. L., 1933, c. 36, Michie's N. C. Code § 2593 (f), which provides that the holder of such a note "shall not be entitled to a deficiency judgment." The trial court overruled the demurrer and the defendant appealed to the State Supreme Court. There the plaintiff contended that the Federal Constitution precluded the State from closing the doors of its courts to him. Disclaiming any intention of passing on any question of substantive law, the State Supreme Court held that the state statute denied the state courts jurisdiction to grant the relief sought. Accordingly, it reversed the trial court and dismissed the suit. Without appealing to this Court, the plaintiff brought a new suit in a Federal District Court in North Carolina on the ground of diversity of citizenship, seeking the same relief against the same defendant on the same claim. *Held:* The identical issue having been finally adjudicated in the state courts and the cause of action being barred there, it may not be relitigated in the federal courts. Pp. 186–193.

(a) The federal question as to the constitutionality of the state statute having been clearly raised in the State Supreme Court, it necessarily was adjudicated by that Court, notwithstanding the Court's disclaimer of any intention to pass on any question of "substantive law." Pp. 187–188.

(b) The plaintiff could have appealed to this Court. Since he elected not to do so, the decision of the State Supreme Court became a final adjudication of that question as to this cause of action. Pp. 188–190.

(c) Since the only issue in the state courts was whether all courts of the State were closed to the litigation and the State Supreme Court held that they were, thereby denying enforcement of an asserted federal claim, the "merits" of the controversy were

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adjudicated in the only sense that adjudication of the "merits" is relevant to the principles of *res judicata*. Pp. 190–191.

(d) The decision of the State Supreme Court closed the door not only to the suit in the state courts but also to a similar suit in a federal court in North Carolina based on diversity of citizenship, since a federal court in such a suit must follow state law and policy. *Erie R. Co.* v. *Tompkins*, 304 U. S. 64. Pp. 191–192.

150 F. 2d 679, reversed.

In a suit by a citizen of Virginia against a citizen of North Carolina, the Supreme Court of North Carolina held that N. C. L., 1933, c. 36, Michie's N. C. Code § 2593 (f) denied the state courts jurisdiction to grant a deficiency judgment on a purchase-money note secured by a deed of trust on land in Virginia. 220 N. C. 18, 16 S. E. 2d 411. The plaintiff in that suit then brought a new suit on the same claim in a Federal District Court in North Carolina on grounds of diversity of citizenship. The District Court gave judgment for the plaintiff. The Circuit Court of Appeals affirmed. 150 F. 2d 679. This Court granted certiorari. 326 U. S. 713. *Reversed,* p. 193.

George Lyle Jones argued the cause for petitioner. With him on the brief was *George H. Ward.*

R. Roy Rush argued the cause for respondent. With him on the brief was *John L. Walker.*

Mr. Justice Frankfurter delivered the opinion of the Court.

In 1940, Bullington, a citizen of Virginia, sold land in Virginia to Angel, a citizen of North Carolina. Only part of the purchase price was paid. For the balance, Angel executed a series of notes secured by a deed of trust on the land. Upon default on one of the notes, Bullington, acting upon an acceleration clause in the deed, caused all other notes to become due and called upon the trus-

tees to sell the land. The sale was duly made in Virginia and the proceeds of the sale applied to the payment of the notes. This controversy concerns attempts to collect the deficiency.

Bullington began suit for the deficiency in the Superior Court of Macon County, North Carolina. Angel countered with a demurrer, the substance of which was that a statute of North Carolina (c. 36, Public Laws 1933, Michie's Code § 2593 (f)) precluded recovery of such a deficiency judgment. This is the relevant portion of that enactment:

> "In all sales of real property by mortgagees and/or trustees under powers of sale contained in any mortgage or deed of trust hereafter executed, . . . the mortgagee or trustee or holder of the notes secured by such mortgage or deed of trust shall not be entitled to a deficiency judgment on account of such mortgage, deed of trust or obligation secured by the same: . . . ."

The Superior Court overruled the demurrer, and an appeal to the Supreme Court of North Carolina followed. Bullington supported his Superior Court judgment on the ground that the United States Constitution precluded North Carolina from shutting the doors of its courts to him. The North Carolina Supreme Court, holding that the North Carolina Act of 1933 barred Bullington's suit against Angel, reversed the Superior Court and dismissed the action. 220 N. C. 18, 16 S. E. 2d 411. Bullington did not seek to review this judgment here. Instead, he sued Angel for the deficiency in the United States District Court for the Western District of North Carolina. Angel pleaded in bar the judgment in the North Carolina action. The District Court gave judgment for Bullington, 56 F. Supp. 372, and the Circuit Court of Appeals for the Fourth Circuit affirmed. 150 F. 2d 679. We granted certiorari, 326 U. S. 713, because the failure

to dismiss this action, on the ground that the judgment in the North Carolina court precluded the right thereafter to recover on the same cause of action in the federal court, presented an important question in the administration of justice.

1. We start with the fact that the prevailing rule as to *res judicata* is settled law in North Carolina. An adjudication bars future litigation between the same parties not only as to all issues actually raised and decided but also as to those which could have been raised. *Southern Distributing Co.* v. *Carraway,* 196 N. C. 58, 60–61, 144 S. E. 535, 537; *Moore* v. *Harkins,* 179 N. C. 167, 101 S. E. 564. When the disposition of a prior litigation is invoked as a bar to an action, the identity of the causes of action in the two suits is usually the bone of contention. On this score there can here be no controversy. It is indisputable that the parties, the nature of the claim and the desired relief were precisely the same in the two actions successively brought by Bullington against Angel, first in the Superior Court of Macon County and then in the federal district court. For all practical purposes, the complaint in the present action was a carbon copy of the complaint in the State court action. If the North Carolina action had been dismissed because it was brought in one North Carolina court rather than in another, of course no federal issue would have been involved. See, *e. g., Woods* v. *Nierstheimer,* 328 U. S. 211. Had that been the case, a suit for the same cause of action could have been initiated in a North Carolina federal district court, just as another suit could have been brought in the proper North Carolina State court. But that is not the present situation. A quite different situation is before us. Being somewhat unusual, it calls for a critical consideration of the scope and purpose of the doctrine of *res judicata.*

2. The judgment of the Supreme Court of North Carolina would clearly bar this suit had it been brought anew

in a state court. For purposes of diversity jurisdiction a federal court is, "in effect, only another court of the State." *Guaranty Trust Co.* v. *York,* 326 U. S. 99, 108; see *Traction Company* v. *Mining Company,* 196 U. S. 239, 253; *Ex parte Schollenberger,* 96 U. S. 369, 377. Of course, Bullington could not have succeeded in the District Court for the Western District of North Carolina after an adverse judgment in the State courts, had the decision in this case involved no federal ground. That is equally true where a federal question was decided in the State courts. That the adjudication of federal questions by the North Carolina Supreme Court may have been erroneous is immaterial for purposes of *res judicata. Baltimore S. S. Co.* v. *Phillips,* 274 U. S. 316, 325. A higher court was available for an authoritative adjudication of the federal questions involved. And so the question is whether federal rights were necessarily involved and adjudicated in the litigation in the State courts.

3. For purposes of *res judicata,* the significance of what a court says it decides is controlled by the issues that were open for decision. What were the issues in the North Carolina litigation? Bullington sought a deficiency judgment. Angel, by demurrer, resisted on the ground that a North Carolina statute precluded a deficiency judgment. The North Carolina Supreme Court, reversing the trial court, found the North Carolina statute a bar to such a suit. It said that

> "the limitation created by the statute is upon the jurisdiction of the court in that it is declared that the holder of notes given to secure the purchase price of real property 'shall not be entitled to a deficiency judgment on account' thereof. This closes the courts of this State to one who seeks a deficiency judgment on a note given for the purchase price of real property. The statute operates upon the adjective law of the State, which pertains to the practice and procedure,

or legal machinery by which the substantive law is made effective, and not upon the substantive law itself. It is a limitation of the jurisdiction of the courts of this State." 220 N. C. 18, 20, 16 S. E. 2d 411, 412.

But the allowable "limitation of the jurisdiction of the courts" of North Carolina presents more than a question of local law for determination by the North Carolina Supreme Court. Speaking for a unanimous Court, Mr. Justice Brandeis thus expressed the subordination to the requirements of the Constitution of the power of a State to withdraw jurisdiction from its courts: "The power of a State to determine the limits of the jurisdiction of its courts and the character of the controversies which shall be heard in them is, of course, subject to the restrictions imposed by the Federal Constitution." *McKnett* v. *St. Louis & S. F. Ry. Co.,* 292 U. S. 230, 233. The Contract Clause, the Full Faith and Credit Clause, the Privileges or Immunities Clause, all fetter the freedom of a State to deny access to its courts howsoever much it may regard such withdrawal of jurisdiction "the adjective law of the State," or the exercise of its right to regulate "the practice and procedure" of its courts. *Broderick* v. *Rosner,* 294 U. S. 629, 642. A State "cannot escape its constitutional obligations by the simple device of denying jurisdiction in such cases to courts otherwise competent." *Kenney* v. *Supreme Lodge,* 252 U. S. 411, 415; and see *White* v. *Hart,* 13 Wall. 646. This pervasive principle of our federal law, constitutional and statutory, was thus put by Mr. Justice Holmes: " Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." *Davis* v. *Wechsler,* 263 U. S. 22, 24.

4. Here, claims based on the United States Constitution were plainly and reasonably made in the North Caro-

lina suit. The North Carolina Supreme Court met these claims. It met them by saying that the North Carolina statute did not deal with substantive matters but merely with matters regulating local procedure. But whether the claims are based on a federal right or are merely of local concern is itself a federal question on which this Court, and not the Supreme Court of North Carolina, has the last say. That Court could not put a federal claim aside, as though it were not in litigation, by the talismanic word "jurisdiction." When an asserted federal right is denied, the sufficiency of the grounds of denial is for this Court to decide. *Titus* v. *Wallick,* 306 U. S. 282, 291. Bullington could have come here, not merely by the grace of this Court on certiorari, but on appeal, as did White in *White* v. *Hart, supra,* to challenge, successfully, the right of Georgia to limit the jurisdiction of the Georgia courts; as did the East New York Savings Bank in the recent case of *East New York Bank* v. *Hahn,* 326 U. S. 230, to challenge, though unsuccessfully, the limitation which New York placed upon the jurisdiction of its courts. Cf. *Kenney* v. *Supreme Lodge,* 252 U. S. 411, 416. Since it was open for Bullington to come here to seek reversal of the decision of the North Carolina Supreme Court shutting him out of the North Carolina courts and he chose not to do so, the decision of the North Carolina Supreme Court concluded an adjudication of a federal question even though it was not couched in those terms. For purposes of litigating the issues in controversy in the North Carolina action, the North Carolina Supreme Court was an intermediate tribunal. If a litigant chooses not to continue to assert his rights after an intermediate tribunal has decided against him, he has concluded his litigation as effectively as though he had proceeded through the highest tribunal available to him. An adjudication of an issue implies that a man had a chance to win his case. The chance was necessarily afforded by the North Carolina litigation.

It was in process of determination when the Supreme Court of North Carolina decided it against him. He forewent his right to have a higher court, this Court, enable him to win his chance by holding that he was right and that the North Carolina Supreme Court was wrong. He cannot begin all over again in an action involving the same issues before another forum in the same State.

5. It is suggested that the North Carolina Supreme Court did not adjudicate the "merits" of the controversy. It is a misconception of *res judicata* to assume that the doctrine does not come into operation if a court has not passed on the "merits" in the sense of the ultimate substantive issues of a litigation. An adjudication declining to reach such ultimate substantive issues may bar a second attempt to reach them in another court of the State. Such a situation is presented when the first decision is based not on the ground that the distribution of judicial power among the various courts of the State requires the suit to be brought in another court in the State, but on the inaccessibility of all the courts of the State to such litigation. And that is the essence of the present case. The only issue in controversy in the first North Carolina litigation was whether or not all the courts of North Carolina were closed to that litigation. The merits of that issue were adjudicated. And that was the issue raised in the second litigation in North Carolina—that in the federal district court. The merits of this issue having been adjudicated, they cannot be relitigated.

The "merits" of a claim are disposed of when it is refused enforcement. If an asserted federal claim is denied enforcement on a professed local ground, but a so-called local ground which is subject to review here because it is in fact the adjudication of a federal question, then the "merits" of that claim were adjudicated in the only sense that adjudication of the "merits" is relevant to the principles of *res judicata*. A State court can-

not sterilize federal claims by putting on the adjudication a local label.

6. The merits of this controversy were adjudicated by the North Carolina Supreme Court since that court, or this Court on appeal, might have decided that the North Carolina statute did not bar Bullington's first action. The North Carolina statute might have been found unconstitutional. Federal issues were thus involved in the adjudication by the North Carolina Supreme Court. Bullington knew that there were federal issues in the State suit because he raised them. He was then content to drop them and let the intermediate adjudication stand. Now he wants an encore.

7. It is suggested that the North Carolina Supreme Court construed the North Carolina statute to close only the North Carolina State courts but not the federal court sitting in North Carolina. In the first place, the North Carolina Supreme Court said no such thing. It construed the statute expressive of State policy and spoke only of the jurisdiction of the State courts because it was concerned only with the State courts. Secondly, it is most incongruous to attribute to the legislature and judiciary of North Carolina the imposition of a restriction against all its citizens from suing for a deficiency judgment, while impliedly authorizing citizens of other States to secure such deficiency judgments against North Carolinians. Thirdly, a North Carolina statute, upheld by the highest court of North Carolina, is of course expressive of North Carolina policy. The essence of diversity jurisdiction is that a federal court enforces State law and State policy. If North Carolina has authoritatively announced that deficiency judgments cannot be secured within its borders, it contradicts the presuppositions of diversity jurisdiction for a federal court in that State to give such a deficiency judgment. North Carolina would hardly allow defeat of a State-wide policy through occasional suits in a federal

court. What is more important, diversity jurisdiction must follow State law and policy. A federal court in North Carolina, when invoked on grounds of diversity of citizenship, cannot give that which North Carolina has withheld. Availability of diversity jurisdiction which was put into the Constitution so as to prevent discrimination against outsiders is not to effect discrimination against the great body of local citizens.

Cases like *Lupton's Sons Co.* v. *Automobile Club,* 225 U. S. 489, are obsolete insofar as they are based on a view of diversity jurisdiction which came to an end with *Erie Railroad* v. *Tompkins,* 304 U. S. 64. That decision drastically limited the power of federal district courts to entertain suits in diversity cases that could not be brought in the respective State courts or were barred by defenses controlling in the State courts. Compare *Suydam* v. *Broadnax,* 14 Pet. 67, 75. Of course, where resort is had to a federal court not on grounds of diversity of citizenship but because a federal right is claimed, the limitations upon the courts of a State do not control a federal court sitting in the State. *Holmberg* v. *Armbrecht,* 327 U. S. 392.

8. After an adverse decision against Bullington on a cause of action created by State law, Bullington wants to start all over again in another North Carolina court, albeit a federal court. The first litigation raised and adjudicated federal issues every one of which is again involved in the second suit. To allow such a second suit is to say that a federal right in issue in a State court evaporates because the State court calls it a State right and the litigant accepts the decision. If tolerated, our federal system would afford fine opportunities for needlessly multiplying litigation in this way. The doctrine of *res judicata* is a barrier against it. Litigation is the means for vindicating rights, but it may also involve unwarranted friction and waste. The doctrine of *res judicata* reflects the refusal of law to toler-

ate needless litigation. Litigation is needless if, by fair process, a controversy has once gone through the courts to conclusion. Compare, *e. g., Hazel-Atlas Co.* v. *Hartford Co.*, 322 U. S. 238, 244. And it has gone through, if issues that were or could have been dealt with in an earlier litigation are raised anew between the same parties. *Chicot County Dist.* v. *Bank*, 308 U. S. 371.

Judgment reversed.

MR. JUSTICE REED, dissenting.

My understanding of the Court's decision is that the doctrine of *res judicata,* that is a former adjudication, defeats Bullington's claim against Angel. The opinion is limited to that point. In my view the conclusion reached by the Court is erroneous. To narrow the line of my disagreement, I shall state the issues treated in the opinion with which I agree. The causes of action and the parties in the two suits are identical. Federal questions were raised by Bullington's contention that the North Carolina statute, sufficiently quoted at the beginning of the Court's opinion, Michie's Code, 2593 (f), was unconstitutional by federal tests because it barred the North Carolina courts to Bullington's suit on his notes. It is immaterial, for the purposes of determining the availability of a plea of *res judicata,* whether the North Carolina judgment was erroneous or not. I agree, further, that, on the ground that a state cannot bar this cause of action from its courts, Bullington could have had review in this Court of the North Carolina judgment and that this Court, if it did not conclude that the North Carolina judgment rested on an adequate state ground, could have finally settled that federal constitutional issue.

The reasoning of the Court leads to the announced result because of these presuppositions with which I differ: (I) "For purposes of *res judicata,* the significance of what a court says it decides is controlled by the issues that

were open for decision." (II) "The 'merits' of a claim are disposed of when it is refused enforcement." (III) "Since it was open for Bullington to come here to seek reversal of the decision of the North Carolina Supreme Court shutting him out of the North Carolina courts and he chose not to do so, the decision of the North Carolina Supreme Court concluded an adjudication of a federal question even though it was not couched in those terms." (IV) "For purposes of diversity jurisdiction a federal court is, 'in effect, only another court of the State.'" "He cannot begin all over again in an action involving the same issues before another forum in the same State."

I. To say that for purposes of *res judicata* the significance of what a court says it decides is controlled by the issues, announces a rule which, so far as I know, has no prior authority. To adopt such a rule is to declare that a decision in a cause of action is final between the same parties although the court specifically reserves certain questions not necessary for its decision. *Res judicata* settles all questions which were raised or those that might have been raised but it settles them in accordance with the decision that is made. Of course, when a decision is upon the merits, a matter discussed later, the entire cause of action is adjudicated finally. But this North Carolina adjudication was not upon the merits. It was upon a question of judicial power. The pertinent excerpts from the opinion appear below.[1] The fact that other

[1] 220 N. C. at 20–21, 16 S. E. 2d at 412: "The statute operates upon the adjective law of the State, which pertains to the practice and procedure, or legal machinery by which the substantive law is made effective, and not upon the substantive law itself. It is a limitation of the jurisdiction of the courts of this State.

"The Legislature, within constitutional limitations, can fix and circumscribe the jurisdiction of the courts of this State. The Legislature has exercised its prerogative to so limit the jurisdiction of the

issues, going to the merits of the cause of action, might have been decided seems immaterial.

The rule which I consider sound appears in the Restatement of the Law, Judgments § 49, as follows:

> "Where a valid and final personal judgment not on the merits is rendered in favor of the defendant, the plaintiff is not thereby precluded from thereafter maintaining an action on the original cause of action and the judgment is conclusive only as to what is actually decided."

The way to know what was actually decided in this case is to read the applicable portion of the opinion printed in the preceding note. The result of the decision was to leave the cause of action unaffected because when a state denies a remedy, it leaves "unimpaired the plaintiff's substantive right, so that he is free to enforce it elsewhere." *Bradford Electric Co.* v. *Clapper,* 286 U. S. 145, 160; *Dalton* v. *Webster,* 82 N. C. 279.

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courts of this State that holders of notes given for purchase price of real estate are not entitled to a deficiency judgment thereon in such courts. We cannot hold that this action upon part of the legislative branch of our government impinged the full faith and credit clause of the Constitution of the United States or the general doctrine that the validity of a contract is determined by the law of the place where made, the *lex loci contractus* as distinguished from the *lex fori.* Both the constitutional provision urged and the general doctrine invoked by the appellee are substantive law and the statute involved, as aforesaid, relates solely to the adjective law. No denial of the full force and credit of the Virginia contract is made, and no interpretation or construction of the contract involved is attempted. The court, being deprived of its jurisdiction, has no power to render a judgment for the plaintiff in the cause of action alleged. 'Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause. And this is not less clear upon authority than upon principle.' "

II. It is now to be considered whether or not this judgment of the state court was on the merits. That court said it had no "power to render a judgment for the plaintiff in the cause of action alleged." This Court now says that such a decision is a disposition on the merits. Evidently what is meant is that when a litigant, who has raised a federal constitutional question, has his case dismissed on the ground that the court "has no power to render a judgment for the plaintiff in the cause of action alleged," there is a judgment on the merits on the constitutional question as well as upon the right to recover in North Carolina on any other ground. If we have power to declare that it "concluded an adjudication of a federal question even though it was not couched in those terms," I would reach the opposite conclusion based upon what the North Carolina court did. In my view, the North Carolina court merely decided that it had no power to adjudicate the cause of action. Certainly the state court had the power to interpret its own statute. *Knights of Pythias* v. *Meyer,* 265 U. S. 30, 32; *Chaplinsky* v. *New Hampshire,* 315 U. S. 568. The withdrawal of jurisdiction surely does not make a judgment one upon the merits. The state court cited *Ex parte McCardle,* 7 Wall. 506, to emphasize what it meant. If there was a suit on this note in a federal court on an allegation of diversity of citizenship and the federal court dismissed the suit with an opinion saying that the case was dismissed because of lack of jurisdiction, *e. g.* proof of non-diversity of citizenship, no state court would hold that there had been a decision upon the merits. Where there is no jurisdiction of the subject of the action the judgment is not upon the merits. *Stoll* v. *Gottlieb,* 305 U. S. 165, 171–172. Of course, if there is a judgment upon the merits, that judgment would be binding on both federal and state courts. Even if the North Carolina decision is not upon the merits, it is conclusive on North Carolina courts and upon federal courts in North Carolina,

if those federal courts are courts of the State of North Carolina in the sense that they must follow state decisions upon the power of state courts, under the rule of *Guaranty Trust Co.* v. *York,* 326 U. S. 99. I do not think that the *Guaranty* rule applies. See subdivision IV.

III. If the two preceding numbered divisions of this opinion are sound, there was no occasion for Bullington to seek a review of the first judgment in this Court. He was in the position of the owner of a cause of action, dismissed because prematurely brought or brought in the wrong county. The judgment that the Supreme Court of North Carolina ordered was "dismissed," not on the merits, not with prejudice, and not judgment for the defendant, but a simple dismissal. North Carolina might have declared, by statute, that no cause of action would be recognized in North Carolina for the recovery of a deficiency on a mortgage indebtedness. Instead of this, we are told, authoritatively, by the Supreme Court of North Carolina that North Carolina has withdrawn the jurisdiction of its courts from such a cause of action. This produces quite a different situation.

IV. The pith of the problem, as I see it, is laid bare by the foregoing differentiations. It consists of the question whether the North Carolina decision establishes a controlling rule of law upon the constitutionality of the state statute as tested by the federal Constitution or adjudicates that the statute merely withdraws jurisdiction from state courts over a type of action. This Court concludes that the state decision determined the constitutionality of the statute and that its holding was binding on all federal courts in North Carolina, as well as state courts. This idea is comprehended in the Court's opinion by the statements that the federal courts are courts of the state in diversity cases and that a litigant cannot stop with an intermediate court decision against him and begin a new litigation on the same cause of action.

The Court reaches the conclusion that *res judicata* should apply by an application of *Erie Railroad* v. *Tompkins,* 304 U. S. 64, and *Guaranty Trust Co.* v. *York,* 326 U. S. 99. The teaching of those cases is accepted by me. They lead to the conclusion that in diversity cases, legal or equitable, and this proceeding is a diversity case, the federal courts in a state apply the law of that state in matters of substantive law. In matters of procedure and jurisdiction, I take it, no one would contend that the doctrine of *Erie Railroad* is applicable. One may regret that the line of the Great Divide between substance and procedure cannot be clearly marked so that all may agree as to its location in any one case. But that line exists. We have said that federal courts must follow the law of the state as to burden of proof. *Cities Service Co.* v. *Dunlap,* 308 U. S. 208; *Palmer* v. *Hoffman,* 318 U. S. 109, 117; as to conflict of laws, *Griffin* v. *McCoach,* 313 U. S. 498; *Klaxon Co.* v. *Stentor Co.,* 313 U. S. 487, and as to state statutes of limitation in equity cases, *Guaranty Trust Co.* v. *York, supra.* The reason for these conclusions is to gain the desirable end of a symmetry of law within each state. The momentum of the opinions, just cited, and of the desire for uniformity should not cause us to disregard the rule that state law, statutory or judicial, directed at remedies or powers of courts, cannot affect the federal system. Each of the cases just cited follows the declarations of state law by state courts. In this case, this Court departs from the state court's interpretation of the meaning of a state statute in order to bring about the federal policy of uniformity. By this, the Court departs from the sound rule that a state court's interpretation of state statutes is binding on federal courts. In reaching the conclusion which it does, this Court decides that if a state court does not have power to adjudicate a cause, neither does a federal court in that state. It also departs from controlling precedents that state enactments on jurisdic-

tion, remedies and procedures do not affect the jurisdiction, remedies or procedures of federal courts. It is true that these antedate the *Erie* case but that case did not change the state and federal jurisdiction.

In *Pusey & Jones Co.* v. *Hanssen,* 261 U. S. 491, this Court held that an authority given by Delaware to its Chancellor to appoint a receiver for an insolvent corporation on the application of any creditor did not give additional power to the federal court to appoint a receiver in a diversity case on the application of a simple creditor although the federal courts had long exercised the right to appoint receivers on the application of a secured creditor. This Court said:

> "That a remedial right to proceed in a federal court sitting in equity cannot be enlarged by a state statute is likewise clear, *Scott* v. *Neely,* 140 U. S. 106; *Cates* v. *Allen,* 149 U. S. 451. Nor can it be so narrowed, *Mississippi Mills* v. *Cohn,* 150 U. S. 202; *Guffey* v. *Smith,* 237 U. S. 101, 114. The federal court may therefore be obliged to deny an equitable remedy which the plaintiff might have secured in a state court. Hanssen's contention is that the statute does not enlarge the equitable jurisdiction or remedies; and that it confers upon creditors of a Delaware corporation, if the company is insolvent, a substantive equitable right to have a receiver appointed. If this were true, the right conferred could be enforced in the federal courts, *Scott* v. *Neely,* 140 U. S. 106, 109; since the proceeding is in pleading and practice conformable to those commonly entertained by a court of equity. But it is not true that this statute confers upon the creditor a substantive right."

See *Henrietta Mills* v. *Rutherford County,* 281 U. S. 121, 127–128; *Kelleam* v. *Maryland Casualty Co.,* 312 U. S. 377, 382.

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In *Lupton's Sons Co.* v. *Automobile Club,* 225 U. S. 489, this Court held that a contract which could not be sued upon in the courts of New York because a New York statute provided that no foreign corporation could "maintain any action in this state" without a certificate that it had complied with certain state requirements to do business in the state, could nevertheless be sued upon in the federal court. It was said, p. 500:

> "The State could not prescribe the qualifications of suitors in the courts of the United States, and could not deprive of their privileges those who were entitled under the Constitution and laws of the United States to resort to the Federal courts for the enforcement of a valid contract. . . . The State in the statute before us made no such attempt. The only penalty it imposed, to quote again from the *Mahar Case,* was a disability to sue 'in the courts of New York.' "

These cases make clear that in diversity litigation the federal courts are not simply courts of the state. They are so far as the enforcement of the substantive laws of the state are concerned, but not when procedure or power to act is involved. The *Lupton* case shows too, that, when a state denies power to its courts to adjudicate a cause, that denial does not affect the power of the federal courts to decide the case. As I am of the opinion that the state court merely denied its power to adjudge between these parties and did not decide the merits of Bullington's cause of action, the state court judgment cannot be *res judicata* in the federal court.

If it is true that in passing upon the meaning of a state statute, a federal court is not required to follow the state court's characterization of its statute, as remedial or substantive, this Court's present determination that the statute is substantive for our purposes cannot change the effect in this litigation of the state's decision to the contrary.

When the state court held that for its purposes the statute was remedial, it was remedial in that court. If remedial, the state judgment was not upon the merits and could not be *res judicata* in any court as to the right to recover on the cause of action.

If the plea of *res judicata* is not good and this Court should decide that the state statute is substantive law, *i. e.*, a declaration of the policy of North Carolina against claims on deficiencies after sales of incumbered property, it would be necessary to determine the constitutionality of the North Carolina statute that declares uncollectible in North Carolina a claim on a contract that was good in Virginia. In view of this Court's present decision, I express no opinion upon this issue.

MR. JUSTICE JACKSON and MR. JUSTICE RUTLEDGE join in this opinion.

MR. JUSTICE RUTLEDGE, dissenting.

This is a hard case making, I think, proverbially bad law. On the surface what seems to be decided is simply a question of *res judicata*. Actually the decision rests on an "and/or" hodgepodge of *res judicata* and *Erie* doctrines.[1] In my judgment the admixture not only is unnecessary but distorts and misapplies both doctrines. If *res judicata* properly applies and is adequate to dispose of the cause, there is no occasion for the sidewise introduction of *Erie* ideas. Likewise, if *Erie* appropriately governs the case, the Court's elaborate and altogether novel discussion of *res judicata* is superfluous.

The Court has not decided this case on any basis of full faith and credit.[2] Accordingly *res judicata* as it is applied

[1] *Erie R. R. Co.* v. *Tompkins*, 304 U. S. 64.

[2] The Court does not hold that the full faith and credit clause, Const., Art. IV, § 1, binds the federal courts to give the North Carolina judgment the effect of precluding a further suit in the federal

has neither constitutional nor statutory status. For present purposes it is therefore purely a rule of judicial administration to be applied, like all such rules, as considerations of justice and right application of the policy require, not omitting due regard for its appropriate limits.

Res judicata is a generally sound but by no means unlimited policy of judicial action. The doctrine is grounded in the need for putting an end to litigation.[3] It does this by precluding the parties from showing what is or may be the truth.[4] The sound core of the policy is that ordinarily one suit which determines or gives a full and fair chance

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courts on the substantive cause of action. Two difficulties would arise. (1) If, as the Court asserts, the federal court in diversity cases were only "another North Carolina court," the full faith and credit clause would have no application; but, that it may, see *Cooper* v. *Newell*, 173 U. S. 555, 567: ". . . the courts of the United States are tribunals of a different sovereignty, and exercise a distinct and independent jurisdiction from that exercised by the state courts, and this is true in respect of the courts of the several States as between each other. And the courts of the United States are bound to give to the judgments of the state courts the same faith and credit that the courts of one State are bound to give to the judgments of the courts of her sister States." See also *American Surety Co.* v. *Baldwin*, 287 U. S. 156, where Mr. Justice Brandeis spoke of the full faith and credit clause in connection with the obligation of a federal court sitting in Idaho to follow, as *res judicata*, a previous Idaho decision. (2) The decision would contradict, not confirm, as full faith and credit require, the basis for the North Carolina court's judgment, namely, that the statute does not outlaw substantive claims but only deprives the state courts of power to entertain them.

[3] See Moschzisker, Res Judicata (1929) 38 Yale L. J. 299, 300. In this respect, of course, *res judicata* resembles both statutes of limitations and the doctrine of laches in equity, as well as full faith and credit when applicable to judgments.

[4] Scott, Collateral Estoppel by Judgment (1942) 56 Harv. L. Rev. 1. So do statutes of limitations, laches and full faith and credit *re* judgments, when applicable.

for determining causes of action and issues [5] between litigants should be enough and when this much has been given further opportunity should be denied.

Stated so simply, however, the doctrine would be as much trap for the unwary as boon for the wise or lucky litigant. Exceptions and qualifications are so numerous as to make the field not only technical but treacherous, this case being a nice illustration. Qualification may itself lose sight of basic policy and become sheer technicality.[6] But general rules are not qualified so extensively as this one has been without reason. There is good reason for much of what has been done in this respect with *res judicata.*

The effect of the rule qualifies its scope. It is not every case in which a litigant has had "one bite at the cherry" that the law forbids another. In other words, it is not every such case in which the policy of stopping litigation outweighs that of showing the truth. This is so not only where the first suit actually gives no real chance to secure a substantial determination,[7] but also though less generally of others in which the litigant has such a chance and foregoes or misses it.[8] It is so too whether the claimed

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[5] Cf. note 9 *infra* and text.

[6] A sign generally that something is radically wrong with the rule or with it and the exceptions together. Cf. *Georgetown College* v. *Hughes,* 76 U. S. App. D. C. 123, 130 F. 2d 810.

[7] See *Walden* v. *Bodley,* 14 Pet. 156, 161; *Hughes* v. *United States,* 4 Wall. 232, 237; Restatement, Judgments (1942) § 49.

[8] "Judgments of nonsuit, of non prosequitur, of nolle prosequi, of discontinuance and of dismissal generally, are exceptions to the general rule that when the pleadings, the court, and the parties are such as to permit of a trial on the merits, the judgment will be considered as final and conclusive of all matters which could have been so tried." 2 Freeman, Judgments (5th ed.) 1579–1580. And "generally speaking, judgments merely of dismissal, whether voluntary or involuntary, in actions at law are not on the merits and do not operate

estoppel by prior suit is "direct" or "indirect," that is, on the same or a different cause of action.[9]

Upon the law as well as the policy, the question has been one of balancing considerations of justice and convenience between stopping litigation and stopping the showing of the truth.[10] That balance has never been so one-sided in favor of the former that the matter is ended simply by showing that a party has had some chance, however slight, in a previous litigation to secure a favorable decision.

If this were the law every case where a party takes a nonsuit or a dismissal expressly for the purpose of starting over again would be a final and conclusive determination against him. I know of no jurisdiction where the law has been so harsh. Nor do I think it should be in this one.

There are too many good reasons why persons starting out in litigation should not be barred of their rights by the fact alone that they withdraw in order to start again, even though by going on to the end they might pull through successfully against great odds. Crucial witnesses may disappear or die and time be required for finding them or others. Surprise in the course of trial may occur justifying withdrawal without fatal loss of rights. Even as in

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as a bar or estoppel in subsequent proceedings involving the same matters." *Id.* at 1582. See *Haldeman* v. *United States,* 91 U. S. 584; *Jacobs* v. *Marks,* 182 U. S. 583; *Manhattan Life Ins. Co.* v. *Broughton,* 109 U. S. 121; Restatement, Judgments (1942) §§ 53, 54.

[9] Scott, *op. cit. supra* note 4, p. 2; Restatement, Judgments (1942) 175–176. Usually "direct" estoppel is said to preclude redetermination of issues actually determined or which might have been determined "on the merits." *Ibid.* But "indirect" estoppel precludes relitigating only issues actually decided. *Cromwell* v. *County of Sac,* 94 U. S. 351, 352–353.

[10] The process of course crystallizes in definite rules for types of cases, but the important fact is that these rules do not all come out the same way for application of the rule of preclusion and that in the process of crystallization the weighing of the opposing considerations forms the rule for or against that policy.

this case, jurisdictional and other uncertainties may arise putting in jeopardy or making comparatively or completely futile further pursuit of the pending litigation when another suit in the same or a different court might provide a more certain and less expensive mode of disposing of the controversy for all the parties.

These and other reasons have qualified flat application of *res judicata* too long and too universally for their qualifying effects to be thrown overboard now simply because a withdrawing litigant might conceivably have come out victorious had he gone on to the very farthest end.[11] Such a criterion would turn *res judicata* into a rigid rule requiring exhaustion of judicial remedies, a notion heretofore wholly alien to the doctrine.[12]

This course, moreover, seems to be justified on the basis that the grounds of an adjudication have nothing to do with the adjudication or its effects, for purposes of applying *res judicata.* That is true, apparently, for applying *res judicata* to Bullington's failure to take his appeal here in the North Carolina state court suit, so as to cut off his right ever to secure a decision on the " 'merits' in the sense of the ultimate substantive issues of a litigation." But it is not true, apparently, for application of the doctrine to different jurisdictional rulings. For "an adjudication declining to reach such ultimate substantive issues may bar a second attempt to reach them in another court of the

[11] The Court clearly implies that Bullington would not be foreclosed on *res judicata* by the North Carolina decision if his route to this Court for review had been by certiorari rather than by appeal. But the ruling as made, in so far as it rests on the failure to appeal, ignores the settled law that for purposes of applying *res judicata* failure to take appeal has no bearing once the judgment becomes final. See note 19. It also defeats the policy of *res judicata;* for a party, instead of being allowed to accept the jurisdictional ruling, is forced to appeal to the highest court in order to save his rights no matter how meritless the appeal, thus prolonging rather than shortening litigation.

[12] See note 19.

State. Such a situation is presented when the first decision is based *not on the ground* that the distribution of judicial power among the various courts of the State requires the suit to be brought in another court in the State, *but on* the inaccessibility of all the courts of the State to such litigation. And that is the essence of the present case." (Emphasis added.)

I can understand the distinction drawn. But I find difficulty in understanding why *res judicata* turns for application in this case to cut off determination of substantive issues not at all upon the grounds of decision but only on the fact of adverse decision; but, for application to such issues when a jurisdictional question is also involved, it turns not simply upon the adjudication, but upon the grounds for the jurisdictional determination. If *res judicata* is governed solely by the adjudication without reference to what is adjudicated, that is, merely by the fact of adverse decision, I should think that rule would apply in all cases. If, on the contrary, the grounds of adjudication are relevant and controlling for the one class of questions, I should think they would be for the other.

The fallacy lies in the novel and unprecedented idea that the groundings of a court's decision have nothing to do with whether *res judicata* applies, except when they relate to one kind of jurisdictional determination rather than another. Apart from the exception, the idea ignores the vast body of law which has grown up on the basis that the grounding of the decision is the criterion for applying the doctrine.[13] And much of that case law has been that if the " 'merits' in the sense of the ultimate substantive issues of a litigation" are not reached, their later determination is not foreclosed.[14] This is true whether or not the jurisdic-

[13] See Scott, *op. cit., supra* note 4; Restatement, Judgments (1942) §§ 49, 50, 53, 54.

[14] See authorities cited in note 7 *supra*.

tional ruling is erroneous or valid and whether or not if erroneous it might have been corrected on appeal.

That law I think is sound, and I think it is just as sound when the jurisdictional decision goes off erroneously on a federal ground or erroneously ignoring one as when it rests on a valid basis. It is grounded in the policy that unless a litigant gets a real bite at the apple of discord he should not be foreclosed from another attempt. Its basis is that in such a case it is better and more just not to stop litigation than it is to stop the showing of the truth and thereby bring about a forfeiture of valuable substantive rights without giving at least one full and fair, which means fairly certain, opportunity for securing decision upon them.

Bullington has not had such an opportunity. He has never received, and now never can receive a decision on the substantive merits of his claim, unless possibly he can catch and serve Angel in another state and after prolonged further litigation succeed in inducing this Court to hold the North Carolina bar and *res judicata* not operative there. See *Riley* v. *New York Trust Co.*, 315 U. S. 343, 349: "By the Constitutional provision for full faith and credit, the local doctrines of *res judicata,* speaking generally, become a part of national jurisprudence, and therefore federal questions cognizable here."

Conceivably Bullington by coming here in the North Carolina suit might have secured a decision that the North Carolina statute and decision were invalid constitutionally in excluding him from all the state's courts and that the state must afford him a remedy on proof of his substantive claim. But the very multiplicity of the constitutional questions enumerated in the Court's opinion which were or might have been pertinent made that chance slim indeed. What is more important is that if the judgment had been thus reversed and remanded, it would have been

wiped out and he then would have been free to dismiss the suit and start over again in the federal courts sitting in the state or in the state courts. *Bucher* v. *Cheshire R. R. Co.*, 125 U. S. 555, 578–579.[15]

On the other hand, if the case had gone against him here, then his right to start over in the federal court in North Carolina would depend upon whether one of two grounds were accepted for this Court's decision, namely, on the one hand, that North Carolina had power to bar his substantive claim and had done so in effect though not in words, thus closing the doors of the federal court to it under the *Erie* rule; on the other, that the state had power to close its courts against his claim without adjudicating its substantive validity, thus leaving him free to go to the federal court under the *Erie* rule. Either result was a conceivable one, depending on whether the Court should conclude that a "right without a remedy" remains a right, for this purpose, or becomes none at all. But the only chance for Bullington's ultimate success, in the event of adverse deci-

[15] "If . . . a judgment has been vacated by the trial court or reversed by an appellate court, it is no longer conclusive between the parties, either as a merger of the original cause of action or as a bar to an action upon the original cause of action . . . ." Restatement, Judgments (1942) 163.

"Ordinarily, after a judgment has been reversed on appeal and the cause remanded, the case stands for trial de novo on the issues properly joined. . . . With respect to the right of plaintiff to take a voluntary nonsuit, it stands in the same relative position which it occupied before the trial in the first instance." *Shell Petroleum Corp.* v. *Shore*, 80 F. 2d 785, 786.

This is the general rule. 89 A. L. R. 109; 126 A. L. R. 305. It would seem to apply in North Carolina. North Carolina follows both the doctrine that the trial court, upon remand by an appellate court, is to proceed as if there had been no previous trial and the doctrine that judgments not on the merits do not constitute an estoppel to subsequent actions. *Hickory* v. *Railroad*, 138 N. C. 311, 318; *Grimes* v. *Andrews*, 170 N. C. 515; cf. Gen. Stat. N. C. (1943) § 1–25, as interpreted in *Grimes* v. *Andrews*, 170 N. C. at 522.

sion here, would have been for the decision to have turned out on the latter ground.

That chance was hardly worth the gamble. For this Court has declared in *Guaranty Trust Co.* v. *York*, 326 U. S. 99, 108–109, that a right without a remedy is no right at all for purposes of enforcement by a diversity suit in a federal court sitting in the state.[16] And the nature of the North Carolina statute as construed by the state court reaches exactly the result which the *York* case says precludes resort to the federal court on the same cause in a diversity suit.[17] Indeed this seems to be an alternative basis for the present decision.[18] Bullington's chance to get to the federal court on such a basis was therefore practically nil.

Should he now be barred because he did not take the extremely remote chance of securing a favorable decision, reversing the state court's judgment and forcing the state to hear his case on the merits? Not, I think, unless we can say he then would have been forced, if successful, to continue the litigation in the state courts and could not withdraw to start over in the North Carolina federal court. This we could not say unless we were to overrule the *Bucher* case, which Bullington had a right to assume we would not do. Why he should be barred from doing now, because he did not take his almost hopeless appeal, what he would have been at liberty to do if he had taken it successfully, I am not able to understand. No sound policy of ending litigation, conserving judicial time or litigants' rights or in any other respect can possibly be served by

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[16] The *York* case however did not purport to apply or extend the rule to a cause of action arising under and governed by the laws of another state than that in which the federal court was sitting. But cf. *Klaxon Co.* v. *Stentor Elec. Mfg. Co.*, 313 U. S. 487.

[17] Except for the factor noted in note 16.

[18] See text *infra*.

such a ruling.[19] Moreover, the very difficulties in his way for securing a successful determination here, which would give him some certain remedy either in the state or in the federal courts, were sufficient reason, in my opinion, to justify his foregoing that dubious procedure and starting over again in the federal court.

The real trouble here is not with the law of *res judicata,* for that law has no valid application to these facts. It is that the doctrine is used as an escape from facing squarely the real question presented. This is whether North Carolina's decision made the *Erie* doctrine applicable. The Court's opinion does state expressly that the effect of the North Carolina decision was to create a policy of the state against the validity of all claims for deficiency judgments, and comes almost but not quite to saying this requires the case to go off on application of the *York* rule.

That issue is inescapable here. The *Erie* rule did not purport to change the law of federal jurisdiction in diversity cases, taking it out of the hands of Congress and the federal courts and putting it within the states' power to determine. It purported only to prescribe the rule federal courts should follow in applying the substantive law. If the North Carolina decision was exclusively a jurisdic-

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[19] "The application of the principle of res judicata has not in any way been made to depend upon whether the judgment in question is subject to review in another tribunal. Except in so far as it may affect the question of its finality, as in the case of orders on motions, the fact that a judgment may or may not be appealable should have no bearing upon its effect as res judicata." 2 Freeman, Judgments (5th ed.) 1339.

Thus, there is no doctrine of exhaustion of judicial remedies. If the judgment of a court goes on jurisdictional grounds, the party may accept it and, instead of appealing, may institute another action where he will not be met by the jurisdictional bar. Cf. Restatement, Judgments (1942) 194–195; Cook, The Logical and Legal Bases of the Conflict of Laws (1942) 133–135.

tional one, it had no effect on the power of the federal courts in that state to hear controversies excluded by it from the state courts, and the decision neither reached the merits of the controversy "in the sense of the ultimate substantive issues of a litigation" nor barred Bullington from going to the federal court. See *Lupton's Sons Co.* v. *Automobile Club,* 225 U. S. 489. If on the other hand the decision was in effect, although not in words, a determination of the merits in that sense, it both adjudicated Bullington's substantive rights and barred him from maintaining the later suit successfully in the federal court. That question is here and until it is resolved he is deprived of any day in court except to go from one to another without securing decision either on the merits substantially or "on the merits" jurisdictionally.

From the Court's opinion I cannot say whether the question has been resolved. Its discussion of North Carolina's "policy" and its overruling of the *Lupton's Sons* case, *supra,* would seem to indicate that it is applying *York,* though without saying so frankly. But, if so, why speak also of *res judicata*? The law should not be made into such a merry-go-round. Bullington is entitled to one full day in court on the substance of his claim. This he has not had.

I hardly need add that I agree with the views expressed by MR. JUSTICE REED.

MR. JUSTICE JACKSON joins in this opinion.

CONE *v.* WEST VIRGINIA PULP & PAPER CO.

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

No. 184. Argued February 3, 1947.—Decided March 3, 1947.

Where a party whose motion for a directed verdict has been denied in a federal district court fails, within 10 days after reception of a verdict against him, to make a motion for judgment notwithstanding the verdict, as authorized by Rule 50 (b) of the Federal Rules of Civil Procedure, an appellate court is precluded from directing entry of such a judgment. Pp. 217–218.

153 F. 2d 576, reversed.

Petitioner sued respondent in a state court for damages for trespass upon lands. The suit was removed to the Federal District Court because of diversity of citizenship. A judgment for the petitioner was reversed by the Circuit Court of Appeals, which directed entry of judgment for the respondent. 153 F. 2d 576. This Court granted certiorari "limited to the questions of federal procedure raised by the petition for the writ." 329 U. S. 701. *Reversed,* p. 218.

H. Wayne Unger and, by special leave of Court, *James P. Mozingo, pro hac vice,* argued the cause for petitioner. With them on the brief was *W. J. McLeod, Jr.*

Christie Benet and *Charles W. Waring* argued the cause for respondent. With them on the brief was *J. B. S. Lyles.*

MR. JUSTICE BLACK delivered the opinion of the Court.

The petitioner brought this action in a South Carolina state court. Upon motion of respondent, it was removed to the Federal District Court because of diversity

of citizenship of the parties. The complaint claimed $25,000 damages upon allegations that the respondent's agents had trespassed upon and cut timber from lands owned by and in the possession of the petitioner. Respondent's answer denied that the petitioner had title or possession of the lands and timber. Both title and possession became crucial issues in the trial. The burden of proving them rested on the petitioner.[1] When all the evidence of both parties had been introduced, the respondent moved for a directed verdict in its favor on the ground that the petitioner had failed to prove that he either owned or was in possession of the land.[2] This motion was denied. The jury returned a verdict for petitioner for $15,000, and the court entered judgment on the verdict. The respondent moved for a new trial on the ground of newly discovered evidence. This motion was denied. Respondent did not move for judgment notwithstanding the verdict as it might have done under Rule 50 (b) of the

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[1] Under governing South Carolina law an action such as this is not one to try title but "to recover damages for trespass to property of which the plaintiff was in possession." *Macedonia Baptist Church* v. *Columbia,* 195 S. C. 59, 70, 10 S. E. 2d 350, 355. But possession may be presumed from proof of legal title. *Beaufort Land & Investment Co.* v. *New River Lumber Co.,* 86 S. C. 358, 68 S. E. 637; *Haithcock* v. *Haithcock,* 123 S. C. 61, 115 S. E. 727; Code of Laws of South Carolina (1942) § 377. Petitioner here undertook to prove possession both by showing that he had legal title and by showing that he had openly and notoriously exercised acts of dominion, possession, and ownership over a long period of years.

[2] Respondent first moved to dismiss the case on the same grounds under Rule 41 (b) of the Rules of Civil Procedure. That rule provides for a dismissal, under the circumstances and conditions there set out, where "upon the facts and the law the plaintiff has shown no right to relief." Since substantially the same disposition of the case on the same grounds was later requested by respondent in the motion for a directed verdict, we shall have no occasion further to discuss the motion to dismiss.

Federal Rules of Civil Procedure, which is set out below.[3]

The Circuit Court of Appeals decided that the admission of certain evidence offered by the petitioner to prove legal title was prejudicial error. It held that without this improperly admitted evidence petitioner's proof was not sufficient to submit the question of title to the jury. That court also held that petitioner's evidence showing possession was insufficient to go to the jury. It therefore reversed the case. But instead of remanding it to the District Court for a new trial, the Circuit Court of Appeals directed that judgment be entered for respondent. 153 F. 2d 576. That court has thus construed Rule 50 (b) as authorizing an appellate court to direct a judgment notwithstanding the verdict, even though no motion for such a judgment had been made in the District Court within ten days after the jury's discharge.

The petition for certiorari challenged the power of an appellate court to direct entry of a judgment notwithstanding the verdict where timely motion for such a judg-

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[3] 50 (b) "RESERVATION OF DECISION ON MOTION. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict . . . A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial."

ment had not been made in the District Court. On three previous occasions we have granted certiorari to consider this point but failed to reach it because, upon examination of the evidence, we found it sufficient to justify submission of all three cases to the jury. *Conway* v. *O'Brien,* 312 U. S. 492; *Berry* v. *United States,* 312 U. S. 450; *Halliday* v. *United States,* 315 U. S. 94. In this case we granted certiorari "limited to the questions of federal procedure raised by the petition for the writ." 329 U. S. 701. The point we had in mind was whether a party's failure to make a motion in the District Court for judgment notwithstanding the verdict, as permitted in Rule 50 (b), precludes an appellate court from directing entry of such a judgment. Other questions have been discussed here, but we do not consider them. Consequently, we accept, without approving or disapproving, the Circuit Court of Appeals' holding that there was prejudicial error in the admission of evidence and in the submission of the case to the jury.

Rule 50 (b) contains no language which absolutely requires a trial court to enter judgment notwithstanding the verdict even though that court is persuaded that it erred in failing to direct a verdict for the losing party. The rule provides that the trial court "may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed." This "either-or" language means what it seems to mean, namely, that there are circumstances which might lead the trial court to believe that a new trial rather than a final termination of the trial stage of the controversy would better serve the ends of justice. In short, the rule does not compel a trial judge to enter a judgment notwithstanding the verdict instead of ordering a new trial; it permits him to exercise a discretion to choose between the two alternatives. See *Berry* v. *United States, supra,* 452–

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453.[4] And he can exercise this discretion with a fresh personal knowledge of the issues involved, the kind of evidence given, and the impression made by witnesses. His appraisal of the bona fides of the claims asserted by the litigants is of great value in reaching a conclusion as to whether a new trial should be granted. Determination of whether a new trial should be granted or a judgment entered under Rule 50 (b) calls for the judgment in the first instance of the judge who saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impart. See *March* v. *Philadelphia & West Chester Traction Co.,* 285 Pa. 413, 418, 132 A. 355, 357; *Bunn* v. *Furstein,* 153 Pa. Super. 637, 638, 34 A. 2d 924. See also *Yutterman* v. *Sternberg,* 86 F. 2d 321, 324. Exercise of this discretion presents to the trial judge an opportunity, after all his rulings have been made and all the evidence has been evaluated, to view the proceedings in a perspective peculiarly available to him alone. He is thus afforded "a last chance to correct his own errors without the delay, expense or other hardships of an appeal." See *Greer* v. *Carpenter,* 323 Mo. 878, 882, 19 S. W. 2d 1046, 1047. *Cf. United States* v. *Johnson,* 327 U. S. 106, 112.

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[4] The Advisory Committee on Rules for Civil Procedure in commenting on Rule 50 (b) stated that "A trial court or an appellate court in setting aside a verdict always has discretion, if justice requires it, to order a new trial, instead of directing the entry of judgment. Rule 50 (b) states that the court on a motion for judgment notwithstanding the verdict 'may either order a new trial or direct the entry of judgment' for the moving party." Report of Proposed Amendments to Rules of Civil Procedure (1946) 66. See also New York Symposium on Federal Rules (1938) 283–284. Compare *March* v. *Philadelphia & West Chester Traction Co.,* 285 Pa. 413, 132 A. 355; *Nadeau* v. *Maryland Casualty Co.,* 170 Minn. 326, 331, 212 N. W. 595, 597; *Anderson* v. *Newsome,* 193 Minn. 157, 258 N. W. 157; *Porsmer* v. *Davis,* 152 Minn. 181, 188 N. W. 279; *Jackson* v. *Hansard,* 45 Wyo. 201, 218, 17 P. 2d 659, 664.

There are other practical reasons why a litigant should not have his right to a new trial foreclosed without having had the benefit of the trial court's judgment on the question. Take the case where a trial court is about to direct a verdict because of failure of proof in a certain aspect of the case. At that time a litigant might know or have reason to believe that he could fill the crucial gap in the evidence. Traditionally, a plaintiff in such a dilemma has had an unqualified right, upon payments of costs, to take a nonsuit in order to file a new action after further preparation, unless the defendant would suffer some plain legal prejudice other than the mere prospect of a second lawsuit. *Pleasants* v. *Fant,* 22 Wall. 116, 122; *Jones* v. *S. E. C.,* 298 U. S. 1, 19–20 and cases cited. Rule 41 (a) (1) preserves this unqualified right of the plaintiff to a dismissal without prejudice prior to the filing of defendant's answer. And after the filing of an answer, Rule 41 (a) (2) still permits a trial court to grant a dismissal without prejudice "upon such terms and conditions as the court deems proper." [5]

In this case had respondents made a timely motion for judgment notwithstanding the verdict, the petitioner could have either presented reasons to show why he should have a new trial, or at least asked the court for permission to dismiss. If satisfied from the knowledge acquired from the trial and because of the reasons urged that the ends of justice would best be served by allowing petitioner another chance, the judge could have so provided in his discretion. The respondent failed to submit

[5] Rule 41 (a) (2), Federal Rules of Civil Procedure, has been interpreted as authorizing a plaintiff to dismiss his action "without prejudice where the court believes that although there is a technical failure of proof there is nevertheless a meritorious claim." Report of Proposed Amendments to Rules of Civil Procedure (1946) 64; see *United States* v. *Lyman,* 125 F. 2d 67; 138 F. 2d 509; *Home Owners' Loan Corporation* v. *Huffman,* 134 F. 2d 314, 317.

a motion for judgment notwithstanding the verdict to the trial judge in order that he might exercise his discretionary power to determine whether there should be such a judgment, a dismissal or a new trial. In the absence of such a motion, we think the appellate court was without power to direct the District Court to enter judgment contrary to the one it had permitted to stand.

It has been suggested that the petitioner could have presented affidavits to the Circuit Court of Appeals to support his claim for a new trial, and that that court could thereupon have remanded the question to the District Court to pass upon it.[6] Such a circuitous method of determining the question cannot be approved. For Rule 50 (b) specifically prescribes a period of ten days for making a motion for judgment notwithstanding the verdict. Yet the method here suggested would enable litigants to extend indefinitely the prescribed ten-day period simply by adoption of the expedient of an appeal. Furthermore, it would present the question initially to the appellate court when the primary discretionary responsibility for its decision rests on the District Court.

Reversed.

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[6] This general suggestion was made by the Advisory Committee on Rules for Civil Procedure in its recent recommendation to us for modification of Rule 50 (b). The Committee said: "Even on appeal, if the appellate court sets aside his verdict, he may present to the appellate court affidavits to support his claim to a new trial, and the appellate court has power to receive the affidavits and remand the case to the trial court with instructions to consider the affidavits and determine whether a new trial should be allowed." Report of Proposed Amendments, *supra*, 66.

Syllabus.

NATIONAL LABOR RELATIONS BOARD *v.* DONNELLY GARMENT CO. ET AL.

NO. 38. CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.*

Argued October 16, 1946.—Decided March 3, 1947.

Before the National Labor Relations Board a union charged an employer with unfair labor practices, including the formation and domination of a plant union to forestall the efforts of the complaining union to organize the employees. The Trial Examiner rejected an offer by the employer to prove through the testimony of 1,200 employees that they had not been coerced to join the plant union and excluded evidence that the formation of the plant union followed strike threats and violence by the complaining union against other plants. The Board ordered disestablishment of the plant union. The Circuit Court of Appeals found no basis for setting aside the proceedings as unfair on the ground that either the Examiner or the Board was biased, held that the Board properly limited the evidence to issues raised by the complaint, and found no impropriety in the exclusion of evidence offered to prove misconduct on the part of the complaining union. However, it found that the employer had been denied a fair hearing in not being allowed to present testimony of its employees that the plant union was truly independent and that they had joined it voluntarily. Accordingly, it denied enforcement of the order and remanded the case to the Board "for further proceedings not inconsistent with the opinion of this Court." The Board denied the employer's application for a new examiner and assigned the case to the original examiner for further hearing. This time the Examiner heard eleven of the 1,200 employees named in the offer of proof rejected in the earlier proceeding and allowed the president of the employer corporation to testify fully; but excluded all evidence of events subsequent to the termination of the first hearing. Upon findings and recommendations substantially the same as previously made, the Board issued virtually the same order. The

*Together with No. 39, *International Ladies' Garment Workers' Union* v. *Donnelly Garment Co. et al.*, also on certiorari to the same Court.

Circuit Court of Appeals denied enforcement "for want of due process in the proceedings upon which the order is based." *Held:*

1. Upon the record, there was no want of due process in the Board's proceedings. Pp. 225–238.

2. In view of the nature of the administrative process with which the Board is entrusted and in the light of the statement in the Court's opinion in the first review that "the least that the Board can do . . . is . . . to accord the petitioners an opportunity to introduce all of the competent and material evidence which was rejected by the Trial Examiner; and to receive and consider such evidence together with all other competent and material evidence in the record before making new findings and a new order," the remand on the first review did not require a proceeding *de novo* before the Board nor a rehearing on issues as to which the original hearing was adequate. Pp. 225–228.

3. Upon examination of the whole record, it can not be said that the Board disregarded the ruling of the Circuit Court of Appeals that the Board should consider testimony of employees to the effect that they voluntarily organized and joined the plant union and that the union's affairs were uninfluenced by the employer. Pp. 222–231.

4. Discriminatory treatment by the Board is not established by the fact that evidence as to the effect of violence by an outside union on the formation of the plant union was limited to events within six months of the formation of the plant union, whereas evidence of coercion by the employer in the formation of the plant union was admitted though related to a period two years prior to the formation of the plant union. Pp. 231–232.

5. The Board was not bound on the second hearing to admit evidence of the complaining union's misconduct, inasmuch as there already was evidence in the record to apprise the Board of alleged misconduct by the complaining union if on that score the Board chose not to entertain charges of unfair labor practices against the employer. *Labor Board* v. *Indiana & Michigan Electric Co.*, 318 U. S. 9, distinguished. Pp. 233–236.

6. The power of the Circuit Court of Appeals under § 10 (e) to require the Board to take additional evidence can not be employed to enlarge the statutory scope of judicial review. Pp. 234–235.

7. The Board's denial of the employer's application for the designation of a new examiner for the hearing on the remand was not improper. Pp. 236–237.

8. The Circuit Court of Appeals not having considered the question of the sufficiency of the evidence to sustain the findings on which the order of the Board was based, the case is remanded to that court for determination of this issue. Pp. 237–238.

151 F. 2d 854, reversed.

A cease-and-desist order of the National Labor Relations Board, 21 N. L. R. B. 164, against an employer was denied enforcement by the Circuit Court of Appeals, which remanded the case to the Board. 123 F. 2d 215. A second order of the Board, issued after a further hearing, 50 N. L. R. B. 241, was also denied enforcement. 151 F. 2d 854. On petitions of the Board and the complaining union, this Court granted certiorari. 327 U. S. 775. *Reversed and remanded,* p. 238.

Ruth Weyand argued the cause for the National Labor Relations Board. With her on the brief were *Solicitor General McGrath, Stanley M. Silverberg, Gerhard P. Van Arkel, Morris P. Glushien* and *Fannie M. Boyls.*

Clif Langsdale argued the cause for the International Ladies' Garment Workers' Union. With him on the brief was *Clyde Taylor.*

Robert J. Ingraham argued the cause for the Donnelly Garment Co., respondent. With him on the brief was *Burr S. Stottle.*

Frank E. Tyler argued the cause and filed a brief for the Donnelly Garment Workers' Union, respondent.

Mr. Justice Frankfurter delivered the opinion of the Court.

On March 6, 1940, the National Labor Relations Board, on finding that the Donnelly Garment Company had engaged in labor practices condemned as "unfair" by the

Wagner Act, issued an order against the Company "to effectuate the policies" of the Act. The Circuit Court of Appeals for the Eighth Circuit denied enforcement of the order and remanded the case to the Board. 123 F. 2d 215. After carrying out what it conceived to be the directions of the Court, the Board again found against the Company. The Court below denied enforcement of the Board's second order "for want of due process in the proceedings upon which the order is based." 151 F. 2d 854, 875. The correctness of this ruling is now before us, for we brought the case here, 327 U. S. 775, to rule on important issues in the administration of the Wagner Act. This protracted litigation has given rise to a swarm of questions. In view of the fact that the case comes to us after it has been twice before the Board and three times before the court below, on a record of thirteen volumes with a total of more than 5000 pages, even an earnest attempt at compactness cannot avoid a somewhat extended opinion.

The case presents limited legal phases of one of those bitter, unedifying conflicts with which American industrial history is unfortunately replete. For other litigation growing out of this strife, see 20 F. Supp. 767; 21 F. Supp. 807; 304 U. S. 243; 23 F. Supp. 998; 99 F. 2d 309; 119 F. 2d 892; 121 F. 2d 561; 47 F. Supp. 61; 47 F. Supp. 65; 47 F. Supp. 67; 55 F. Supp. 572; 55 F. Supp. 587; 147 F. 2d 246; 154 F. 2d 38. It has its roots in a campaign by the International Ladies' Garment Workers' Union (hereafter designated as International) to unionize the women's garment industry in Kansas City, Missouri. Because of its importance, the Donnelly Garment Company (to be called Company for short) became the particular target of these unionizing efforts. These continued with varying intensity over a period of years but met with little success among the Company's employees.

In 1938, International began proceedings before the Board charging the Company with a series of unfair labor practices in violation of § 8 (1), (2), (3) of the National Labor Relations Act, 49 Stat. 449, 29 U. S. C. §§ 151 *et seq.* The main charge was that the Company, to counteract the efforts of International, had stimulated the formation of a plant union, the Donnelly Garment Workers' Union (hereafter called Union) and had dominated it through financial and other aid. Following the usual procedure there was a hearing before a trial examiner. At the hearing, the Examiner rejected an offer by the Company to prove, through the testimony of 1200 employees, that they had not been coerced by the Company to join Union, but that each of them had done so of his own free will, and that they had no knowledge of Company influence in the affairs of Union. The Examiner also excluded evidence to show that the formation of the Union followed strike threats and violence by International, successful against smaller competitors of the Company, to coerce the Company into a closed-shop agreement with International. To these and other less important exclusions the Company duly excepted on the submission of the Trial Examiner's intermediate report. The Board upheld the Examiner's rulings on evidence, accepted his findings of fact, and, with a qualification not here relevant, adopted his recommendations. Thereupon it issued the usual cease-and-desist order, and directed the disestablishment of Union and reimbursement to employees of the amount of the dues which the Company had checked off on behalf of Union (21 N. L. R. B. 164).

Review of this order came before the Circuit Court of Appeals on the Company's petition to set it aside and on the Board's cross-petition for its enforcement. On several contentions, the disposition of which is relevant to

the questions now calling for decision, the Court sustained the Board. It found no basis for setting aside the proceedings as unfair on the claim that either the Examiner or the Board was biased. It held that the Board properly limited the evidence to issues raised by the complaint, and since International was not on trial it found no impropriety in the exclusion of evidence offered to prove its misconduct. The Court did however find that the Company had been denied a fair hearing in not being allowed to present the testimony of its employees to the effect that Union was truly independent and that they had joined it voluntarily. The Court remanded the case to the Board "for further proceedings not inconsistent with the opinion of this Court."

The Board thereupon set the case for a second hearing before the original Examiner. Insisting that he was biased and had prejudged as valueless "the evidence to be adduced at the pending hearing," the Company moved for a new trial examiner. The Board denied the application and the case proceeded to hearing. This time the Examiner heard eleven of the 1200 employees named in the offer of proof rejected in the earlier proceeding, but declined to hear the rest on the ground that their testimony would be merely cumulative. He allowed the President of the Company, whom illness had kept from the earlier hearing, to testify fully. Otherwise, he received no evidence that had been available but was not offered at the earlier proceeding, and excluded all evidence of events subsequent to the termination of the first hearing. The Examiner's findings and recommendations, in respects here material, were substantially the same as those he had previously made, and the Board, acting upon his intermediate report, issued virtually the same order. 50 N. L. R. B. 241. The Company again petitioned the Circuit Court of Appeals to set aside the order, and the Board again requested its enforcement.

During the pendency of these proceedings, the Company invoked § 10 (e) of the Wagner Act and asked the Court leave to adduce before the Board evidence which it claimed had been erroneously excluded. This motion was not granted. Instead, as already noted, the Court denied the Board's petition for enforcement "for want of due process in the proceedings upon which the order is based." 151 F. 2d 854, 875. The Court set forth its views in a careful opinion of more than thirty pages in the printed record. There was also a concurring opinion, and a dissent.

The Court canvassed many items of evidence. As to some of the Board's rulings which it disapproved, the Court stated explicitly that by themselves they would not have afforded sufficient ground for reversal. Rulings which individually would not invalidate an order of the Board do not in combination acquire the necessary strength to undo what the Board, acting under authority given it by Congress, has done. We do not find that in their combination these rulings amounted to unfairness. We must therefore consider one by one those objections which the Court deemed sufficient to vitiate the Board's order. For the Court below did not suggest that the Board as a tribunal was so biased as to be incapable of fair judgment in this case. It found that such a finding against the Board was not justified.

First. The controlling basis of the Court's finding of unfairness in the Board proceedings related to testimony proffered by the Company at the second hearing before the Examiner. This second hearing was not a new proceeding. It was a stage in a process consisting of the first proceeding before the Board, the remand resulting from review of the Board's order in the Circuit Court of Appeals, and the second proceeding before the Board in response to this remand. The correctness of the Court's judgment refusing enforcement of the Board's

second order must be judged in the light of the interrelation of the two proceedings before the Board, and the Board's justifiable interpretation of the directions which it received upon remand of the first order. Indeed, the disposition of the present case turns decisively on the view that is taken of the Board's interpretation of its duty under the Court's mandate.

It becomes necessary therefore to revert to the precise terms of the Court's mandate. The order was remanded by the Circuit Court of Appeals "to said Labor Board for further proceedings not inconsistent with the opinion of this Court." The Court's opinion yields this gloss upon its mandate:

> "Our conclusion is that the petition of the Board for enforcement of the order under review must be denied. We think that the least that the Board can do, in order to cure the defects in its procedure caused by the failure of the Trial Examiner to receive admissible evidence, is to vacate the order and the findings and conclusions upon which it is based; to accord to the petitioners [the Company and the plant union] an opportunity to introduce all of the competent and material evidence which was rejected by the Trial Examiner; and to receive and consider such evidence together with all other competent and material evidence in the record before making new findings and a new order." 123 F. 2d 215, 225.

The Board based its new order upon the record of the first proceeding, reopening the hearing only for the purpose of admitting the erroneously excluded testimony of the employees. In short, the Board did not understand the remand to call for a new trial. The Court, when called upon to construe it four years later, took a different view of the meaning of its decision of November, 1941: "It is, we think, apparent that what this Court, in effect,

ruled was that the Company and the plant union were entitled to a new trial upon the evidence already taken and such competent and material evidence as might be proffered upon a further hearing." 151 F. 2d 854, 856. From this point of view, the Court could readily conclude that the record which came to it "presents an incomplete picture."

We have recognized that "the court that issues a mandate is normally the best judge of its content, on the general theory that the author of a document is ordinarily the authoritative interpreter of its purposes." But, we continued, "it is not even true that a lower court's interpretation of its mandate is controlling here. Compare *United States* v. *Morgan*, 307 U. S. 183. Therefore, we would not be foreclosed by the interpretation which the Court of Appeals gave to its mandate, even if it had been directed to a lower court." *Federal Communications Comm'n* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 141. Here, as in that case, a much deeper issue is involved. As we had occasion to point out in the *Pottsville* case, there are significant differences between the relations of an appellate court to a lower court and those of a court to a law-enforcing agency, like the Board, whose order is subject only to restricted judicial review. These differences may be particularly telling upon remand of an order to the agency. Due regard for these differences must guide us through the maze of details in this case.

In the context of the opinion remanding the Board's original order and of the nature of the administrative process with which it is entrusted, the Board was justified in not deeming itself under duty to grant a "new trial" in the sense in which a lower court must start anew when an upper court directs such a new trial. There was no reference to a "new trial," nor was any intimation given that such was the breadth of what the remand re-

quired. From the Court's opinion there appears only a very restricted dissatisfaction with the original proceedings before the Board, calling for a correspondingly restricted correction. "The least that the Board can do," wrote the court, "is . . . to accord to the petitioners an opportunity to introduce all of the competent and material evidence which was rejected by the Trial Examiner; and to receive and consider such evidence together with all other competent and material evidence in the record before making new findings and a new order." 123 F. 2d at 225. "The least that the Board can do" may well imply that the Board is authorized to draw on the wide scope of its statutory discretion. But to advise the Board of "the least that [it] can do" does not put the Board in default for not doing more. Due process does not afford a party the right to treat as a rehearsal a hearing on the issues for which the hearing was adequate. And the Wagner Act does not require that ground be covered a second time or piecemeal.

Second. Since in our view the remand did not call for a proceeding *de novo,* the Board was not required to reopen any issue as to which its ruling was left unassailed by the Circuit Court of Appeals in its first decision. We shall therefore consider the particular defects which the Circuit Court of Appeals found in the second hearing, by treating that hearing not as a new trial but as the sequel of the first hearing under a remand by the Circuit Court of Appeals for the limited purpose of correcting the prior erroneous exclusion of testimony.

(1) The Board's decision that the Company had engaged in unfair labor practices to a large extent turned on the Company's relation to the plant union. It is fair to infer that the lower court's denial of enforcement of the Board's order was influenced most by its finding that the Trial Examiner and the Board did not comply with the Court's mandate on the first review regarding the

proffer of testimony of the Company's employees to the effect that they voluntarily organized and joined the Union and that, to their knowledge, its affairs were uninfluenced by the Company. At the second hearing the Examiner admitted the testimony of eleven such employees, excluding further oral testimony of the same nature as merely cumulative. The court below did not quarrel with confining this line of testimony to eleven witnesses. But it reached the view that neither the Examiner nor the Board took this testimony into account in reaching the findings on which the Board's second order was based. It was principally from this that the Court concluded that the Company was denied the full hearing to secure which the case was remanded to the Board.

According to an early English judge, "The devil himself knoweth not the mind of man," and a modern reviewing court is not much better equipped to lay bare unexposed mental processes. It is a grave responsibility to conclude that in admitting the testimony of the Company's employees, the Board went through a mere pretense of obedience to the Court's direction, and heard the testimony with a deaf ear and a closed mind. In light of the authority with which Congress has endowed the Board, and with due regard to the conscientiousness which we must attribute to another branch of the Government, we cannot reject its explicit avowal that it did take into account evidence which it should have considered unless an examination of the whole record puts its acceptance beyond reason. Since this matter is crucial, it is appropriate to quote fully the Board's decision on the point:

> "In remanding the case to the Board for further hearing, the Circuit Court directed that the respondent [the Company] and the D. G. W. U. [the plant union] be permitted to adduce the previously proffered testimony of respondent's [the Company's] employees to show, in substance, that they formed

and joined the D. G. W. U. of their own free will and that they were not influenced, interfered with, or coerced by the respondent in choosing that organization as their bargaining representative. In compliance with the Court's mandate and pursuant to the respective offers of proof submitted by the respondent and the D. G. W. U. at the original hearing, the Board permitted the introduction of such testimony. We have carefully considered all such evidence adduced by the respondent and the D. G. W. U. We find, however, that the testimony in question does not overcome more positive evidence in the record that the respondent committed acts of interference and assistance in the formation and administration of the D. G. W. U. which subjected that organization to the respondent's domination and which removed from the employees' selection of the D. G. W. U. the complete freedom of choice which the Act contemplates. Since we find the testimony here adduced totally unpersuasive that the employees voluntarily designated the D. G. W. U., we are moreover impelled to adhere to the opinion, derived from our experience in administration of the Act, that conclusionary evidence of this nature is immaterial to issues such as those presented in this case. A consideration of all the evidence convinces us, and we find, that the respondent dominated and interfered with the formation and administration of the D. G. W. U. and contributed support thereto; and that the respondent thereby interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act." 50 N. L. R. B. 241.

We cannot read this otherwise than as an assurance by the Board that it did not merely go through the motions of allowing the testimony of these witnesses to get into the record as an empty formality, but that it duly heeded the

order of the Court and reflected upon the testimony. The Board judged of its worth, as it had a right to, in light of the mass of other testimony in the case, and found it unpersuasive. Had the Board said no more the court below could hardly have found disregard of its mandate. The Board's skeptical expression regarding this kind of testimony hardly disproves obedience to the Court's mandate. Even lower courts sometime indicate disagreement with a ruling they are bound to enforce. Out of repeated instances of hearing the same thing a generalization as to its worth will almost inevitably emerge in the thoughts of a tribunal. As to this sort of testimony, it has been observed that a feeling by employees "that they were under no sense of constraint . . . is a subtle thing, and the recognition of constraint may call for a high degree of introspective perception." Judge Magruder in *Bethlehem Shipbuilding Corp.* v. *National Labor Relations Board,* 114 F. 2d 930, 937. We are not called upon to lay down a general rule of materiality regarding such testimony. Suffice it to say that the Board obeyed the decision of the Circuit Court of Appeals that the testimony of the Company's employees regarding Union was to be adduced and considered. Its probative value was for the Board. See *Pittsburgh Plate Glass Co.* v. *National Labor Relations Board,* 313 U. S. 146, 163. And the Court did not rule that the rest of the record repelled the Board's assurance that it "carefully considered" the evidence the Court bade it to consider. It expressly withheld consideration of the Board's order on the basis of the whole record.

(2) The new testimony of the Donnelly employees led to rulings on evidence by the Examiner, approved by the Board, which in the view of the Court below contributed to render the hearing unfair. The testimony related to the offensive aspect of International's unionizing efforts and the bearing of this upon the claim of Company that Union was quite independent and not the Company's

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instrument. The employees were allowed to testify that they were antagonized by acts of violence on the part of International and that they sought self-protection in a union of their own, voluntarily formed. The Examiner limited this line of testimony to acts of violence within six months preceding the organization of Union. This was based on the notion that a time limit had to be drawn somewhere in ascertaining the effect of known violence in persuading Donnelly employees to form their own union, and that a period longer than six months was too remote, or, in any event, had not sufficient probative value. Surely this was a reasonable ruling by the hearing-tribunal. At any rate it was not so circumscribing of proof in establishing the issue toward which the evidence was directed as to call for correction. But it is urged that while the Company was so restricted on proof of this issue the Board allowed evidence further back calculated to show a continuous state of mind toward influencing employee association by the Company. By way of rebuttal to the employees' testimony that the plant union of 1937 was a spontaneous effort of the employees wholly uninfluenced by the Company, the Board admitted evidence to show that the Company fostered a company union in 1935. It does not follow that the limitation of time on admissible evidence is the same regardless of the issue for which the evidence is tendered. Certainly we cannot say that it was not admissible to allow this evidence of company coercion in 1935 as bearing on the independence of the new plant union in 1937. And so we cannot find a solid enough ground to establish discriminatory treatment by the Board because on this issue it went back to 1935 whereas on the issue of the influence of International's violence in the formation of the 1937 plant union, it drew the line at events six months prior thereto.

(3) While we think that the Board properly construed the scope of the remand not to require a retrial of issues canvassed at the first hearing, time does not stop still even for the administrative process. Change in circumstances may make relevant at the second hearing what was irrelevant at the first hearing. The Circuit Court of Appeals found such a change in circumstances in a decision of this Court rendered after the first review below. In its decision of November 6, 1941, the Circuit Court of Appeals sustained the exclusion by the Board of testimony to prove misdeeds by International. The tenor of its reasoning was that an inquiry into charges of unfair labor practices by the Company did not make relevant charges of misconduct against International, the complainant. The Board issued the order now challenged on June 9, 1943. In the meantime, on January 18, 1943, this Court decided *National Labor Relations Board* v. *Indiana & Michigan Electric Co.*, 318 U. S. 9. That case, so the court below thought, required the admission at the second hearing of the offer of proof regarding International's acts of violence.

We regard this as a misapplication of the *Indiana & Michigan* case. This case is not that case. They have in common an accusation of grave misconduct against a complainant before the Board. Otherwise, the circumstances of the two cases, and the legal issues they raise, are very different. The *Indiana & Michigan* case involved a proceeding under § 10 (e) of the National Labor Relations Act authorizing the Circuit Court of Appeals to order additional evidence to be taken before the Board when it is shown "to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence" at the hearing. We had previously held that such an application "was addressed to the sound judicial dis-

cretion of the court." *Southport Petroleum Co.* v. *Labor Board,* 315 U. S. 100, 104. Section 10 (e) in effect formulates a familiar principle regarding newly discovered evidence. Even without such explicitness this Court has, on occasion, not allowed administrative orders to stand where there has been a drastic change in circumstances. In *Indiana & Michigan* the offer of proof related to events subsequent to the Board's hearing, tending to show acts of serious violence on behalf of a complaining union. The Board had refused to reopen the case and the Circuit Court of Appeals for the Sixth Circuit granted the application under § 10 (e). We held that, in the light of the circumstances before it, the Circuit Court of Appeals did not abuse its discretion in ordering additional evidence to be taken before the Board. The proffered testimony was held relevant on three grounds: (1) Inasmuch as the Board, by the very nature of its case load, must exercise discretion in entertaining complaints, the newly revealed misconduct on the part of the complainant might affect, not the jurisdiction of the Board, but the exercise of its power to entertain a charge; (2) the new evidence bore materially upon the credibility of some important witnesses before the Board; (3) the Board had attributed to the Company responsibility for the conduct of some of its supervisory employees, and the new evidence might lead the Board to conclude that their conduct was to be attributed to self-interest and not charged against the employer.

Here we have a totally different situation. We are not reviewing an allowable exercise of judicial discretion by the Circuit Court of Appeals in ordering the Board to hear newly discovered evidence. On review of its order, the Board cannot be compelled to admit evidence which it excluded unless such exclusion was clearly insupportable. The power to adduce additional evidence granted

to the Circuit Court of Appeals by § 10 (e) cannot be employed to enlarge the statutory scope of judicial review. The short of the matter is that the Court deemed it reversible error on the part of the Board not to entertain testimony on a matter which the court deemed irrelevant to the issues at the first hearing. It did so because it interpreted the *Indiana & Michigan* case to hold that failure by the Board to allow a full-dress inquiry into the misconduct of a complainant, particularly if very serious, renders the proceedings unfair as a matter of law. We were not dealing with such an abstraction in the *Indiana & Michigan* case. Nothing short of such an abstraction will justify invalidation of the order in this case because the Board did not deal with the charges against International as a separate issue, or as though the International had been on trial. The only consideration affecting the behavior of a complainant that played a part in the decision in *Indiana & Michigan* and which may here be invoked, is the suggestion that the character of a complainant may rightfully influence the Board in entertaining a complaint. But the charges against International had in fact been brought to the attention of the Board even though not in the way in which International would have been tried had it been formally charged with crime. It would be unreal to deny that there was plenty of evidence in the record to apprise the Board of alleged misconduct by International if on that score it chose not to entertain charges of unfair labor practices against the company. In the light of the Board's opinion, it would be doctrinaire to assume that it would have reached any other result if evidence of International's misconduct had been more voluminous. *Pittsburgh Plate Glass Co.* v. *National Labor Relations Board, supra.* The two other respects in which newly discovered evidence as to violence was ordered to be heard in the *Indiana & Michigan* case are

completely lacking here. Here we have not new evidence material to the credibility of important witnesses or relevant in assessing the responsibility by an employer for conduct of supervisory employees. The refusal of the Board in effect to try International did not impair the validity of the Board's order.

Even in judicial trials, the whole tendency is to leave rulings as to the illuminating relevance of testimony largely to the discretion of the trial court that hears the evidence. See, *e. g.*, Morgan, Foreword, American Law Institute Code of Evidence, p. 15. Courts of appeal are less and less inclined to base error on such rulings. Administrative tribunals are given even freer scope in the application of the conventional rules of evidence. See *Tagg Bros.* v. *United States,* 280 U. S. 420, 442. It is significant that the Wagner Act specifically provided that "the rules of evidence prevailing in courts of law or equity shall not be controlling." § 10 (b).

Third. This brings us to the only other objection to a ruling of the Board made after the first hearing. On the first review, the court below rejected the Company's contention that the Examiner was biased. 123 F. 2d at 219. On the second review, the Court was of opinion that the Board improperly denied the Company's application for a new Examiner. It did so, apparently, not because it found actual bias on the part of the Examiner demonstrated at either hearing. The Court seemed to be moved by the generous feeling that a party ought not to be put to trial before an examiner who, by reason of his prior rulings and findings, may not be capable of exercising impartiality. Certainly it is not the rule of judicial administration that, statutory requirements apart, see Judicial Code § 21, 28 U. S. C. § 25, a judge is disqualified from sitting in a retrial because he was reversed on earlier rulings. We find no warrant for impos-

ing upon administrative agencies a stiffer rule, whereby examiners would be disentitled to sit because they ruled strongly against a party in the first hearing. The Board might have gone beyond the legal compulsions and ordered the new evidence to be heard before a new Examiner who could report with a mind wholly free from prior litigious embroilments. The Board might have been well advised also to allow greater leeway in admitting evidence not strictly relevant. It takes time to avoid even the appearance of grievances. But it is time well spent, even though it is not easy to satisfy interested parties, and defeated litigants, no matter how fairly treated, do not always have the feeling that they have received justice. In any event, we are not the advisers of these agencies. And we have no right to upset their orders unless they fall afoul of legal requirements. *Cf. Inland Empire Council* v. *Millis,* 325 U. S. 697. We do not find that the Board's order offends them.

Fourth. We have examined all the issues pressed here but we need not enlarge upon our conclusion that they are without merit. There remains the proper disposition of the case. Having found infirmities in the proceedings which led to the order, the Court below did not consider the sufficiency of the evidence to sustain the findings on which the order was based. This controversy has been so long in litigation that, other things being equal, it would be highly desirable finally to dispose of the whole case here. But other things are not equal. It is not the function of this Court to review in the first instance the sufficiency of evidence on which the Board's order is based. Congress placed that function in the Circuit Court of Appeals. And this case is peculiarly not one in which we should do the unusual thing and pass on evidence without its prior consideration by the lower court. It is not for us to make an independent examination of this entire record. The de-

mands of the work of this Court preclude an independent canvass of a record of thirteen volumes, containing more than 5000 pages. Two judges below who had gone over this mass of evidence reached opposite conclusions regarding its sufficiency to support the Board's findings. For the determination of this issue we remand the case to the Circuit Court of Appeals.

Reversed and remanded.

UNITED STATES *v.* POWELL ET AL., RECEIVERS.

NO. 56. CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.*

Argued January 13, 1947.—Decided March 3, 1947.

1. Section 321 (a) of the Transportation Act of 1940 provides that commercial rates shall be applicable to transportation of property for the United States, excepting "military or naval property of the United States moving for military or naval and not for civil use." *Held:* Phosphate rock and superphosphate which were property of the United States, and which were transported in 1941 on consignment to the British Ministry of War Transport under the Lend-Lease Act, but which were for use in Britain as farm fertilizer, were not within the exception and were not entitled to land-grant rather than commercial rates. Pp. 239–242, 247.
2. The fact that the goods transported were "defense articles" under the Lend-Lease Act did not of itself entitle them to land-grant rates under § 321 (a). Pp. 242–245.
3. Although the exception in § 321 (a) is to be construed strictly in favor of the United States, the standards of the Lend-Lease Act are not to be read into the Transportation Act. Pp. 243–244.
4. The property here involved was being transported for a "civil" use within the meaning of § 321 (a), since it was destined for use by civilian agencies in agricultural projects and not for use by the armed services to satisfy any of their needs or wants or by any civilian agency which acted as their adjunct or otherwise serviced them in any of their activities. Pp. 245–247.

152 F. 2d 228, 230, affirmed.

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*Together with No. 57, *United States* v. *Atlantic Coast Line Railroad Co.*, also on certiorari to the same Court.

Respondents brought suits against the United States under the Tucker Act, 36 Stat. 1091, to recover sums allegedly due for transportation of government property. The District Courts gave judgment for respondents. 60 F. Supp. 433 (No. 56). The Circuit Court of Appeals affirmed. 152 F. 2d 228, 230. This Court granted certiorari. 328 U. S. 826. *Affirmed,* p. 247.

Robert L. Werner argued the cause for the United States. With him on the brief were *Acting Solicitor General Washington, Assistant Attorney General Sonnett, Philip Elman, Paul A. Sweeney, Oscar H. Davis* and *Hubert H. Margolies.*

Thomas L. Preston argued the cause for respondents in No. 56. With him on the brief was *W. R. C. Cocke.*

Thomas W. Davis argued the cause for respondent in No. 57. With him on the brief was *J. M. Townsend.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

These cases involve controversies between the United States and respondent carriers over the transportation charges for shipments of government property in 1941. In one case phosphate rock and superphosphate are involved; in the other, phosphate rock. In both the commodities were purchased by the United States, shipped on government bills of lading over the lines of respondents, and consigned to the British Ministry of War Transport. They were exported to Great Britain under the Lend-Lease Act of March 11, 1941, 55 Stat. 31, 22 U. S. C. Supp. I, § 411 *et seq.,* for use as farm fertilizer under Britain's wartime program for intensified production of food. It is agreed that these shipments were "defense articles" as defined in § 2 of that Act.[1]

[1] The term includes "Any agricultural, industrial or other commodity or article for defense."

Respondents billed the United States for transportation charges on these shipments at the commercial rate and were paid at that rate. The Seaboard is a land-grant railroad. The Atlantic Coast Line is not; but it entered into an equalization agreement with the United States in 1938 under which it agreed to accept land-grant rates for shipments which the United States could alternatively move over a land-grant road.[2] The General Accounting Office excepted to these payments on the ground that land-grant rates were applicable. The amounts of the alleged overpayments were deducted from subsequent bills concededly due by the United States. Respondents thereupon instituted suits under the Tucker Act, 36 Stat. 1091, 1093, as amended, 28 U. S. C. § 41 (20), to recover the amounts withheld. The United States counterclaimed for the difference between the amounts due under the commercial rate and those due under the land-grant rate and asked that the difference be set off against the claims of respondents and that the complaints be dismissed. The District Courts gave judgment for respondents. The Circuit Court of Appeals affirmed. 152 F. 2d 228, 230. The cases are here on petitions for writs of certiorari which we granted because of the importance of determining the controlling principle for settlement of the many claims of this character against the Government.

For years the land-grant rate was fifty per cent of the commercial rate and was applicable to the transportation

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[2] The points from which the phosphate was moved by the Atlantic Coast Line are also stations on the Seaboard Line. Hence the United States is entitled to secure land-grant deductions from the Atlantic Coast Line if the Seaboard would have been subject to land-grant rates on those articles.

Since the land-grant rates were substantially lower than the commercial rates, roads which competed with the land-grant lines were unable to get the government business. For that reason they entered into equalization agreements. See *Southern Ry. Co.* v. *United States*, 322 U. S. 72, 73–74.

of property or troops of the United States. 43 Stat. 477, 486, 10 U. S. C. § 1375; *United States* v. *Union Pacific R. Co.*, 249 U. S. 354, 355; *Southern Ry. Co.* v. *United States*, 322 U. S. 72, 73. A change was effected by the Transportation Act of September 18, 1940, 54 Stat. 898, 954, 49 U. S. C. § 65. See *Krug* v. *Santa Fe Pac. R. Co.*, 329 U. S. 591. All carriers by railroad which released their land-grant claims against the United States [3] were by that Act entitled to the full commercial rates for all shipments, except that those rates were inapplicable to the transportation of "military or naval property of the United States moving for military or naval and not for civil use or to the transportation of members of the military or naval forces of the United States (or of property of such members) when such members are traveling on official duty . . . ." § 321 (a).[4] The Seaboard filed such a re-

[3] Section 321 (b).

[4] This provision was eliminated from § 321 (a) by the Act of December 12, 1945, 59 Stat. 606, 49 U. S. C. Supp. V, § 65 (a). Section 2 of that Act made October 1, 1946, the effective date of the amendment but provided that "any travel or transportation specifically contracted for prior to such effective date shall be paid for at the rate, fare, or charge in effect at the time of entering into such contract of carriage or shipment."

Senator Wheeler, Chairman of the Senate Committee on Interstate Commerce, who had charge of the bill on the floor, made the following statement concerning pending controversies of the nature involved in the instant cases:

> "Now, Mr. President, I wish to repeat what I said a moment ago. It should be made perfectly clear that the passage of this bill resulting in the repeal of the land-grant rates will have no effect whatever upon the controversies as to the proper classification of this material, provided it has moved prior to the effective date of the act. These controversies, which were discussed extensively at the hearings, will have to be settled by the courts; and action on the present bill, if favorable, will have no effect whatever upon the question of whether materials that have moved prior to the repeal fall within or without the classification of military or naval property." 91 Cong. Rec. p. 9237.

lease. Accordingly, the question presented by these cases is whether the fertilizer was "military or naval property of the United States moving for military or naval and not for civil use" within the meaning of § 321 (a) of the Transportation Act.

The legislative history of the Transportation Act of 1940 throws no light on the scope of the except clause.[5] But it is apparent from the face of the statute that there are important limitations on the type of property which must be carried at less than the applicable commercial rates. In the first place, it is not the transportation of "all" property of the United States that is excepted but only the transportation of "military or naval" property of the United States. In the second place, the excepted property must be "moving for military or naval and not for civil use." Thus the scope of the clause is restricted both by the nature of the property shipped and by the use to which it will be put at the end of the transportation.

The bulk and main stress of petitioner's argument are based on the Lend-Lease Act which was enacted about six months after the Transportation Act. It is pointed out that in the case of every shipment under the Lend-Lease Act there was a finding by the Executive that the shipment

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[5] See H. Rep. No. 2016, 76th Cong., 3d Sess., p. 87; H. Rep. No. 2832, 76th Cong., 3d Sess., p. 93. Relief from land-grant deductions was urged on the basis of the financial plight of the railroads and the substantial increase in government traffic which occurred in the 1930's. See Report of President's Committee of September 20, 1938, 1 Hearings, House Committee on Interstate and Foreign Commerce, 76th Cong., 1st Sess., on H. R. 2531, pp. 261, 271–272; Public Aids to Transportation (1938), Vol. II, pp. 42–45. The section finally enacted appears to represent a compromise between a House Bill eliminating land-grant rates entirely (see H. Rep. No. 1217, 76th Cong., 1st Sess., p. 27) and a Senate Bill which by its silence left them unchanged. S. 2009, 76th Cong., 1st Sess.

would promote our national defense,[6] that the Act was indeed a defense measure,[7] and that unless the administration of that Act is impeached, all lend-lease "defense articles" fall within the except clause and are entitled to land-grant rates.

Under conditions of modern warfare, foodstuffs lend-leased for civilian consumption sustained the war production program and made possible the continued manufacture of munitions, arms, and other war supplies necessary to maintain the armed forces. For like reasons, fertilizers which made possible increased food production served the same end. In that sense all civilian supplies which maintained the health and vigor of citizens at home or abroad served military functions.

So for us the result would be clear if the standards of the Lend-Lease Act were to be read into the Transportation Act. For the circumstance that the fertilizer was to be used by an ally rather than by this nation would not be controlling.

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[6] The authority was vested in the President, who might, when he deemed it "in the interest of national defense," authorize the Secretary of War, the Secretary of the Navy, or the head of any other department or agency of the Government to lease, lend, etc., "any defense article." § 3 (a) (2).

[7] The Act was entitled "An Act to Promote the Defense of the United States"; and the interests of national defense were the standards governing its administration, as § 3 (a) (2), *supra*, note 6, makes plain. The same purpose is evident from the Committee Reports. H. Rep. No. 18, 77th Cong., 1st Sess., pp. 2, 11; S. Rep. No. 45, 77th Cong., 1st Sess., p. 2. And as President Roosevelt stated on September 11, 1941, in transmitting the Second Report under the Act, "We are not furnishing this aid as an act of charity or sympathy, but as a means of defending America. . . . The lend-lease program is no mere side issue to our program of arming for defense. It is an integral part, a keystone, in our great national effort to preserve our national security for generations to come, by crushing the disturbers of our peace." S. Doc. No. 112, 77th Cong., 1st Sess., p. VI.

Our difficulty, however, arises when we are asked to transplant those standards into the Transportation Act. And that difficulty is not surmounted though the exception in § 321 (a) be construed, as it must be, *Northern Pacific R. Co.* v. *United States,* decided this day, *post,* p. 248, strictly in favor of the United States.

In the first place, the Transportation Act, which preceded the Lend-Lease Act by only six months, provided its own standards. They were different at least in terms from the standards of the Lend-Lease Act; and they were provided at a time when Congress was much concerned with the problems of national defense. In September, 1940, when the Transportation Act was passed, Congress and the nation were visibly aware of the possibilities of war. Appropriations for the army and navy were being increased and the scope of their operations widened,[8] alien registration was required,[9] training of civilians for military service was authorized,[10] development of stock piles of strategic and critical materials was encouraged [11]—to mention only a few of the measures being passed in the interests of national defense. See 50 Yale L. J. 250. Moreover, the realities of total war were by then plain to all. Europe had fallen; militarism was rampant. Yet in spite of our acute awareness of the nature of total war, in spite of the many measures being enacted and the many steps being taken by the Congress and the Chief Executive to prepare our national defense,

[8] See, for example, Act of June 11, 1940, 54 Stat. 265, 292, 297; Act of June 13, 1940, 54 Stat. 350, 377; Act of June 14, 1940, 54 Stat. 394; Acts of June 15, 1940, 54 Stat. 396, 54 Stat. 400; Act of June 26, 1940, 54 Stat. 599.

[9] Act of June 28, 1940, 54 Stat. 670, 8 U. S. C. § 451 *et seq.*

[10] Act of September 16, 1940, 54 Stat. 885, 50 U. S. C. App. § 301 *et seq.*

[11] Act of September 16, 1940, 54 Stat. 897.

§ 321 (a) of the Transportation Act was couched in different terms. In other parts of that Act,[12] as in many other congressional enactments passed during the period, the exigencies of national defense constituted the standard to govern administrative action. But the standard written into § 321 (a) did not reflect the necessities of national defense or the demands which total war makes on an economy. It used more conventional language—"military or naval" use as contrasted to "civil" use. That obviously is not conclusive on the problem of interpretation which these cases present. But in light of the environment in which § 321 (a) was written we are reluctant to conclude that Congress meant "all property of the United States transported for the national defense" when it used more restrictive language.

In the second place, the language of § 321 (a) emphasizes a distinction which would be largely obliterated if the requirements of national defense, accentuated by a total war being waged in other parts of the world, were read into it. Section 321 (a) uses "military or naval" use in contrast to "civil" use. Yet if these fertilizer shipments are not for "civil" use, we would find it difficult to hold that like shipments by the Government to farmers in this country during the course of the war were for "civil" use. For in total war food supplies of allies are pooled; and the importance of maintaining full agricultural production in this country if the war effort was to be successful, cannot be gainsaid. When the resources of a nation are mobilized for war, most of what it does is for a military end—whether it be rationing, or increased industrial or agricultural production, price control, or the

[12] Thus § 1 emphasized the policy in establishing a national transportation system adequate, *inter alia,* to meet the needs "of the national defense."

host of other familiar activities. But in common parlance, such activities are civil, not military. It seems to us that Congress marked that distinction when it wrote § 321 (a). If that is not the distinction, then "for military or naval and not for civil use" would have to be read "for military or naval use or for civil use which serves the national defense." So to construe § 321 (a) would, it seems to us, largely or substantially wipe out the line which Congress drew and, in time of war, would blend "civil" and "military" when Congress undertook to separate them. Yet § 321 (a) was designed as permanent legislation, not as a temporary measure to meet the exigencies of war. It was to supply the standard by which rates for government shipments were to be determined at all times—in peace as well as in war. Only if the distinction between "military" and "civil" which common parlance marks is preserved, will the statute have a constant meaning whether shipments are made in days of peace, at times when there is hurried activity for defense, or during a state of war.

In the third place, the exception in § 321 (a) extends not only to the transportation of specified property for specified uses. It extends as well to "the transportation of members of the military or naval forces of the United States (or of property of such members) when such members are traveling on official duty . . . ." That clause plainly does not include the multitude of civilians employed by the Government during the war and exclusively engaged in furthering the war effort, whether they be lend-lease officials or others.[13] Thus, the entire except clause

[13] The provision under land-grant legislation that "troops of the United States" should be transported at half rates was held not to include discharged soldiers, discharged military prisoners, rejected applicants for enlistment, applicants for enlistment provisionally accepted, retired enlisted men, or furloughed soldiers en route back to their sta-

contained in § 321 (a) will receive a more harmonious construction if the scope of "military or naval" is less broadly construed, so as to be more consonant with the restrictive sense in which it is obviously used in the personnel portion of the clause.

In sum, we hold that respondents in these cases were entitled to the full applicable commercial rate for the transportation of the fertilizer. In *Northern Pacific R. Co.* v. *United States, supra,* we develop more fully the breadth of the category of "military or naval property" of the United States "moving for military or naval . . . use." It is sufficient here to say that the fertilizer was being transported for a "civil" use within the meaning of § 321 (a), since it was destined for use by civilian agencies in agricultural projects and not for use by the armed services to satisfy any of their needs or wants or by any civilian agency which acted as their adjunct or otherwise serviced them in any of their activities.

Affirmed.

MR. JUSTICE RUTLEDGE dissents.

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tions. *United States* v. *Union Pacific R. Co., supra.* The same result was reached in the case of engineer officers of the War Department who were assigned to duty in connection with the improvement of rivers and harbors. *Southern Pacific Co.* v. *United States,* 285 U. S. 240.

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NORTHERN PACIFIC RAILWAY CO. *v.* UNITED STATES.

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

No. 400. Argued January 13, 1947.—Decided March 3, 1947.

1. Section 321 (a) of the Transportation Act of 1940 provides that commercial rates shall be applicable to transportation of property for the United States, excepting "military or naval property of the United States moving for military or naval and not for civil use." *Held:* The property involved in each of the five classes hereinafter described, which at the time of the shipments in 1941–1943 was property of the United States, was within the exception and hence entitled to land-grant rather than commercial rates. Pp. 250–255.

(1) Copper cable consigned to a naval officer for use in the installation of degaussing equipment (a defense against magnetic mines) on a cargo vessel, being built by a shipbuilding company under contract with the Maritime Commission, according to plans whereby the vessel would be convertible into a military or naval auxiliary. The degaussing specifications were prepared by the Navy, which also furnished all material and bore the cost. The vessel was delivered in 1941 and was operated as directed by the Maritime Commission or the War Shipping Administration. Pp. 251, 255.

(2) Lumber for use in the construction of a munitions plant which was being constructed for the Government by contractors under Army supervision. Pp. 251, 255.

(3) Lumber for the construction of pontons by a contractor under a contract with the Marine Corps. The product was either shipped overseas in connection with military or naval operations or used in the training of combat engineers. Pp. 251, 255.

(4) Bowling alley equipment destined for a naval air base under construction on public land reserved for Navy use. The equipment was intended to be used for recreation by the civilian construction crew, and, upon completion of construction, by the Navy. In fact it was used only by servicemen. Pp. 252, 255.

(5) Liquid paving asphalt consigned to the Civil Aeronautics Authority for use in constructing runways at an airport in Alaska under a program approved by a joint cabinet board as being

necessary for the national defense. Work was commenced by a civilian contractor, and, after the shipment had moved, was taken over by the Army which thereafter had full control of the field. Pp. 252, 255.

2. Although the shipment of asphalt was to a civilian agency (the Civil Aeronautics Authority), it was nevertheless "military or naval" property within the meaning of § 321 (a). Pp. 252–253.
3. "Military or naval" property within the meaning of § 321 (a) is not limited to property shipped by or under control of the Army or Navy, nor to property procured by those departments. P. 253.
4. The exception prescribed by § 321 (a) is not confined to property for ultimate use directly by the armed forces. P. 253.
5. Within the meaning of § 321 (a), an intermediate manufacturing phase can not be said to have an essential "civil" aspect, when the products or articles involved are destined to serve military or naval needs. It is the dominant purpose for which the manufacturing or processing activity is carried on that is controlling. P. 255.
6. Doubts as to the meaning of a statute which operates as a grant of public property, or as a relinquishment of a public interest, should be resolved in favor of the Government and against the private claimant. P. 257.
7. Section 321 (a), though enacted in the interests of the railroads, continues land-grant rates in a narrower category, and is to be construed in favor of the Government and against the railroads. Pp. 257–258.

156 F. 2d 346, affirmed.

Petitioner brought suit against the United States under the Tucker Act to recover the difference between commercial rates and the land-grant rates which it received for the transportation of government property. The District Court gave judgment for the United States. 64 F. Supp. 1. The Circuit Court of Appeals affirmed. 156 F. 2d 346. This Court granted certiorari. 329 U. S. 701. *Affirmed*, p. 258.

Lorenzo B. da Ponte argued the cause for petitioner. With him on the brief was *Marcellus L. Countryman, Jr.*

Robert L. Werner argued the cause for the United States. With him on the brief were *Acting Solicitor Gen-*

eral Washington, Assistant Attorney General Sonnett, Philip Elman, Paul A. Sweeney, Oscar H. Davis and *Hubert H. Margolies.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This is a companion case to *United States* v. *Powell* and *United States* v. *Atlantic Coast Line R. Co.,* decided this day, *ante,* p. 238. This case, like those, involves the construction of the provision of § 321 (a) of the Transportation Act of 1940 which entitles "military or naval property of the United States moving for military or naval and not for civil use" to land-grant rates. Petitioner was a land-grant road, 13 Stat. 365, 370, and for years carried government property at land-grant rates. 43 Stat. 477, 486, 10 U. S. C. § 1375. It qualified to receive the higher rates authorized by § 321 (a) of the Transportation Act of 1940 by the timely filing of the required release of land-grant claims pursuant to § 321 (b) of the Act.[1]

The shipments in controversy were made over petitioner's railroad on government bills of lading in 1941, 1942, and 1943. They were admittedly government property at the time of carriage. Petitioner submitted its bills to the Government at the published commercial tariff rates. The United States, claiming that under § 321 (a) of the Transportation Act each shipment was entitled to move at land-grant rates, deducted the difference between the commercial rates and the land-grant rates. Petitioner thereupon brought this suit under the Tucker Act to recover the deducted sums. The District Court entered judgment for the United States on the

[1] This release was followed by a settlement of the litigation before this Court in *United States* v. *Northern Pacific R. Co.,* 311 U. S. 317. See *United States* v. *Northern Pacific R. Co.,* 41 F. Supp. 273; S. Doc. No. 48, 77th Cong., 1st Sess.

claims here involved. 64 F. Supp. 1. The Circuit Court of Appeals affirmed. 156 F. 2d 346. The case is here on certiorari.

The shipments involved five types of property:

Copper cable.—Copper cable was transported to Tacoma, Wash., for use in the installation of degaussing equipment (a defense against magnetic mines) on a cargo vessel being so built that it might readily be converted into a military or naval auxiliary. The work was done by a contractor under contract with the Maritime Commission. The degaussing specifications were furnished by the Navy, which also furnished the equipment and bore the cost. The vessel was delivered in 1941 and was operated as directed by the Maritime Commission or the War Shipping Administration. Whether it operated as a cargo vessel or as a military or naval auxiliary does not appear.

Lumber for construction of munitions plant.—In 1942 the Twin Cities Ordnance Plant was being constructed in Minnesota by contractors under the supervision of the Army. The plant was government owned and Army sponsored. Army officers were procuring agents for the lumber used in the construction. Petitioner transported lumber for use in the construction. The plant was completed in 1943 and manufactured ammunition for the armed forces.

Lumber for construction of Marine Corps pontons.—Petitioner in 1943 carried fir lumber to a plant in Minnesota to be treated, kiln-dried, milled, and manufactured by a contractor into parts of demountable floating bridges required to move military personnel and war vehicles across water barriers. The construction was under a contract with the Marine Corps. The manufactured product was either shipped overseas in connection with military or naval operations or was used in connection with the training of combat engineers.

Bowling alleys for Dutch Harbor.—Petitioner moved bowling alley equipment to Seattle, Washington, for reshipment to the Naval Air Base, Dutch Harbor, Alaska. The Navy had entered into a contract for the construction of an air base at Dutch Harbor on public land reserved for Navy use. The purchase and installation of the bowling alleys were pursuant to that contract and were approved by the Navy officer who had supervision and control of the construction program. The recreational facilities, which included the bowling alleys, were planned for initial use by the civilian construction crew and then, when construction work was ended, by the Navy. But in fact they were used only by members of the armed forces.

Liquid paving asphalt for Cold Bay, Alaska, airport.—In 1942 petitioner moved liquid paving asphalt to Seattle, Washington, for reshipment to Alaska. The asphalt was for use in constructing runways at an airport at Cold Bay under a program of the Civil Aeronautics Authority approved by a joint cabinet board as being necessary for the national defense. Work was commenced by a civilian contractor and, after the shipment had moved, was taken over by the Army which thereafter had full control of the field.

In four of the above instances the property was consigned to an army or navy officer; in the fifth, the shipment of liquid paving asphalt, the Civil Aeronautics Authority was the consignee. And as we have said, the property in each case was at the time of shipment property of the United States. The question remains whether within the meaning of § 321 (a) it was "military or naval" property and, if so, whether it was "moving for military or naval" use.

There is a suggestion that since the shipment of asphalt was to a civilian agency, the Civil Aeronautics Authority, it was not "military or naval" property. The theory is

that "military or naval" property means only property shipped by or under control of the Army or Navy.

We see no merit in that suggestion. Section 321 (a) makes no reference to specific agencies or departments of government. The fact that the War or Navy Department does the procurement might, of course, carry special weight or be decisive in close cases. But it is well known that procurement of military supplies or war material is often handled by agencies other than the War and Navy Departments. Procurement of cargo and transport vessels by the Maritime Commission is an outstanding example. See Merchant Marine Act of 1936, § 902, 49 Stat. 2015–2016, as amended, 46 U. S. C. § 1242. And shortly before the Transportation Act of 1940 was enacted, Congress by the Act of June 25, 1940, 54 Stat. 572, 573–574, authorized the Reconstruction Finance Corporation to create subsidiary corporations to purchase and produce equipment, supplies, and machinery for the manufacture of arms, ammunition, and implements of war. And later that Act was amended to enable those corporations to purchase or produce any supply or article necessary for the national defense or war effort. Act of June 10, 1941, 55 Stat. 248, 249. As we have held in *United States* v. *Powell, supra,* not every purchase which furthers the national defense is for "military or naval" use within the meaning of § 321 (a). But property may fall within that category though it is procured by departments other than War or Navy.

It is also suggested that the property covered by the exception in § 321 (a) is confined to property for ultimate use directly by the armed forces. Under that view materials shipped for the construction of vessels for the Maritime Commission and used to service troops at home or abroad would not be "military or naval" property. We likewise reject that argument. Civilian agencies may service the armed forces or act as adjuncts to them. The Mari-

time Commission is a good example. An army and navy on foreign shores or in foreign waters cannot live and fight without a supply fleet in their support. The agency, whether civil or military, which performs that function is serving the armed forces. The property which it employs in that service is military or naval property, serving a military or naval function.

But petitioner contends that, even if that is true, the construction of vessels or other military equipment or supplies is in a different category. It argues that none of the articles shipped in the present case was military or naval, since they were not furnished to the armed forces for their use. They were supplied, so the argument runs, for manufacture and construction which are civilian pursuits and which were here in fact performed by civilian contractors. Only the completed product, not the component elements, was, in that view, for military or naval use.

Military or naval property may move for civil use, as where Army or Navy surplus supplies are shipped for sale to the public. But in general the use to which the property is to be put is the controlling test of its military or naval character. Pencils as well as rifles may be military property. Indeed, the nature of modern war, its multifarious aspects, the requirements of the men and women who constitute the armed forces and their adjuncts, give military or naval property such a broad sweep as to include almost any type of property. More than articles actually used by military or naval personnel in combat are included. Military or naval use includes all property consumed by the armed forces or by their adjuncts, all property which they use to further their projects, all property which serves their many needs or wants in training or preparation for war, in combat, in maintaining them at home or abroad, in their occupation after victory is won. It is the relation of the shipment to the military or naval effort that is control-

ling under § 321 (a). The property in question may have to be reconditioned, repaired, processed or treated in some other way before it serves their needs. But that does not detract from its status as military or naval property. *Southern Pacific Co.* v. *Defense Supplies Corp.*, 64 F. Supp. 605. Within the meaning of § 321 (a) an intermediate manufacturing phase cannot be said to have an essential "civil" aspect, when the products or articles involved are destined to serve military or naval needs. It is the dominant purpose for which the manufacturing or processing activity is carried on that is controlling.

Measured by that test, there can be no doubt that the five types of property involved in the present litigation were "military or naval" property of the United States "moving for military or naval and not for civil use" within the meaning of § 321 (a). The lumber for the pontons, the asphalt for the airfield, the lumber for the ammunition plant were used in Army or Navy projects directly related to combat preparation or to actual combat. Copper cable for the cargo vessel, though farther removed from that category, was well within the definition of "military or naval" property. It, too, was a defensive weapon. Beyond that it was purchased by the Navy Department and consigned to one of its officers. It was supplied pursuant to Navy specifications; and the ship on which it was installed was being prepared for possible ultimate use by the Navy. The bowling alleys were also well within the statutory classification. The needs of the armed forces plainly include recreational facilities. The morale and physical condition of combat forces are as important to the successful prosecution of a war as their equipment. The fact that the bowling alleys were planned for initial use of civilian workers makes no difference. It is the nature of the work being done, not the status of the person handling the materials, that is decisive. Supplies to maintain civilians repairing Army or Navy planes is a case in point.

The dominant purpose of the project in this case was the same whether civilians or military or navy personnel did the actual work.

Petitioner contends that if Congress intended to include in "military or naval property" articles for use in the manufacture of implements of war, it would have said so. It seeks support for that position from other Congressional enactments under which such materials were excluded because not mentioned [2] or were included by specific reference.[3] We can find, however, little support for petitioner's contention in that argument. Apart from the different wording of those acts and the different ends they served, there is one decisive and controlling circumstance. We have more in § 321 (a) than a declaration that "military or naval" property is entitled to land-grant rates. Congress went further and drew the line between property moving for "military or naval" use and property moving

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[2] The embargo against "arms or munitions of war" authorized by the Joint Resolution of March 14, 1912 (see 37 Stat. 1733), was held not to include machinery for the construction of a munitions plant. 32 Op. Atty. Gen. 132.

[3] Thus the Act of July 2, 1940, 54 Stat. 712, 714, 50 U. S. C. App. § 701, authorized the President to prohibit or curtail "the exportation of any military equipment or munitions, or component parts thereof, or machinery, tools, or material, or supplies necessary for the manufacture, servicing, or operation thereof . . . ."

The Act of November 30, 1940, 54 Stat. 1220, amending the Anti-Sabotage Act, defined "national-defense material" as including "arms, armament, ammunition, livestock, stores of clothing, food, foodstuffs, fuel, supplies, munitions, and all other articles of whatever description and any part or ingredient thereof," which the United States intended to use in the national defense.

The Act of October 16, 1941, 55 Stat. 742, authorized the President to requisition the following types of property for the defense of the United States: "military or naval equipment, supplies, or munitions, or component parts thereof, or machinery, tools, or materials necessary for the manufacture, servicing, or operation of such equipment, supplies, or munitions . . . ."

for "civil" use. As we have said, the controlling test is the use to which the property is dedicated or devoted. The fact that Congress did not define what was a "military or naval" use as distinguished from a "civil" use is unimportant. The classification made by Congress under this Act, unlike that made under the acts on which petitioner relies, was all-inclusive not partial. What is military or naval is contrasted to what is civil. The normal connotation of one serves to delimit or expand the other. It is in that context that "military or naval" must be construed.

Petitioner also contends that § 321 (a) is a remedial enactment which should be liberally construed so as to permit no exception which is not required. Cf. *Piedmont & N. Ry. Co.* v. *Interstate Commerce Commission,* 286 U. S. 299, 311–312. But it is a familiar rule that where there is any doubt as to the meaning of a statute which "operates as a grant of public property to an individual, or the relinquishment of a public interest," the doubt should be resolved in favor of the Government and against the private claimant. *Slidell* v. *Grandjean,* 111 U. S. 412, 437. See *Southern Ry. Co.* v. *United States,* 322 U. S. 72, 76. That rule has been applied in construing the reduced rate conditions of the land-grant legislation. *Southern Pacific Co.* v. *United States,* 307 U. S. 393, 401; *Southern Ry. Co.* v. *United States, supra.* That principle is applicable here where the Congress, by writing into § 321 (a) an exception, retained for the United States an economic privilege of great value. The fact that the railroads, including petitioner, filed releases of their land-grant claims in order to obtain the benefits of § 321 (a) is now relied upon as constituting full consideration for the rate concession. It is accordingly argued that the railroads made a contract with the United States which should be generously construed. Cf. *Russell* v. *Sebastian,* 233 U. S. 195, 205. The original land-grants resulted in a contract. *Burke*

v. *Southern Pacific R. Co.*, 234 U. S. 669, 680. Yet, as we have seen, they were nonetheless public grants strictly construed against the grantee. The present Act, though passed in the interests of the railroads, was in essence merely a continuation of land-grant rates in a narrower category. Therefore, it, too, must be construed like any other public grant.

Affirmed.

UNITED STATES *v.* UNITED MINE WORKERS OF AMERICA.

NO. 759. CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.*

Argued January 14, 1947.—Decided March 6, 1947.

1. Neither the Norris-LaGuardia Act, 47 Stat. 70, nor § 20 of the Clayton Act, 38 Stat. 738, deprives a federal district court of jurisdiction to issue a restraining order and preliminary injunction in a suit by the Government to prevent a union and its officers from precipitating a nation-wide strike in the bituminous coal mines pending judicial interpretation of a labor contract between the Government and the union, at a time when the mines are being operated by the Government during a national emergency pursuant to an executive order issued by the President under his constitutional authority as President and as Commander in Chief of the Army and Navy and authority conferred upon him by the War Labor Disputes Act, 57 Stat. 163. Pp. 269–289.

(a) The general term "employer," as used in the restrictive provisions of the Norris-LaGuardia Act and the Clayton Act, does not include the Government. Pp. 269–284.

(b) Neither the policy nor the legislative history of those Acts discloses any intention of Congress to make them applicable to disputes between the Government and its own employees. Pp. 273–280.

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*Together with No. 760, *United States* v. *Lewis;* No. 781, *United Mine Workers of America* v. *United States;* No. 782, *Lewis* v. *United States;* and No. 811, *United Mine Workers of America et al.* v. *United States,* also on certiorari to the same Court.

(c) Views expressed in debates on the War Labor Disputes Act eleven years after the passage of the Norris-LaGuardia Act cannot be accepted as authoritative guides to the construction of the latter, when some of those making the statements were not members of Congress at the time of the passage of the Act and when none had been a member of the committee which reported the bill. Pp. 281–282.

(d) Neither the rejection of a substitute bill which would have authorized injunctions upon application of the Attorney General to restrain violations of the War Labor Disputes Act nor anything else in the legislative history of that Act constitutes an authoritative expression of Congress directing the courts to withhold injunctive relief from the Government in disputes with its own employees. Pp. 282–284.

(e) For the purpose of this case, the miners are employees of the Government, even though the private managers of the mines have been retained as operating managers for the Government and the regulations provide that none of the earnings or liabilities resulting from the operation of the mines are for the account or at the risk or expense of the Government. Pp. 284–288.

(f) In seizing and operating the mines, the Government was exercising a sovereign function. P. 289.

2. Even if the Norris-LaGuardia Act were applicable, the District Court, in the circumstances of this case, had power to issue a restraining order for the purpose of preserving existing conditions pending a decision upon its own jurisdiction; and disobedience is punishable as criminal contempt. Pp. 289–295.

3. In this case, none of the procedural aspects of the trial involved error so prejudicial as to require reversal of the judgments for civil and criminal contempt. Pp. 295–301.

(a) The proceedings complied with Rule 42 (b) of the Federal Rules of Criminal Procedure requiring criminal contempt to be prosecuted on notice stating the essential facts constituting the contempt charged. P. 296.

(b) Rule 42 (b) was not designed to cast doubt upon the propriety of instituting criminal contempt proceedings on pleadings resting only on information and belief. P. 296.

(c) Although the requirement of Rule 42 (b) that the notice issuing to defendants describe the criminal contempt charged as such was not complied with, this did not result in substantial prejudice to defendants, where they were fully aware that a criminal contempt was charged, acted accordingly in their motions and

arguments, and actually enjoyed during the trial all the enhanced protections accorded defendants in criminal contempt proceedings. Pp. 297–298.

(d) Defendants were properly tried by the court without a jury, since their demand for a jury trial was based only on § 11 of the Norris-LaGuardia Act and this case was not one "arising under" that Act. P. 298.

(e) Having been accorded all rights and privileges owing to defendants in criminal contempt cases, defendants were not substantially prejudiced because their trial included a proceeding in civil contempt and was carried on in the main equity suit. Pp. 298–301.

(f) In the circumstances of this case, there was good cause for the extension of the temporary restraining order at a time when there was in progress argument on defendants' motion to vacate the rule to show cause in the contempt proceedings. P. 301.

4. The Government was entitled to obtain relief in this case by way of civil contempt and was not limited to a proceeding in criminal contempt. Pp. 301–302.

5. The contempt continued for 15 days from issuance of the restraining order until the finding of guilty. Its willfulness was not qualified by any concurrent attempt of defendants to challenge the order. Immediately following the finding of guilty, defendant Lewis, president of the union, stated openly in court that defendants would adhere to their policy of defiance. This policy was causing economic paralysis which was rapidly spreading from the coal mines to practically every other major industry. It constituted a serious threat to orderly constitutional government and to the economic and social welfare of the nation. While Lewis was the aggressive leader, he acted as the representative of the union; and it was the members of the union who executed the nation-wide strike. *Held:*

(a) The trial court properly found both Lewis and the union guilty of both civil and criminal contempt. Pp. 303–304.

(b) The record clearly warrants a fine of $10,000 against Lewis for criminal contempt; and that fine is sustained. P. 304.

(c) The record does not warrant the unconditional imposition of a fine of $3,500,000 against the union; and the judgment against the union is modified so as to require it (1) to pay a fine of $700,000 and (2) to pay an additional fine of $2,800,000, unless it shows within five days after the issuance of the mandate herein that it has fully complied with the temporary restraining order and the preliminary injunction. Pp. 304–305.

6. In imposing a fine for criminal contempt, a trial judge may properly take into consideration the extent of the willful and deliberate defiance of the court's order, the seriousness of the consequences of the contumacious behavior, the necessity of effectively terminating the defendant's defiance as required by the public interest, and the importance of deterring such acts in the future. P. 303.
7. Because of the nature of these standards, great reliance must be placed upon the discretion of the trial judge. P. 303.
8. Where the purpose of judicial sanctions in civil contempt proceedings is to coerce the defendant into compliance with the court's order, the court must consider the character and magnitude of the harm threatened by continued contumacy and the probable effectiveness of any suggested sanction in bringing about the desired result. P. 304.
9. A court which has returned a conviction for contempt must, in fixing the amount of a fine to be imposed as a punishment or as a means of securing future compliance, consider the amount of defendant's financial resources and the consequent seriousness of the burden to that particular defendant. P. 304.

70 F. Supp. 42, modified and affirmed.

In a Federal District Court, a union and its president were adjudged guilty of criminal and civil contempt and fined for violation of a temporary restraining order issued in a suit by the Government in a labor dispute arising while the coal mines were in the possession of, and were being operated by, the Government pursuant to Executive Order 9728, 11 F. R. 5593, issued under the President's constitutional authority as Commander in Chief of the Army and Navy and authority conferred upon him by the War Labor Disputes Act, 57 Stat. 163. 70 F. Supp. 42. While an appeal to the United States Court of Appeals for the District of Columbia was pending, this Court granted certiorari pursuant to § 240 (a) of the Judicial Code. 329 U. S. 708, 709, 710. *Affirmed,* except that the fine imposed on the union is modified conditionally, p. 307.

Attorney General Clark and *Assistant Attorney General Sonnett* argued the cause for the United States.

With them on the brief were *Acting Solicitor General Washington, John Ford Baecher, Joseph M. Friedman* and *J. Francis Hayden.*

Welly K. Hopkins and *Joseph A. Padway* argued the cause for the United Mine Workers and John L. Lewis. With them on the brief were *Edmund Burke, T. C. Townsend, Harrison Combs, M. E. Boiarsky, Henry Kaiser* and *James A. Glenn.*

Briefs were filed as *amici curiae* by *George Moskowitz* and *Carl Rachlin* for the Workers Defense League; *Robert W. Kenny, Joseph Forer, David Rein* and *Herman A. Greenberg* for the National Lawyers Guild; *Lee Pressman, Eugene Cotton* and *Frank Donner* for the Congress of Industrial Organizations; and *William L. Standard* for the National Maritime Union of America, CIO, urging reversal.

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

In October, 1946, the United States was in possession of, and operating, the major portion of the country's bituminous coal mines.[1] Terms and conditions of employment

[1] The United States had taken possession of the mines pursuant to Executive Order 9728 of May 21, 1946, 11 F. R. 5593, in which the President, after determining that labor disturbances were interrupting the production of bituminous coal necessary for the operation of the national economy during the transition from war to peace, directed the Secretary of the Interior to take possession of and operate the mines and to negotiate with representatives of the miners concerning the terms and conditions of employment.

The President's action was taken under the Constitution, as President of the United States and Commander in Chief of the Army and Navy, and by virtue of the authority conferred upon him by the War Labor Disputes Act, 57 Stat. 163, 50 U. S. C. App. §§ 1501–1511. Section 3 of the Act authorizes the seizure of facilities necessary for the war effort if and when the President finds and proclaims that

were controlled "for the period of Government possession" by an agreement [2] entered into on May 29, 1946, between Secretary of the Interior Krug, as Coal Mines Administrator, and John L. Lewis, as President of the United Mine Workers of America.[3] The Krug-Lewis agreement embodied far-reaching changes favorable to the miners; [4] and, except as amended and supplemented therein, the agreement carried forward the terms and conditions of the National Bituminous Coal Wage Agreement of April 11, 1945.[5]

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strikes or other labor disturbances are interrupting the operation of such facilities.

Section 3 directs that the authority under that section to take possession of the specified facilities will terminate with the ending of hostilities and that the authority under that section to operate facilities seized will terminate six months after the ending of hostilities. The President on December 31, 1946, proclaimed that hostilities were terminated on that day. 12 F. R. 1.

[2] The initial paragraph of the contract provided:

"This agreement between the Secretary of the Interior, acting as Coal Mines Administrator under the authority of Executive Order No. 9728 (dated May 21, 1946, 11 F. R. 5593), and the United Mine Workers of America, covers for the period of Government possession the terms and conditions of employment in respect to all mines in Government possession which were as of March 31, 1946, subject to the National Bituminous Coal Wage Agreement, dated April 11, 1945."

[3] In compliance with Executive Order No. 9728 and § 5 of the War Labor Disputes Act, the agreement had been submitted to and approved by the National Wage Stabilization Board.

[4] See p. 286 *infra*.

[5] The saving clause was in the following form:

"Except as amended and supplemented herein, this agreement carries forward and preserves the terms and conditions contained in all joint wage agreements effective April 1, 1941, through March 31, 1943, the supplemental agreement providing for the six (6) day workweek, and all the various district agreements executed between the United Mine Workers and the various Coal Associations and Coal Companies (based upon the aforesaid basic agreement) as they existed on March 31, 1943, and the National Bituminous Coal Wage Agreement, dated April 11, 1945."

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On October 21, 1946, the defendant Lewis directed a letter to Secretary Krug and presented issues which led directly to the present controversy. According to the defendant Lewis, the Krug-Lewis agreement carried forward § 15 of the National Bituminous Coal Wage Agreement of April 11, 1945. Under that section either party to the contract was privileged to give ten days' notice in writing of a desire for a negotiating conference which the other party was required to attend; fifteen days after the beginning of the conference either party might give notice in writing of the termination of the agreement, effective five days after receipt of such notice. Asserting authority under this clause, the defendant Lewis in his letter of October 21 requested that a conference begin November 1 for the purpose of negotiating new arrangements concerning wages, hours, practices, and other pertinent matters appertaining to the bituminous coal industry.[6]

Captain N. H. Collisson, then Coal Mines Administrator, answered for Secretary Krug. Any contractual basis for requiring negotiations for revision of the Krug-Lewis agreement was denied.[7] In the opinion of the Government, § 15 of the 1945 agreement had not been preserved by the Krug-Lewis agreement; indeed, § 15 had been expressly nullified by the clause of the latter contract providing that the terms contained therein were to cover the period of Government possession. Although suggesting that any negotiations looking toward a new agreement be carried on with the mine owners, the Government expressed willingness to discuss matters affecting the operation of the mines under the terms of the Krug-Lewis agreement.

[6] The letter also charged certain breaches of contract by the Government and asserted significant changes in Government wage policy.

[7] Captain Collisson also specifically denied breaches of contract on the part of the Government.

Conferences were scheduled and began in Washington on November 1, both the union and the Government adhering to their opposing views regarding the right of either party to terminate the contract.[8] At the fifth meeting, held on November 11, the union for the first time offered specific proposals for changes in wages and other conditions of employment. On November 13 Secretary Krug requested the union to negotiate with the mine owners. This suggestion was rejected.[9] On November 15 the union, by John L. Lewis, notified Secretary Krug that "Fifteen days having now elapsed since the beginning of said conference, the United Mine Workers of America, exercising its option hereby terminates said Krug-Lewis Agreement as of 12:00 o'clock P. M., Midnight, Wednesday, November 20, 1946."

Secretary Krug again notified the defendant Lewis that he had no power under the Krug-Lewis agreement or under the law to terminate the contract by unilateral declaration.[10] The President of the United States announced his strong support of the Government's position and requested reconsideration by the union in order to avoid a national crisis. However, the defendant Lewis, as union president, circulated to the mine workers copies of the November 15 letter to Secretary Krug. This communication was for the "official information" of union members.

The United States on November 18 filed a complaint in the District Court for the District of Columbia against

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[8] Conferences were carried on without prejudice to the claims of either party in this respect.

[9] Secretary Krug and defendant Lewis met privately on November 13 and again on November 14.

[10] Secretary Krug had been advised by the Attorney General, whose opinion had been sought, that § 15 of the 1945 agreement was no longer in force.

the United Mine Workers of America and John L. Lewis, individually and as president of the union. The suit was brought under the Declaratory Judgment Act[11] and sought judgment to the effect that the defendants had no power unilaterally to terminate the Krug-Lewis agreement. And, alleging that the November 15 notice was in reality a strike notice, the United States, pending the final determination of the cause, requested a temporary restraining order and preliminary injunctive relief.

The court, immediately and without notice to the defendants, issued a temporary order[12] restraining the

[11] Judicial Code, § 274d, 28 U. S. C. § 400.

[12] The pertinent part of the order was as follows:

"NOW, THEREFORE, IT IS BY THE COURT this 18th day of November 1946,

"ORDERED that the defendants and each of them and their agents, servants, employees, and attorneys, and all persons in active concert or participation with them, be and they are hereby restrained pending further order of this Court from permitting to continue in effect the notice heretofore given by the defendant, John L. Lewis, to the Secretary of Interior dated November 15, 1946; and from issuing or otherwise giving publicity to any notice that or to the effect that the Krug-Lewis Agreement has been, is, or will at some future date be terminated, or that said agreement is or shall at some future date be nugatory or void at any time during Government possession of the bituminous coal mines; and from breaching any of their obligations under said Krug-Lewis Agreement; and from coercing, instigating, inducing, or encouraging the mine workers at the bituminous coal mines in the Government's possession, or any of them, or any person, to interfere by strike, slow down, walkout, cessation of work, or otherwise, with the operation of said mines by continuing in effect the aforesaid notice or by issuing any notice of termination of agreement or through any other means or device; and from interfering with or obstructing the exercise by the Secretary of the Interior of his functions under Executive Order 9728; and from taking any action which would interfere with this Court's jurisdiction or which would impair, obstruct, or render fruitless, the determination of this case by the Court;

"AND IT IS FURTHER ORDERED that this restraining order shall expire at 3 o'clock p. m. on November 27th, 1946, unless before such

defendants from continuing in effect the notice of November 15, from encouraging the mine workers to interfere with the operation of the mines by strike or cessation of work, and from taking any action which would interfere with the court's jurisdiction and its determination of the case. The order by its terms was to expire at 3:00 p. m. on November 27 unless extended for good cause shown. A hearing on the preliminary injunction was set for 10:00 a. m. on the same date. The order and complaint were served on the defendants on November 18.

A gradual walkout by the miners commenced on November 18, and, by midnight of November 20, consistent with the miners' "no contract, no work" policy, a full-blown strike was in progress. Mines furnishing the major part of the nation's bituminous coal production were idle.

On November 21 the United States filed a petition for a rule to show cause why the defendants should not be punished as and for contempt, alleging a willful violation of the restraining order. The rule issued, setting November 25 as the return day and, if at that time the contempt was not sufficiently purged, setting November 27 as the day for trial on the contempt charge.

On the return day, defendants, by counsel, informed the court that no action had been taken concerning the November 15 notice, and denied the jurisdiction of the court to issue the restraining order and rule to show cause. Trial on the contempt charge was thereupon ordered to begin as scheduled on November 27. On November 26 the defendants filed a motion to discharge and vacate the rule to show cause. Their motion challenged the jurisdiction of the court, and raised the grave question of

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time the order for good cause shown is extended, or unless the defendants consent that it may be extended for a longer period;

"AND IT IS FURTHER ORDERED that plaintiff's motion for preliminary injunction be set down for hearing on November 27th, 1946, at 10:00 o'clock a. m."

whether the Norris-LaGuardia Act [13] prohibited the granting of the temporary restraining order at the instance of the United States.[14]

After extending the temporary restraining order on November 27, and after full argument on November 27 and November 29, the court, on the latter date, overruled the motion and held that its power to issue the restraining order in this case was not affected by either the Norris-LaGuardia Act or the Clayton Act.[15]

The defendants thereupon pleaded not guilty and waived an advisory jury. Trial on the contempt charge proceeded. The Government presented eight witnesses, the defendants none. At the conclusion of the trial on

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[13] 47 Stat. 70, 29 U. S. C. § 101.

[14] The grounds offered for the motion were:

"1. The Temporary Restraining Order is void in that this case involves and grows out of a labor dispute. Under the provisions of the Norris-LaGuardia Act (47 Stat. 70), and the provisions of Section 20 of the Clayton Act (38 U. S. Stat. C. 323, 730), this Honorable Court is without jurisdiction over the subject-matter of this cause.

"2. Equity acts only where there is no plain, adequate, and complete remedy at law. The allegations of the Petition for the Rule purport to show a violation of the War Labor Disputes Act—a serious offense—in which field there is no place for equity intervention.

"3. Observance of all the strict rules of criminal procedure is required to establish criminal contempt. It is apparent that the alleged facts set out in the unverified Petition and in the affidavit of Captain Collisson, filed in support of the Rule, are based wholly upon hearsay, information and belief and are not sufficient to sustain the Rule to Show Cause.

"4. The object of the Petition for the Rule is necessarily punitive and not compensatory. Accordingly, it being for criminal contempt, the Petition should have been presented as an independent proceeding and not as supplemental to the original cause.

"5. The Temporary Restraining Order is beyond the jurisdiction of this Honorable Court and therefore void because it contravenes the First, Fifth, and Thirteenth Amendments to the Constitution of the United States."

[15] 38 Stat. 730, 738, § 20, 29 U. S. C. § 52.

December 3, the court found that the defendants had permitted the November 15 notice to remain outstanding, had encouraged the miners to interfere by a strike with the operation of the mines and with the performance of governmental functions, and had interfered with the jurisdiction of the court. Both defendants were found guilty beyond reasonable doubt of both criminal and civil contempt dating from November 18. The court entered judgment on December 4, fining the defendant Lewis $10,000, and the defendant union $3,500,000. On the same day a preliminary injunction, effective until a final determination of the case, was issued in terms similar to those of the restraining order.

On December 5 the defendants filed notices of appeal from the judgments of contempt. The judgments were stayed pending the appeals. The United States on December 6 filed a petition for certiorari in both cases. Section 240 (a) of the Judicial Code authorizes a petition for certiorari by any party and the granting of certiorari prior to judgment in the Circuit Court of Appeals. Prompt settlement of this case being in the public interest, we granted certiorari on December 9, and subsequently, for similar reasons, granted petitions for certiorari filed by the defendants, 329 U. S. 708, 709, 710. The cases were consolidated for argument.

I.

Defendants' first and principal contention is that the restraining order and preliminary injunction were issued in violation of the Clayton and Norris-LaGuardia Acts. We have come to a contrary decision.

It is true that Congress decreed in § 20 of the Clayton Act that "no such restraining order or injunction shall prohibit any person or persons . . . from recommending, advising, or persuading others . . ." to strike. But by the

Act itself this provision was made applicable only to cases "between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment . . . ." [16] For reasons which will be explained at greater length in discussing the applicability of the Norris-LaGuardia Act, we cannot construe the general term "employer" to include the United States, where there is no express reference to the United States and no evident affirmative grounds for believing that Congress intended to withhold an otherwise available remedy from the Government as well as from a specified class of private persons.

Moreover, it seems never to have been suggested that the proscription on injunctions found in the Clayton Act is in any respect broader than that in the Norris-LaGuardia Act. Defendants do not suggest in their argument that it is. This Court, on the contrary, has stated that the Norris-LaGuardia Act "still further . . . [narrowed] the circumstances under which the federal courts could grant injunctions in labor disputes." [17] Consequently, we would feel justified in this case to consider the application of the Norris-LaGuardia Act alone. If it does not apply, neither does the less comprehensive proscription of the Clayton Act; [18] if it does, defendants' reliance on the Clayton Act is unnecessary.

By the Norris-LaGuardia Act, Congress divested the federal courts of jurisdiction to issue injunctions in a specified class of cases. It would probably be conceded that the characteristics of the present case would be such

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[16] *American Foundries* v. *Tri-City Council,* 257 U. S. 184, 202 (1921); *Duplex Printing Press Co.* v. *Deering,* 254 U. S. 443, 470 (1921).

[17] *United States* v. *Hutcheson,* 312 U. S. 219, 231 (1941).

[18] See also *Allen Bradley Co.* v. *Union,* 325 U. S. 797, 805 (1945); *United States* v. *Hutcheson,* 312 U. S. 219, 235, 236 (1941).

as to bring it within that class if the basic dispute had remained one between defendants and a private employer, and the latter had been the plaintiff below. So much seems to be found in the express terms of §§ 4 and 13 of the Act, set out in the margin.[19] The specifications in

[19] "SEC. 4. No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

"(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

"(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 3 of this Act;

"(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

"(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

"(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

"(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

"(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

"(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

"(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 3 of this Act."

"SEC. 13. When used in this Act, and for the purposes of this Act—

"(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees;

§ 13 are in general terms and make no express exception of the United States. From these premises, defendants argue that the restraining order and injunction were forbidden by the Act and were wrongfully issued.

Even if our examination of the Act stopped here, we could hardly assent to this conclusion. There is an old and well-known rule that statutes which in general terms divest pre-existing rights or privileges will not be applied to the sovereign without express words to that effect.[20] It has been stated, in cases in which there were extraneous

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whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a 'labor dispute' (as hereinafter defined) of 'persons participating or interested' therein (as hereinafter defined).

"(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.

"(c) The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

"(d) The term 'court of the United States' means any court of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress, including the courts of the District of Columbia."

[20] *Lewis* v. *United States*, 92 U. S. 618, 622 (1875); *United States* v. *Herron*, 20 Wall. 251, 263 (1873); see *Guarantee Co.* v. *Title Guaranty Co.*, 224 U. S. 152, 155 (1912).

and affirmative reasons for believing that the sovereign should also be deemed subject to a restrictive statute, that this rule was a rule of construction only.[21] Though that may be true, the rule has been invoked successfully in cases so closely similar to the present one,[22] and the statement of the rule in those cases has been so explicit,[23] that we are inclined to give it much weight here. Congress was not ignorant of the rule which those cases reiterated; and, with knowledge of that rule, Congress would not, in writing the Norris-LaGuardia Act, omit to use "clear and specific [language] to that effect" if it actually intended to reach the Government in all cases.

But we need not place entire reliance on this exclusionary rule. Section 2,[24] which declared the public policy of

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[21] *United States* v. *California,* 297 U. S. 175, 186 (1936); *Green* v. *United States,* 9 Wall. 655, 658 (1869).

[22] *United States* v. *Stevenson,* 215 U. S. 190, 197 (1909); *United States* v. *American Bell Telephone Co.,* 159 U. S. 548, 553–555 (1895); *Dollar Savings Bank* v. *United States,* 19 Wall. 227, 238, 239 (1873).

[23] "The most general words that can be devised (for example, any person or persons, bodies politic or corporate) affect not him [the sovereign] in the least, if they may tend to restrain or diminish any of his rights or interests." *Dollar Savings Bank* v. *United States,* 19 Wall. 227, 239 (1873). "If such prohibition is intended to reach the Government in the use of known rights and remedies, the language must be clear and specific to that effect." *United States* v. *Stevenson,* 215 U. S. 190, 197 (1909).

In both these cases the question, as in the present case, was whether the United States was divested of a certain remedy by a statute or a rule of law which, without express reference to the United States, made that remedy generally unavailable.

[24] "SEC. 2. In the interpretation of this Act and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are herein defined and limited, the public policy of the United States is hereby declared as follows:

"Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual

the United States as a guide to the Act's interpretation, carries indications as to the scope of the Act. It predicates the purpose of the Act on the contrast between the position of the "individual unorganized worker" and that of the "owners of property" who have been permitted to "organize in the corporate and other forms of ownership association," and on the consequent helplessness of the worker "to exercise actual liberty of contract . . . and thereby to obtain acceptable terms and conditions of employment." The purpose of the Act is said to be to contribute to the worker's "full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives . . . for the purpose of collective bargaining . . . ." These considerations, on their face, obviously do not apply to the Government as an employer or to relations between the Government and its employees.

If we examine §§ 4 and 13, on which defendants rely, we note that they do not purport to strip completely from the federal courts all their pre-existing powers to issue injunctions, that they withdraw this power only in a speci-

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unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of, and limitations upon, the jurisdiction and authority of the courts of the United States are hereby enacted."

fied type of case, and that this type is a case "involving or growing out of any labor dispute." Section 13, in the first instance, declares a case to be of this type when it "involves persons" or "involves any conflicting or competing interests" in a labor dispute of "persons" who stand in any one of several defined economic relationships. And "persons" must be involved on both sides of the case, or the conflicting interests of "persons" on both sides of the dispute. The Act does not define "persons." In common usage that term does not include the sovereign, and statutes employing it will ordinarily not be construed to do so.[25] Congress made express provision, R. S. § 1, 1 U. S. C. § 1, for the term to extend to partnerships and corporations, and in § 13 of the Act itself for it to extend to associations. The absence of any comparable provision extending the term to sovereign governments implies that Congress did not desire the term to extend to them.

Those clauses in § 13 (a) and (b) spelling out the position of "persons" relative to the employer-employee relationship affirmatively suggest that the United States, as an employer, was not meant to be included. Those clauses require that the case involve persons "who are engaged in the same industry, trade, craft, or occupation," who "have direct or indirect interests therein," who are "employees of the same employer," who are "members of the same or an affiliated organization of employers or employees," or who stand in some one of other specified positions relative to a dispute over the employer-employee relationship. Every one of these qualifications in § 13 (a) and (b) we think relates to an economic role ordinarily filled by a private individual or corporation, and not by a sovereign government. None of them is at all suggestive of any part played by the United States in its relations

[25] *United States* v. *Cooper Corp.*, 312 U. S. 600, 604 (1941); *United States* v. *Fox*, 94 U. S. 315, 321 (1876).

with its own employees. We think that Congress' failure to refer to the United States or to specify any role which it might commonly be thought to fill is strong indication that it did not intend that the Act should apply to situations in which the United States appears as employer.

In the type of case to which the Act applies, § 7 requires certain findings of fact as conditions precedent to the issuance of injunctions even for the limited purposes recognized by the Act. One such required finding is that "the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection." Obviously, such finding could never be made if the complainant were the United States, and federal property were threatened by federal employees, as the responsibility of protection would then rest not only on state officers, but also on all federal civil and military forces. If these failed, a federal injunction would be a meaningless form. This provision, like those in §§ 2, 4 and 13, already discussed, indicates that the Act was not intended to affect the relations between the United States and its employees.

Defendants maintain that certain facts in the legislative history of the Act so clearly indicate an intent to restrict the Government's use of injunctions that all the foregoing arguments to the contrary must be rejected.

Representative Beck of Pennsylvania indicated in the course of the House debates that he thought the Government would be included within the prohibitions of the Act.[26] Mr. Beck was not a member of the Judiciary Committee which reported the bill, and did not vote

[26] 75 Cong. Rec. 5473. An amendment by Representative Beck, designed to save to the United States the right to intervene by injunction in private labor disputes, was defeated. 75 Cong. Rec. 5503, 5505.

for its passage. We do not accept his views as expressive of the attitude of Congress relative to the status of the United States under the Act.

Representative Blanton of Texas introduced an amendment to the bill which would have made an exception to the provision limiting the injunctive power "where the United States Government is the petitioner," and this amendment was defeated by the House.[27] But the first comment made on this amendment, after its introduction, was that of Representative LaGuardia, the House sponsor of the bill, who opposed it, not on the ground that such an exception should not be made, but rather on the ground that the express exception was unnecessary. Mr. LaGuardia read the definition of a person "participating or interested in a labor dispute" in § 13 (b), referred to the provisions of § 13 (a), and then added: "I do not see how in any possible way the United States can be brought in under the provisions of this bill." When Mr. Blanton thereupon suggested the necessity of allowing the Government to use injunctions to maintain discipline in the army and navy, Mr. LaGuardia pointed out that these services are not "a trade, craft, or occupation." Mr. Blanton's only answer to Mr. LaGuardia's opposition was that the latter "does not know what extensions will be made." A vote was then taken and the amendment defeated.[28] Obviously this incident does not reveal a Congressional intent to legislate concerning the relationship between the United States and its employees.

In the debates in both Houses of Congress numerous references were made to previous instances in which the United States had resorted to the injunctive process in labor disputes between private employers and private em-

[27] 75 Cong. Rec. 5503.

[28] *Ibid.*

ployees,[29] where some public interest was thought to have become involved. These instances were offered as illustrations of the abuses flowing from the use of injunctions in labor disputes and the desirability of placing a limitation thereon. The frequency of these references and the attention directed to their subject matter are compelling circumstances. We agree that they indicate that Congress, in passing the Act, did not intend to permit the United States to continue to intervene by injunction in purely private labor disputes.

But whether Congress so intended or not is a question different from the one before us now. Here we are concerned only with the Government's right to injunctive relief in a dispute with its own employees. Although we recognize that Congress intended to withdraw such remedy in the former situation, it does not follow that it intended to do so in the latter. The circumstances in which the Government sought such remedy in 1894 and 1922 were vastly different from those in which the Government is seeking to carry out its responsibilities by taking legal action against its own employees, and we think that the references in question have only the most distant and uncertain bearing on our present problem. Indeed, when we look further into the history of the Act, we find other events which unequivocally demonstrate that injunctive relief was not intended to be withdrawn in the latter situation.

When the House had before it a rule for the consideration of the bill, Representative Michener, a ranking minority member of the Judiciary Committee and spokesman for the minority party on the Rules Committee, made a general statement in the House concerning the subject matter of the bill and advocating its immediate consideration. In this survey he clearly stated that the Gov-

[29] Most frequently mentioned was the Government action in connection with the railway strikes of 1894 and 1922.

ernment's rights with respect to its own employees would not be affected: [30]

> "Be it remembered that this bill does not attempt to legislate concerning Government employees. I do not believe that the enactment of this bill into law will take away from the Federal Government any rights which it has under existing law, to seek and obtain injunctive relief where the same is necessary for the functioning of the Government."

In a later stage of the debate, Representative Michener repeated this view in the following terms: [31]

> "This deals with labor disputes between individuals, not where the Government is involved. It is my notion that under this bill the Government can function with an injunction, if that is necessary in order to carry out the purpose of the Government. I should like to see this clarified, but I want to go on record as saying that under my interpretation of this bill the Federal Government will not at any time be prevented from applying for an injunction, if one is necessary in order that the Government may function."

Representatives Michener and LaGuardia were members of the Judiciary Committee which reported and recommended the bill to the House. They were the most active spokesmen for the Committee, both in explaining the bill and advocating its passage. No member of the House who voted for the bill challenged their explanations. At least one other member expressed a like understanding.[32] We cannot but believe that the House ac-

[30] 75 Cong. Rec. 5464.

[31] 75 Cong. Rec. 5509.

[32] Representative Schneider, at 75 Cong. Rec. 5514, stated: "And it has also been pointed out that the enactment of this bill will not take away from the Federal Government any rights which it has under existing law to seek and obtain injunctive relief where the same is

cepted these authoritative representations as to the proper construction of the bill.[33] The Senate expressed no contrary understanding,[34] and we must conclude that Congress, in passing the Act, did not intend to withdraw the Government's existing rights to injunctive relief against its own employees.

If we were to stop here, there would be little difficulty in accepting the decision of the District Court upon the scope of the Act. And the cases in this Court express consistent views concerning the types of situations to which the Act applies.[35] They have gone no farther than to follow Congressional desires by regarding as beyond the jurisdiction of the District Courts the issuance of injunctions sought by the United States and directed to persons who are not employees of the United States. None of these cases dealt with the narrow segment of the employer-employee relationship now before us.

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deemed by Government officials to be necessary for the functioning of the Government.

"In other words, a tremendous field in which the injunction can still be used effectively will remain after the enactment of this bill."

[33] *United States* v. *Wrightwood Dairy Co.*, 315 U. S. 110, 125 (1942); *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443, 475 (1921).

[34] We have been cited to no instances in which the consideration of the Senate was directed to the specific issue of the relationship between the United States and its own employees. The use of the injunction by the Government was in question, but primarily in respect to those instances in which the United States had taken action in private labor disputes, *e. g.*, 75 Cong. Rec. 4509, 4619, 4620, 4693, 5001, 5005. Silence upon the status of the Government as employer is not inconsistent with the desire of the House to exclude from the Act those disputes in which the United States is seeking relief against its own employees.

[35] *United States* v. *American Federation of Musicians*, 318 U. S. 741 (1943); see *United States* v. *Hutcheson*, 312 U. S. 219, 227 (1941). In accord is *United States* v. *Weirton Steel Co.*, 7 F. Supp. 255 (1934); cf. *Anderson* v. *Bigelow*, 130 F. 2d 460 (1942).

But regardless of the determinative guidance so offered, defendants rely upon the opinions of several Senators uttered in May, 1943, while debating the Senate version of the War Labor Disputes Act.[36] The debate at that time centered around a substitute for the bill, S. 796, as originally introduced.[37] Section 5 of the substitute, as amended, provided, "The district courts of the United States and the United States courts of the Territories or possessions shall have jurisdiction, for cause shown, but solely upon application by the Attorney General or under his direction . . . to restrain violations or threatened violations of this act." [38] Following the rejection of other amendments aimed at permitting a much wider use of injunctions and characterized as contrary to the Norris-LaGuardia Act,[39] several Senators were of the opinion that § 5 itself would remove some of the protection given employees by that Act,[40] a view contrary to what we have just determined to be the scope of the Act as passed in 1932. Section 5 was defeated and no injunctive provisions were contained in the Senate bill.

We have considered these opinions, but cannot accept them as authoritative guides to the construction of the Norris-LaGuardia Act. They were expressed by Sena-

[36] It was upon § 3 of this Act that the President based in part the seizure of the bituminous coal mines. See note 1, *supra*.

[37] 89 Cong. Rec. 3812. The substitute bill embodied two amendments proposed by Senator Connally on the floor of the Senate. 89 Cong. Rec. 3809.

[38] Section 5 of the substitute bill originally did not limit the issuance of injunctions to those sought by the Attorney General, but Senator Wagner's proposal to insert "but solely upon application by the Attorney General or under his direction" was accepted. 89 Cong. Rec. 3986.

[39] A great number of the references to the Norris-LaGuardia Act were made in connection with the proposed Taft and Reed amendments. 89 Cong. Rec. 3897, 3984, 3985, 3986.

[40] Senators Connally and Danaher expressed this view and other Senators were apparently in accord. 89 Cong. Rec. 3988–9.

tors, some of whom were not members of the Senate in 1932, and none of whom was on the Senate Judiciary Committee which reported the bill. They were expressed eleven years after the Act was passed and cannot be accorded even the same weight as if made by the same individuals in the course of the Norris-LaGuardia debates.[41] Moreover, these opinions were given by individuals striving to write legislation from the floor of the Senate and working without the benefit of hearings and committee reports on the issues crucial to us here.[42] We fail to see how the remarks of these Senators in 1943 can serve to change the legislative intent of Congress expressed in 1932, and we accordingly adhere to our conclusion that the Norris-LaGuardia Act did not affect the jurisdiction of the courts to issue injunctions when sought by the United States in a labor dispute with its own employees.

It has been suggested, however, that Congress, in passing the War Labor Disputes Act, effectively restricted the theretofore existing authority of the courts to issue injunctions in connection with labor disputes in plants seized by the United States. Chief reliance is placed upon the rejection by the Senate of § 5 of the Connally substitute bill.[43] But it is clear that no com-

[41] See *United States* v. *Wrightwood Dairy Co.*, 315 U. S. 110, 125 (1942); *McCaughn* v. *Hershey Chocolate Co.*, 283 U. S. 488, 493 (1931); *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443, 474 (1921).

[42] 89 Cong. Rec. 3889, 3890, 3904–5.

[43] Section 5, as we have noted before, would have permitted issuing injunctions to restrain violations of the Act. It is not at all clear that the rejection of a proposal in this form should, in any event, be of determinative significance in the case at bar. Here the United States resorted to the District Court for vindication of its right under a formal contract, said to be operative "for the period of Government possession" and mutually adopted by the parties concerned as a satisfactory solution to a grave situation. The District Court, to

parable action transpired in the House. Indeed, proposals in the House and the House substitute [44] for S. 796 authorized the use of injunctions in connection with private plants not yet seized by the United States. These admitted inroads on the Norris-LaGuardia Act drew much comment [45] on the floor of the House, but nevertheless prevailed. Seizure was also contemplated, and criminal sanctions were made available in this situation, without specifically authorizing the use of injunctions by the United States. The latter issue was not raised, not debated and not commented upon in the House. But the fact that the House version did not provide for the issuance of injunctions to aid in the operation of seized plants is not the issue here. Rather, it is whether the House expressed any intent to restrict the existing authority of the courts. We find not the slightest suggestion to that effect in either the House substitute bill or the debates concerning it.

Nor can the action of the conference committee be construed as a Congressional proscription of issuing injunctions to aid the United States in dealing with employees in seized plants. Neither the House nor Senate version, as these bills went to conference, in any way placed this issue before the conferees. The conference committee simply struck the broader provisions of the House bill allowing injunctions to issue in private labor disputes and

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preserve existing conditions, issued a restraining order and a preliminary injunction, effective until contractual rights could be ascertained. True, the action of the defendant Lewis in calling a strike, in addition to terminating the contract, suggests a violation of § 6 of the War Labor Disputes Act. But Senate disapproval of using injunctions to avert the latter event does not necessarily imply a desire to diminish the contractual rights and remedies of the United States.

[44] 89 Cong. Rec. 5382.

[45] See, for example, 89 Cong. Rec. 5241, 5243, 5299, 5305, 5321, 5325.

had no occasion to consider the narrower question we have before us now. The conferees, in producing the Act in its final form, did nothing which suggests that the Congress intended to bar injunctions sought by the Government to aid in the operation of seized plants. We thus find nothing in the legislative background of the War Labor Disputes Act which constitutes an authoritative expression of Congress directing the courts to withhold from the United States injunctive relief in connection with an Act designed to strengthen the hand of the Government in serious labor disputes.

The defendants contend, however, that workers in mines seized by the Government are not employees of the Federal Government; that in operating the mines thus seized, the Government is not engaged in a sovereign function; and that, consequently, the situation in this case does not fall within the area which we have indicated as lying outside the scope of the Norris-LaGuardia Act. It is clear, however, that workers in the mines seized by the Government under the authority of the War Labor Disputes Act stand in an entirely different relationship to the Federal Government with respect to their employment from that which existed before the seizure was effected. That Congress intended such to be the case is apparent both from the terms of the statute and from the legislative deliberations preceding its enactment. Section 3 of the War Labor Disputes Act calls for the seizure of any plant, mine, or facility when the President finds that the operation thereof is threatened by strike or other labor disturbance and that an interruption in production will unduly impede the war effort. Congress intended that by virtue of Government seizure, a mine should become, for purposes of production and operation, a Government facility in as complete a sense as if the Government held full

title and ownership.[46] Consistently with that view, criminal penalties were provided for interference with the operation of such facilities.[47] Also included were procedures for adjusting wages and conditions of employment of the workers in such a manner as to avoid interruptions in production.[48] The question with which we are confronted is not whether the workers in mines under Government seizure are "employees" of the Federal Government for every purpose which might be conceived,[49] but whether,

[46] Thus in the legislative debates Senator Connally stated: ". . . but it does seem to me that the power and authority and sovereignty of the Government of the United States are so comprehensive that when we are engaged in war and a plant is not producing, we can take it over, and that when we do take it over, it is a Government plant, just as much as if we had a fee simple title to it, . . ." 89 Cong. Rec. 3811–3812. See also *id.* at 3809, 3884–3885, 5722.

[47] War Labor Disputes Act, § 6, provided:

"(a) Whenever any plant, mine, or facility is in the possession of the United States, it shall be unlawful for any person (1) to coerce, instigate, induce, conspire with, or encourage any person, to interfere, by lock-out, strike, slow-down, or other interruption, with the operation of such plant, mine, or facility, or (2) to aid any such lock-out, strike, slow-down, or other interruption interfering with the operation of such plant, mine, or facility by giving direction or guidance in the conduct of such interruption, or by providing funds for the conduct or direction thereof or for the payment of strike, unemployment, or other benefits to those participating therein. No individual shall be deemed to have violated the provisions of this section by reason only of his having ceased work or having refused to continue to work or to accept employment.

"(b) Any person who willfully violates any provision of this section shall be subject to a fine of not more than $5,000, or to imprisonment for not more than one year, or both."

[48] *Id.*, § 5.

[49] Thus according to § 23 of the Revised Regulations for the Operation of the Coal Mines Under Government Control, issued by the Coal Mines Administrator on July 8, 1946: ". . . nothing in these regulations shall be construed as recognizing such personnel as officers and employees of the Federal Government within the meaning of the

for the purposes of this case, the incidents of the relationship existing between the Government and the workers are those of governmental employer and employee.

Executive Order 9728, in pursuance of which the Government seized possession of the mines, authorized the Secretary of the Interior to negotiate with the representatives of the miners, and thereafter to apply to the National Wage Stabilization Board for appropriate changes in terms and conditions of employment for the period of governmental operation.[50] Such negotiations were undertaken and resulted in the Krug-Lewis agreement. That agreement contains many basic departures from the earlier contract entered into between the mine workers and the private operators on April 11, 1945, which, except as amended and supplemented by the Krug-Lewis agreement, was continued in effect for the period of Government possession. Among the terms of the Krug-Lewis agreement were provisions for a new mine safety code. Operating managers were directed to provide the mine employees with the protection and benefits of Workmen's Compensation and Occupational Disease Laws. Provision was made for a Welfare and Retirement Fund and a Medical and Hospital Fund. The agreement granted substantial wage increases and contained terms relating to vacations and vacation pay. Included were provisions calling for changes in equitable grievance procedures.

It should be observed that the Krug-Lewis agreement was one solely between the Government and the union.

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statutes relating to Federal employment." And see § 16. Section 23 also provides, however: "All personnel of the mines, both officers and employees, shall be considered as called upon by Executive Order No. 9728, to serve the Government of the United States . . . ."

[50] After the negotiation of the Krug-Lewis agreement, the changes agreed upon therein were approved by the National Wage Stabilization Act and thereafter by the President. This procedure is provided for in § 5 of the War Labor Disputes Act.

The private mine operators were not parties to the contract nor were they made parties to any of its subsequent modifications. It should also be observed that the provisions relate to matters which normally constitute the subject matter of collective bargaining between employer and employee. Many of the provisions incorporated into the agreement for the period of Government operation had theretofore been vigorously opposed by the private operators and have not subsequently received their approval.

It is descriptive of the situation to state that the Government, in order to maintain production and to accomplish the purposes of the seizure, has substituted itself for the private employer in dealing with those matters which formerly were the subject of collective bargaining between the union and the operators. The defendants by their conduct have given practical recognition to this fact. The union negotiated a collective agreement with the Government and has made use of the procedures provided by the War Labor Disputes Act to modify its terms and conditions. The union has apparently regarded the Krug-Lewis agreement as a sufficient contract of employment to satisfy the mine workers' traditional demand of a contract as a condition precedent to their work. The defendant Lewis, in responding to a suggestion of the Secretary of the Interior that certain union demands should be taken to the private operators with the view of making possible the termination of Government possession, stated in a letter dated November 15, 1946: "The Government of the United States seized the mines and entered into a contract. The mine workers do not propose to deal with parties who have no status under that contract." The defendant Lewis in the same letter referred to the operators as "strangers to the Krug-Lewis Agreement" and to the miners as the "400,000 men who now serve the Government of the United States in the bituminous coal mines."

The defendants, however, point to the fact that the private managers of the mines have been retained by the Government in the role of operating managers with substantially the same functions and authority. It is true that the regulations for the operation of the mines issued by the Coal Mines Administrator provide for the retention of the private managers to assist in the realization of the objects of Government seizure and operation.[51] The regulations, however, also provide for the removal of such operating managers at the discretion of the Coal Mines Administrator.[52] Thus the Government, though utilizing the services of the private managers, has nevertheless retained ultimate control.

The defendants also point to the regulations which provide that none of the earnings or liabilities resulting from the operation of the mines, while under seizure, are for the account or at the risk or expense of the Government; [53] that the companies continue to be liable for all Federal, State, and local taxes; [54] and that the mining companies remain subject to suit.[55] The regulations on which defendants rely represent an attempt on the part of the Coal Mines Administrator to define the respective powers and obligations of the Government and private operators during the period of Government control. We do not at this time express any opinion as to the validity of these regulations. It is sufficient to state that, in any event, the matters to which they refer have little persuasive weight in determining the nature of the relation existing between the Government and the mine workers.

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[51] Revised Regulations for the Operation of the Coal Mines under Government Control, § 15.

[52] Regulations, §§ 16, 31.

[53] Regulations, §§ 17, 40.

[54] Regulations, § 24.

[55] *Ibid.*

We do not find convincing the contention of the defendants that in seizing and operating the coal mines the Government was not exercising a sovereign function and that, hence, this is not a situation which can be excluded from the terms of the Norris-LaGuardia Act. In the Executive Order which directed the seizure of the mines, the President found and proclaimed that "the coal produced by such mines is required for the war effort and is indispensable for the continued operation of the national economy during the transition from war to peace; that the war effort will be unduly impeded or delayed by . . . interruptions [in production]; and that the exercise . . . of the powers vested in me is necessary to insure the operation of such mines in the interest of the war effort and to preserve the national economic structure in the present emergency . . . ." Under the conditions found by the President to exist, it would be difficult to conceive of a more vital and urgent function of the Government than the seizure and operation of the bituminous coal mines. We hold that in a case such as this, where the Government has seized actual possession of the mines, or other facilities, and is operating them, and the relationship between the Government and the workers is that of employer and employee, the Norris-LaGuardia Act does not apply.

II.

Although we have held that the Norris-LaGuardia Act did not render injunctive relief beyond the jurisdiction of the District Court, there are alternative grounds which support the power of the District Court to punish violations of its orders as criminal contempt.

Attention must be directed to the situation obtaining on November 18. The Government's complaint sought a declaratory judgment in respect to the right of the de-

fendants to terminate the contract by unilateral action. What amounted to a strike call, effective at midnight on November 20, had been issued by the defendant Lewis as an "official notice." Pending a determination of defendants' right to take this action, the Government requested a temporary restraining order and injunctive relief. The memorandum in support of the restraining order seriously urged the inapplicability of the Norris-LaGuardia Act to the facts of this case, and the power of the District Court to grant the ancillary relief depended in great part upon the resolution of this jurisdictional question. In these circumstances, the District Court unquestionably had the power to issue a restraining order for the purpose of preserving existing conditions pending a decision upon its own jurisdiction.

The temporary restraining order was served on November 18. This was roughly two and one-half days before the strike was to begin. The defendants filed no motion to vacate the order. Rather, they ignored it, and allowed a nationwide coal strike to become an accomplished fact. This Court has used unequivocal language in condemning such conduct,[56] and has in *United States* v. *Shipp,* 203 U. S. 563 (1906), provided protection for judicial authority in situations of this kind. In that case this Court had allowed an appeal from a denial of a writ of *habeas corpus* by the Circuit Court of Tennessee. The petition had been filed by Johnson, then confined under a sentence of death imposed by a state court. Pending the appeal, this Court issued an order staying all proceedings against

[56] "If a party can make himself a judge of the validity of orders which have been issued, and by his own act of disobedience set them aside, then are the courts impotent, and what the Constitution now fittingly calls the 'judicial power of the United States' would be a mere mockery." *Gompers* v. *Bucks Stove & Range Co.,* 221 U. S. 418, 450 (1911).

Johnson. However, the prisoner was taken from jail and lynched. Shipp, the sheriff having custody of Johnson, was charged with conspiring with others for the purpose of lynching Johnson, with intent to show contempt for the order of this Court. Shipp denied the jurisdiction of this Court to punish for contempt on the ground that the stay order was issued pending an appeal over which this Court had no jurisdiction because the constitutional questions alleged were frivolous and only a pretense. The Court, through Mr. Justice Holmes, rejected the contention as to want of jurisdiction, and in ordering the contempt to be tried, stated:

> "We regard this argument as unsound. It has been held, it is true, that orders made by a court having no jurisdiction to make them may be disregarded without liability to process for contempt. *In re Sawyer,* 124 U. S. 200; *Ex parte Fisk,* 113 U. S. 713; *Ex parte Rowland,* 104 U. S. 604. But even if the Circuit Court had no jurisdiction to entertain Johnson's petition, and if this court had no jurisdiction of the appeal, this court, and this court alone, could decide that such was the law. It and it alone necessarily had jurisdiction to decide whether the case was properly before it. On that question, at least, it was its duty to permit argument and to take the time required for such consideration as it might need. See *Mansfield, Coldwater & Lake Michigan Ry. Co.* v. *Swan,* 111 U. S. 379, 387. Until its judgment declining jurisdiction should be announced, it had authority from the necessity of the case to make orders to preserve the existing conditions and the subject of the petition, just as the state court was bound to refrain from further proceedings until the same time. Rev. Stat. § 766; act of March 3, 1893, c. 226, 27 Stat. 751. The fact that the petitioner was entitled to argue his

case shows what needs no proof, that the law contemplates the possibility of a decision either way, and therefore must provide for it." 203 U. S. 573.

If this Court did not have jurisdiction to hear the appeal in the *Shipp* case, its order would have had to be vacated. But it was ruled that only the Court itself could determine that question of law. Until it was found that the Court had no jurisdiction, ". . . it had authority from the necessity of the case to make orders to preserve the existing conditions and the subject of the petition . . . ."

Application of the rule laid down in *United States* v. *Shipp, supra,* is apparent in *Carter* v. *United States,* 135 F. 2d 858 (1943). There a district court, after making the findings required by the Norris-LaGuardia Act, issued a temporary restraining order. An injunction followed after a hearing in which the court affirmatively decided that it had jurisdiction and overruled the defendants' objections based upon the absence of diversity and the absence of a case arising under a statute of the United States. These objections of the defendants prevailed on appeal, and the injunction was set aside. *Brown* v. *Coumanis,* 135 F. 2d 163 (1943). But in *Carter,* a companion case, violations of the temporary restraining order were held punishable as criminal contempt. Pending a decision on a doubtful question of jurisdiction, the District Court was held to have power to maintain the *status quo* and punish violations as contempt.[57]

[57] "It cannot now be broadly asserted that a judgment is always a nullity if jurisdiction of some sort or other is wanting. It is now held that, except in case of plain usurpation, a court has jurisdiction to determine its own jurisdiction, and if it be contested and on due hearing it is upheld, the decision unreversed binds the parties as a thing adjudged. Treinies v. Sunshine Mining Co., 308 U. S. 66, 60 S. Ct. 44, 84 L. Ed. 85; Sunshine Anthracite Coal Co. v. Adkins, 310 U. S. 381, 403, 60 S. Ct. 907, 84 L. Ed. 1263; Stoll v. Gottlieb, 305 U. S. 165, 59 S. Ct. 134, 83 L. Ed. 104. So in the matter of federal

In the case before us, the District Court had the power to preserve existing conditions while it was determining its own authority to grant injunctive relief. The defendants, in making their private determination of the law, acted at their peril. Their disobedience is punishable as criminal contempt.

Although a different result would follow were the question of jurisdiction frivolous and not substantial, such contention would be idle here. The applicability of the Norris-LaGuardia Act to the United States in a case such as this had not previously received judicial consideration, and both the language of the Act and its legislative history indicated the substantial nature of the problem with which the District Court was faced.

Proceeding further, we find impressive authority for the proposition that an order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings.[58] This is true without regard even for the constitutionality of the Act under which the order is issued. In *Howat* v. *Kansas,* 258 U. S. 181, 189–90 (1922) this Court said:

> "An injunction duly issuing out of a court of general jurisdiction with equity powers upon pleadings properly invoking its action, and served upon persons made parties therein and within the jurisdiction, must

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jurisdiction, which is often a close question, the federal court may either have to determine the facts, as in contested citizenship, or the law, as whether the case alleged arises under a law of the United States."

[58] *Howat* v. *Kansas,* 258 U. S. 181 (1922); *Russell* v. *United States,* 86 F. 2d 389 (1936); *Locke* v. *United States,* 75 F. 2d 157 (1935); *O'Hearne* v. *United States,* 62 App. D. C. 285, 66 F. 2d 933 (1933); *Schwartz* v. *United States,* 217 F. 866 (1914); *Brougham* v. *Oceanic Steam Navigation Co.,* 205 F. 857 (1913); *Blake* v. *Nesbet,* 144 F. 279 (1905); see *Alemite Mfg. Corp.* v. *Staff,* 42 F. 2d 832, 833 (1930).

be obeyed by them however erroneous the action of the court may be, even if the error be in the assumption of the validity of a seeming but void law going to the merits of the case. It is for the court of first instance to determine the question of the validity of the law, and until its decision is reversed for error by orderly review, either by itself or by a higher court, its orders based on its decision are to be respected, and disobedience of them is contempt of its lawful authority, to be punished." [59]

Violations of an order are punishable as criminal contempt even though the order is set aside on appeal, *Worden* v. *Searls,* 121 U. S. 14 (1887),[60] or though the basic action has become moot, *Gompers* v. *Bucks Stove & Range Co.,* 221 U. S. 418 (1911).

We insist upon the same duty of obedience where, as here, the subject matter of the suit, as well as the parties, was properly before the court; where the elements of federal jurisdiction were clearly shown; and where the authority of the court of first instance to issue an order ancillary to the main suit depended upon a statute, the scope and applicability of which were subject to substantial doubt. The District Court on November 29 affirmatively decided that the Norris-LaGuardia Act was of no force in this case and that injunctive relief was therefore authorized. Orders outstanding or issued after that date were to be obeyed until they expired or were set aside by appropriate proceedings, appellate or otherwise. Convictions for criminal contempt intervening before that time may stand.

It does not follow, of course, that simply because a defendant may be punished for criminal contempt for dis-

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[59] See *Alemite Mfg. Corp.* v. *Staff,* 42 F. 2d 832, 833 (1930).

[60] See *Salvage Process Corp.* v. *Acme Tank Cleaning Process Corp.,* 86 F. 2d 727 (1936).

obedience of an order later set aside on appeal, that the plaintiff in the action may profit by way of a fine imposed in a simultaneous proceeding for civil contempt based upon a violation of the same order. The right to remedial relief falls with an injunction which events prove was erroneously issued, *Worden* v. *Searls, supra,* at 25, 26; *Salvage Process Corp.* v. *Acme Tank Cleaning Process Corp.,* 86 F. 2d 727 (1936); *S. Anargyros* v. *Anargyros & Co.,* 191 F. 208 (1911); [61] and *a fortiori* when the injunction or restraining order was beyond the jurisdiction of the court. Nor does the reason underlying *United States* v. *Shipp, supra,* compel a different result. If the Norris-LaGuardia Act were applicable in this case, the conviction for civil contempt would be reversed in its entirety.

Assuming, then, that the Norris-LaGuardia Act applied to this case and prohibited injunctive relief at the request of the United States, we would set aside the preliminary injunction of December 4 and the judgment for civil contempt; but we would, subject to any infirmities in the contempt proceedings or in the fines imposed, affirm the judgments for criminal contempt as validly punishing violations of an order then outstanding and unreversed.

III.

The defendants have pressed upon us the procedural aspects of their trial and allege error so prejudicial as to require reversal of the judgments for civil and criminal contempt. But we have not been persuaded.

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[61] See *Leman* v. *Krentler-Arnold Co.,* 284 U. S. 448, 453 (1932); *Bessette* v. *W. B. Conkey Co.,* 194 U. S. 324, 329 (1904); *McCann* v. *New York Stock Exchange,* 80 F. 2d 211, 214 (1935). In accord in the case of settlement is *Gompers* v. *Bucks Stove & Range Co.,* 221 U. S. 418, 451–2 (1911): ". . . when the main cause was terminated . . . between the parties, the complainant did not require and was not entitled to any compensation or relief of any other character."

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The question is whether the proceedings will support judgments for both criminal and civil contempt; and our attention is directed to Rule 42 (b) of the Rules of Criminal Procedure.[62] The rule requires criminal contempt to be prosecuted on notice stating the essential facts constituting the contempt charged. In this respect, there was compliance with the rule here. Notice was given by a rule to show cause served upon defendants together with the Government's petition and supporting affidavit. The pleadings rested only upon information and belief, but Rule 42 (b) was not designed to cast doubt upon the propriety of instituting criminal contempt proceedings in this manner.[63] The petition itself charged a violation of the outstanding restraining order, and the affidavit alleged in detail a failure to withdraw the notice of November 15, the cessation of work in the mines, and the consequent

[62] 18 U. S. C. A. following § 687. Rule 42 (b) regulates various aspects of a proceeding for criminal contempt where the contempt is not committed in the actual presence of the court:

"Disposition Upon Notice and Hearing. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment."

[63] *Conley* v. *United States*, 59 F. 2d 929 (1932); *Kelly* v. *United States*, 250 F. 947 (1918); see *National Labor Relations Board* v. *Arcade-Sunshine Co.*, 74 App. D. C. 361, 362, 122 F. 2d 964, 965 (1941).

interference with governmental functions and the jurisdiction of the court. The defendants were fairly and completely apprised of the events and conduct constituting the contempt charged.

However, Rule 42 (b) requires that the notice issuing to the defendants describe the criminal contempt charged as such. The defendants urge a failure to comply with this rule. The petition alleged a willful violation of the restraining order, and both the petition and the rule to show cause inquired as to why the defendants should not be "punished as and for a contempt" of court. But nowhere was the contempt described as criminal as required by the rule.

Nevertheless, the defendants were quite aware that a criminal contempt was charged.[64] In their motion to discharge and vacate the rule to show cause, the contempt charged was referred to as criminal.[65] And in argument on the motion the defendants stated and were expressly informed that a criminal contempt was to be tried. Yet it is now urged that the omission of the words "criminal contempt" from the petition and rule to show cause was prejudicial error. Rule 42 (b) requires no such rigorous appli-

[64] It could be well argued that the use of the word "punished" in the petition and rule to show cause was in itself adequate notice, for "punishment" has been said to be the magic word indicating a proceeding in criminal, rather than civil, contempt. Moskovitz, *Contempt of Injunctions, Civil and Criminal*, 43 Col. L. Rev. 780, 789–90 (1943). But "punishment" as used in contempt cases is ambiguous. "It is not the fact of punishment but rather its character and purpose . . . ." *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 441 (1941).

Noteworthy also is the allegation in the affidavit that the defendants' violation of the restraining order had "interfered with this Court's jurisdiction." And the charge in the petition of "wilfully . . . and deliberately" disobeying the restraining order indicates an intention to prosecute criminal contempt.

[65] See point 4, note 14, *supra*. The points and authorities in support of the motion used similar language.

cation, for it was designed to insure a realization by contemnors that a prosecution for criminal contempt is contemplated.[66] Its purpose was sufficiently fulfilled here, for this failure to observe the rule in all respects has not resulted in substantial prejudice to the defendants.

Not only were the defendants fully informed that a criminal contempt was charged, but we think they enjoyed during the trial itself all the enhanced protections accorded defendants in criminal contempt proceedings.[67] We need not treat these at length, for defendants, in this respect, urge only their right to a jury trial as provided in § 11 of the Norris-LaGuardia Act. But § 11 is not operative here, for it applies only to cases "arising under this Act," [68] and we have already held that the restriction upon injunctions imposed by the Act do not govern this case.[69] The defendants, we think, were properly tried by the court without a jury.

If the defendants were thus accorded all the rights and privileges owing to defendants in criminal contempt cases, they are put in no better position to complain because their trial included a proceeding in civil contempt and was carried on in the main equity suit. Common

[66] The rule in this respect follows the suggestion made in *McCann* v. *New York Stock Exchange*, 80 F. 2d 211, 214–215 (1935). Notes to the Rules of Criminal Procedure, Advisory Committee, March, 1945, p. 34.

[67] *Cooke* v. *United States*, 267 U. S. 517, 537 (1925); see *Michaelson* v. *United States*, 266 U. S. 42, 66–67 (1924).

[68] Section 11 provides in part: "In all cases arising under this Act in which a person shall be charged with contempt in a court of the United States (as herein defined), the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the contempt shall have been committed . . . ."

[69] We believe, and the Government admits, that the defendants would have been entitled to a jury trial if § 11 applied to the instant contempt proceeding and if this case arose under the Norris-LaGuardia Act.

sense would recognize that conduct can amount to both civil and criminal contempt. The same acts may justify a court in resorting to coercive and to punitive measures.[70] Disposing of both aspects of the contempt in a single proceeding would seem at least a convenient practice. Litigation in patent cases has frequently followed this course,[71] and the same method can be noted in other situations in both federal and state courts.[72] Rule 42 (b), while demanding fair notice and recognition of the criminal aspects of the case, contains nothing precluding a simultaneous disposition of the remedial aspects of the contempt tried. Even if it be the better practice to try criminal contempt alone and so avoid obscuring the defendant's privileges in any manner, a

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[70] "It may not be always easy to classify a particular act as belonging to either one of these two classes. It may partake of the characteristics of both." *Bessette* v. *W. B. Conkey Co.*, 194 U. S. 324, 329 (1904). See *Lamb* v. *Cramer*, 285 U. S. 217, 221 (1932); *Merchants' Stock & Grain Co.* v. *Board of Trade of Chicago*, 201 F. 20, 24 (1912).

[71] "In patent cases it has been usual to embrace in one proceeding the public and the private remedy—to punish the defendant if found worthy of punishment, and, at the same time, or as an alternative, to assess damages and costs for the benefit of the plaintiff . . . ." *Hendryx* v. *Fitzpatrick*, 19 F. 810, 813 (1884). Examples of this procedure appear in *Union Tool Co.* v. *Wilson*, 259 U. S. 107 (1922); *Matter of Christensen Engineering Co.*, 194 U. S. 458 (1904); *Wilson* v. *Byron Jackson Co.*, 93 F. 2d 577 (1937); *Kreplik* v. *Couch Patents Co.*, 190 F. 565 (1911).

[72] *Farmers National Bank* v. *Wilkinson*, 266 U. S. 503 (1925); *In re Swan*, 150 U. S. 637 (1893); *In re Ayers*, 123 U. S. 443 (1887); *Merchants' Stock & Grain Co.* v. *Board of Trade of Chicago*, 201 F. 20 (1912). See *Phillips Sheet & Tin Plate Co.* v. *Amalgamated Assn. of Iron & Tin Workers*, 208 F. 335, 340 (1913). Instances in the state courts include *Carey* v. *District Court of Jasper County*, 226 Iowa 717, 285 N. W. 236 (1939); *Holloway* v. *Peoples Water Co.*, 100 Kan. 414, 167 P. 265 (1917); *Grand Lodge, K. P. of New Jersey* v. *Jansen*, 62 N. J. Eq. 737, 48 A. 526 (1901).

mingling of civil and criminal contempt proceedings must nevertheless be shown to result in substantial prejudice before a reversal will be required.[73] That the contempt proceeding carried the number and name of the equity suit [74] does not alter this conclusion, especially where, as here, the United States would have been the complaining party in whatever suit the contempt was tried. In so far as the criminal nature of the double proceeding domi-

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[73] We are not impressed with defendants' attack on the pleadings as insufficient to support a judgment for civil contempt. The petition, affidavit, and rule to show cause did not expressly mention civil contempt or remedial relief, but the affidavit contained allegations of interference with the operation of the mines and with governmental functions. These claims do not negative remedial or coercive relief. More significantly, the affidavit charged disobedience of the restraining order by failing to withdraw the notice of Nov. 15. We will not assume that the defendants were not instantly aware that a usual remedy in such a situation is to impose coercive sanctions until the act is performed. This is a function of civil contempt. *Lamb* v. *Cramer*, 285 U. S. 217, 221 (1932); *Michaelson* v. *United States*, 266 U. S. 42, 66 (1924); *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 449 (1911). Furthermore, defendants' counsel, in argument on the motion to vacate, remarked that the United States was proceeding upon the theory of civil contempt, and attempted only to demonstrate the inability of the United States to seek this relief. And when the Government's suggestions for fines were before the court, defendants' counsel argued the excessiveness of the fines for either civil or criminal contempt.

[74] Criminal contempt was apparently tried out in the equity suit in the patent cases in note 71 *supra*. And this was the practice followed in *Matter of Christensen Engineering Co.*, 194 U. S. 458 (1904); *Bessette* v. *W. B. Conkey Co.*, 194 U. S. 324 (1904); *New Orleans* v. *Steamship Co.*, 20 Wall. 387 (1874). In none of these cases in this Court, however, has there been an affirmative discussion of the propriety of proceeding in this manner. Compare *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 445 (1911); *United States* v. *Bittner*, 11 F. 2d 93, 95 (1926), with *Nye* v. *United States*, 313 U. S. 33, 42 (1941).

nates [75] and in so far as the defendants' rights in the criminal trial are not diluted by the mixing of civil with criminal contempt, to that extent is prejudice avoided.[76] Here, as we have indicated, all rights and privileges of the defendants were fully respected, and there has been no showing of substantial prejudice flowing from the formal peculiarities of defendants' trial.

Lastly, the defendants have assigned as error and argued in their brief that the District Court improperly extended the restraining order on November 27 for another ten days. There was then in progress argument on defendants' motion to vacate the rule to show cause, a part of the contempt proceedings. In the circumstances of this case, we think there was good cause shown for extending the order.[77]

IV.

Apart from their contentions concerning the formal aspects of the proceedings below, defendants insist upon the inability of the United States to secure relief by way

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[75] Cf. *Nye* v. *United States,* 313 U. S. 33, 42 (1941); *Union Tool Co.* v. *Wilson,* 259 U. S. 107, 110 (1922); *In re Merchants' Stock & Grain Co.,* 223 U. S. 639, 642 (1912); *Matter of Christensen Engineering Co.,* 194 U. S. 458, 461 (1904).

[76] In *Federal Trade Commission* v. *A. McLean & Son,* 94 F. 2d 802 (1938), it could not be said that the criminal element had been dominant and clear from the very outset of the case. The same is true of *Norstrom* v. *Wahl,* 41 F. 2d 910 (1930).

[77] Rule 65 (b) of the Federal Rules of Civil Procedure provides that a temporary restraining order should expire according to its terms "unless within the time so fixed the order, for good cause shown, is extended for a like period . . ." There being sufficient cause for the extension, there is no conflict with the subsequent clause of Rule 65 (b) requiring that "the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character . . . ." 308 U. S. 744.

of civil contempt in this case, and would limit the right to proceed by civil contempt to situations in which the United States is enforcing a statute expressly allowing resort to the courts for enforcement of statutory orders. *McCrone* v. *United States,* 307 U. S. 61 (1939), however, rests upon no such narrow ground, for the Court there said that "Article 3, § 2, of the Constitution, expressly contemplates the United States as a party to civil proceedings by extending the jurisdiction of the federal judiciary 'to Controversies to which the United States shall be a Party.' " *Id.* at 63. The United States was fully entitled to bring the present suit and to benefit from orders entered in its behalf.[78] We will not reduce the practical value of the relief granted by limiting the United States, when the orders have been disobeyed, to a proceeding in criminal contempt, and by denying to the Government the civil remedies enjoyed by other litigants, including the opportunity to demonstrate that disobedience has occasioned loss.[79]

V.

It is urged that, in any event, the amount of the fine of $10,000 imposed on the defendant Lewis and of the fine of $3,500,000 imposed on the defendant Union were arbitrary, excessive, and in no way related to the evidence adduced at the hearing.

Sentences for criminal contempt are punitive in their nature and are imposed for the purpose of vindicating the authority of the court. *Gompers* v. *Bucks Stove & Range*

[78] Section 24 of the Judicial Code, 28 U. S. C. § 41, extends the jurisdiction of the District Courts to "all suits of a civil nature, at common law or in equity, brought by the United States . . . ."

[79] The Court in the *McCrone* case affirmed 100 F. 2d 322 and noted, 307 U. S. 61, 63, note 4, the conflict with *Federal Trade Commission* v. *A. McClean & Son,* 94 F. 2d 802, 804 (1938), upon which defendants now rely.

Co., supra, at 441. The interests of orderly government demand that respect and compliance be given to orders issued by courts possessed of jurisdiction of persons and subject matter. One who defies the public authority and willfully refuses his obedience, does so at his peril. In imposing a fine for criminal contempt, the trial judge may properly take into consideration the extent of the willful and deliberate defiance of the court's order, the seriousness of the consequences of the contumacious behavior, the necessity of effectively terminating the defendant's defiance as required by the public interest, and the importance of deterring such acts in the future. Because of the nature of these standards, great reliance must be placed upon the discretion of the trial judge.

The trial court properly found the defendants guilty of criminal contempt. Such contempt had continued for 15 days from the issuance of the restraining order until the finding of guilty. Its willfulness had not been qualified by any concurrent attempt on defendants' part to challenge the order by motion to vacate or other appropriate procedures. Immediately following the finding of guilty, defendant Lewis stated openly in court that defendants would adhere to their policy of defiance. This policy, as the evidence showed, was the germ center of an economic paralysis which was rapidly extending itself from the bituminous coal mines into practically every other major industry of the United States. It was an attempt to repudiate and override the instrument of lawful government in the very situation in which governmental action was indispensable.

The trial court also properly found the defendants guilty of civil contempt. Judicial sanctions in civil contempt proceedings may, in a proper case, be employed for either or both of two purposes: to coerce the defendant into compliance with the court's order, and to compensate

the complainant for losses sustained. *Gompers* v. *Bucks Stove & Range Co., supra,* at 448, 449. Where compensation is intended, a fine is imposed, payable to the complainant. Such fine must of course be based upon evidence of complainant's actual loss,[80] and his right, as a civil litigant, to the compensatory fine is dependent upon the outcome of the basic controversy.[81]

But where the purpose is to make the defendant comply, the court's discretion is otherwise exercised. It must then consider the character and magnitude of the harm threatened by continued contumacy, and the probable effectiveness of any suggested sanction in bringing about the result desired.[82]

It is a corollary of the above principles that a court which has returned a conviction for contempt must, in fixing the amount of a fine to be imposed as a punishment or as a means of securing future compliance, consider the amount of defendant's financial resources and the consequent seriousness of the burden to that particular defendant.

In the light of these principles, we think the record clearly warrants a fine of $10,000 against defendant Lewis for criminal contempt. A majority of the Court, however, does not think that it warrants the unconditional imposition of a fine of $3,500,000 against the defendant union. A majority feels that, if the court below had assessed a fine of $700,000 against the defendant union, this, under the circumstances, would not be

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[80] *Leman* v. *Krentler-Arnold Co.,* 284 U. S. 448, 455–456 (1932); *Gompers* v. *Bucks Stove & Range Co.,* 221 U. S. 418, 443–444 (1911); *Parker* v. *United States,* 126 F. 2d 370, 380 (1942); *Judelshon* v. *Black,* 64 F. 2d 116 (1933); *Norstrom* v. *Wahl,* 41 F. 2d 910, 914 (1930).

[81] See pp. 294–295 *supra.*

[82] Cf. *Doyle* v. *London Guarantee Co.,* 204 U. S. 599 (1907). See also *In re Chiles,* 22 Wall. 157, 168 (1874).

excessive as punishment for the criminal contempt theretofore committed; and feels that, in order to coerce the defendant union into a future compliance with the court's order, it would have been effective to make the other $2,800,000 of the fine conditional on the defendant's failure to purge itself within a reasonable time. Accordingly, the judgment against the defendant union is held to be excessive. It will be modified so as to require the defendant union to pay a fine of $700,000, and further, to pay an additional fine of $2,800,000 unless the defendant union, within five days after the issuance of the mandate herein, shows that it has fully complied with the temporary restraining order issued November 18, 1946, and the preliminary injunction issued December 4, 1946. The defendant union can effect full compliance only by withdrawing unconditionally the notice given by it, signed John L. Lewis, President, on November 15, 1946, to J. A. Krug, Secretary of the Interior, terminating the Krug-Lewis agreement as of twelve o'clock midnight, Wednesday, November 20, 1946, and by notifying, at the same time, its members of such withdrawal in substantially the same manner as the members of the defendant union were notified of the notice to the Secretary of the Interior above-mentioned; and by withdrawing and similarly instructing the members of the defendant union of the withdrawal of any other notice to the effect that the Krug-Lewis agreement is not in full force and effect until the final determination of the basic issues arising under the said agreement.

We well realize the serious proportions of the fines here imposed upon the defendant union. But a majority feels that the course taken by the union carried with it such a serious threat to orderly constitutional government, and to the economic and social welfare of the nation, that a fine of substantial size is required in order to emphasize the

gravity of the offense of which the union was found guilty. The defendant Lewis, it is true, was the aggressive leader in the studied and deliberate non-compliance with the order of the District Court; but, as the record shows, he stated in open court prior to imposition of the fines that "the representatives of the United Mine Workers determined that the so-called Krug-Lewis Agreement was breached," and that it was the union's "representatives" who "notified the Secretary of the Interior that the contract was terminated as of November 20th." And certainly it was the members of the defendant union who executed the nationwide strike. Loyalty in responding to the orders of their leader may, in some minds, minimize the gravity of the miners' conduct; but we cannot ignore the effect of their action upon the rights of other citizens, or the effect of their action upon our system of government. The gains, social and economic, which the miners and other citizens have realized in the past are ultimately due to the fact that they enjoy the rights of free men under our system of government. Upon the maintenance of that system depends all future progress to which they may justly aspire. In our complex society, there is a great variety of limited loyalties, but the overriding loyalty of all is to our country and to the institutions under which a particular interest may be pursued.

We are aware that the defendants may have sincerely believed that the restraining order was ineffective and would finally be vacated. However, the Government had sought a declaration of its contractual rights under the Krug-Lewis agreement, effective since May 29, 1946, and solemnly subscribed by the Government and the defendant union. The restraining order sought to preserve conditions until the cause could be determined, and obedience by the defendants would have secured this result. They had full opportunity to comply with the order of the District Court, but they deliberately refused obedience and

determined for themselves the validity of the order. When the rule to show cause was issued, provision was made for a hearing as to whether or not the alleged contempt was sufficiently purged. At that hearing the defendants stated to the court that their position remained then in the status which existed at the time of the issuance of the restraining order. Their conduct showed a total lack of respect for the judicial process. Punishment in this case is for that which the defendants had done prior to imposition of the judgment in the District Court, coupled with a coercive imposition upon the defendant union to compel obedience with the court's outstanding order.

We have examined the other contentions advanced by the defendants but have found them to be without merit. The temporary restraining order and the preliminary injunction were properly issued, and the actions of the District Court in these respects are affirmed. The judgment against the defendant Lewis is affirmed. The judgment against the defendant union is modified in accordance with this opinion, and, as modified, that judgment is affirmed.

So ordered.

MR. JUSTICE JACKSON joins in this opinion except as to the Norris-LaGuardia Act which he thinks relieved the courts of jurisdiction to issue injunctions in this class of case.

MR. JUSTICE FRANKFURTER, concurring in the judgment.

The historic phrase "a government of laws and not of men" epitomizes the distinguishing character of our political society. When John Adams put that phrase into the Massachusetts Declaration of Rights he was not indulging in a rhetorical flourish. He was expressing the aim

of those who, with him, framed the Declaration of Independence and founded the Republic. "A government of laws and not of men" was the rejection in positive terms of rule by fiat, whether by the fiat of governmental or private power. Every act of government may be challenged by an appeal to law, as finally pronounced by this Court. Even this Court has the last say only for a time. Being composed of fallible men, it may err. But revision of its errors must be by orderly process of law. The Court may be asked to reconsider its decisions, and this has been done successfully again and again throughout our history. Or, what this Court has deemed its duty to decide may be changed by legislation, as it often has been, and, on occasion, by constitutional amendment.

But from their own experience and their deep reading in history, the Founders knew that Law alone saves a society from being rent by internecine strife or ruled by mere brute power however disguised. "Civilization involves subjection of force to reason, and the agency of this subjection is law."[1] The conception of a government by laws dominated the thoughts of those who founded this Nation and designed its Constitution, although they knew as well as the belittlers of the conception that laws have to be made, interpreted and enforced by men. To that end, they set apart a body of men, who were to be the depositories of law, who by their disciplined training and character and by withdrawal from the usual temptations of private interest may reasonably be expected to be "as free, impartial, and independent as the lot of humanity will admit." So strongly were the framers of the Constitution bent on securing a reign of law that they endowed the judicial office with extraordinary safeguards and prestige. No one, no matter how exalted his public office or how righteous

[1] Pound, *The Future of Law* (1937) 47 Yale L. J. 1, 13.

his private motive, can be judge in his own case. That is what courts are for. And no type of controversy is more peculiarly fit for judicial determination than a controversy that calls into question the power of a court to decide. Controversies over "jurisdiction" are apt to raise difficult technical problems. They usually involve judicial presuppositions, textual doubts, confused legislative history, and like factors hardly fit for final determination by the self-interest of a party.

Even when a statute deals with a relatively uncomplicated matter, and the "words in their natural sense as they would be read by the common man" would appear to give an obvious meaning, considerations underlying the statute have led this Court to conclude that "the words cannot be taken quite so simply." See *Milburn Co.* v. *Davis Co.*, 270 U. S. 390, 400. How much more true this is of legislation like the Norris-LaGuardia Act. This Act altered a long process of judicial history, but altered it by a scheme of complicated definitions and limitations.

The Government here invoked the aid of a court of equity in circumstances which certainly were not covered by the Act with inescapable clarity. Colloquially speaking, the Government was "running" the mines. But it was "running" them not as an employer, in the sense that the owners of the coal mines were the employers of the men the day before the Government seized the mines. Nor yet was the relation between the Government and the men like the relation of the Government to the civil service employees in the Department of the Interior. It would be naive or wilful to assert that the scope of the Norris-La Guardia Act in a situation like that presented by this bill raised a question so frivolous that any judge should have summarily thrown the Government out of court without day. Only when a court is so obviously traveling outside its orbit as to be merely usurping judicial forms and facilities, may an order issued by a

court be disobeyed and treated as though it were a letter to a newspaper. Short of an indisputable want of authority on the part of a court, the very existence of a court presupposes its power to entertain a controversy, if only to decide, after deliberation, that it has no power over the particular controversy. Whether a defendant may be brought to the bar of justice is not for the defendant himself to decide.

To be sure, an obvious limitation upon a court cannot be circumvented by a frivolous inquiry into the existence of a power that has unquestionably been withheld. Thus, the explicit withdrawal from federal district courts of the power to issue injunctions in an ordinary labor dispute between a private employer and his employees cannot be defeated, and an existing right to strike thereby impaired, by pretending to entertain a suit for such an injunction in order to decide whether the court has jurisdiction. In such a case, a judge would not be acting as a court. He would be a pretender to, not a wielder of, judicial power.

That is not this case. It required extended arguments, lengthy briefs, study and reflection preliminary to adequate discussion in conference, before final conclusions could be reached regarding the proper interpretation of the legislation controlling this case. A majority of my brethren find that neither the Norris-LaGuardia Act nor the War Labor Disputes Act limited the power of the district court to issue the orders under review. I have come to the contrary view. But to suggest that the right to determine so complicated and novel an issue could not be brought within the cognizance of the district court, and eventually of this Court, is to deny the place of the judiciary in our scheme of government. And if the district court had power to decide whether this case was properly before it, it could make appropriate orders so as to afford the necessary time for fair consideration and decision while

existing conditions were preserved. To say that the authority of the court may be flouted during the time necessary to decide is to reject the requirements of the judicial process.

It does not mitigate such defiance of law to urge that hard-won liberties of collective action by workers were at stake. The most prized liberties themselves presuppose an independent judiciary through which these liberties may be, as they often have been, vindicated. When in a real controversy, such as is now here, an appeal is made to law, the issue must be left to the judgment of courts and not the personal judgment of one of the parties. This principle is a postulate of our democracy.

And so I join the opinion of the Court insofar as it sustains the judgment for criminal contempt upon the broad ground of vindicating the process of law.[2] The records of this Court are full of cases, both civil and criminal, involving life or land or small sums of money, in which the Court proceeded to consider a federal claim that was not obviously frivolous. It retained such cases under its power until final judgment, though the claim eventually turned out to be unfounded and the judgment was one denying the jurisdiction either of this Court or of the court from which the case came. In the case before us, the District Court had power "to preserve the existing conditions" in the discharge of "its duty to permit argument and to take the time required for such consideration as it might need" to decide whether the controversy involved a labor dispute to which the Norris-LaGuardia Act applied. *United States* v. *Shipp,* 203 U. S. 563, 573, and *Howat* v. *Kansas,* 258 U. S. 181.

[2] Since, in my view, this was not a conviction for contempt in a case "arising under this Act," the jury provisions of § 11 of the Norris-LaGuardia Act do not apply. For obvious reasons, the petitioners do not claim that the Constitution of the United States affords them a right to trial by jury.

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In our country law is not a body of technicalities in the keeping of specialists or in the service of any special interest. There can be no free society without law administered through an independent judiciary. If one man can be allowed to determine for himself what is law, every man can. That means first chaos, then tyranny. Legal process is an essential part of the democratic process. For legal process is subject to democratic control by defined, orderly ways which themselves are part of law. In a democracy, power implies responsibility. The greater the power that defies law the less tolerant can this Court be of defiance. As the Nation's ultimate judicial tribunal, this Court, beyond any other organ of society, is the trustee of law and charged with the duty of securing obedience to it.

It only remains to state the basis of my disagreement with the Court's views on the bearing of the Norris-LaGuardia Act, 47 Stat. 70, 29 U. S. C. § 101, and the War Labor Disputes Act, 57 Stat. 163, 50 U. S. C. App. § 1501. As to the former, the Court relies essentially on a general doctrine excluding the Government from the operation of a statute in which it is not named, and on the legislative history of the Act. I find the countervailing considerations weightier. The Norris-LaGuardia Act deprived the federal courts of jurisdiction to issue injunctions in labor disputes except under conditions not here relevant. The question before a court of equity therefore is whether a case presents a labor dispute as defined by the Act. Section 13 (c) defines "labor disputes":

> "The term 'labor dispute' includes any controversy concerning terms or conditions of employment . . . regardless of whether or not the disputants stand in the proximate relation of employer and employee."

That the controversy before the district court comes within this definition does not need to be labored. The

controversy arising under the Lewis-Krug contract concerned "terms or conditions of employment" and was therefore a "labor dispute," whatever further radiations the dispute may have had. The Court deems it appropriate to interpolate an exception regarding labor disputes to which the Government is a party. It invokes a canon of construction according to which the Government is excluded from the operation of general statutes unless it is included by explicit language.

The Norris-LaGuardia Act has specific origins and definite purposes and should not be confined by an artificial canon of construction. The title of the Act gives its scope and purpose, and the terms of the Act justify its title. It is an Act "to define and limit the jurisdiction of courts sitting in equity." It does not deal with the rights of parties but with the power of the courts. Again and again the statute says "no court shall have jurisdiction," or an equivalent phrase. Congress was concerned with the withdrawal of power from the federal courts to issue injunctions in a defined class of cases. Nothing in the Act remotely hints that the withdrawal of this power turns on the character of the parties. The only reference to parties underscores their irrelevance to the issue of jurisdiction, for the power of the courts is withdrawn in a labor dispute "regardless of whether or not the disputants stand in the proximate relation of employer and employee." The limitation on the jurisdiction of the court depends entirely on the subject matter of the controversy. Section 13 (a) defines it:

> "A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; . . . ."

Neither the context nor the content of the Act qualifies the terms of that section. Did not the suit brought by the Government against Lewis and the United Mine Workers "grow out of a labor dispute" within the terms of § 13 (a)?

As already indicated, the Court now finds an exception to the limitation which the Norris-LaGuardia Act placed upon the equity jurisdiction of the district court, not in the Act but outside it. It invokes a canon of construction that a sovereign is presumptively not intended to be bound by its own statute unless named in it. At best, this canon, like other generalities about statutory construction, is not a rule of law. Whatever persuasiveness it may have in construing a particular statute derives from the subject matter and the terms of the enactment in its total environment. "This rule has its historical basis in the English doctrine that the Crown is unaffected by acts of Parliament not specifically directed against it. . . . The presumption is an aid to consistent construction of statutes of the enacting sovereign when their purpose is in doubt, but it does not require that the aim of a statute fairly to be inferred be disregarded because not explicitly stated." So wrote the late Chief Justice for the whole Court in *United States* v. *California,* 297 U. S. 175, 186, and this point of view was very recently applied in *United States* v. *Rice,* 327 U. S. 742, 749. It is one thing to read a statute so as not to bind the sovereign by restrictions, or to impose upon it duties, which are applicable to ordinary citizens. It is quite another to interpolate into a statute limiting the jurisdiction of a court, the qualification that such limitation does not apply when the Government invokes the jurisdiction. No decision of this Court gives countenance to such a doctrine of interpolation. The text, context, content and historical setting of the Norris-LaGuardia Act all converge to indicate the unrestricted withdrawal by Congress from the federal district courts of the

power to issue injunctions in labor disputes, excepting only under circumstances explicitly defined and not here present. The meaning which a reading of the text conveys and which is confirmed by the history which led Congress to free the federal courts from entanglements in these industrial controversies through use of the injunction, ought not to be subordinated to an abstract canon of construction that carries the residual flavor of the days when a personal sovereign was the law-maker.

Moreover, the rule proves too much. If the United States must explicitly be named to be affected, the limitations imposed by the Norris-LaGuardia Act upon the district court's jurisdiction could not deprive the United States of the remedies it theretofore had. Accordingly, the courts would not be limited in their jurisdiction when the United States is a party and the Act would not apply in any proceeding in which the United States is complainant. It would mean that, in order to protect the public interest, which may be jeopardized just as much whether an essential industry continued under private control or has been temporarily seized by the Government, a court could, at the behest of the Attorney General of the United States, issue an injunction as courts did when they issued the *Debs,* the *Hayes* and the *Railway Shopmen's* injunctions.[3] But it was these very injunctions, secured by the Attorney General of the United States under claim of compelling public emergency, that gave the most powerful momentum to the enactment of the Norris-LaGuardia Act. This history is too familiar to be rehearsed. It is surely surprising to conclude that when a long and persistent effort to take the federal courts out of the industrial conflict, insofar as the labor injunction put them into it, found its way to the statute books,

[3] *United States* v. *Debs,* 64 F. 724; 158 U. S. 564; *United States* v. *Hayes,* unreported, D. Ind. 1919; *United States* v. *Railway Employees' Dept. A. F. L.,* 283 F. 479, 286 F. 228, 290 F. 978.

the Act failed to meet the grievances that were most dramatic and deepest in the memory of those most concerned with the legislation.

It is urged, however, that legislative history cuts down what might otherwise be the scope of the Act. Reliance is placed on statements by two Representatives during the House debates on the Bill, calculated to show that Congress purposed to exclude from the limitation of the jurisdiction of the district courts labor disputes involving "employees" of the Government, at least where injunctions are sought by the Attorney General. Since both statements came from spokesmen for the Bill, they carry weight. The nature of these remarks, the circumstances under which they were delivered, as well as their setting, define their meaning and the significance to be given them as a gloss upon the Act.

There was before the House an Amendment by Representative Blanton which would have made the Act applicable "except where the United States Government is the petitioner." (75 Cong. Rec. 5503.) Representative LaGuardia opposed the Amendment, remarking "I do not see how in any possible way the United States can be brought in under the provisions of this bill." If this is to be read apart from the meaning afforded by the context of the debates and the whole course of the legislation, it would mean that the jurisdiction to grant a *Debs* injunction continued unaffected. No one would have been more startled by such a conclusion than Mr. LaGuardia. The fact is that a situation like the present, where the Government for a time has some relation to a labor dispute in an essentially private industry, was evidently not in the thought of Congress. Certainly it was not discussed. Mr. LaGuardia's statement regarding the position of the United States under the Act followed his reading of § 13 (b) under which a person is to be deemed interested in a labor dispute only if "engaged in the same industry, trade,

craft, or occupation in which such dispute occurs." His brief, elliptical remark plainly conveyed that the business of the Government of the United States is not an "industry, trade, craft, or occupation." This is made unequivocally clear by the colloquy that followed. Mr. Blanton inquired whether Mr. LaGuardia was willing "for the Army and the Navy to form a labor union and affiliate themselves with the American Federation of Labor and not permit the Government of the United States to preserve its rights?" The short answer for Mr. LaGuardia to have made was "The United States is not subject to the provisions of the Act, because by employer we mean a private employer." Instead of that, Mr. LaGuardia replied, "Oh, the Army and the Navy are not in a trade, craft, or occupation." In short, the scope of the limitation upon the jurisdiction of the courts depended not on party, but on subject matter. Representative Blanton's amendment was rejected by 125 to 21.

The second Representative upon whom the Court relies is Mr. Michener. He said, "Be it remembered that this bill does not attempt to legislate concerning Government employees. I do not believe that the enactment of this bill into law will take away from the Federal Government any rights which it has under existing law, to seek and obtain injunctive relief where the same is necessary for the functioning of the Government." (75 Cong. Rec. 5464.) Later he added ". . . This deals with labor disputes between individuals, not where the Government is involved. It is my notion that under this bill the Government can function with an injunction, if that is necessary in order to carry out the purpose of the Government. I should like to see this clarified, but I want to go on record as saying that under my interpretation of this bill the Federal Government will not at any time be prevented from applying for an injunction, if one is necessary in order that the Government may function." (*Id.* at 5509.) What Mr.

Michener gave as *his* interpretation of what survived the Norris-LaGuardia Act, was precisely the claim of the Government in asking for the *Debs* injunction. That injunction was sought and granted in order that the Government might function. Insofar, then, as Mr. Michener's statements imply that the United States could again get a *Debs* injunction, his understanding is belied by the whole history of the legislation, as reflected in its terms.[4] These statements can only mean, then, that if, say, employees in the Treasury Department had to be enjoined so that government could go on, it was Representative Michener's view that an injunction could issue. No attempt was made to make this view explicit in the Act. It was not discussed, and only one statement appears to share it.[5] In any event, it does not imply a broader exemption than that of which Representative LaGuardia spoke.

It is to be noted that the discussion in the House followed passage in the Senate of that which subsequently became the Act. It is a matter of history that the Senate Judiciary Committee was the drafting and driving force behind the Bill. The Bill had extended consideration by a subcommittee of the Senate Judiciary Committee followed by weighty reports and full discussion on the Senate floor. We are not pointed to a suggestion or a hint in the Senate proceedings that the withdrawal of jurisdiction to issue

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[4] Compare Representative LaGuardia's reply to a proposed amendment by Representative Beck which would have exempted from the operation of the Act disputes "where the welfare, health, or lives of a public are concerned who are not parties to such labor dispute, or where a labor dispute involves the obstruction of any instrumentality of interstate or foreign commerce." Mr. LaGuardia claimed that the amendment was out of order because not germane to the purposes of the legislation. "The present bill refers only to disputes between employees and employer . . . The public is fully protected by penal and other statutes . . . ." 75 Cong. Rec. 5503.

[5] See statement of Representative Schneider, 75 Cong. Rec. 5514.

injunctions in labor disputes was subject to a latent exception as to injunctions sought by the Government. The whole contemporaneous history is against it. The experience which gave rise to the Norris-LaGuardia Act only underscores the unrestricted limitation upon the jurisdiction of the courts, except in situations of which this is not one. To find implications in the fact that in the course of the debates it was not explicitly asserted that the district courts could not issue an injunction in a labor controversy even at the behest of the Government is to find the silence of Congress more revealing than the natural meaning of legislation and the history which begot it. The remarks of Mr. LaGuardia and Mr. Michener ought not to be made the equivalent of writing an amendment into the Act. It is one thing to draw on all relevant aids for shedding light on the dark places of a statute. To allow inexplicit remarks in the give-and-take of debate to contradict the very terms of legislation and the history behind it is to put out the controlling light on meaning shed by the explicit provisions of an Act in its setting.

But even if we assume that the Act was not intended to apply to labor disputes involving "employees" of the United States, are the miners in the case before us "employees" of the United States within the meaning of this interpolated exception? It can hardly be denied that the relation of the miners to the United States is a hybrid one. Clearly, they have a relation to the Government other than that of employees of plants not under Government operation. Equally clearly, they have a relation and a status different from the relation and status of the clerks at the Treasury Department. Never in the country's history have the terms of employment of the millions in Government service been established by collective bargaining. But the conditions of employment—hours, wages, holi-

days, vacations, health and welfare program, etc.—were so fixed for the miners during the period of Government seizure. The proper interpretation of this collective agreement between the Government and the United Mine Workers is precisely what is at the bottom of this controversy. Neither a spontaneous nor a sophisticated characterization would resort to the phrase "Government employees" without more, in speaking of the miners during the operation of the mines by the Government. The only concrete characterization of the status of employees in seized plants was expressed by Under Secretary Patterson at a hearing on the predecessor bill to that which became the law under which this seizure was made. He spoke of the role of the Government as that of "A receiver that would be charged with the continuity of operation of the plant." [6] Nothing in the Acts authorizing seizure of

[6] Hearings on S. 2054 before a Subcommittee of the Committee on the Judiciary, Senate, 77th Cong., 1st Sess., p. 14. The characterization was accepted by members of the Committee which approved the Bill. *Id.* at pp. 16, 18, 130. Senator Connally refers to the private employer who "will continue to operate it under the supervision of the Government." *Id.* at 55. See also p. 57. While at one point he referred to the United States as an employer (*id.* at 120), he did so in a special context for the purposes of a discussion about collective bargaining with reference to wages. As to wages, of course, the Government would stand *in loco* "employer" during its operation of the plant.

The analogy of equity receivership is not inapt. In a limited sense, employees of plants in receivership in a federal court may be considered employees of the United States, since the operation of the plant is under the jurisdiction and control of a United States officer. But no one aware of the background of mischief which the Act was intended to remedy could find an intention in Congress to allow injunctions in labor disputes involving plants in receivership. Compare *Trainmen* v. *Toledo, P. & W. R. Co.*, 321 U. S. 50, 55, 58–61. No series of cases contributed more to the feeling that the federal courts abused their equity jurisdiction than those involving employees of

private plants indicates that the employees of these plants were to be considered employees of the United States in the usual and natural meaning of the term. In the full debates on bills providing for Government seizure of plants, Congressional leaders clearly indicated their understanding that as the law then stood there could be no injunctions in labor disputes in seized plants.[7]

But not only was such the understanding when the legal question emerged in the course of considering the need of war legislation. Recent legislation and its history

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railroads in equity receivership. See, *e. g.*, 1 Gresham, Life of Walter Quintin Gresham, cc. XXIII to XXV; Gregory, Labor and the Law, 95–97; Nelles, *A Strike and Its Legal Consequences—An Examination of the Receivership Precedent for the Labor Injunction* (1931) 40 Yale L. J. 507, *passim*. If injunctions will not issue in disputes involving employees of railroads or other industries in receivership under operation by the federal courts, nothing relevant to the construction of the statute warrants the inference that Congress allowed the injunction to be available in disputes involving employees of plants in "receivership" under operation of the Secretary of the Interior.

[7] See especially the debates on a proposed amendment to the Smith-Connally Bill whereby Senator Connally sought to add the injunction as a remedy against violation of the Act.

"MR. CONNALLY. . . . The provision is limited to plants which the Government takes over. It would not change the Norris-LaGuardia Act in any respect, *except in the one particular case* . . .

. . . . . .

"MR. LANGER. Mr. President, is it not true that unless section 5 is stricken from the bill that a portion of the Norris-LaGuardia Act will be repealed?

"MR. DANAHER. It would certainly be overridden; . . . ." (Emphasis supplied.) 89 Cong. Rec. 3988–89.

See also the statements of Senators Taft, Vandenberg, and Wagner, and compare those of Senators Revercomb and Barkley; and see the colloquy between Senators Connally and Vandenberg, *id.* at 3906, quoted *infra* note 10.

are relevant not merely because they show later understanding of the terms of an older statute. The War Labor Disputes Act of 1943 is directly and primarily involved in this case. The whole controversy arises under the authority to seize mines given by that Act. The real question before us is whether in authorizing such seizure and operation Congress also gave to the United States the right to prevent interference with its statutory operation through the equitable remedies here invoked.

By the War Labor Disputes Act, Congress created a new relationship among the Government, the plant owners, the employees. The rights, duties, remedies incident to that relation are those given by the Act. Congress naturally addressed itself to possible interferences with the Government's operation of seized plants. It dealt specifically with this subject. It gave the Government specific remedies which it might invoke against such interference.[8] Remedy by injunction was not given. It was not merely omitted. A fair reading of the legislative history shows that it was expressly and definitively denied. As reported out of the Senate Committee, S. 796 provided for plant seizure. It did not include the injunction among the remedies for interference with Government operation.[9] But when the Bill reached the floor of the Senate, Senator Connally, sponsor of the Bill, offered and urged an amendment giving the district courts jurisdiction to restrain violations of the measure.[10] He accepted, somewhat reluctantly, the

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[8] 57 Stat. 163, 165–66, 50 U. S. C. App. § 1506 (b).

[9] S. Rep. No. 147, 78th Cong., 1st Sess.

[10] 89 Cong. Rec. 3809. And see p. 3906:

"MR. VANDENBERG. . . .

"I am very anxious that there shall be additional statutory protection to the uninterrupted production of war necessities, but I am wondering whether in order to achieve that purpose it is necessary for

amendment of Senator Wagner to limit the proposed amendment to an injunction at the behest of the Attorney

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me to impinge upon a very profound hostility I have always had to the use of injunctions in labor disputes. I voted for the original Norris-LaGuardia Act, and I have always felt that one of the most useful things we ever did, not only as a matter of fair play, but in respect to the status of the courts was substantially to separate from court jurisdiction the responsibility of, in effect, umpiring labor disputes.

"What I wish to ask the able Senator from Texas, if I may, is this: In his proposal, on page 4, it is provided that any person who willfully violates any provision of the act is to be guilty of a felony, and subject to a fine or imprisonment. Is not that a conclusive penalty? Is it necessary in addition to go back into all the old injunctive process in connection with labor disputes?

"MR. CONNALLY. That is not a legal inquiry really. Of course, it might be that we could get along without the provision. Like the Senator, I voted for the Norris-LaGuardia Act, and I favored the policy embodied therein. This provision, however, applies only to plants taken over by the Government. It seems to me that if the Government is to operate a plant, it should have the widest and the fullest authority to operate it as it wants to do and to prevent interruption. Therefore, because of the attitude of some who were interested in the bill, I inserted section 5. I do not think the bill would be very seriously crippled if it were eliminated, but I think it is improved by its remaining in. I do not think it would be fatal to strike out that provision, but I hope that will not be done.

"MR. VANDENBERG. I thank the Senator for his frank statement. When the Government has taken over the operation of a plant and it becomes in essence a Government operation, it is rather difficult to resist the argument that the Government should not be deprived of any instrumentality in the enforcement, virtually, of its sovereignty.

"MR. CONNALLY. That is true.

"MR. VANDENBERG. Nevertheless, I apprehend that the very fact that the injunctive process is restored in the Senator's bill is the reason why it appears in the additional amendment offered by the able Senator from Ohio, where, it seems to me, it becomes decidedly more offensive, using that word in the sense in which I have used it."

The reference is to an amendment proposed by Senator Taft

General, precisely as was here sought and granted.[11] On motion of Senator Danaher, this proposal was rejected by the Senate after full debate,[12] participated in by Senators especially conversant with the history and scope of the existing remedies available to the Government. With this remedy denied to the Government, the Bill was passed and sent to the House.[13] The House did not like the Bill. Its version did not see fit specifically to add to the limited seizure provisions of the Selective Service Act of 1940, although apparently it assumed that there could be seizure under existing law in the case of failure by defense plants to produce as a result of labor troubles. Instead, the House version provided stringent anti-strike and anti-lockout provisions as to plants in private operation, and by specific amendment to the Norris-LaGuardia Act the district courts were authorized to restrain violations of such provisions. But this *pro tanto* repeal of the Norris-LaGuardia Act was not made available to the United States as a remedy against interference with operation of plants seized under the earlier, 1940 Act.[14]

The bill then went to conference. What came out was, so far as here material, the bill that had passed the Senate. The United States was granted power to seize and oper-

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authorizing injunctions in any circuit court of appeals at the request of the Attorney General in case of failure to obey orders of the War Labor Board, or whenever "operations are hindered or reduced by lock-out, strike, or otherwise." This applied apparently to plants in private operation. 89 Cong. Rec. 3897–98. Compare the Bill passed by the House, note 14.

[11] 89 Cong. Rec. 3907, 3988–89.

[12] *Id.* at 3989.

[13] *Id.* at 3993.

[14] Compare § 4 (b) and (c) with § 12 (a) and (b), 89 Cong. Rec. 5382–83. For the earlier seizure provisions see 54 Stat. 885, 892, 50 U. S. C. App. § 309.

ate defense plants whose production was hampered by labor disputes. Specific remedies were formulated by Congress against interference with the Government's operation. The injunction was not included.[15] In neither house was further attempt made to reintroduce the Connally proposal giving the Government relief by injunction. Nor was it suggested that the Government had such redress under existing law. On the floor of the Senate, Senator Thomas of Utah, Chairman of the Committee on Education and Labor, said:

> "Mr. President, I ask the Senator from New Mexico [Mr. Hatch], the Senator from Connecticut [Mr. Danaher], and the Senator from Texas [Mr. Connally], the sponsor of the bill, whether there is a unanimous opinion on the part of those three great lawyers that there will not be a reopening of the district courts to industry-labor disputes? . . . I should like that point to be made so firmly and so strongly that no lawyer in the land who would like to take advantage of the situation created by the mere mention of the words 'district court' will resort to the court in order to confuse our industry-labor relations."

Mr. Connally answered:

> "Mr. President, . . . I think I speak for the Senator from Vermont and the Senator from New Mexico and the Senator from Connecticut and also the Senator from Indiana [Mr. Van Nuys], although he is not present, when I say that there is no jurisdiction whatever conferred by this bill providing for resort to the United States district court, except the one mentioned by the Senator from Connecticut, which is merely the right to go there for a civil action for damages, and

[15] See Conference Report on S. 796, H. Rep. No. 531, 78th Cong., 1st Sess.

no jurisdiction whatever is given over labor disputes. Does that answer the Senator?"

"MR. THOMAS of Utah. I thank the Senator for making that statement and I hope it will satisfy the lawyers of the country.

"MR. CONNALLY. I am sure it will." [16]

Under these circumstances the Bill became law, and the seizure giving rise to this controversy was made under that law. The separate items of this legislative history cannot be judged in isolation. They must be considered together, and as part of the course of legislation dealing with injunctions in labor disputes. To find that the Government has the right which Senator Connally's amendment sought to confer but which the Congress withheld is to say that voting down the amendment had the same effect as voting it up.

Events since the passage of the Act underscore what would appear to be the controlling legislative history of the War Labor Disputes Act, and prove that Congress saw fit not to authorize district courts to issue an injunction in cases like this. To meet the grave crisis growing out of the strike on the railroads last May, Congress, upon the recommendation of the President and the Attorney General, deemed additional legislation necessary for dealing with labor disputes. The proposals in each house carried a provision which authorized an injunction to issue for violation of the War Labor Disputes Act.[17] Senator Mead proposed an amendment to delete the provisions for injunctions.[18] In the debates that followed no one suggested that the new proposal was unnecessary, that the

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[16] 89 Cong. Rec. 5754. The Senators mentioned by Mr. Connally were the managers on the part of the Senate of the bill in conference.

[17] H. R. 6578, 79th Cong., 2d Sess.

[18] 92 Cong. Rec. 6019.

jurisdiction proposed to be conferred already existed, or that if granted, as requested by the Attorney General, it would not, as Senator Mead claimed, repeal *pro tanto* the Norris-LaGuardia Act. The debates show clearly that what was contemplated was a change in the War Labor Disputes Act, whereby a new and an additional remedy would be authorized.[19] The Bill never became law.

As is well known, as the debates clearly show, as Senator Connally admitted, the War Labor Disputes Act was directed primarily against stoppage in the coal mines.[20] The situation that Congress feared was exactly that which has occurred and which underlies this controversy. To deal with the situation, Congress gave the United States the power to seize the mines. To effectuate this power, the Government was given authority to invoke criminal penalties for interferences with the operation of the mines. Senator Connally sought more. He wanted Congress to empower the district courts to enjoin interference. The Senate did not want an injunction to issue and voted the proposal down. The Senate's position was adopted by

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[19] See, particularly, the statements of Senator Mead (pp. 6019–20), Senator Morse (pp. 6021, 6022), Senator Pepper (pp. 6022, 6023), Senator Wagner (p. 6022), Senator Wheeler (p. 6025), Senator Barkley (p. 6028), Senator Fulbright (p. 6024).

[20] Senator Connally said: "Mr. Lewis appeared before the Truman committee 3 or 4 weeks ago. I happen to be a member of that committee, and when he said he did not regard his no-strike agreement as binding . . . I determined then that if I could get this bill before the Senate, I was going to bring it up and press it in order that if he did disregard the agreement, the President or the Government of the United States would have a weapon with which to meet the threat and the danger." 89 Cong. Rec. 3886. See also H. Rep. No. 440, 78th Cong., 1st Sess., p. 6. The references to the coal situation in the debates are innumerable. See, *e. g.*, 89 Cong. Rec. 3767, 3886, 3888, 3889, 3900–01.

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the Conference Committee. The House of Representatives yielded its view and approved the Conference report. The whole course of legislation indicates that Congress withheld the remedy of injunction. This Court now holds that Congress authorized the injunction.

I concur in the Court's opinion insofar as it is not inconsistent with these views, and, under the compulsion of the ruling of the majority that the court below had jurisdiction to issue its orders, I join in the Court's judgment.

Mr. Justice Black and Mr. Justice Douglas, concurring in part and dissenting in part.

For the reasons given in the Court's opinion, we agree that neither the Norris-LaGuardia Act nor the War Labor Disputes Act barred the Government from obtaining the injunction it sought in these proceedings. The "labor disputes" with which Congress was concerned in the Norris-LaGuardia Act were those between private employers and their employees. As to all such "labor disputes," the Act drastically limited the jurisdiction of federal courts; it barred relief by injunction except under very narrow circumstances, whether injunction be sought by private employers, the Government, or anyone else. But the attention of Congress was neither focused upon, nor did it purport to affect, "labor disputes," if such they can be called, between the Government and its own employees. There was never an intimation in the progress of the Act's passage that a labor dispute within the Act's meaning would arise because of claims against the Government asserted collectively by employees of the Interior, State, Justice, or any other Government department. Congress had never in its history provided a program for fixing wages, hours, and working conditions of its employees by collective bargaining. Working condi-

tions of Government employees had not been the subject of collective bargaining, nor been settled as a result of labor disputes. It would require specific congressional language to persuade us that Congress intended to embark upon such a novel program or to treat the Government employer-employee relationship as giving rise to a "labor dispute" in the industrial sense.

We have no doubt that the miners became Government employees when the Government took over the mines. It assumed complete control over the mines and their operation. The fact that it utilized the managerial forces of the private owners does not detract from the Government's complete authority. For whatever control Government agents delegated to the private managers, those agents had full power to take away and exercise themselves. If we thought, as is here contended, that the Government's possession and operation of the mines were not genuine, but merely pretended, we should then say that the Norris-LaGuardia Act barred these proceedings. For anything less than full and complete Government operation for its own account [1] would make this proceeding the equivalent of the Government's seeking an injunction for the benefit of the private employers. We think the Norris-LaGuardia Act prohibits that. But as we read the War Labor Disputes Act and the President's order taking over the mines against the background of circumstances which prompted both, we think, apparently contrary to the implications of the regulations, that the Government operates these mines for its own account as a matter of law; [2] and those who work in them, during

[1] An analogy is a taking by the Government of a leasehold interest in property in whole or in part. See *United States* v. *Petty Motor Co.*, 327 U. S. 372.

[2] Section 9 of the Selective Service Act, 54 Stat. 892, 50 U. S. C. App. § 309, granted power "to take immediate possession of any . . . plant . . . and through the appropriate branch, bureau, or depart-

the period of complete Government control, are employees of the Government.

Since the Norris-LaGuardia Act is inapplicable, we agree that the District Court had power in these proceedings to enter orders necessary to protect the Government against an invasion of the rights it asserted, pending adjudication of the controversy its complaint presented to the court. It is therefore unnecessary for us to reach the question of whether the District Court also had power to enter these orders under the doctrine of *United States* v. *Shipp*, 203 U. S. 563.

We agree that the court had power summarily to coerce obedience to those orders and to subject defendants to such conditional sanctions as were necessary to compel obedience. And we agree that in such civil contempt proceedings to compel obedience, it was not necessary for the court to abide by all the procedural safeguards which surround trials for crime. Without such coercive powers, courts could not settle the cases and controversies before them. Courts could not administer justice if persons were left free pending adjudication to engage in conduct which would either immediately interrupt the judicial proceedings or so change the *status quo* of the subject matter of a controversy that no effective

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ment of the Army or Navy to manufacture therein such product . . . as may be required . . . ." And it provides for payment: "The compensation to be paid . . . as rental for use of any manufacturing plant while used by the United States, shall be fair and just . . . ." Section 3 of the War Labor Disputes Act, 57 Stat. 164, 50 U. S. C. App. Supp. V § 309, extended this authority to include power to take immediate possession of any "mine . . . equipped for the manufacture, production, or mining of any articles or materials which may be required for the war effort . . . whenever the President finds . . . and proclaims that there is an interruption of the operation of such . . . mine . . . as a result of a strike or other labor disturbance . . . and that the exercise of such power and authority is necessary to insure the operation of such . . . mine . . . in the interest of the war effort . . . ."

judgment could be rendered. Disorder in the courtroom, or so near to it as to interrupt a trial, and disobedience of an affirmative court order, are typical examples of offenses which must necessarily be dealt with summarily. To remove such imminent interference with orderly judicial proceedings, courts must have power to act immediately. In recognition of this fact, the contempt power came into existence.[3] This power is of ancient lineage,[4] has always been exercised by our courts, and has the express recognition of Congress under the name of contempt. Rev. Stat. § 725, 28 U. S. C. § 385. Where the court exercises such coercive power, however, for the purpose of compelling future obedience, those imprisoned "carry the keys of their prison in their own pockets," *In re Nevitt,* 117 F. 448, 461; by obedience to the court's valid order, they

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[3] See *e. g., Cooke* v. *United States,* 267 U. S. 517, 534–537; Fox, History of Contempt of Court (1927); Beale, *Contempt of Court,* 21 Harv. L. Rev. (1908) 161, 169–170.

[4] "As early as the time of Richard III it was said that the chancellor of England compels a party against whom an order is issued by imprisonment; [2 R. III, 9 pl. 22] and a little later it was said in the chancery that 'a decree does not bind the right, but only binds the person to obedience, so that if the party will not obey, then the chancellor may commit him to prison till he obey, and that it is all the chancellor can do.' [27 H. VIII, 15.] This imprisonment was by no means a punishment, but was merely to secure obedience to the writ of the king. Down to within a century it was very doubtful if the chancellor could under any circumstances inflict punishment for disobedience of a decree. If the decree commanded the defendant to transfer property, the chancellor acquired power as early as the sixteenth century to sequester the property as security for performance; but if the decree were for the doing of any other act, or were a decree for an injunction, the chancellor was helpless if he could not compel obedience by imprisonment. . . . In any case the contempt of a defendant who had violated a decree in chancery could be purged by doing the act commanded and paying costs; or, if his disobedience had been the violation of a negative injunction, he could purge himself of contempt by undoing what he had done and paying costs." Beale, *supra.*

can end their confinement; and the court's coercive power in such a "civil contempt" proceeding ends when its order has been obeyed. *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 441, 445. See also *Doyle* v. *London Guarantee Co.*, 204 U. S. 599, 607. The District Court did not enter a conditional decree here. But this Court has modified the District Court's decree to provide as part of the judgment such a coercive sanction in the form of a conditional fine. We agree with the Court's decision in this respect.[5]

The *Gompers* decision and many others have pointed out that the object of such coercive contempt proceedings is not to punish for an offense against the public, but to compel obedience to valid court orders. Yet the decision of this Court also approves unconditional fines as criminal punishment for past disobedience. We cannot agree to this aspect of the Court's judgment. At a very early date this Court declared, and recently it has reiterated, that in contempt proceedings courts should never exercise more than "the least possible power adequate to the end proposed." *Anderson* v. *Dunn*, 6 Wheat. 204, 231; *In re Michael*, 326 U. S. 224, 227.

[5] "In the case of contempt in violating an order or decree of a court of equity, we have an entirely different problem. . . . If the court limits itself to its proper action in such cases, namely, process of imprisonment merely to prevent the violation of the decree, and if the imprisonment is to cease as soon as the danger of disobedience has ceased, the jury, which is thought necessary to pass upon the desert of a defendant to suffer punishment, is not required. . . . So far, therefore, as popular clamor demands a trial by jury in such a case, it seems to go beyond the requirements of justice; and the statutes which commit the trial of questions of fact in such process to a jury are not likely permanently to prove satisfactory. This statement, however, is to be limited to cases of merely preventive imprisonment. Where the court inflicts a definite term of imprisonment by way of punishment for the violation of its orders, the case does not differ, it would seem, from the case of criminal contempt out of court, and regular process and trial by jury should be required." *Id.* 173–174.

In certain circumstances criminal contempt culminating in unconditional punishment for past disobedience may well constitute an exercise of "the least possible power adequate to the end proposed." Thus in situations which would warrant only a use of coercive sanctions in the first instance, criminal punishment might be appropriate at a later stage if the defendant should persist in disobeying the order of the court. Without considering the constitutional requisites of such criminal punishment, we believe the application of it inappropriate and improper here. The imposition of criminal punishment here was an exercise of far more than "the least possible power adequate to the end proposed." For here the great and legitimate "end proposed" was affirmative action by the defendants to prevent interruption of coal production pending final adjudication of the controversy. Coercive sanctions sufficient to accomplish this end were justified. From the record we have no doubt but that a conditional civil sanction would bring about at least as prompt and unequivocal obedience to the court's order as would criminal punishment for past disobedience. And this would accomplish a vindication of the District Court's authority against a continuing defiance. Consequently, we do not believe that the accomplishment of the justifiable "end proposed" called for summary criminal punishment which is designed to deter others from disobedience to court orders or to avenge a public wrong, rather than the imposition of a coercive sanction. And for the reasons stated by MR. JUSTICE RUTLEDGE, we think that the flat $700,000 criminal fine against the defendant union is excessive by constitutional and statutory standards.

In determining whether criminal punishment or coercive sanction should be employed in these proceedings, the question of intent—the motivation of the contumacy—becomes relevant. Difficult questions of law were presented by this case. It is plain that the defendants acted

willfully for they knew that they were disobeying the court's order. But they appear to have believed in good faith, though erroneously, that they were acting within their legal rights. Many lawyers would have so advised them. This does not excuse their conduct; the whole situation emphasized the duty of testing the restraining order by orderly appeal instead of disobedience and open defiance. However, as this Court said in *Cooke* v. *United States,* 267 U. S. 517, 538, "the intention with which acts of contempt have been committed must necessarily and properly have an important bearing on the degree of guilt and the penalty which should be imposed."

We think it significant that the conduct which was prohibited by the restraining order for violation of which these defendants have been punished for contempt is also punishable under the War Labor Disputes Act. That Act provides a maximum punishment of $5,000 fine and one year imprisonment for those who interfere with the operation of mines taken over by the United States. Had the defendants been tried under that statute, their punishment would have been limited thereby and in their trial they would have enjoyed all the constitutional safeguards of the Bill of Rights. Whatever constitutional safeguards are required in a summary contempt proceeding, whether it be for criminal punishment, or for the imposition of coercive sanction, we must be ever mindful of the danger of permitting punishment by contempt to be imposed for conduct which is identical with an offense defined and made punishable by statute. *In re Michael, supra.*[6]

[6] See also *In re Debs,* 158 U. S. 564; *Gompers* v. *Bucks Stove & Range Co.,* 221 U. S. 418; *Gompers* v. *United States,* 233 U. S. 604, 610, 611; *Ex parte Grossman,* 267 U. S. 87; *Ex parte Hudgings,* 249 U. S. 378, 383; *Michaelson* v. *United States,* 266 U. S. 42; *Blackmer* v. *United States,* 284 U. S. 421, 440; *Nye* v. *United States,* 313 U. S. 33; *Bridges* v. *California,* 314 U. S. 252, 264; *Pendergast* v. *United States,* 317 U. S. 412; *In re Bradley,* 318 U. S. 50. Frankfurter and Landis, *Power of Congress Over Procedure in Criminal Contempts in "In-*

The situation of grave emergency facing the country when the District Court acted called for the strongest measures—measures designed to produce quick and unqualified obedience of the court's order. If the $10,000 fine on defendant Lewis and the $3,500,000 fine on the defendant union be treated as coercive fines, they would not necessarily be excessive. For they would then be payable only if the defendants continued to disobey the court's order. Defendants could then avoid payment by purging themselves. The price of continued disobedience would be the amount of the fines. See *Doyle* v. *London Guarantee Co., supra,* 602. The fines would be fixed so as to produce the greatest likelihood that they would compel obedience.

We should modify the District Court's decrees by making the entire amount of the fines payable conditionally. On December 7, 1946, Mr. Lewis directed the mine workers to return to work until midnight, March 31, 1947. But, so far as we are aware, the notice which purported to terminate the contract has not been withdrawn. Thus, there has been, at most, only a partial compliance with the temporary injunction.

Hence our judgment should provide that the defendants pay their respective fines only in the event that full and unconditional obedience to the temporary injunction, including withdrawal of the notice which purported to terminate the contract, is not had on or before a day certain.

MR. JUSTICE MURPHY, dissenting.

An objective reading of the Norris-LaGuardia Act removes any doubts as to its meaning and as to its applicability to the facts of this case. Section 4 provides in

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ferior" Federal Courts, 37 Harv. L. Rev. 1010, 1043–1045 (1924) and authorities there collected; Nelles and King, *Contempt by Publication in the United States,* 28 Col. L. Rev. 401 (1928).

clear, unmistakable language that "No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute . . . ." That language, which is repeated in other sections of the Act, is sufficient by itself to dispose of this case without further ado. But when proper recognition is given to the background and purpose of the Act, it becomes apparent that the implications of today's decision cast a dark cloud over the future of labor relations in the United States.

Due recognition must be given to the circumstances that gave rise to this case. The Government was confronted with the necessity of preserving the economic health of the nation; dire distress would have eventuated here and abroad from a prolonged strike in the bituminous coal mines. It was imperative that some effective action be taken to break the stalemate. But those factors do not permit the conversion of the judicial process into a weapon for misapplying statutes according to the grave exigencies of the moment. That can have tragic consequences even more serious and lasting than a temporary dislocation of the nation's economy resulting from a strike of the miners.

The whole thrust of the Norris-LaGuardia Act is directed toward the use of restraining orders and injunctions in cases arising out of labor disputes between private employers and private employees. It was in that setting that the abuses of federal equity power had flourished; and it was those abuses that led to the adoption of the Act. The application of the Act to the instant situation is thus clear. It cannot be denied that this case is one growing out of a labor dispute between the private coal operators and the private miners. That is a matter of common knowledge. Executive Order No. 9728, which authorized the Secretary of the Interior to take possession of and to operate the coal mines, explicitly stated that this action

was taken "as a result of existing or threatened strikes and other labor disturbances." Those strikes and labor disturbances grew out of the relations between the operators and the miners. The Government further recognized that fact by its subsequent refusal to negotiate with the miners on their demands and its insistence that these demands be addressed to the private mine owners. It is precisely in situations arising out of disputes of this nature that Congress has said that no court of the United States shall have jurisdiction to issue any restraining order or injunction.

The crux of this case is whether the fact that the Government took over the possession and operation of the mines changed the private character of the underlying labor dispute between the operators and the miners so as to make inapplicable the Norris-LaGuardia Act. The answer is clear. Much has been said about the Government's status as employer and the miners' status as Government employees following the seizure. In my opinion, the miners remained private employees despite the temporary gloss of Government possession and operation of the mines; they bear no resemblance whatever to employees of the executive departments, the independent agencies and the other branches of the Government. But when all is said and done, the obvious fact remains that this case involves and grows out of a labor dispute between the operators and the miners. Government seizure of the mines cannot hide or change that fact. Indeed, the seizure took place only because of the existence of the dispute and because it was thought some solution might thereafter result. The dispute, however, survived the seizure and is still very much alive. And it still retains its private character, the operators on the one side and the coal miners on the other.

The important point, and it cannot be overemphasized, is that Congress has decreed that strikes and labor disturb-

ances growing out of private labor disputes are to be dealt with by some means other than federal court restraining orders and injunctions. Further confirmation, if any be needed, is to be found in the terms and in the history of the War Labor Disputes Act. To this clearly enunciated policy of making "government by injunction" illegal, Congress has made no exception where the public interest is at stake or where the Government has seized the private properties involved. Congress can so provide. But it has not done so as yet; until it does, we are not free to sanction the use of restraining orders and injunctions in a case of this nature.

The Government's seizure of the coal mines thus becomes irrelevant to the issue. The federal equity power to issue restraining orders and injunctions simply cannot be invoked in this case, since it grows out of a private labor dispute. And it makes no difference that the party seeking the proscribed relief is the Government rather than a private employer. The touchstone of the Norris-La-Guardia Act is the existence of a labor dispute, not the status of the parties. Among the specific evils which the framers of the Act had in mind were the injunctions secured by the Government in the *Debs*, the *Hayes* and the *Railway Shopmen's* cases. The Act was drawn to prevent, among other things, the recurrence of such injunctions. The Government concededly could not obtain an injunction in a private labor dispute where there has been no seizure of private properties, no matter how great the public interest in the dispute might be. To permit the Government to obtain an injunction where there has been a seizure would equally flout the language and policy of the Act. In whatever capacity the Government acts, this statute closes the doors of the federal courts where a restraining order or injunction is sought in a case arising out of a private labor dispute.

Moreover, if seizure alone justifies an injunction contrary to the expressed will of Congress, some future Government could easily utilize seizure as a subterfuge for breaking any or all strikes in private industries. Under some war-time or emergency power, it could seize private properties at the behest of the employers whenever a strike threatened or occurred on a finding that the public interest was in peril. A restraining order could then be secured on the specious theory that the Government was acting in relation to its own employees. The workers would be effectively subdued under the impact of the restraining order and contempt proceedings. After the strike was broken, the properties would be handed back to the private employers. That essentially is what has happened in this case. That is what makes the decision today so full of dangerous implications for the future. Moreover, if the Government is to use its seizure power to repudiate the Norris-LaGuardia Act and to intervene by injunction in private labor disputes, that policy should be determined by Congress. It is not the function of this Court to sanction that policy where Congress has remained silent. Once Congress has spoken, it will be time enough to consider the constitutional issues raised by an application of that policy.

Since in my view the restraining order and the temporary injunction in this case are void and without effect, there remains for me only the contention that the defendants are guilty of criminal contempt for having willfully ignored the void restraining order. It is said that the District Court had the power to preserve existing conditions while it was determining its own authority to grant injunctive relief; hence the defendants acted at their own peril in disobeying the restraining order. Eloquent pleas are made for the supremacy of the judiciary over the individual and the requirement that a per-

son obey court orders until they are reversed by orderly and proper proceedings. Heavy emphasis is placed upon *United States* v. *Shipp*, 203 U. S. 563.

These arguments have a seductive attractiveness here. Ordinarily, of course, it is better policy to obey a void order than run the risk of a contempt citation. And as a general proposition, individuals cannot be allowed to be the judges of the validity of court orders issued against them. But the problem raised by the violation of the restraining order in this case must be viewed against the background and language of the Norris-LaGuardia Act.

Unlike most other situations, this Act specifically prohibits the issuance of restraining orders except in situations not here involved. There is no exception in favor of a restraining order where there is some serious doubt about the court's jurisdiction; indeed, the prohibition against restraining orders would be futile were such an exception recognized, for the minds of lawyers and judges are boundless in their abilities to raise serious jurisdictional objections. And so Congress has flatly forbidden the issuance of all restraining orders under this Act. It follows that when such an order is issued despite this clear prohibition, no man can be held in contempt thereof, however unwise his action may be as a matter of policy. When he violates the void order, 28 U. S. C. § 385 comes into operation, forbidding punishment for contempt except where there has been disobedience of a "lawful writ, process, order, rule, decree, or command" of a court.

This absolute outlawry of restraining orders in cases involving private labor disputes is not without reason. The issuance of such orders prior to the adoption of the Norris-LaGuardia Act had a long and tortured history. Time and again strikes were broken merely by the issuance of a temporary restraining order, purporting to maintain the *status quo*. Because of the highly fluid character of labor disputes, the delay involved in testing an order

of that nature often resulted in neutralizing the rights of employees to strike and picket. And too often, these orders did more than stabilize existing conditions; they called for affirmative change. The restraining order in the instant case is but one example of this. While purporting to preserve the *status quo*, it actually commands the defendants to rescind the strike call—thereby affirmatively interfering with the labor dispute.

Congress was well aware of this use of restraining orders to break strikes. After full consideration, it intentionally and specifically prohibited their use, with certain exceptions not here relevant. We are not free to disregard that prohibition. Hence the doctrine of the *Shipp* case has no relation whatever to our present problem. That case dealt with an order of this Court staying the execution of a convicted felon, an order which lay within the recognized power of this Court and which had not been validly prohibited by Congress. Naturally, no man could violate that order with impunity. But we are acting here in the unique field of labor relations, dealing with a type of order which Congress has definitely proscribed. If we are to hold these defendants in contempt for having violated a void restraining order, we must close our eyes to the expressed will of Congress and to the whole history of equitable restraints in the field of labor disputes. We must disregard the fact that to compel one to obey a void restraining order in a case involving a labor dispute and to require that it be tested on appeal is to sanction the use of the restraining order to break strikes—which was precisely what Congress wanted to avoid. Every reason supporting the salutary principle of the *Shipp* case breaks down when that principle is applied in this setting. I would therefore reverse the judgment of the District Court *in toto*.

It has been said that the actions of the defendants threatened orderly constitutional government and the

economic and social stability of the nation. Whatever may be the validity of those statements, we lack any power to ignore the plain mandates of Congress and to impose vindictive fines upon the defendants. They are entitled to be judged by this Court according to the sober principles of law. A judicial disregard of what Congress has decreed may seem justified for the moment in view of the crisis which gave birth to this case. But such a disregard may ultimately have more disastrous and lasting effects upon the economy of the nation than any action of an aggressive labor leader in disobeying a void court order. The cause of orderly constitutional government is ill-served by misapplying the law as it is written, inadequate though it may be, to meet an emergency situation, especially where that misapplication permits punitive sanctions to be placed upon an individual or an organization.

MR. JUSTICE RUTLEDGE, dissenting.

This case became a *cause célèbre* the moment it began. No good purpose can be served by ignoring that obvious fact. But it cannot affect our judgment save only perhaps to steel us, if that were necessary, to the essential and accustomed behavior of judges.[1] In all cases great or small this must be to render judgment evenly and dispassionately according to law, as each is given understanding to ascertain and apply it.

[1] "Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend." Holmes, J., dissenting, in *Northern Securities Co.* v. *United States*, 193 U. S. 197, 400–401.

No man or group is above the law. Nor is any beyond its protection. *In re Yamashita,* 327 U. S. 1, dissenting opinion, 41. These truths apply equally to the Government. When its power is exerted against the citizen or another in the nation's courts, those tribunals stand not as partisans, but as independent and impartial arbiters to see that the balance between power and right is held even. In discharging that high function the courts themselves, like the parties, are subject to the law's majestic limitations. We are not free to decide this case, or any, otherwise than as in conscience we are enabled to see what the law commands.

I.

MR. JUSTICE FRANKFURTER has shown conclusively, I think, that the policy of the Norris-LaGuardia Act, 47 Stat. 70, applies to this situation. The legislative history he marshals so accurately and cogently compels the conclusion that the War Labor Disputes Act of 1943, 57 Stat. 163, not only confirms the applicability of the earlier statute, but itself excludes resort to injunctive relief for enforcement of its own provisions in situations of this sort.

That Act expressly provides the remedies for its enforcement. Beyond seizure of plants, mines and facilities for temporary [2] governmental operation, they are exclusively

[2] "*Provided,* That whenever any such plant, mine, or facility has been or is hereafter so taken by reason of a strike, lock-out, threatened strike, threatened lock-out, work stoppage, or other cause, such plant, mine, or facility *shall be returned to the owners thereof as soon as practicable, but in no event more than sixty days after the restoration of the productive efficiency thereof prevailing prior to the taking of possession thereof* . . . ." (Emphasis added.) War Labor Disputes Act § 3 (Act of June 25, 1943, 57 Stat. 163, 50 U. S. C. App. §§ 1501, 1503).

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criminal in character.[3] They do not include injunctive or other equitable relief. Nor was the omission unintentional or due to oversight. It was specific and deliberate.

The Senate thoroughly considered and debated various proposals for authorizing equity to intervene in labor disputes, one by the Act's sponsor in that body. Positively, repeatedly and unwaveringly it rejected all of them. They were likewise rejected in conference, where the Senate's view prevailed over that of the House. The latter body had not been inattentive to the problem. It sought and failed to secure the very thing this Court now says, in effect, was included.[4] That issue and that policy were indeed the main thrust and focus of the legislative struggle, and the outcome was not negative; it was positive and conclusive against using or giving the equitable remedies.

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[3] "SEC. 6. (a) Whenever any plant, mine, or facility is in the possession of the United States, it shall be unlawful for any person (1) to coerce, instigate, induce, conspire with, or encourage any person, to interfere, by lock-out, strike, slow-down, or other interruption, with the operation of such plant, mine, or facility, or (2) to aid any such lock-out, strike, slow-down, or other interruption interfering with the operation of such plant, mine, or facility by giving direction or guidance in the conduct of such interruption, or by providing funds for the conduct or direction thereof or for the payment of strike, unemployment, or other benefits to those participating therein. No individual shall be deemed to have violated the provisions of this section by reason only of his having ceased work or having refused to continue to work or to accept employment.

"(b) Any person who willfully violates any provision of this section shall be subject to a fine of not more than $5,000, or to imprisonment for not more than one year, or both." War Labor Disputes Act of 1943, § 6.

[4] The issue is not avoided, nor is the effect of final legislative rejection nullified, by the easy device of resting the power said to exist upon common law rules of statutory construction which, if otherwise pertinent, were in the very teeth of Congress' positive refusal to confer the power after the fullest and most attentive consideration. That device only conceals the true issue. See also note 11.

Surely we have not come so far toward complete inversion of legislative history as to write out of the law the views concerning a matter of such major policy held by the chamber which prevailed at the final stage of enactment and to write into the law diametrically opposing views of another chamber which yielded at that time. The case, as MR. JUSTICE FRANKFURTER demonstrates beyond any doubt, cannot be one where inattention, oversight or inaction may explain or give significance to what was done by the House of Representatives. That body was defeated, not simply silent, in the outcome. Willingly or otherwise, it acquiesced in the Senate's policy of refusing to authorize injunctive relief, and in doing so joined formally and effectively in the final act which made that policy law.

This means to me that Congress, in that action, did not simply confirm the Norris-LaGuardia Act's policy or leave it untouched with respect to situations within the War Labor Disputes Act's coverage. It means that Congress was not departing from or nullifying that policy. Rather by the later Act Congress adopted the same policy, the long prevailing national policy, for those situations.

The Senate, and at the end the Congress, were not declining expressly to authorize labor injunctions only to turn squarely about and nullify that refusal in the same breath, merely by virtue of the fact that the employees of seized plants necessarily were made subject temporarily to ultimate governmental operating direction and control.[5] We cannot attribute to Congress an intent so du-

[5] Seizure without such ultimate control, of course, would have been only one-sided, halfway seizure, operative only against management and owners. But seizure with such control did not require or mean that the control was to be exercised by labor injunctions. There was, and is, no inconsistency whatever between conferring the one power and denying the other. For this is exactly what Congress has done with reference to all plants not subject to the seizure power. Besides

plicitous. Thus to construe the Act not only would bring the provision for temporary control into collision with its remedial provisions as the history shows they were intended to apply. It would be to find Congress guilty of using a devious method for achieving indirectly exactly the thing it expressly declined to do. The words "governmental employee," "employee . . . for the purposes of this case" or "relationship . . . of employer and employee," none of which appear in the statute, cannot be given effect consistently with our function to write into the Act, by judicial interpolation, remedial provisions which Congress flatly and finally declined to incorporate.

Whether Congress acted wisely in this refusal is not our concern. But it is not irrelevant to the Act's meaning, purpose and effect that there were good reasons, indeed strong ones, for Congress to continue to follow the Norris-LaGuardia Act's policy rather than break away from it at that crucial time. Under the statute practically every industrial or mining facility, together with many of transportation,[6] was subject to seizure and governmental operation. Introducing the labor injunction into the Act's structure therefore would have been tantamount to repeal of the Norris-LaGuardia Act for the duration of the emergency powers, since seizure was authorized whenever the President should find, after investigation, and proclaim that there was an interruption of operations "as a result

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imputing to Congress the purpose to do with one hand what the other denied was being done, the identification of these two very distinct things serves only to confuse and make obscure the real question. This is simply whether Congress intended to abrogate for seized plants or to continue in force the established policy against labor injunctions as a method of exercising the powers of ultimate control conferred upon the Government.

[6] Section 2 (c) excludes carriers as defined in Title I of the Railway Labor Act, 45 U. S. C. § 151, or carriers by air as subject to Title II of the Railway Labor Act, 45 U. S. C. § 181.

of a strike or other labor disturbance." § 3. Ready means thus would have been made available, if such had been the statute's purpose, for suspending the Norris-LaGuardia policy and provisions in any case where they might become operative.

Congress was thoroughly familiar with the history and effects of injunctions in labor disputes, with the long settled national policy against them, and with the universal abhorrence in the ranks of labor, however otherwise divided, toward them. In view of all these things Congress well may have felt and I think did feel, as my brother's recital of the history shows, that it was both unnecessary and unwise, perhaps would even be harmful to furtherance of the war effort, in substance to repeal the Norris-LaGuardia policy for the duration of the war emergency and thus to resurrect, in that critical situation, the long disused instruments that Act had outlawed.

It is important in this connection that 1943, rather than 1945 or 1946, was the year in which the War Labor Disputes Act was adopted. We were then not yet over the hump of the war. But neither had we reached the peak of labor disturbances which came only after active hostilities ceased, more than two years later.[7] The great body of American workers was bending to the patriotic duty of peak production for war purposes. By comparison with what occurred after the fighting ended, the volume of man-

[7] The available statistics speak in terms of "strikes" for 1943 and "work stoppages arising from labor-management disputes" for 1945 and 1946. For 1943, 13,500,529 man-days were lost through strikes. For 1945, 38,025,000 man-days were lost through work stoppages, and 113,000,000 man-days were so lost in 1946. In 1943 there were 3,752 strikes. In 1945 there were 4,750 work stoppages and in 1946, 4,700. See Strikes in 1943, Bull. No. 782, U. S. Bureau of Labor Statistics; Work Stoppages Caused by Labor-Management Disputes in 1945, Bull. No. 878, U. S. Bureau of Labor Statistics; Review of Labor-Management Disputes, 1946, U. S. Bureau of Labor Statistics Release, January 11, 1947.

days lost was about one-tenth of the later postwar peak loss.[8] Moreover, at that time the War Labor Board, specially constituted to deal with such disturbances, was functioning with a high degree of efficiency in their settlement.[9] There was nevertheless strong feeling that labor disputes should not be allowed to interrupt war production, regardless of cause or blame. And from this arose the demand for more effective powers to deal with them.

It was in this setting and to meet the problems it had thrown up, not the later one out of which this controversy arose, that the War Labor Disputes Act was adopted. The Act was exactly what its title indicated, a measure for dealing with labor disputes in the emergency of the war. Congress, it is true, anticipated that for a limited period after the end of fighting the same emergency powers would be needed.[10] But this does not mean that those

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[8] See note 7.

[9] See Hearings before the Committee on Military Affairs of the House of Representatives on S. 796, 78th Cong., 1st Sess., 25–26. "The War Labor Board was set up to deal with industrial relations. While this Board may not have a perfect record, it has a very good record to its credit, particularly when we consider the great problems it must deal with." 89 Cong. Rec. 5339.

The number of War Labor Board cases resulting in plant seizures by the United States, so far as statistics are available, is as follows: Four cases from June 25, 1943, the date of the passage of the War Labor Disputes Act, to December 31, 1943; seventeen cases from January 1, 1944, to December 31, 1944; fifteen cases from January 1, 1945, to August, 1945. We are informed that in no instance of seizure, except the one under consideration, was a labor injunction issued at the behest of the Government.

[10] Section 3 provides: "*Provided further,* That possession of any plant, mine, or facility shall not be taken under authority of this section after the termination of hostilities in the present war, as proclaimed by the President, or after the termination of the War Labor Disputes Act; and the authority to operate any such plant, mine, or facility under the provisions of this section shall terminate at the end

powers were shaped, or are now to be measured in scope, so as to meet all of the situations which since have arisen in the vastly changed circumstances; or that Congress intended them to be met by repealing the settled policy against injunctions in labor disputes in the sweeping manner now accomplished by the Court's decision. On the contrary, in June of 1943, Congress dealt with the situation then before it and refused to authorize such relief because that situation did not demand this.

In view of all these considerations, I cannot believe that Congress, in effect and by indirection, was exerting its war power to the greatest possible extent or was thereby either repealing or suspending the nation's settled policy against injunctions in labor disputes. Rather, the conclusion is inescapable that Congress was relying exclusively upon the added powers of enforcement expressly conferred by the Act, namely, the power of seizure and the force of the criminal sanction, to accomplish the needed results.[11]

These were in themselves powerful sanctions. They carried with them the added and very great sanction of

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of six months after the termination of such hostilities as so proclaimed."

It may be noted that on December 31, 1946, the President by proclamation announced the end of hostilities. 12 Fed. Reg. 1. The emergency powers conferred by the Act terminate six months thereafter.

[11] If general common law rules of statutory construction were appropriate for criteria to determine such issues as this case presents for the meaning of the Act, certainly that rule would be equally applicable with any other which dictates that when a statute provides specific remedies adequate for enforcing its provisions those remedies alone are deemed to be made available. But in view of the legislative and other history, this case is not one to be turned, in my opinion, by such vague, conveniently selective and often, as here, contradictory canons of construction.

aroused public opinion [12] which would follow not simply upon interruption of essential war production but more particularly upon such an event in any facility taken over and operated under governmental auspices. Congress, after mature deliberation, concluded that these sanctions were adequate, and for that reason made them exclusive. In no other way can its repeated and final refusals to confer the strenuously sought equitable remedies be made consistent with the legislative and general history or be given meaning and effect. To construe the Act as permitting what Congress thus so explicitly refused to allow is to go beyond our function and intrude upon that of Congress. This we have no right or power to do. If the situation presented by the facts of this case is one which goes beyond the powers Congress has conferred for dealing with it, that is a matter for Congress' consideration, not for correction by this Court.

Accordingly, upon the specific terms of the War Labor Disputes Act itself, upon the legislative history as summarized by MR. JUSTICE FRANKFURTER, and upon the historical setting in which the statute was enacted as defining the problems it was designed to meet, together with shaping the nature and scope of the measures required to meet

[12] It is this sanction upon which Congress has chosen to rely ultimately, for instance, in the Railway Labor Act, though provision is made for preliminary resort to processes of conciliation, mediation and voluntary arbitration before the use of ultimate economic force by strike or lockout, when the sanction of public opinion comes chiefly into play. See *Brotherhood of Railroad Trainmen* v. *Toledo, Peoria & W. R. R.*, 321 U. S. 50; *General Committee* v. *Missouri-Kansas-Texas R. R.*, 320 U. S. 323. On the whole, that policy and the sanctions provided have worked successfully to eliminate stoppages in railway transportation. And as of June, 1943, it may be fairly assumed that Congress, in declining to authorize the issuance of labor injunctions, was conscious of and chose to rely upon this accepted sanction together with the specific ones then conferred by the War Labor Disputes Act.

them, I conclude that that Act in no way impaired but on the contrary adopted and incorporated the policy of the Norris-LaGuardia Act concerning the issuance of injunctions in labor disputes.

II.

This conclusion substantially compels the further one that *United States* v. *Shipp,* 203 U. S. 563, has no valid application to the situation presented by this case.

This Court has not yet expressly denied, rather it has repeatedly confirmed Congress' power to control the jurisdiction of the inferior federal courts and its own appellate jurisdiction. Const., Art. III, § 2. *Ex parte McCardle,* 7 Wall. 506; *Lockerty* v. *Phillips,* 319 U. S. 182, 187, and authorities cited. See Warren, New Light on the History of the Federal Judiciary Act of 1789 (1923), 37 Harv. L. Rev. 49, 67 ff. That power includes the power to deny jurisdiction as well as to confer it. *Ibid.* And where Congress has acted expressly to exclude particular subject matter from the jurisdiction of any court, except this Court's original jurisdiction, I know of no decision here which holds the exclusion invalid, or that a refusal to obey orders or judgments contravening Congress' mandate is criminal or affords cause for punishment as for contempt.

If that were the law, the result could only be to nullify the congressional power over federal jurisdiction for a great volume of cases. And if it should become the law, for every case raising a question not frivolous concerning the court's jurisdiction to enter an order or judgment, that punishment for contempt may be imposed irrevocably simply upon a showing of violation, the consequences would be equally or more serious. The force of such a rule, making the party act on pain of certain punishment regardless of the validity of the order violated or the court's

jurisdiction to enter it as determined finally upon review, would be not only to compel submission.[13] It would be also in practical effect for many cases to terminate the litigation, foreclosing the substantive rights involved without any possibility for their effective appellate review and determination.

This would be true, for instance, wherever the substantive rights asserted or the opportunity for exercising them would vanish with obedience to the challenged order. Cf. *Ex parte Fisk,* 113 U. S. 713. The First Amendment liberties especially would be vulnerable to nullification by such control. Thus, the constitutional rights of free speech and free assembly could be brought to naught and censorship established widely over those areas merely by applying such a rule to every case presenting a substantial question concerning the exercise of those rights. This Court has refused to countenance a view so destructive of the most fundamental liberties. *Thomas* v. *Collins,* 323 U. S. 516. These and other constitutional rights would be nullified by the force of invalid orders issued in flat violation of the constitutional provisions securing them, and void for that reason. The same thing would be true also in other cases involving doubt, where statutory or other rights asserted or the benefit of asserting them would vanish, for any practical purpose, with obedience.

Indeed it was because these were so often the effects, not simply of final orders entered after determination upon the merits, but of interlocutory injunctions and *ex parte* restraining orders, that the Norris-LaGuardia Act became law and, as I think, the War Labor Disputes Act continued in force its policy. For in labor disputes the effect of such

[13] More especially when account is taken of the vast liberty, called "discretion," which courts are said to have, and in this case are held to have, in fixing punishments for contempts. But see Part IV.

orders, it was pointed out officially and otherwise,[14] is generally not merely failure to maintain the *status quo* pending final decision on the merits. It is also most often to break the strike, without regard to its legality or any conclusive determination on that account, and thus to render moot and abortive the substantive controversy.[15]

[14] "The restraining order and the preliminary injunction invoked in labor disputes reveal the most crucial points of legal maladjustment. Temporary injunctive relief without notice, or, if upon notice, relying upon dubious affidavits, serves the important function of staying defendant's conduct regardless of the ultimate justification of such restraint. The preliminary proceedings, in other words, make the issue of final relief a practical nullity. . . . the suspension of strike activities, even temporarily, may defeat the strike for practical purposes and foredoom its resumption, even if the injunction is later lifted." Frankfurter and Greene, The Labor Injunction (1930) 200–201.

"Time is the essence of the strike. Keeping the injunction alive by dilatory tactics blunts the edge of the only effective instrument that labor possesses, namely, the strike.

"The bill now before us makes it well-nigh impossible to secure a restraining order except under the well-defined and limited conditions set out in sections 7 and 8." 75 Cong. Rec. 5489. See also *People ex rel. Sandnes* v. *Sheriff of Kings County*, 164 Misc. 355, 359.

[15] See note 14. *Ex parte Fisk*, 113 U. S. 713, presents another clear illustration of the type of right which would be wholly nullified by general application of the alleged broad conception of the *Shipp* doctrine. There the Circuit Court, in contravention of explicit acts of Congress as this Court found, had ordered Fisk to submit to oral examination before trial in a removed civil cause, the examination to be before a justice of the court and according to procedure prescribed by state law for the state court from which the case was removed. Fisk refused to obey the order, standing upon the Circuit Court's lack of jurisdiction to enter it, was held in contempt for this, and fined $500 and ordered imprisoned until the fine was paid. He brought habeas corpus to secure release from the imprisonment thus imposed.

This Court held void both the order for examination and the order of commitment, as beyond the Circuit Court's jurisdiction, and granted petitioner's release from custody. The Court said: "Not only is no such power [of examination] conferred, but it is prohibited

It is not every case therefore where substantial doubt appears, concerning either the issues in the main cause or the court's jurisdiction to issue interlocutory or other orders, in which violation will bring the so-called *Shipp* doctrine into play. If that were true, then indeed would a way have been found to nullify the constitutional limitations placed upon the powers of courts, including the control of Congress over their jurisdiction. Then also the liberties of our people would be placed largely at the mercy of invalid orders issued without power given by the Constitution and in contravention of power constitutionally withheld by Congress. *Ex parte Fisk,* 113 U. S. 713; *Thomas* v. *Collins, supra.*

Indeed the *Shipp* doctrine thus broadly conceived would go far toward nullifying the historic jurisdiction of this Court and others in habeas corpus, for it would do this in the many situations where the cause of commitment is violation of a doubtfully valid court order and the ground asserted for release is the court's lack of jurisdiction to enter it. Thus, in this case, if the party Lewis had been imprisoned rather than fined, the broad application now made of the *Shipp* decision would dictate that he could not be released by habeas corpus, even though it were now held here that the restraining orders were beyond the District Court's jurisdiction to issue.[16] If those

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by the plain language and the equally plain purpose of the acts of Congress . . . The Circuit Court was, therefore, without authority to make the orders for the examination of petitioner in this case, and equally without authority to enforce these orders by process for contempt." Pp. 724, 726. Had Fisk submitted, as *Shipp* is now said to require should be done, not only would the specific commands of Congress have been nullified. His right, secured by those commands, could never have been vindicated. The statutes would have been made dead letters.

[16] Indeed at least one state court has held this result to follow and in his dissenting opinion in *In re Sawyer,* 124 U. S. 200, 224, Harlan, J.,

orders were valid, for purposes of finally and conclusively imposing punishment in contempt, regardless of the court's want of power to issue them, this would be so whether the punishment were fine or imprisonment. And it clearly would follow in cases of criminal contempt,[17] perhaps in others, that the court's lack of jurisdiction could furnish no basis for granting relief, unless the penalty were found to be cruel and unusual or, in the case of a fine, excessive.[18]

I cannot believe that the historic powers of our courts in habeas corpus or the rights of citizens, confirmed as these have been for so long by an unbroken line of decisions,[19] have been or can be overthrown and subverted,

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stated this to be his view of the law (see however note 19), as apparently also it was of Waite, C. J. P. 223. See *Reid* v. *Independent Union,* 200 Minn. 599 (certiorari), but see the dissenting opinion, 200 Minn. at 612; Collateral Attack Upon Labor Injunctions Issued in Disregard of Anti-Injunction Statutes (1938) 47 Yale L. J. 1136; *People ex rel. Sandnes* v. *Sheriff of Kings County,* 164 Misc. 355.

[17] See Part IV.

[18] *Ibid.*

[19] *Ex parte Rowland,* 104 U. S. 604; *Ex parte Fisk,* 113 U. S. 713; *In re Ayers,* 123 U. S. 443, 507; *In re Sawyer,* 124 U. S. 200; *In re Burrus,* 136 U. S. 586; *Thomas* v. *Collins,* 323 U. S. 516 (arising under state law). And see *Ex parte Young,* 209 U. S. 123, 143; cf. pp. 135, 139, collecting the authorities.

In the *Sawyer* case, *supra,* the Court said: "The case cannot be distinguished in principle from that of a judgment of the Common Bench in England in a criminal prosecution, which was *coram non judice;* or the case of a sentence passed by the Circuit Court of the United States upon a charge of an infamous crime, without a presentment or indictment by a grand jury. *Case of the Marshalsea,* 10 Rep. 68, 76; *Ex parte Wilson,* 114 U. S. 417; *Ex parte Bain,* 121 U. S. 1." 124 U. S. at 221. Hardly can it be said that the *Sawyer* decision went on the ground that the question of jurisdiction to enter the order was not substantial, in view of the length and detail of the Court's opinion, which gave no hint of such a suggestion, and in view also of the fact that Field, J., concurred in a separate opinion and

merely by the fact that the question of the court's power to issue the order violated may be doubtful and not merely frivolous. Nor do I think the *Shipp* decision accomplished or purported to accomplish so much.

Certainly if its purpose had been to overrule the decisions so thoroughly established, and to trench so heavily upon the historic liberties they and the Constitution itself secure, some note would have been taken of that fact. So great a revolution hardly could have been wrought unanimously or without attentive recognition of what was being done. There was indeed reference in the opinion to the previous decisions. The Court stated: "It has been held, it is true, that orders made by a court having no jurisdiction to make them may be disregarded without liability to process for contempt," citing the *Sawyer, Fisk,* and *Rowland* cases.[20] 203 U. S. at 573. But there was not the slightest suggestion, by this reference or otherwise, that the Court had any purpose whatever to impair the force of those decisions, much less to overrule them. Nor in fact was this its intent. It mentioned them only to put them aside as inapplicable to the situation before it.

Indeed, in *Gompers* v. *Bucks Stove & R. Co.,* 221 U. S. 418, decided five years after the *Shipp* decision, a unanimous Court joined in citing *Ex parte Rowland,* 104 U. S. 604, in context consistent only with the view that its doctrine, and therefore that of others like it decided prior to the *Shipp* case, remained fully effective. P. 436. There was no intimation, as otherwise necessarily would have been given, that the *Shipp* decision had reversed or modified the *Rowland* case, or any like it, in any way. And in

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Waite, C. J., and Harlan, J., wrote separate dissents taking the position which the Court now accepts for this case. See note 16 *supra.* Harlan, J., however, receded from his view in *Ex parte Young, supra,* where he dissented on other grounds. 209 U. S. at 169, 174.

[20] See note 19.

Ex parte Young, 209 U. S. 123, not only the Court, p. 143, but the opposing distinguished counsel, pp. 135, 139, all concurred in reaffirming the *Rowland* ruling. Harlan, J., dissenting, retracted his former contrary view (see note 19 *supra*) in this respect. Pp. 169, 174. And Holmes, J., who spoke for the Court in the *Shipp* case, joined with the Court's reaffirmation of the *Rowland* doctrine in both the *Gompers* and *Young* opinions.

The Court in *Shipp* was dealing with a situation quite different from the ones presented in the previous decisions and in this case. In none of them was the action which violated the court's order such as would have defeated its jurisdiction not only to enter the order but also to proceed with the cause before it in any manner, except to deal with the matter of contempt.[21] In them the Court was not

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[21] In *Ex parte Rowland,* 104 U. S. 604, the county commissioners' disobedience of an order commanding them to collect a certain tax did not moot the controversy, which was whether the judgment debtor, by proceeding against the proper county official, the tax collector, could satisfy its judgment by forcing collection of the tax; and, the order being held void, their action in disobeying it was held not to be contempt.

The disobedience of the petitioner in *Ex parte Fisk,* 113 U. S. 713, deprived the plaintiff in the suit against him of the use of his testimony but did not defeat this suit or the ability of the courts to decide whether he could be forced to submit to examination. See note 19 *supra.*

In *In re Sawyer,* 124 U. S. 200, the refusal of the city officials to obey an order enjoining them from removing a police judge did not vitiate judicial power to decide the issue whether the city officials possessed the removal power. The controversy remained and, as this Court pointed out, it was determinable by mandamus or *quo warranto.* This Court held the order invalid and the officials not guilty of contempt.

In *In re Burrus,* 136 U. S. 586, the refusal of the grandparents to give up the child upon order issued by a federal court did not destroy the power of the court, which had already been exercised,

faced with the necessity for taking action to vindicate its power to hear and determine the main controversy, as well as the incidental one arising upon the validity of the interlocutory or other order. Nor is it here.

But exactly such a situation was presented in the *Shipp* case. The conduct there held to be contempt not only was in itself criminal and in violation, as it turned out, of this Court's lawful order for taking the appeal in Johnson's case. It ousted this Court altogether of jurisdiction to take any action in that cause. It rendered the cause moot, thereby putting an end to any proceedings concerning it here or elsewhere. Shipp's alleged conduct constituted therefore the most serious possible interference with the due and orderly course of administering justice. It utterly destroyed the power of all courts to act. Further, the order violated was not made directly in contravention of an act of Congress, as was true in the *Fisk* case and, as I think, in this one. It rather was made in complete conformity with the statutes conferring authority on this Court to take jurisdiction of and hear such causes. Nothing in it violated either a congressional mandate and policy or the rights of any party.

Moreover the decision was not effective, as its doctrine is now said to be, to put Shipp to any choice of obedience on pain of certain punishment regardless of the violated order's validity or invalidity as ultimately determined on review. No such situation was presented on the facts, and no such ruling could properly have been made. Shipp had not been convicted. The case came here upon a challenge *in limine,* not after the event, made upon the plead-

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though improperly the Court held, to determine whether the child was properly in their custody or in the custody of the father. As the contempt order was held void, habeas corpus was granted.

Moreover in none of these cases did the disobedience destroy the jurisdiction of the trial and appellate courts to determine jurisdiction.

ings in the contempt proceedings to their validity. The basis asserted was the invalidity of the order allowing the appeal in Johnson's case, for alleged want of jurisdiction of this Court to enter it.[22] That contention was rejected and the order was held valid. It was in this connection only that the Court stated it had "jurisdiction to determine its jurisdiction" in doubtful cases. That statement was not a ruling that, regardless of a violated order's ultimate validity as determined on review,[23] punishment in contempt for violating it could be irrevocably imposed. It was merely a statement of the reason for the order's validity.[24] The holding was that this Court had jurisdiction,

[22] See note 24. The order allowing appeal directed "that all proceedings against the appellant be stayed, and the custody of the said appellant be retained, pending this appeal."

[23] See note 24. The Court was reviewing its own order, the one that was violated.

[24] The statement was made in response to counsel's contention that the order allowing the appeal was void and therefore would not support a conviction for contempt. The Court rejected the premise, not the conclusion.

The basis of counsel's contention was that the Circuit Court lacked jurisdiction and therefore that this Court also lacked jurisdiction. His brief stated: "The only question, therefore, is whether Johnson's proceeding in habeas corpus in the Circuit Court did or did not in fact constitute a 'case that involves the construction or application of the Constitution of the United States.' If it did, this Court had appellate jurisdiction of it and should proceed to inquire whether its order has been disobeyed. If it did not, this Court had no jurisdiction of it *and should now so hold for the purposes of this proceeding* . . . ." (Emphasis added.) And elsewhere the brief stated: "We assume that it will hardly be contended that the mere allowance of an appeal is sufficient to give the court jurisdiction of a case which from its nature is not appealable. Such action is *pro forma* only, and as it is necessarily had in every case the jurisdiction of the court would always be established by an *ex parte* order."

In answer to these arguments the Government's brief said: "Certainly no one would challenge the jurisdiction of this court if the Circuit Court had jurisdiction, and accordingly the defendants here

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as of course it does in doubtful as well as clear cases, to determine whether the federal courts—the Circuit Court and accordingly this Court also—had power to pass upon Johnson's petition for habeas corpus.[25]

From that ruling and from it alone the consequence followed that Shipp could be held in contempt on proof, still to be made, that he had done acts in violation of the order as thus conclusively determined to be valid by the court of last resort. This was a far cry from holding that punishment in contempt can be laid irrevocably, regardless of the outcome on review concerning the order's validity. The Court by its ruling was not making void orders valid for purposes of punishment by way of contempt. Only if the Court has held its own order which Shipp violated invalid would such a question have been presented.

The *Shipp* decision therefore was in fact simply an application of the long established rule that punishment in contempt may be inflicted on proof of violation of a valid order of court as determined finally on review. It did not overrule, nor was it in any way inconsistent with the long prior course of decisions holding that when an order is void for want of jurisdiction it may be disobeyed with impunity pending but depending upon determination of its invalidity by appeal, habeas corpus, or other mode

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deny the jurisdiction of this court simply as a corollary to their contention that the Circuit Court did not possess jurisdiction. But the jurisdiction of this court is not dependent upon contentions, and it has jurisdiction to take the case and retain it for final determination whether it turns out that the Circuit Court had jurisdiction or not."

[25] See note 24. No argument was made that even if the Circuit Court had jurisdiction this Court did not. Thus, the statement in the opinion "But even if the Circuit Court had no jurisdiction to entertain Johnson's petition, and if this court had no jurisdiction of the appeal, this court, and this court alone, could decide that such was the law," 203 U. S. at 573, means "But even if the Circuit Court had no jurisdiction to entertain Johnson's petition, and if *for that reason* this court had no jurisdiction of the appeal," etc.

of review. *Gompers* v. *Bucks Stove & R. Co., supra; Ex parte Young, supra.* It was an application, in the circumstances presented, of the settled rule that one who takes it upon himself to violate an order of court he thinks void thereby takes the risk that on review he will be sustained and, in the contrary event and then only, will he be subject irrevocably to punishment for contempt. *Ibid.*

In my judgment this is the rule properly applicable in this case, the only one consistent with the settled and unvaried course of decision, with the commands of the War Labor Disputes Act, of the Norris-LaGuardia Act, and with § 268 of the Judicial Code, 36 Stat. 1163, 28 U. S. C. § 385.

Apart from immediate and other interferences with judicial proceedings not presented here, that section authorizes punishment for contempt only for disobedience of a "*lawful* writ, process, order, rule, decree, or command of the said courts." (Emphasis added.) The section by its terms, apart from the exceptions not here applicable, limits power to punish for contempt to violations of lawful orders, thereby necessarily excluding others. Nor did it purport to make lawful for that purpose interlocutory orders issued without jurisdiction as determined finally upon review.[26]

This case, unlike the *Shipp* case, in no way involves interference with any of the legal proceedings or the due

[26] It has been held that habeas corpus will not lie where the disobedience was to a lawful, but erroneous, order of a court. *Ex parte Kearney,* 7 Wheat. 38. See also *Locke* v. *United States,* 75 F. 2d 157, 159: "Error must be corrected by appeal, and cannot be tested by disobedience. . . . Willful disobedience of an injunction, however erroneous, issued by a court having jurisdiction while such injunction is in force unreversed constitutes contempt of court." And it has been said that if an injunction is reversed on appeal on grounds other than "jurisdiction," the violator may nevertheless be punished for criminal, though not for civil, contempt. *Worden* v. *Searls,* 121 U. S. 14; *Salvage Process Corp.* v. *Acme Tank Cleaning Corp.,* 86 F. 2d 727.

course of administering justice in any sense contemplated by § 268 or by the *Shipp* decision. No court, trial or appellate, was deprived by the defendants' conduct of jurisdiction or power to take any action in any of the proceedings, collateral or in the main suit, which existed at the beginning of the controversy. The order therefore falls exclusively within the concluding clause of § 268 and the power to punish for contempt on account of its violation depends, by the command of that clause, upon the order's lawful character.

Since in my opinion the order was jurisdictionally invalid when issued, by virtue of the War Labor Disputes Act and its adoption of the Norris-LaGuardia Act's policy, it follows that the violation gave no sufficient cause for sustaining the conviction for contempt. *Ex parte Fisk, supra.* Lewis and the United Mine Workers necessarily took the risk that the order would be found valid on review and, in that event, that punishment for contempt would apply. They did not take the risk that it would apply in any event, even if the order should be found void as beyond the jurisdiction of the Court to enter. See the dissenting opinion in *Carter* v. *United States,* 135 F. 2d 858, 862. The *Shipp* case furnishes no precedent for such a view nor do I know of any other in this Court which does.[27]

On the contrary that view has been long rejected, and I do not think we should disturb or depart from that settled course of decision now. "If the command of the writ [of mandamus] was in excess of jurisdiction, so neces-

[27] To be distinguished are cases in which Congress provides an adequate but limited opportunity for challenging the validity of administrative or other orders, but forecloses such opportunity when it is not taken as prescribed. See *Yakus* v. *United States,* 321 U. S. 414, cf. dissenting opinion, p. 460. See also *United States* v. *Ruzicka,* 329 U. S. 287; *Falbo* v. *United States,* 320 U. S. 549; *Estep* v. *United States,* 327 U. S. 114; *Gibson* v. *United States,* 329 U. S. 338. That is very different from affording no opportunity whatever except by obedience.

sarily were the proceedings for contempt in not obeying." *Ex parte Rowland,* 104 U. S. 604, 617–618. The power of the federal courts to issue stay orders to maintain the *status quo* pending appeal, like other matters affecting their jurisdiction except in the case of this Court's original jurisdiction, is subject to Congress' control. That control has been exercised, in my view, to exclude such jurisdiction in cases of this character. And, this being true, I do not think either this or any other court subject to that mandate has power to punish as for contempt the violation of such an order issued in contravention of Congress' command. *Ex parte Fisk, supra.*

III.

The issues concerning the manner in which the contempt proceeding was conducted are in themselves of great moment, apart from the foregoing conclusions which I think are dispositive of the controversy. And the Court's rulings upon them are of such a character that I cannot accede by silence.

At times in our system the way in which courts perform their function becomes as important as what they do in the result. In some respects matters of procedure constitute the very essence of ordered liberty under the Constitution. For this reason, especially in the Bill of Rights, specific guaranties have been put around the manner in which various legal proceedings shall be conducted. They differentiate sharply between the procedures to be followed in criminal proceedings and in civil ones. These differences mark one of the great constitutional divides.[28] They separate the zone of punishment for crime, with all its odious consequences, from that of giving civil relief, where no such consequences attend, not partially but completely.

[28] *Yakus* v. *United States,* 321 U. S. 414, dissenting opinion, at 479 ff.

In any other context than one of contempt, the idea that a criminal prosecution and a civil suit for damages or equitable relief could be hashed together in a single criminal-civil hodgepodge would be shocking to every American lawyer and to most citizens. True, the same act may give rise to all these varied legal consequences. But we have never adopted, rather our Constitution has totally rejected, the continental system of compounding criminal proceedings with civil adjudications.[29] Our tradition is exactly the contrary and few would maintain that this has had no part in bringing about the difference existing today for individual freedom here and in Europe.

I do not think the Constitution contemplated that there should be in any case an admixture of civil and criminal proceedings in one. Such an idea is altogether foreign to its spirit. There can be no question that contempt power was conferred adequate to sustain the judicial function, in both civil and criminal forms. But it does not follow that the Constitution permits lumping the two together or discarding for the criminal one all of the procedural safeguards so carefully provided for every other such proceeding.

The founders did not command the impossible. They could not have conceived that procedures so irreconcilably inconsistent in many ways[30] could be applied simultane-

[29] Thus, in some civil law countries damages, as well as other penalties, are assessed in a criminal proceeding. See Schwenk, Criminal Codification and General Principles of Criminal Law in Argentina, Mexico, Chile, and the United States: A Comparative Study (1942) 4 La. L. Rev. 351, 373–374; Goirand and Thompson, The French Judicial System and Procedure in French Courts (1919) 14. See also Esmein, A History of Continental Criminal Procedure (1913) 429–430.

[30] Upon the authorities, the following procedural provisions of the Bill of Rights, at least, would seem to apply to criminal contempt: The provision against double jeopardy, see *In re Bradley*, 318 U. S.

ously. Nor was their purpose to create any part of judicial power, even in contempt, wholly at large, free from any constitutional limitation or to pick and choose between the conflicting civil and criminal procedures and remedies at will. Much less was it to allow mixing civil remedies and criminal punishments in one lumped form of relief, indistinguishably compounding them and thus putting both in unlimited judicial discretion, with no possibility of applying any standard of measurement on review.[31]

50; the provision against self-incrimination, *Gompers* v. *Bucks Stove & R. Co.*, 221 U. S. 418, 444; the provision for due process insofar as it necessitates "suitable notice and adequate opportunity to appear and to be heard," *Blackmer* v. *United States*, 284 U. S. 421, 440; and, although the Sixth Amendment protections have been said not to apply as such to criminal contempts, *Myers* v. *United States*, 264 U. S. 95, 104–105; *Blackmer* v. *United States*, 284 U. S. at 440, but see text *infra*, doubtless at least the provisions for "a speedy and public trial," for "compulsory process" and for the assistance of counsel, see *Cooke* v. *United States*, 267 U. S. 517, 537, are implied in the due process provision of the Fifth Amendment. And it has been said that the protection against cruel and unusual punishments in the Eighth Amendment applies to criminal contempt, *United States ex rel. Brown* v. *Lederer*, 140 F. 2d 136, 139.

There are also protections not expressly included in the Bill of Rights which apply in criminal contempt, *e. g.*, that the defendant is presumed to be innocent and must be proved guilty beyond a reasonable doubt. *Gompers* v. *Bucks Stove & R. Co.*, 221 U. S. 418, 444. And see *Ex parte Hudgings*, 249 U. S. 378, 383: "Existing within the limits of and sanctioned by the Constitution, the power to punish for contempt committed in the presence of the court is not controlled . . . as to modes of accusation and methods of trial generally safeguarding the rights of the citizen. This, however, expresses no purpose to exempt judicial authority from constitutional limitations, since its great and only purpose is to secure judicial authority from obstruction in the performance of its duties to the end that means appropriate for the preservation and enforcement of the Constitution may be secured."

[31] See Part IV.

If this can be done in any case, it can be done in others. And that being true, if it can be done at all, not simply a loophole but a very large breach has been left in the wall of procedural protections thrown around the citizen's punishment for crime. For it is to be recalled that under the Court's ruling here upon the *Shipp* doctrine not merely the violation of valid judicial orders, but also the disobedience of invalid orders issued in excess of any court's jurisdiction becomes a crime and punishable as such by summary proceedings in criminal contempt, although the substantive rights involved in the litigation are wholly civil ones. The vastly expanded area of criminal conduct under this conception would afford equally wide room for dispensing with the criminal procedural protections under the unrestricted scope, otherwise than by "judicial discretion," which the present ruling concerning criminal or criminal-civil proceedings in contempt affords.

In my opinion, our system does not comprehend a power so unconfined anywhere within its broad borders, and it is time the large confusion about this were swept away.[32] It

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[32] The confusion, at least as to the matter of indictments and jury trial, cf. note 33, has its origin in historical error exposed in Fox, The History of Contempt of Court (1927), and Frankfurter and Landis, Power of Congress over Procedure in "Inferior" Federal Courts—A Study in Separation of Powers (1924) 37 Harv. L. Rev. 1010. "Down to the early part of the eighteenth century cases of contempt even in and about the common-law courts when not committed by persons officially connected with the court were dealt with by the ordinary course of law, *i. e.*, tried by jury, except when the offender confessed or when the offense was committed 'in the actual view of the court.'" Frankfurter and Landis, *supra*, at 1042. Until 1720 "there is no instance in the common-law precedents of punishment otherwise than after trial in the ordinary course and not by summary process." *Id.*, 1046.

However, Wilmot, J., in 1765, influenced by Star Chamber procedure and precedents, although the Star Chamber had been abolished in 1641, stated that it was "immemorial usage" to punish all con-

is not necessary in this case to ask or decide whether all of the Constitution's criminal procedural protections thrown about all other criminal prosecutions, without suggestion of explicit exception, apply to criminal contempt proceedings. It is enough that we are sure some of them apply, as this Court has ruled repeatedly.[33] It does not matter that some of those which incontestably are applicable may not have been put in issue or preserved for review in this case.[34] The question cuts more deeply than the

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tempts summarily. *Almon's Case,* Wilmot's Notes, p. 243. And although this opinion was not published until thirty-seven years later, "there is ample evidence that, as a result of private communication between Wilmot and Blackstone, Wilmot's views of 1765 found their way, 'both in phrase and matter' into the fourth volume of the famous Commentaries published in 1769 . . . ." Frankfurter and Landis, *supra,* at 1046, n. 128. Wilmot's error "has bedevilled the law of contempt both in England and in this country ever since." *Id.,* 1047.

This history furnishes a slender thread indeed for thinking that the Constitution makers had no purpose to apply the usual procedural protections to criminal contempts. ". . . it is very doubtful whether at the date of the Constitution that doctrine [of *Almon's Case, supra*] did form part of the common law adopted by the United States. Mr. Justice Wilmot's undelivered judgement lay concealed until the year 1802, and, so far as is known, was not cited in an English Court until the hearing of *Burdett* v. *Abbot* in 1811. It was first cited with approval from the Bench in 1821, and was not therefore adopted as the common law of England until after the establishment of the American Constitution." Fox, *supra,* at 207.

[33] See note 30. It has been ruled consistently, however, that the rights to have the proceeding begun by indictment, Amend. V, and tried by jury, Amend. VI, do not apply. *E. g., Eilenbecker* v. *District Court,* 134 U. S. 31; *Gompers* v. *United States,* 233 U. S. 604; *In re Debs,* 158 U. S. 564.

[34] Defendants have not argued either in the District Court or in this Court that they are constitutionally entitled to a jury trial. And they expressly waived in open court whatever rights they had to an advisory jury. On the other hand if, as I think, the Norris-LaGuardia Act's provisions have been adopted for this and like cases, cf. Part I, § 11 of that Act of its own force secured the right of trial by jury and forbade waiver otherwise than in writing. Federal Rules of Criminal Procedure, Rule 23 (a).

application of any specific guaranty. It affects the right to insist upon or have the benefit of any.

This case is characteristic of the long-existing confusion concerning contempts and the manner of their trial, among other things, in that most frequently the question of the nature and character of the proceeding, whether civil or criminal, is determined at its end in the stage of review rather than, as it should be and as in my opinion it must be, at the beginning. *Gompers* v. *Bucks Stove & R. Co.*, 221 U. S. 418, 444. And this fact in itself illustrates the complete jeopardy in which rights are placed when the nature of the proceeding remains unknown and unascertainable until the final action on review.

Not only is one thus placed in continuing dilemma throughout the proceedings in the trial court concerning which set of procedural rights he is entitled to stand upon, whether upon the criminal safeguards or only on the civil. He also does not and cannot know until it is too late, that is, until the appellate phase is ended, whether one group or the other of appellate jurisdictional and procedural rules applies. Indeed he may find that his right of review has been taken either prematurely or too late depending entirely on whether the appellate court finally concludes that the proceeding has been civil or criminal in character.[35]

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[35] In civil cases under Rule 73 appeal is taken by filing notice thereof "within the time prescribed by law," and generally, though there are exceptions, the time is three months. 28 U. S. C. § 230; *Mosier* v. *Federal Reserve Bank*, 132 F. 2d 710, 712. In criminal cases the Federal Rules now allow taking an appeal by filing notice of appeal as in civil cases. But an appeal must be taken by a defendant within 10 days after entry of judgment or after denial of motion for new trial. Rule 37 (a) (2). In *Nye* v. *United States*, 313 U. S. 33, it was held that 28 U. S. C. § 230 rather than the Criminal Appeals Rules governed timeliness in a criminal contempt appeal. But the new Criminal Rules would seem to apply to criminal contempts. *Moore* v. *United States*, 150 F. 2d 323, 324. See Rules 42 and 54; 55 Stat. 779, 18 U. S. C. § 689.

On certiorari, if the Rules of Criminal Procedure govern, there

See Swayzee, Contempt of Court in Labor Injunction Cases (1935) 21–22.

Precisely for these reasons this Court, when confronted in the *Gompers* case, *supra,* with a proceeding commingling civil and criminal features, such as we have here, refused to countenance such a mixture and, finding that the proceedings had been civil, held the criminal penalty of fixed terms of imprisonment to be invalid.[36] The Court said:

> "There was therefore a departure—a variance between the procedure adopted and the punishment imposed, when, in answer to a prayer for remedial

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is also a difference. In civil cases the time for petitioning for certiorari is three months. In criminal cases the petition must be filed within thirty days after entry of judgment. Rule 37 (b) (2). Compare *Nye* v. *United States, supra,* at 42, n. 6, as to the law prior to the new Criminal Rules.

The largest present difference between appeals in civil and criminal contempts is that, "except in connection with an appeal from a final judgment or decree, a party to a suit may not review upon appeal an order fining or imprisoning him for the commission of a civil contempt." *Fox* v. *Capital Co.,* 299 U. S. 105, 107, and cases cited. Compare *Lamb* v. *Cramer,* 285 U. S. 217. On the other hand, if the contempt is criminal, it may be directly reviewed. *Union Tool Co.* v. *Wilson,* 259 U. S. 107. It has been held that where the contempt is both civil and criminal, the criminal procedure governs for purposes of review so that there may be immediate review of both the part that is civil and the part that is criminal. *Union Tool Co.* v. *Wilson, supra,* at 111; *Nye* v. *United States,* 313 U. S. at 42–43.

[36] There as here the contempt proceedings were entitled and conducted as collateral to civil litigation between the parties and the order for contempt had been grounded upon disobedience to a restraining order issued in the course of the litigation, conduct which would have sustained either civil or criminal penalty. The Court of Appeals had held the proceeding criminal. But this Court held it to be civil since it was collateral, not an independent suit at law to vindicate the public interest. Hence, it followed that the criminal penalty could not stand. Neither the Norris-LaGuardia Act nor the War Labor Disputes Act was then in force.

relief, in the equity cause, the court imposed a punitive sentence appropriate only to a proceeding at law for criminal contempt. The result was as fundamentally erroneous as if in an action of 'A. *vs.* B. for assault and battery,' the judgment entered had been that the defendant be confined in prison for twelve months." 221 U. S. at 449.

Not only must the punishments be kept separate and distinct.[37] This must be done with the entire proceedings.[38] Punishment and civil relief must be correlated with the character of the proceeding. Procedural rights

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[37] Throughout the opinion the Court insisted the two forms of relief are altogether incompatible not only for interchangeability between the two types of proceeding, but necessarily for commingling in indistinguishable conglomeration. Imprisonment as penalty for criminal contempt could be imposed for fixed terms, but in civil contempt this could not be done, the court's power being limited to remedial or coercive imprisonment, that is, until the person convicted should comply with the court's order. So also with fines, which in civil contempt can be no more in amount than is commensurate with the injury inflicted or is necessary to secure compliance and must be contingent, whereas the limitation requiring correlation to the amount of injury does not apply to fines in criminal proceedings. 221 U. S. at 442–444, 449. The same distinction applies as to the payment of costs. P. 447. See Part IV.

As will appear, this distinction is of paramount importance in this case. And so it was in the *Gompers* case, for the main cause had been settled, and the Court held this required not only reversal, but dismissal of the contempt proceeding, which would not have been true in one for criminal contempt. 221 U. S. at 451–452.

[38] As with the factor of relief, the opinion throughout uses alternative, not conjunctive, language concerning the two types of proceedings. Civil contempts, it said, "are between the original parties and are instituted and tried as a part of the main cause. But on the other hand, proceedings at law for criminal contempt are between the public and the defendant, and are not a part of the original cause." 221 U. S. at 445. See also p. 446.

not only in matters of practice,[39] but in others "which involve substantial rights and constitutional privileges," [40] are so distinct and in some instances contradictory that "manifestly" they cannot be intermingled. Nor can those applicable in criminal proceedings be disregarded when criminal penalty is sought. Not only such matters as the privilege against self-incrimination, the presumption of innocence, the necessity for proof beyond a reasonable doubt,[41] the allowance of costs, the appropriate mode of review [42] with attendant limitations of time and other differences, require this. What is most important, because the application and observance of all these rights and others depend upon it, is that the person charged is entitled to know from the beginning, not merely at the

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[39] For example, most frequently perhaps the methods and times for securing appellate review, which at the time of the *Gompers* decision included whether the case could be reviewed by writ of error or appeal. 221 U. S. at 444; cf. *Bessette* v. *Conkey Co.*, 194 U. S. 324. See note 40; see also note 35.

[40] "The question as to the character of such proceedings has generally been raised, in the appellate court, to determine whether the case could be reviewed by writ of error or on appeal. *Bessette* v. *Conkey,* 194 U. S. 324. But it may involve much more than mere matters of practice. For, notwithstanding the many elements of similarity in procedure and in punishment, there are some differences between the two classes of proceedings which involve substantial rights and constitutional privileges. Without deciding what may be the rule in civil contempt, it is certain that in proceedings for criminal contempt the defendant is presumed to be innocent, he must be proved to be guilty beyond a reasonable doubt, and cannot be compelled to testify against himself. *Boyd* v. *United States,* 116 U. S. 616; *United States* v. *Jose,* 63 Fed. Rep. 951; *State* v. *Davis,* 50 W. Va. 100; *King* v. *Ohio Ry.,* 7 Biss. 529; *Sabin* v. *Fogarty,* 70 Fed. Rep. 482, 483; *Drakeford* v. *Adams,* 98 Georgia, 724." 221 U. S. at 444.

[41] See note 40.

[42] See notes 35, 37, 39.

end or some intermediate stage,[43] in which sort of proceeding he is involved.

This, the Court said, "is not a mere matter of form, for manifestly every citizen, however unlearned in the law, by a mere inspection of the papers in contempt proceedings ought to be able to see whether it was instituted for private litigation or for public prosecution . . . . He should not be left in doubt as to whether relief or punishment was the object in view. He is not only entitled to be informed of the nature of the charge against him, but to know that it is a charge and not a suit. *United States* v. *Cruikshank,* 92 U. S. 542, 559." 221 U. S. at 446.

This rule has now been incorporated also in Rule 42 (b) of the Federal Rules of Criminal Procedure,[44] and was applicable in this case. By the terms of that rule the charge of criminal contempt was required to be "prosecuted on notice" and it was further commanded that the notice state "the essential facts constituting the criminal contempt charged *and describe it as such,*" which was not done here. The rule was adopted to outlaw "the frequent confusion between civil and criminal contempt proceedings," following immediately a suggestion made in *McCann* v. *New York Stock Exchange,* 80 F. 2d 211.[45]

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[43] Cf. note 40.

[44] "A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. . . ." Rule 42 (b), Federal Rules of Criminal Procedure.

[45] Judge L. Hand's opinion in the *McCann* case reads in part as follows: ". . . the respondent will often find it hard to tell whether

See also *Nye* v. *United States,* 313 U. S. 33, 42–43. But it flatly incorporates the effect of the decision in the *Gompers* case, *supra.*

The language used by the Court was language of the Constitution, reinforced by citation of the *Cruikshank* case. Careful as it was about expressly overruling prior decisions [46] where the Sixth Amendment's requirement [47] had not been observed, there can be no doubt that the Court was announcing for the future that the constitutional requirement must be complied with. And the

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the prosecution is not a remedial move in the suit, undertaken on behalf of the client. This can be made plain if the judge enters an order in limine, directing the attorney to prosecute the respondent criminally on behalf of the court, and if the papers supporting the process contain a copy of this order or allege its contents correctly. We think that *unless this is done the prosecution must be deemed to be civil and will support no other than a remedial punishment.* Nothing of the sort was done here, and the order must be reversed. . . ." (Emphasis added.) 80 F. 2d 211, 214–215.

The possibilities of confusion are multiplied when the contempt is instituted in a suit in which the United States is a party, since the United States may bring civil as well as criminal contempt proceedings. *McCrone* v. *United States,* 307 U. S. 61.

[46] The Court said: "Inasmuch, therefore, as proceedings for civil contempt are a part of the original cause, the weight of authority is to the effect that they should be entitled therein. But the practice has hitherto been so unsettled in this respect that we do not now treat it as controlling, but only as a fact to be considered along with others as was done in *Worden* v. *Searls,* 121 U. S. 25, in determining a similar question." 221 U. S. at 446.

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

result in the case itself accorded with what this view required.[48]

One who does not know until the end of litigation what his procedural rights in trial are, or may have been, has no such rights. He is denied all by a hide-and-seek game between those that are criminal and those that are civil. The view which would seem to be the only one consistent with the whole spirit of the Constitution, and with the nature of our free institutions, is that all of the constitutional guaranties applicable to trials for crime should apply to such trials for contempt, excepting only those which may be wholly inconsistent with the nature and execution of the function the court must perform.[49] As has been said, courts in performing this function are not above the Constitution; rather they are empowered to perform it in order to make the Constitution itself operative.[50] Accordingly, not the least but the greatest possible application of it to this phase of their work is the only rule consistent with their place in the constitutional scheme. *In re Michael,* 326 U. S. 224, 227.

Hence, whatever may be true of indictment and jury trials, I see no compelling reason whatever for not apply-

[48] Not only in the ruling that reversal was required for the imposition of the criminal penalty in the proceeding held to be civil, but also in the order for dismissal on the ground that the cause, including the contempt phase, had become moot. See note 37 *supra.*

[49] Cf. *In re Michael,* 326 U. S. 224, 227; dissenting opinion of Holmes, J., in *Toledo Newspaper Co.* v. *United States,* 247 U. S. 402, 422; *Michaelson* v. *United States,* 266 U. S. 42, 67: "The only substantial difference between such a proceeding as we have here [criminal contempt], and a criminal prosecution by indictment or information is that in the latter the act complained of is the violation of a law and in the former the violation of a decree. In the case of the latter, the accused has a constitutional right of trial by jury; while in the former he has not."

[50] See *Ex parte Hudgings,* 249 U. S. 378, 383, quoted in note 30 *supra.*

ing the other limitations of the Sixth Amendment. None of them is inconsistent with the due and proper performance of the court's function in criminal contempt. Some at the least are applicable by virtue of the due process guaranty of the Fifth Amendment. "Due process of law, therefore, in the prosecution of contempt, except of that committed in open court, requires that the accused should be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation. We think this includes the assistance of counsel, if requested, and the right to call witnesses to give testimony, relevant either to the issue of complete exculpation or in extenuation of the offense and in mitigation of the penalty to be imposed." *Cooke* v. *United States*, 267 U. S. 517, 537. Only one case, apart from those involving indictment or jury trial, has held the Sixth Amendment inapplicable in such proceedings.[51] Whether or not that case was a departure from our long established tradition that in criminal proceedings the defendant is entitled to be confronted with the witnesses against him, other departures should not be made.

Surely the rights to a speedy and public trial, to have compulsory process for obtaining witness in his favor, to have the assistance of counsel for his defense, and, as the *Gompers* case held, to be informed of the *nature* as well as the cause of the accusation, cannot be denied

[51] *Blackmer* v. *United States*, 284 U. S. 421, 440. The ruling was first made in *Myers* v. *United States*, 264 U. S. 95, 104–105, in connection with a statutory venue problem relating to judicial districts and divisions which is correlative constitutionally to the right of jury trial. The ruling was reasserted in *Ex parte Grossman*, 267 U. S. 87, 117, which held that the pardoning power extended to criminal contempts. In the *Grossman* case the statement was obviously dictum. In the *Myers* case it was dictum as to all guaranties except perhaps that of trial in the district where the crime was committed, a guaranty as stated above correlated to jury trial.

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in our system to any person charged with crime, with the single exception of contempts committed in the immediate presence of the court by way of interference with the proceedings. Those guaranties are in no way inconsistent with the court's proper and complete discharge of its function in contempt. And they would seem to be essential to any conception of a fair trial as the Fifth Amendment's due process clause comprehends this.

When the assertion and securing of all other rights depends upon one, that one is the core of all. Here the right "to know that it was a charge, and not a suit" comprehended all other procedural rights in the trial and appellate courts. Without this, none could be asserted or maintained. The denial of that right, deferring it until the decision here is handed down, is in my opinion not only a denial of all. It is a violation both of the Constitution and of Rule 42 (b).

But we are told that this, and all that followed or may have followed from it, make no difference because there was no prejudice. There are at least two answers. This Court has held that the denial of constitutional guaranties in trials for crime is in itself prejudice. *Kotteakos* v. *United States,* 328 U. S. 750, 765, and cases cited in n. 19. The other, there was prejudice and in the most important thing beyond knowing the nature of the proceeding in advance of trial, namely, in the penalty itself.

IV.

Not only was the penalty against the union excessive, as the Court holds. Vice infected both "fines" more deeply. As the proceeding itself is said to have been both civil and criminal, so are the two "fines." Each was imposed in a single lump sum, with no allocation of specific portions as among civil damages, civil coercion and criminal punishment. The Government concedes that some part of each

"fine" was laid for each purpose. But the trial court did not state, and the Government has refused to speculate, how much was imposed in either instance for each of those distinct remedial functions.

This was in the teeth of the *Gompers* and other previous decisions here. The law has fixed standards for each remedy, and they are neither identical nor congealable. They are, for damages in civil contempt, the amount of injury proven and no more, *Gompers* v. *Bucks Stove & R. Co., supra,* at 444; for coercion, what may be required to bring obedience and not more, whether by way of imprisonment or fine; [52] for punishment, what is not cruel and unusual or, in the case of a fine, excessive within the Eighth Amendment's prohibition. And for determining excessiveness of criminal fines there are analogies from legislative action which in my opinion are controlling.[53]

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[52] As stated in note 37, coercive relief is civil in character, *Gompers* v. *Bucks Stove & R. Co.*, 221 U. S. 418, 442, the decree being when imprisonment is imposed that the defendant stand committed unless and until he performs the act required by the court's order. When this is done the sentence is discharged, for the defendant carries the keys of his prison in his own pocket. *In re Nevitt,* 117 F. 448, 461. The limitation is a corollary of the civil character of the remedy. This forbids imposition of fixed-term sentences for coercive purposes. *Gompers* v. *Bucks Stove & R. Co., supra,* although they have "incidental" coercive effects. *Id.*, at 443.

The purpose and character of the relief, not its particular form, determine its limits. *Id.*, at 443, citing *Doyle* v. *London Guarantee Co.*, 204 U. S. 599, 605, 607. Hence, when a fine is used in substitution for coercive imprisonment, it also must be contingent, giving opportunity for compurgation. Unless this is done, the fine takes on punitive character. *Doyle* v. *London Guarantee Co., supra.*

[53] It is in defining the nature and character of criminal penalties that legislative judgment and, within the authority it confers, the judgment of the trial court rather than appellate courts have the widest range. Legislative experience and judgment in this field therefore furnish a measure entitled to great and in some instances I think conclusive weight for consideration of the allowable range of punish-

The Government concedes that the Eighth Amendment's limitation applies to penalties in criminal contempt; and that in civil contempt the damages awarded cannot exceed the proven amount of injury. It also concedes, as I understand, that purely coercive relief can be no greater than is necessary to secure obedience. But in its view there was no necessity here for allocation of specific amounts in order to comply with these distinct standards. Rather punishment and damages may be lumped with a third undefined amount for civil coercion; and the whole mass sustained, without reference to the constituent elements or any of the established standards for measuring them, other than by over-all application of the Eighth Amendment's limitation to the mass. And in this view it maintains neither "fine" is excessive.

Obviously, however, when all these distinct types and functions of relief are lumped together, in a single so-called

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ment, as such, in criminal contempts where the penalty is undefined by statute.

The only crime for which the amount of the fine has no maximum is treason, where the fine authorized is not less than $10,000. 18 U. S. C. § 2. For rescue of one convicted of a capital crime while going to or during execution the fine may be not more than $25,000. 18 U. S. C. § 248. Maximum fines of $20,000 are set for offering a bribe to a judicial officer and for acceptance of a bribe by a judge. 18 U. S. C. §§ 237, 238. The same maximum is set for mailing matter with intent to increase weight in order to increase the compensation of a railroad mail carrier. 18 U. S. C. § 358. In some cases of embezzlement and like crimes, the fine may be the amount embezzled, *e. g.*, 18 U. S. C. § 173, and in one instance twice that amount. 18 U. S. C. § 172. But ordinarily the maximum allowed by Congress has been $10,000, and often it is less.

Moreover, where Congress itself has fixed a maximum fine for criminal punishment of the act held to be a contempt, that judgment would seem to furnish a standard to be applied in the contempt proceeding. See *In re Michael*, 326 U. S. 224, 227. In this case the War Labor Disputes Act authorized a fine of not over $5000 or imprisonment for not over one year, or both. 50 U. S. C. App. § 1506 (b).

"fine," none of the long-established bases for measurement can be applied, for there is nothing to which they can apply. We can only speculate upon what portion of each "fine" may have been laid to compensate for damages, what for punishment, and what, if any,[54] for civil coercion. Moreover, the District Court made no findings whatever concerning the amount of civil damages sustained, even if it could be assumed that there was evidence to sustain such findings.[55] And on the record none of the "fine" was made contingent, affording an opportunity for compurgation, as is required for coercive penalties.[56]

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[54] The fines in this case were flat fines imposed absolutely, without contingency for compurgation or otherwise. The court acted on the Government's recommendation, which as to the union was made on the basis of $250,000 a day for the fourteen days elapsed after the restraining orders issued and the violations occurred. No part of the fine was laid contingently upon future conduct. Both penalties therefore would seem to be strictly criminal, or criminal combined with civil damages for past conduct, not coercive in the sense of coercive relief as contemplated in the decisions, see note 52, although the amounts fixed for each fine gave it "incidental" coercive effect in the popular sense. *Ibid.*

[55] The Government's asserted loss in revenues, chiefly relied on for this purpose, was not only highly speculative rather than proven in amount. It was injury which would have followed from the strike had it arisen before or after seizure. Such damages may result from any strike whether the Government or another is "employer," and would seem to be both speculative and indirect within the rule forbidding the award of such damages. *Hadley* v. *Baxendale,* 9 Exch. 341.

[56] See notes 54, 57. The order for coercive fines reads, by analogy to the order for coercive imprisonment, cf. note 52, that, unless there is obedience to the order of the court, the fine shall be paid on or before a day certain, in default of which the defendant shall be imprisoned until it is paid. See *Doyle* v. *London Guarantee Co.,* 204 U. S. 599, 602. In the case of corporations or unincorporated associations, the default provision is either that the responsible officers be imprisoned, *Parker* v. *United States,* 126 F. 2d 370, 379, or perhaps that execution issue against the contemnor's property. See *United States* v. *Ridgewood Garment Co.,* 44 F. Supp. 435, 436. Compare Rev. Stat. § 1041, 18 U. S. C. § 569, with 38 Stat. 738, 28 U. S. C. § 387.

It follows that we have no basis except our own speculative imagination by which to determine whether the so-called "fines," or either of them, are excessive as damages, or indeed as coercive relief looking to the future, or as penalty for past crime.

In this state of things, it is utterly impossible to perform our function of review in the manner heretofore required, even within the broad limits prescribed for cases of civil and criminal contempt. This commingling of the various forms of relief, like that of the proceedings themselves, deprives these contemnors of any possibility for having the scope of the relief given against them measured according to law.

That is no insubstantial deprivation. When hybrid proceedings can produce hybrid penalties, concealing what is for punishment and what remedial, what criminal and what civil, and in the process can discard constitutional procedural protections against just such consequences, as convenience or other wholly discretionary impulse may command, then indeed to the extent we allow this will we have adopted the continental tradition of the civilians and rejected our own. No case in this Court heretofore has ever sustained such conglomerate proceedings and penalties.[57]

That the Government is complainant here, both as "employer" seeking remedial relief and in sovereign capac-

[57] See the opinion of the Court, 330 U. S. 258, 300, n. 74. Only in rare instances have other federal courts, after consideration, done so. See *Kreplik* v. *Couch Patents Co.*, 190 F. 565. See also the discussion, by way of dictum, in *Hendryx* v. *Fitzpatrick*, 19 F. 810, 811, 813. In still other instances the two types of contempt have been mingled without discussion. See *Chicago Directory Co.* v. *United States Directory Co.*, 123 F. 194. And see *Wilson* v. *Byron Jackson Co.*, 93 F. 2d 577, dismissing for jurisdictional reasons an appeal from an order adjudging the appellants guilty of civil and criminal contempt.

ity [58] seeking to vindicate the court's authority by criminal penalty, does not nullify all these long-established limitations or put the courts wholly at large, limited by nothing except their unconfined discretion as to the scope and character of the relief allowable. Power there is to take adequate measures when violation is clearly shown and adequate proof is made to sustain them. For proven violation, criminal penalty within the Eighth Amendment's limits as we would measure similar impositions placed by Congress, at the most; for damages proven and found, civil award commensurate with the finding; and for coercion, civil relief by way of imprisonment or "fine," but in either case contingent only, not final, giving opportunity for compurgation and for termination, on its being made, of further penalty for the future.

These are the limitations the law has prescribed. They apply equally when the Government is complainant, and whether in one capacity or the other, or both, as when others are.[59] They cannot be dispensed with, separately or by conglomerating all into a single indiscriminate lump, at the suit of the Government or another, in this case or for others. To permit this would be to throw overboard the limitations prescribed by law and make the courts purely discretionary arbitrators of controversies. That cannot be done in our system.

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[58] The two capacities are distinct, not identical. Each, it is true, may be exercised ultimately in the public interest. But if in the capacity of temporary "employer" the Government is to have the benefits of that status, it should be subject also to its limitations except as Congress otherwise provides. To jumble the two capacities as is done here is only to nullify the rights in trial and remedy of employees and others.

[59] The limitations upon criminal contempt, procedural and remedial, always apply to the Government, for it alone can bring that proceeding. It cannot defeat them by mingling that proceeding and relief with civil ones, merely by virtue of being also the complaining civil litigant.

The Court seemingly recognizes this, in part, in the revision it makes of the District Court's penalties. Lewis' fine is affirmed in amount but wholly changed in character. Instead of composite relief as the District Court made it, the Court makes that fine wholly a criminal penalty, thus in effect increasing the amount of his criminal imposition. The union's fine, though held excessive and "reduced," by what standard is not apparent, is replaced by a flat criminal fine of $700,000 plus a contingent penalty of $2,800,000 said to be entirely for civil coercion, although the strike was ended in December. Any award for civil damages allegedly sustained apparently is eliminated.

The Court thus purports to make separate the distinct items of relief commingled in the District Court's action. But in doing so, in my opinion, it wholly disregards the established standard for measuring criminal fines and its own as well as the District Court's function relating to them. If Lewis and the union had been convicted on indictment and jury trial in a proceeding surrounded by all the constitutional and other safeguards of criminal prosecution for violating the War Labor Disputes Act, the maximum fines which could be applied by that Act's terms would be $5,000 for each. In addition, Lewis could have been imprisoned for a year.[60]

In my opinion, when Congress prescribes a maximum penalty for criminal violation of a statute, that penalty fixes the maximum which can be imposed whether the conviction is in a criminal proceeding as such for its violation or is for contempt for violating an order of court to observe it temporarily. *Gompers* v. *United States,* 233 U. S. 604, 612. If the fine or other penalty in such a case can be multiplied twice or any other number of times, merely by bringing a civil suit, securing a temporary restraining order and then convicting the person who violates

[60] See note 53 *supra.*

it of criminal contempt, regardless of the order's validity and of any of the usual restraints of criminal procedure, the way will have been found to dispense with substantially all of those protections relating not only to the course of the proceedings but to the penalty itself.

But it is in relation to the flat criminal fine of $700,000 against the union that the Court's disregard of the constitutional and other standards is most apparent. By what measuring rod this sum has been arrived at as the appropriate and lawful amount, I am unable to say, unless indeed it is simply by a rough estimate of what the union should be forced to pay on all counts. Never has a criminal fine of such magnitude been heretofore laid and sustained, so far as I am able to discover. And only for treason, with one other possible exception,[61] has Congress authorized one so large. Moreover, the Court's enumeration of factors to be taken into account indicates expressly, as I read the opinion, that one is the coercive effect of the imposition for the future, though it is thoroughly settled that in contempt criminal punishment is to be laid only for past conduct.[62] *Gompers* v. *Bucks Stove & R. Co., supra,* and authorities cited.

Thus, the Court in effect imposes double coercive penalties, in view of the additional contingent award of $2,800,000 for that specific and sole purpose. I think the criminal fine of $700,000 not only constitutionally excessive, far beyond any heretofore sustained for violation of any statute or order of court. It is also an unlawful commingling of civil coercive and criminal penalties, without the essential contingent feature in the coercive phase, under our prior decisions.

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[61] *Ibid.*

[62] The opinion states: "In imposing a fine for criminal contempt, the trial judge may properly take into consideration . . . the necessity of effectively terminating the defendant's defiance as required by the public interest . . . ." 330 U. S. 258, 303.

Moreover, it is the District Court's function, not ours, in the first instance to fix the amounts of criminal fines. In equity proceedings for coercive relief, appellate courts including this one have power to revise and fix awards for such purposes, and if damages also are sought to review amounts awarded for this purpose for consistency with the proof. *Gompers* v. *Bucks Stove & R. Co., supra.* But in a criminal proceeding which is at law even in contempt, *ibid.,* our function is not in the first instance to fix the fines ourselves. That function is the District Court's. *Ibid.* We can only determine whether those imposed by it are excessive under the Eighth Amendment.

In its revision of the penalties therefore the Court in my opinion not only fails to unscramble the coercive and criminal elements, as the prior decisions here require to be done.[63] It imposes grossly excessive criminal penalties, determined in amount by wholly arbitrary estimate related to no previously established standard legislatively or judicially fixed. And in doing so, it usurps the District Court's function. All this flows in part at least from its basic error, which is its failure to follow the rule of the *Gompers* and other cases that not only civil and criminal penalties, but also civil and criminal proceedings are altogether different and separate things, and under the Constitution must be kept so.

Much more is involved in this controversy than the issues which have been discussed. The issues in the main suit have not been determined and it would be beyond our function to intimate opinion concerning them now. But

[63] The statement in the *Gompers* opinion, 221 U. S. at 443, that criminal penalties have incidental coercive effects and civil ones incidental penal effects, was not intended to contradict its ruling that criminal penalties cannot be imposed in civil contempt proceedings or therefore commingled indistinguishably.

beyond this controversy as a whole lie still graver questions. They involve opposing claims concerning the right to strike and the power of the Government, as against this, to keep the nation's economy going. Those are indeed grave matters.

No right is absolute. Nor is any power, governmental or other, in our system. There can be no question that it provides power to meet the greatest crises. Equally certain is it that under "a government of laws and not of men" such as we possess, power must be exercised according to law; and government, including the courts, as well as the governed, must move within its limitations.

This means that the courts and all other divisions or agencies of authority must act within the limits of their respective functions. Specifically it means in this case that we are bound to act in deference to the mandate of Congress concerning labor injunctions, as in judgment and conscience we conceive it to have been made. The crisis here was grave. Nevertheless, as I view Congress' action, I am unable to believe that it has acted to meet, or authorized the courts to meet, the situation which arose in the manner which has been employed.

No man or group is above the law. All are subject to its valid commands. So are the government and the courts. If, as I think, Congress has forbidden the use of labor injunctions in this and like cases, that conclusion is the end of our function. And if modification of that policy is to be made for such cases, that problem is for Congress in the first instance, not for the courts.

MR. JUSTICE MURPHY joins in this opinion.

TESTA ET AL. *v.* KATT.

CERTIORARI TO THE SUPERIOR COURT FOR PROVIDENCE AND BRISTOL COUNTIES, RHODE ISLAND.

No. 431. Argued February 14, 1947.—Decided March 10, 1947.

Section 205 (e) of the Emergency Price Control Act, 56 Stat. 34, as amended, provides that a buyer of goods at above the ceiling price may sue the seller "in any court of competent jurisdiction" for three times the amount of the overcharge plus costs and a reasonable attorney's fee; and § 205 (c) provides that the federal district courts shall have jurisdiction of such suits "concurrently with" state courts. Having purchased an automobile at above the ceiling price, the purchaser sued the seller under § 205 (e) and obtained judgment for damages and costs in a state court having adequate general jurisdiction to enforce similar claims arising under state law. On appeal, the State Supreme Court reversed the judgment on the ground that the suit was for a penalty based on a statute of a foreign sovereign and could not be maintained in the state courts. *Held:* Assuming, without deciding, that § 205 (e) is a penal statute, the state courts were not free under Article VI of the Constitution to refuse enforcement of the claim. *Claflin* v. *Houseman*, 93 U. S. 130; *Mondou* v. *New York, N. H. & H. R. Co.*, 223 U. S. 1. Pp. 389–394.

71 R. I. 472, 47 A. 2d 312, reversed.

A state court of competent jurisdiction awarded the purchaser of an automobile at above the ceiling price a judgment for damages and costs under § 205 (e) of the Emergency Price Control Act, 56 Stat. 34, as amended. The State Supreme Court reversed and, pursuant to local practice, remitted the case and record to the Superior Court. 71 R. I. 472, 47 A. 2d 312. This Court granted certiorari. 329 U. S. 703. *Reversed and remanded,* p. 394.

Acting Solicitor General Washington argued the cause for petitioner. With him on the brief were *Frederick Bernays Wiener, J. Raymond Dubee, William E. Remy, David London, Samuel Mermin* and *Albert J. Rosenthal.*

Paul M. Segal argued the cause for respondent. With him on the brief were *Henry G. Fischer, Bernard A. Helfat, Irving R. Panzer* and *John W. Willis.*

MR. JUSTICE BLACK delivered the opinion of the Court.

Section 205 (e)[1] of the Emergency Price Control Act provides that a buyer of goods at above the prescribed ceiling price may sue the seller "in any court of competent jurisdiction" for not more than three times the amount of the overcharge plus costs and a reasonable attorney's fee. Section 205 (c)[2] provides that federal district courts shall have jurisdiction of such suits "concurrently with State and Territorial courts." Such a suit under § 205 (e) must be brought "in the district or county in which the defendant resides or has a place of business . . . ."

The respondent was in the automobile business in Providence, Providence County, Rhode Island. In 1944 he sold an automobile to petitioner Testa, who also resides

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[1] "(e) If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum 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: . . . . 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. . . ." 56 Stat. 34 as amended, 58 Stat. 632, 640, 50 U. S. C. App., Supp. V, § 925 (e).

[2] "The district courts shall have jurisdiction of criminal proceedings . . . and, concurrently with State and Territorial courts, of all other proceedings under section 205 of this Act. . . ." 56 Stat. 32, as amended, 58 Stat. 632, 640, 50 U. S. C. App., Supp. V, § 925 (c).

in Providence, for $1100, $210 above the ceiling price. The petitioner later filed this suit against respondent in the State District Court in Providence. Recovery was sought under § 205 (e). The court awarded a judgment of treble damages and costs to petitioner. On appeal to the State Superior Court, where the trial was *de novo,* the petitioner was again awarded judgment, but only for the amount of the overcharge plus attorney's fees. Pending appeal from this judgment, the Price Administrator was allowed to intervene. On appeal, the State Supreme Court reversed, 71 R. I. 472, 47 A. 2d 312. It interpreted § 205 (e) to be "a penal statute in the international sense." It held that an action for violation of § 205 (e) could not be maintained in the courts of that State. The State Supreme Court rested its holding on its earlier decision in *Robinson* v. *Norato,* 71 R. I. 256, 43 A. 2d 467 (1945) in which it had reasoned that: A state need not enforce the penal laws of a government which is foreign in the international sense; § 205 (e) is treated by Rhode Island as penal in that sense; the United States is "foreign" to the State in the "private international" as distinguished from the "public international" sense; hence Rhode Island courts, though their jurisdiction is adequate to enforce similar Rhode Island "penal" statutes, need not enforce § 205 (e). Whether state courts may decline to enforce federal laws on these grounds is a question of great importance. For this reason, and because the Rhode Island Supreme Court's holding was alleged to conflict with this Court's previous holding in *Mondou* v. *New York, N. H. & H. R. Co.,* 223 U. S. 1, we granted certiorari. 329 U. S. 703.[3]

[3] Pursuant to Rhode Island practice, the State Supreme Court remitted the case and the record to the Superior Court. That court then entered judgment in accordance with the Supreme Court's

For the purposes of this case, we assume, without deciding, that § 205 (e) is a penal statute in the "public international," "private international," or any other sense. So far as the question of whether the Rhode Island courts properly declined to try this action, it makes no difference into which of these categories the Rhode Island court chose to place the statute which Congress has passed. For we cannot accept the basic premise on which the Rhode Island Supreme Court held that it has no more obligation to enforce a valid penal law of the United States than it has to enforce a penal law of another state or a foreign country. Such a broad assumption flies in the face of the fact that the States of the Union constitute a nation. It disregards the purpose and effect of Article VI of the Constitution which provides: "This Constitution, and the Laws of the United States which shall be be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

It cannot be assumed, the supremacy clause considered, that the responsibilities of a state to enforce the laws of a sister state are identical with its responsibilities to enforce federal laws. Such an assumption represents an erroneous evaluation of the statutes of Congress and the prior decisions of this Court in their historic setting. Those decisions establish that state courts do not bear the same relation to the United States that they do to foreign countries. The first Congress that convened after the Constitution was adopted conferred jurisdiction upon the

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opinion. It is the judgment of the Superior Court which petitioner asked us to review on certiorari. See *Joslin Co.* v. *Providence*, 262 U. S. 668, 673.

state courts to enforce important federal civil laws,[4] and succeeding Congresses conferred on the states jurisdiction over federal crimes and actions for penalties and forfeitures.[5]

Enforcement of federal laws by state courts did not go unchallenged. Violent public controversies existed throughout the first part of the Nineteenth Century until the 1860's concerning the extent of the constitutional supremacy of the Federal Government. During that period there were instances in which this Court and state courts broadly questioned the power and duty of state courts to exercise their jurisdiction to enforce United States civil and penal statutes or the power of the Federal Government to require them to do so.[6] But after the fundamental issues over the extent of federal supremacy had been resolved by war, this Court took occasion in 1876 to review the phase of the controversy concerning the relationship of state courts to the Federal Government. *Claflin* v. *Houseman,* 93 U. S. 130. The opinion of a unanimous court in that case was strongly buttressed by historic references and persuasive reasoning. It repudi-

[4] Judiciary Act of 1789, 1 Stat. 73, 77 (suits by aliens for torts committed in violation of federal laws and treaties; suits by the United States).

[5] 1 Stat. 376, 378 (1794) (fines, forfeitures and penalties for violation of the License Tax on Wines and Spirits); 1 Stat. 373, 375 (1794) (the Carriage Tax Act); 1 Stat. 452 (1796) (penalty for purchasing guns from Indians); 1 Stat. 733, 740 (1799) (criminal and civil actions for violation of the postal laws). See Warren, *Federal Criminal Laws and the State Courts,* 38 Harv. L. Rev. 545; Barnett, *The Delegation of Federal Jurisdiction to State Courts,* 3 Selected Essays on Constitutional Law 1202 (1938).

[6] See *e. g., Martin* v. *Hunter's Lessee,* 1 Wheat. 304, 334–337; *United States* v. *Bailey,* 9 Pet. 238, 259–260; *Prigg* v. *Pennsylvania,* 16 Pet. 539, 615; *Fox* v. *Ohio,* 5 How. 410, 438; *United States* v. *Lathrop,* 17 Johns. (N. Y.) 4 (1819). See also Warren, *supra,* 580–584.

ated the assumption that federal laws can be considered by the states as though they were laws emanating from a foreign sovereign. Its teaching is that the Constitution and the laws passed pursuant to it are the supreme laws of the land, binding alike upon states, courts, and the people, "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[7] It asserted that the obligation of states to enforce these federal laws is not lessened by reason of the form in which they are cast or the remedy which they provide. And the Court stated that "If an act of Congress gives a penalty to a party aggrieved, without specifying a remedy for its enforcement, there is no reason why it should not be enforced, if not provided otherwise by some act of Congress, by a proper action in a State court." *Id.* at 137. And see *United States* v. *Bank of New York,* 296 U. S. 463, 479.

The *Claflin* opinion thus answered most of the arguments theretofore advanced against the power and duty of state courts to enforce federal penal laws. And since that decision, the remaining areas of doubt have been steadily narrowed.[8] There have been statements in cases concerned with the obligation of states to give full faith and credit to the proceedings of sister states which suggested a theory contrary to that pronounced in the *Claflin* opinion.[9] But when in *Mondou* v. *New York, N. H. & H. R. Co.,* 223 U. S. 1, this Court was presented with a case

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[7] U. S. Const. Art. VI. See also *Ex parte Siebold,* 100 U. S. 371, 392–394.

[8] *Tennessee* v. *Davis,* 100 U. S. 257; *Mondou* v. *New York, N. H. & H. R. Co.,* 223 U. S. 1; *Minneapolis & St. L. R. Co.* v. *Bombolis,* 241 U. S. 211; *McKnett* v. *St. Louis & S. F. R. Co.,* 292 U. S. 230; *Baltimore & O. R. R.* v. *Kepner,* 314 U. S. 44; *Miles* v. *Illinois C. R. Co.,* 315 U. S. 698; *Herb* v. *Pitcairn,* 324 U. S. 117, 121–123; 325 U. S. 77.

[9] See n. 10, *infra.*

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testing the power and duty of states to enforce federal laws, it found the solution in the broad principles announced in the *Claflin* opinion.

The precise question in the *Mondou* case was whether rights arising under the Federal Employers' Liability Act, 36 Stat. 291, could "be enforced, as of right, in the courts of the States when their jurisdiction, as fixed by local laws, is adequate to the occasion . . ." *Id.* at 46. The Supreme Court of Connecticut had decided that they could not. Except for the penalty feature, the factors it considered and its reasoning were strikingly similar to that on which the Rhode Island Supreme Court declined to enforce the federal law here involved. But this Court held that the Connecticut court could not decline to entertain the action. The contention that enforcement of the congressionally created right was contrary to Connecticut policy was answered as follows:

> "The suggestion that the act of Congress is not in harmony with the policy of the State, and therefore that the courts of the State are free to decline jurisdiction, is quite inadmissible, because it presupposes what in legal contemplation does not exist. When Congress, in the exertion of the power confided to it by the Constitution, adopted that act, it spoke for all the people and all the States, and thereby established a policy for all. That policy is as much the policy of Connecticut as if the act had emanated from its own legislature, and should be respected accordingly in the courts of the State." *Mondou* v. *New York, N. H. & H. R. Co., supra* at 57.

So here, the fact that Rhode Island has an established policy against enforcement by its courts of statutes of other states and the United States which it deems penal, cannot be accepted as a "valid excuse." *Cf. Douglas* v.

New York, N. H. & H. R. Co., 279 U. S. 377, 388.[10] For the policy of the federal Act is the prevailing policy in every state. Thus, in a case which chiefly relied upon the *Claflin* and *Mondou* precedents, this Court stated that a state court cannot "refuse to enforce the right arising from the law of the United States because of conceptions of impolicy or want of wisdom on the part of Congress in having called into play its lawful powers." *Minneapolis & St. L. R. Co.* v. *Bombolis*, 241 U. S. 211, 222.

The Rhode Island court in its *Robinson* decision, on which it relies, cites cases of this Court which have held that states are not required by the full faith and credit clause of the Constitution to enforce judgments of the courts of other states based on claims arising out of penal statutes.[11] But those holdings have no relevance here, for this case raises no full faith and credit question. Nor need we consider in this case prior decisions to the effect that federal courts are not required to enforce state penal laws. Compare *Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 265, with *Massachusetts* v. *Missouri*, 308 U. S. 1, 20.

[10] It has been observed that the historic origin of the concept first expressed in this country by Chief Justice Marshall in *The Antelope*, 10 Wheat. 66, 123, that "The courts of no country execute the penal laws of another . . ." lies in an earlier English case, *Folliott* v. *Ogden*, 1 H. Bl. 124 (1789), aff'd., *Ogden* v. *Folliott*, 3 T. R. 726 (1790), 4 Bro. P. C. 111. In that case the English courts refused to enforce an American Revolutionary statute confiscating property of loyal British subjects on the ground that English courts must refuse to enforce such penal statutes of a foreign enemy. It has been observed of this case that "of course they could as well have spoken of local public policy, and have reached the same result as surely." Leflar, *Extrastate Enforcement of Penal and Governmental Claims*, 46 Harv. L. Rev. 193, 195 (1932). See *Griffin* v. *McCoach*, 313 U. S. 498; *cf. Hines* v. *Lowrey*, 305 U. S. 85.

[11] See *e. g., Huntington* v. *Attrill*, 146 U. S. 657; *Anglo-American Provision Co.* v. *Davis Provision Co. No. 1*, 191 U. S. 373; *Kenney* v. *Supreme Lodge*, 252 U. S. 411.

For whatever consideration they may be entitled to in the field in which they are relevant, those decisions did not bring before us our instant problem of the effect of the supremacy clause on the relation of federal laws to state courts. Our question concerns only the right of a state to deny enforcement to claims growing out of a valid federal law.

It is conceded that this same type of claim arising under Rhode Island law would be enforced by that State's courts. Its courts have enforced claims for double damages growing out of the Fair Labor Standards Act.[12] Thus the Rhode Island courts have jurisdiction adequate and appropriate under established local law to adjudicate this action.[13] Under these circumstances the State courts are not free to refuse enforcement of petitioners' claim. See *McKnett* v. *St. Louis & S. F. R. Co.*, 292 U. S. 230; and compare *Herb* v. *Pitcairn*, 324 U. S. 117; 325 U. S. 77. The case is reversed and the cause is remanded for proceedings not inconsistent with this opinion.

Reversed.

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[12] *Newman* v. *Geo. A. Fuller Co.*, 72 R. I. 113, 48 A. 2d 345.

[13] Gen. Laws R. I. (1938) c. 500, § 28; c. 525, § 7; c. 631, § 4.

Syllabus.

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA *v.* UNITED STATES.

NO. 6. CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.*

Argued March 8, 1945. Reargued April 29, 30, 1946 and October 15, 16, 1946.—Decided March 10, 1947.

A group of local manufacturers of and dealers in millwork and patterned lumber and their incorporated trade associations and officials thereof and a group of unincorporated trade unions and their officials or business agents were indicted for conspiracy to violate § 1 of the Sherman Act. The indictment charged that they unlawfully combined and conspired together, successfully, to monopolize unduly a part of interstate commerce in the commodities, for the purpose and with the effect of restraining out-of-state manufacturers from shipping and selling the commodities within a certain area and of preventing dealers in that area from freely handling them, and also for the purpose of raising the prices of the commodities; that, to achieve this purpose, a contract was entered into between defendants for a wage scale for members of labor unions working on the articles, combined with a restrictive clause that "no material will be purchased from, and no work will be done on any material or article that has had any operation performed on same by Saw Mills, Mills or Cabinet Shops, or their distributors that do not conform to the rates of wage and working conditions of this agreement"; and that this clause was enforced to the mutual advantage of defendants and to the disadvantage of other manufacturers and of consumers. *Held:*

1. Conspiracies between employers and employees to restrain interstate commerce violate § 1 of the Sherman Act. *Allen Bradley Co.* v. *Local Union No. 3,* 325 U. S. 797. Pp. 400, 411.

2. The indictment charges a conspiracy forbidden by the Sherman Act. P. 401.

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*Together with No. 7, *Bay Counties District Council of Carpenters et al.* v. *United States;* No. 8, *Lumber Products Association, Inc. et al.* v. *United States;* No. 9, *Alameda County Building and Construction Trades Council* v. *United States;* and No. 10, *Boorman Lumber Co. et al.* v. *United States,* also on certiorari to the same Court.

3. On that issue, the power of the trial court is limited by § 6 of the Norris-LaGuardia Act, 47 Stat. 70, which applies to all courts of the United States in all matters growing out of labor disputes covered by the Act which may come before them. P. 401.

4. The purpose and effect of § 6 of the Norris-LaGuardia Act is to relieve organizations, whether of labor or capital, and members of those organizations from liability for damages or imputations of guilt for lawless acts done in labor disputes by some individual officers or members of the organization, without clear proof that the organization or member charged with responsibility for the offense actually participated, gave prior authorization or ratified such acts after actual knowledge of their perpetration. P. 403.

5. The word "organization," as used in the Act, is not restricted to unincorporated entities but covers generically all organizations that take part in labor disputes, including corporations. P. 403, n. 12.

6. While participants in a conspiracy covered by § 6 are not immunized from responsibility for authorized acts in furtherance of such a conspiracy, they are protected against liability for unauthorized illegal acts of other participants in the conspiracy. P. 404.

7. As used in § 6, "authorization" means something different from corporate criminal responsibility for the acts of officers and agents in the course or scope of employment. Its requirement restricts the responsibility or liability in labor disputes of employer or employee associations, organizations or their members for unlawful acts of the officers or members of those associations or organizations, although such officers or members are acting within the scope of their general authority as such officers or members, to those associations, organizations or their officers or members who actually participate in the unlawful acts, except upon clear proof that the particular act charged, or acts generally of that type and quality, had been expressly authorized, or necessarily followed from authority granted, by the association or non-participating member sought to be charged or was subsequently ratified by such association, organization or member after actual knowledge of its occurrence. Pp. 406–407.

8. A refusal to instruct the jury to this effect is reversible error—as to both individuals and organizations and as to both employers and employees—no matter how clear the evidence may be of participation in the conspiracy, since the defendants are entitled to have the jury instructed in accordance with the standards which Congress has prescribed. Pp. 407–412.

9. Prior to the decision of this Court in *Allen Bradley Co.* v. *Local Union No. 3, supra,* two employer groups, each containing an incorporated trade association and its officers and members, both individual and corporate, demurred to the indictment in this case on the ground that, as the restrictive agreement was directed at the maintenance of proper working conditions, the indictment did not state a crime under the Sherman Act. The demurrer was overruled and they pleaded *nolo contendere.* This Court granted certiorari as to them. *Held:* In view of the uncertainty existing, at the time of their pleas of *nolo contendere,* as to liability for contracts between groups of employers and groups of employees that restrained interstate commerce and as to the application of § 6 of the Norris-LaGuardia Act, they should have an opportunity to make defense to the indictment, notwithstanding their pleas of *nolo contendere.* Pp. 411–412.

144 F. 2d 546, reversed.

Petitioners were convicted in a Federal District Court of a conspiracy to violate § 1 of the Sherman Act, 15 U. S. C. § 1. 42 F. Supp. 910. The Circuit Court of Appeals affirmed. 144 F. 2d 546. This Court granted certiorari. 323 U. S. 706–7. *Reversed and remanded,* p. 412.

Charles H. Tuttle argued the cause for the United Brotherhood of Carpenters and Joiners, petitioners in Nos. 6 and 7. With him on the briefs were *Joseph O. Carson* and *Hugh K. McKevitt.*

Joseph O. Carson II, Harry N. Routzohn, Hugh K. McKevitt and *Jack M. Howard* submitted on briefs for the Bay Counties District of Carpenters et al., petitioners in No. 7.

Maurice E. Harrison submitted on briefs for petitioners in No. 8.

Guy C. Calden and *Clarence E. Todd* submitted on briefs for petitioner in No. 9.

Morgan J. Doyle submitted on brief for petitioners in No. 10.

Assistant Attorney General Berge and *Holmes Baldridge* argued the cause on the original argument for the United States. With *Mr. Berge* on the brief were *Solicitor General Fahy* and *Mathias Orfield.*

Holmes Baldridge argued the cause on the reargument for the United States. With him on the brief were *Solicitor General McGrath, Assistant Attorney General Berge, George P. Alt* and *Robert L. Stern.*

Mr. Justice Reed delivered the opinion of the Court.

These are criminal cases in which conviction of various defendants has been obtained in the District Court of the United States for the Northern District of California, Southern Division, and affirmed by the Circuit Court of Appeals for the Ninth Circuit, 144 F. 2d 546. They were charged with conspiracy to violate the Sherman Act, § 1.[1] The parties to the alleged conspiracy were of two groups: on the one hand, local manufacturers of and dealers in the commodities affected and their incorporated trade associations and officials thereof; and, on the other, unincorporated trade unions and their officials or business agents. The indictment charged that the defendants below unlawfully combined and conspired together, successfully, to

[1] 15 U. S. C. § 1:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: . . . Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1–7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

monopolize unduly a part of interstate commerce in millwork and patterned lumber. The purpose and effect of the conspiracy was alleged to be to restrain out-of-state manufacturers from shipping and selling these commodities within the San Francisco Bay area of California and to prevent the dealers in that area from freely handling them. It was alleged that the conspiracy also sought to raise the prices of the products affected. To achieve the purpose, a contract was entered into between the defendants for a wage scale for members of labor unions working on the articles involved, combined with a restrictive clause, ". . . no material will be purchased from, and no work will be done on any material or article that has had any operation performed on same by Saw Mills, Mills or Cabinet Shops, or their distributors that do not conform to the rates of wage and working conditions of this Agreement," with specified exceptions not here material. This clause, it is alleged, was enforced to the mutual advantage of the conspirators by some of the parties through conference or picketing or acquiescence in the arrangement. By means of the conspiracy, union workmen obtained better wages, the employers higher profits and manufacturers against whom the conspiracy was directed were largely prevented from sharing in the Bay Area business, all to the price disadvantage of the consumer and the unreasonable restraint of interstate commerce. The legal theory which was followed in their conviction was that conspiracies between employers and employees to restrain interstate commerce violate the Sherman Act.

Five petitions for certiorari were presented to this Court by different defendants either singly or jointly with others. It is sufficient for the purposes of this review to say that they raised the question of the application of § 1 of the Sherman Act to conspiracies between employers and employees to restrain commerce and, except the petitions in the employer group, the application of § 6 of the

Norris-LaGuardia Act in a trial of such an indictment.[2] On account of the importance of the federal questions raised and asserted conflicts in the circuits, the writs of certiorari were granted.[3]

Since these cases were taken the important question of the application of the Sherman Act to a conspiracy between labor union and business groups has been decided by us. We held that such a conspiracy to restrain trade violated the Sherman Act. *Allen Bradley Co.* v. *Local Union No. 3,* 325 U. S. 797. This holding causes us to approve the ruling of the trial and appellate courts on the first question presented by the certiorari but it left unresolved the question as to the application of § 6 of the Norris-LaGuardia Act, the point to which this decision is directed.

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[2] 47 Stat. 70, 71:

"SEC. 6. No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof."

[3] 323 U. S. 706–7. Compare *Allen Bradley Co.* v. *Local Union No. 3,* 145 F. 2d 215, and *United States* v. *International Fur Workers Union,* 100 F. 2d 541, 547, with the opinion of the Circuit Court of Appeals in this case, 144 F. 2d 546.

These cases were argued in the Supreme Court of the United States first on March 8, 1945. On June 18, 1945, they were restored to the docket and assigned for reargument, counsel being requested to discuss (1) the scope of § 6 of the Norris-LaGuardia Act in relation to prosecutions under the Antitrust Act; (2) the scope of § 6 in relationship to § 13 (b); (3) the scope of the words "association or organization" appearing in § 6, in that section's relationship to § 13 (b); and (4) consideration of the Court's oral charge and written charges requested and refused involving § 6, in the light of objections and exceptions by each and all of the defendants and the state of the evidence on that issue as to each of them. Journal, Sup. Ct., U. S., October Term 1944, pp. 284–5. The cases were reargued on April 29–30, 1946, and again restored to the docket on June 10, 1946, for a third argument.

The indictment charges a conspiracy forbidden by the Sherman Act. On that issue, the power of the trial court is limited by § 6 of the Norris-LaGuardia Act. Note 2, *supra*. The limitations of that section are upon all courts of the United States in all matters growing out of labor disputes, covered by the Act, which may come before them. It properly is conceded that this agreement grew out of such a labor dispute and that all parties defendant participated or were interested in that dispute. See § 13, 47 Stat. 73. Section 6 of the Norris-LaGuardia Act first appeared in a draft bill of the Senate Committee on the Judiciary as § 6 thereof. At that time its form was precisely the same as at present. The draft was drawn as a comprehensive substitute for S. 1482 of the 70th Congress, a bill providing only for a limitation on the jurisdiction of equity courts in the issuance of injunctions. In the 71st Congress, a similarly limited bill on the same subject, S. 2497, was reintroduced and a like comprehensive substitute proposed. Neither substitute was reported out of the Committee.[4] These substitute bills are quite similar in form to the Norris-LaGuardia Act. In substance, and therefore in effectiveness, they are the same.

In the next, the 72d Congress, the bill, H. R. 5315, which was to become the Norris-LaGuardia Act, was introduced. Section 2 succinctly states the public policy that it was designed to further—a definition of and limitation upon the jurisdiction and authority of courts of the United States in labor disputes.[5] That purpose was in accord with

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[4] S. Rep. No. 1060, 71st Cong., 2d Sess., p. 4.

In the hearings on the proposed substitute, the language now incorporated into § 6 of the Norris-LaGuardia Act was criticized as changing the rules of agency, so as to relieve organizations of responsibility for acts of their agents in labor disputes. It was defended as intended to apply the law of agency to labor unions. Hearings, Subcommittee of the Committee on the Judiciary, U. S. Senate, 70th Cong., 2d Sess., on S. 1482, Part 5, p. 759, *et seq.*

[5] 47 Stat. 70.

that behind the earlier drafts referred to above.[6] As the new bill was practically identical with these long considered committee substitutes, the hearings on H. R. 5315 were short.[7] But even so, the attack continued on § 6 as a restriction on the general law of agency in labor disputes.[8] The reply of the House Committee was that it did "not affect the general law of agency" and was necessary "under the circumstances" so that "the courts should know that Congress expects them not to hold officers or associations liable for the unlawful acts of a member without clear proof of actual participation in, or authorization of, any unlawful acts by the officer or association." [9] The Senate Committee was of the view that it was a "rule of evidence," not a "new law of agency."

> "There is no provision made relieving an individual from responsibility for his acts, but provision is made that a person shall not be held responsible for an

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[6] S. Rep. No. 163, 72d Cong., 1st Sess.; H. Rep. No. 669, 72d Cong., 1st Sess.; S. Rep. No. 1060, 71st Cong., 2d Sess.; Hearings, Subcommittee of the Committee on the Judiciary, U. S. Senate, 70th Cong., 1st Sess., on S. 1482; Hearing, Subcommittee of the Committee on the Judiciary, U. S. Senate, 71st Cong., 2d Sess., on S. 2497.

[7] Hearing, Committee on the Judiciary, House of Representatives, 72d Cong., 1st Sess., on H. R. 5315.

[8] *Id.*, p. 16:

"But section 6 effects a revolution in the substantive law of agency. By that section no officer or member of any organization, participating in a labor dispute, and this applies equally to employers, is to be held liable in any court of the United States for the unlawful act of agents acting in such dispute, unless there be clear proof of actual participation, authorization, or ratification of the agents' acts after actual knowledge. The general law of agency is thus repealed or restricted to a labor dispute, and it applies equally to employers and employees. It applies to men who by collusion enter into agreements which may harmfully affect the public interests, and which in some instances might be violations of the antitrust act, although they may be the result, or grow out of, or involve terms of a labor dispute."

See also pp. 33 and 39.

[9] H. Rep. No. 669, 72d Cong., 1st Sess., p. 9.

> 'unlawful act' except upon 'clear proof' of participation or authorization or ratification. Thus a rule of evidence, not a rule of substantive law, is established." [10]

We need not determine whether § 6 should be called a rule of evidence or one that changes the substantive law of agency. We hold that its purpose and effect was to relieve organizations, whether of labor or capital,[11] and members of those organizations from liability for damages or imputation of guilt for lawless acts done in labor disputes by some individual officers or members of the organization, without clear proof that the organization or member charged with responsibility for the offense actually participated, gave prior authorization, or ratified such acts after actual knowledge of their perpetration.[12]

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[10] S. Rep. No. 163, 72d Cong., 1st Sess., p. 19.

[11] "Section 6 of the bill relates to damages for unlawful acts arising out of labor disputes. It is provided that officers and members of any labor organization, and officers and members of any employers' organization, shall not be held liable for damages unless it is proven that the defendant either participated in or authorized such unlawful acts, or ratified such unlawful acts after actual knowledge thereof." S. Rep. No. 163, *supra,* p. 19; 75 Cong. Rec. 4507; 47 Stat. 70, 73:

"SEC. 13. . . .

"(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation."

[12] See the full statement in S. Rep. No. 163, *supra,* pp. 19–21. Nothing has been found to give definition to the word "organization" as used in the act. We see no reason to restrict its meaning to unincorporated entities. Apparently it was employed by the draftsmen to cover, generically, all organizations that take part in labor disputes. See note 11, *supra.* We so apply the word. The corporate form, as is true in this case, is frequently employed for trade groups.

Thus § 6 limited responsibility for acts of a co-conspirator—a matter of moment to the advocates of the bill.[13] Before the enactment of § 6, when a conspiracy between labor unions and their members, prohibited under the Sherman Act, was established, a widely publicized case had held both the unions and their members liable for all overt acts of their co-conspirators.[14] This liability resulted whether the members or the unions approved of the acts or not or whether or not the acts were offenses under the criminal law. While of course participants in a conspiracy that is covered by § 6 are not immunized from responsibility for authorized acts in furtherance of such a conspiracy, they now are protected against liability for unauthorized illegal acts of other participants in the conspiracy.

The legislative history makes the intended meaning of the word "authorization," we think, almost equally clear. The rule of liability for acts of an agent within the scope of his authority, based on the *Danbury Hatters Case,* was urged as an argument against the language of § 6.[15] When

[13] The *Danbury Hatters Case—Loewe* v. *Lawlor,* 208 U. S. 274, and *Lawlor* v. *Loewe,* 235 U. S. 522—involving damages against union members for their union's acts in an unlawful conspiracy, was in their minds. Hearings on S. 1482, *supra,* p. 760, *et seq.* Compare the partnership in crime theory. *United States* v. *Kissel,* 218 U. S. 601, 608; *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 253.

[14] *United States* v. *Railway Employees' Dept. A. F. L.,* 283 F. 479, 492.

[15] Hearings on S. 1482, *supra,* p. 760:

"When that came before the Supreme Court of the United States Justice Holmes—I do not remember the exact language, but he had in mind that it might not be necessary to show that they knew or ought to have known or that they ought to have been warranted in their belief—that under the rule of agency as prevailing in all other activities, including bankers' associations, to which you refer, and all other associations, it is the common accepted proposition, as fundamental as any I know in Anglo-Saxon jurisprudence, that a principal

the Senate Committee on the Judiciary reported the bill, it dealt with this contention.

> "But the argument is made that a man is held legally responsible for the acts of his agents taken in due course of employment. This argument is evidently based upon a doctrine of the civil law of negligence. It has no application to the criminal law. If a man is held responsible for an unlawful act, his responsibility rests on the basis of actual or implied participation. He is responsible for conspiring to do

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may be liable for the acts of his agent, even though he never knew or heard of them and actually forbade them, provided he was acting within the general scope of his authority, in furtherance of the purpose of the association. That is the law laid down by the Supreme Court of the United States, and that is the law that I am afraid is curtailed by this provision in this section 6."

Excerpts from *Lawlor* v. *Loewe*, 235 U. S. at 534–35, will explain the reference: "We agree with the Circuit Court of Appeals that a combination and conspiracy forbidden by the statute were proved, and that the question is narrowed to the responsibility of the defendants for what was done by the sanction and procurement of the societies above named.

"The court in substance instructed the jury that if these members paid their dues and continued to delegate authority to their officers unlawfully to interfere with the plaintiffs' interstate commerce in such circumstances that they knew or ought to have known, and such officers were warranted in the belief that they were acting in the matters within their delegated authority, then such members were jointly liable, and no others. It seems to us that this instruction sufficiently guarded the defendants' rights, and that the defendants got all that they were entitled to ask in not being held chargeable with knowledge as matter of law. . . . If the words of the documents on their face and without explanation did not authorize what was done, the evidence of what was done publicly and habitually showed their meaning and how they were interpreted. The jury could not but find that by the usage of the unions the acts complained of were authorized, and authorized without regard to their interference with commerce among the States."

> an unlawful act or for setting in motion forces intended to result, or necessarily resulting, in an unlawful act.
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> . . . it is high time that, by legislative action, the courts should be required to uphold the long established law that guilt is personal and that men can only be held responsible for the unlawful acts of associates because of participation in, authorization or ratification of such acts. As a rule of evidence, clear proof should be required, so that criminal guilt and criminal responsibility should not be imputed but proven beyond reasonable doubt in order to impose liability." [16]

We hold, therefore, that "authorization" as used in § 6 means something different from corporate criminal responsibility for the acts of officers and agents in the course or scope of employment.[17] We are of the opinion that the requirement of "authorization" restricts the responsibility or liability in labor disputes of employer or employee associations, organizations or their members for unlawful acts of the officers or members of those associations or organizations, although such officers or members are acting within the scope of their general authority as such officers or members, to those associations, organizations or their officers or members who actually participate in the unlawful acts, except upon clear proof that the particular act charged, or acts generally of that type and

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[16] S. Rep. No. 163, *supra*, p. 20.

[17] See *New York Central R. Co.* v. *United States*, 212 U. S. 481, 494.

These cases now being passed upon have not involved the liability of an employer, whether a member or not of an association or organization of employers, for the acts, in a labor dispute, of his or its own officers. We express no opinion upon that.

quality, had been expressly authorized, or necessarily followed from a granted authority, by the association or non-participating member sought to be charged or was subsequently ratified by such association, organization or member after actual knowledge of its occurrence.

In this prosecution the United Brotherhood of Carpenters and Joiners and all the local unions who were convicted requested an instruction or instructions that embodied the above interpretation of § 6.[18] A similar request was made by the individual members by requested instruction No. 58. These requested instructions were refused and instead instructions were given that stated a different concept of law as is evidenced by the excerpts in the marginal note.[19]

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[18] A fair example, requested instruction No. 56, is as follows:

"You are instructed that no labor union or organization can be found guilty in this case for an unlawful act or acts, if any, of individual officers, members or agents, unless you find upon clear proof from the evidence that such labor organization actually participated in, or actually authorized such unlawful act, if any, or ratified such an act, if any, after actual knowledge thereof."

[19] "The act of an agent done for or on behalf of a corporation and within the scope of his authority, or an act which an agent has assumed to do for a corporation while performing duties actually delegated to him, is deemed to be the act of the corporation.

"If you find that there did exist a combination and conspiracy such as is charged in the indictment, and that any defendant corporation participated therein, then I instruct you that such act of participation is deemed to be also the act of the individual director, officer or agent of such defendant corporation who authorized, ordered or did such act in whole or in part.

"Likewise, the list of defendants includes a number of labor union organizations and several members thereof. It has been stipulated in this case that these labor unions are associations. Like corporations, associations are separate entities within the meaning of the Sherman Act, and may be found guilty of violations of that act, separately and apart from the guilt or innocence of their members.

"You are to determine the guilt or innocence of the labor unions

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So far as the Unions, both local and national, are concerned, the necessity under our construction for an instruction based on § 6 is apparent. The United Brotherhood was not a party to any of the agreements. Local unions took a more definitive part than the United Brotherhood. In some instances the name of a local union was signed to the agreement that contained the restrictive clause. Necessarily acts performed by or for the unions were done by their individual officers, members or agents. We do not enter into an analysis of the evidence that was relied upon to show the participation of the unions in the conspiracy. The evidence in any new trial may be quite different. No matter how strong the evidence may be of an association's or organization's participation through its agents in the conspiracy, there must be a charge to the jury setting out correctly the limited liability under § 6 of such association or organization for acts of its agents.[20] For a judge may not direct a verdict of guilty no matter how conclusive the evidence.[21] There is no way of knowing here whether the jury's verdict was based on facts within the condemned instructions, note 19 above, or on actual authorization or

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which are defendants in this case in the same manner as you determine that of the corporations, that is, by an examination of the acts of their agents.

. . . . . .

"In this case, several individuals are named as defendants, together with a number of corporations. While these defendants have been jointly indicted and charged with the offenses contained in the indictment, each defendant is entitled to an independent consideration by you of the evidence as it relates to his conscious participation in the alleged unlawful acts, and it is your duty to determine the guilt or innocence of each individual separately."

[20] See *Battle* v. *United States*, 209 U. S. 36, 38.

[21] *Sparf and Hansen* v. *United States*, 156 U. S. 51, 105, dissent 173. Compare *Capital Traction Company* v. *Hof*, 174 U. S. 1, 13.

ratification of such acts, note 18.[22] A failure to charge correctly is not harmless, since the verdict might have resulted from the incorrect instruction. We are of the opinion, therefore, that the judge should have instructed the jury as to the limitations upon the association's liability for the acts of its agents under § 6. The error is aggravated by the failure to give the correct charge upon request.

The suggestion is made that the alert and powerful unions and corporations gain the greatest degree of immunity under our interpretation of § 6. That is not the case. Section 6 draws no distinction as to liability for unauthorized acts between the large and the small, between national unions and local unions, between powerful unions and weak unions, between associations or organizations and their members. And we draw no such distinctions.

There is no implication in what we have said that an association or organization in circumstances covered by § 6 must give explicit authority to its officers or agents to violate in a labor controversy the Sherman Act or any other law or to give antecedent approval to any act that its officers may do. Certainly an association or organization cannot escape responsibility by standing orders disavowing authority on the part of its officers to make any agreements in violation of the Sherman Act and disclaiming union responsibility for such agreements. Facile arrangements do not create immunity from the act, whether they are made by employee or by employer groups. The condi-

[22] *Bird* v. *United States*, 180 U. S. 356, 361: "The chief object contemplated in the charge of the judge is to explain the law of the case, to point out the essentials to be proved on the one side and the other, and to bring into view the relations of the particular evidence adduced to the particular issues involved." See *Pierce* v. *United States*, 314 U. S. 306.

tions of liability under § 6 are the same in the case of each. The grant of authority to an officer of a union to negotiate agreements with employers regarding hours, wages, and working conditions may well be sufficient to make the union liable. An illustrative but nonrestrictive example might be where there was knowing participation by the union in the operation of the illegal agreement after its execution. And the custom or traditional practice of a particular union can also be a source of actual authorization of an officer to act for and bind the union.

Our only point is this: Congress in § 6 has specified the standards by which the liability of employee and employer groups is to be determined. No matter how clear the evidence, they are entitled to have the jury instructed in accordance with the standards which Congress has prescribed. To repeat, guilt is determined by the jury, not the court. The problem is not materially different from one where the evidence against an accused charged with a crime is well-nigh conclusive and the court fails to give the reasonable-doubt instruction. It could not be said that the failure was harmless error.[23]

It is suggested that since "conscious participation" was required for conviction by the instructions given, error as to the individual defendants cannot be found under any theory of the rule of § 6. But we think that failure to instruct the jury on the imputation of guilt from the acts of others as limited in labor disputes by § 6 affects the individuals as well as the associations. The section covers organizations and their members alike. Individuals, without association authority, may be guilty of such a conspiracy as this under the Sherman Act, but under § 6 they will not be guilty merely because they are members or officers of a guilty association. Nor are individuals guilty

[23] *Weiler* v. *United States,* 323 U. S. 606; *Bruno* v. *United States,* 308 U. S. 287.

because of acts of other individuals in which they did not participate, or which they did not authorize or ratify. Although an illegal conspiracy under the Sherman Act was proven at the trial, the individuals are entitled to have their participation weighed by a jury under an instruction explaining the circumstances under which § 6 permits acts of other individuals or of associations or of organizations in labor disputes to create personal liability. To instruct only that conscious participation of the individual is required leaves a jury free to weigh an individual's guilt in the light of unauthorized and unratified acts of others with whom he is associated but in whose acts he has not participated. As the evidence of any individual's activities in the alleged conspiracy is a minor part of the evidence as to the entire scheme, this delimitation of his responsibility is important.

Certiorari was granted to two employer groups, Nos. 8 and 10, each containing an incorporated trade association and its officers and members, both individual and corporate. Both groups combatted the indictment by demurrer on the ground that, as the restrictive agreement was directed at the maintenance of proper working conditions, it did not state a crime under the Sherman Act. The demurrer was overruled by the trial court. Our decision in *Allen Bradley Company* requires us to uphold this conclusion. Thereafter pleas of *nolo contendere* were entered by each defendant in the employer petitioner groups.

Each of the employer petitioners, if they had stood trial, as we have indicated hereinbefore, would have been entitled to the same instruction under § 6 as we have held the union group should have received. And though the failure so to charge was not excepted to, we would not be precluded from entertaining the objection.[24] The errone-

[24] *Wiborg* v. *United States,* 163 U. S. 632, 658; *Brasfield* v. *United States,* 272 U. S. 448, 450; see also *United States* v. *Atkinson,* 297 U. S. 157, 160. And see Rules of the Supreme Court, Rule 27.

ous charge was on a vital phase of the case and affected the substantial rights of the defendants. We have the power to notice a "plain error" though it is not assigned or specified.[25] In view of their plea of *nolo contendere,* does justice require that these employer groups should now be given an opportunity to stand trial in the situation created by our subsequent rulings in the *Allen Bradley* case and in this case? We think that it does.

This present decision furnishes a guide for the application of § 6 to liability for acts of agents in labor disputes. Ordinarily a plea of *nolo contendere* leaves open for review only the sufficiency of an indictment.[26] However, in view of the then existing uncertainty as to liability for contracts between groups of employers and groups of employees that restrained interstate commerce and the application of § 6 of the Norris-LaGuardia Act, we conclude that in this exceptional situation the employer groups, also, should have an opportunity to make defense to the indictment.[27]

The judgments in each case are reversed and the causes remanded to the District Court.

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

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[25] *Weems* v. *United States,* 217 U. S. 349, 362; *Mahler* v. *Eby,* 264 U. S. 32, 45; *Sibbach* v. *Wilson & Co.,* 312 U. S. 1, 16; see also *Kessler* v. *Strecker,* 307 U. S. 22, 34. And see Rules of Criminal Procedure, Rule 52 (b).

[26] *Nolo contendere* "is an admission of guilt for the purposes of the case." *Hudson* v. *United States,* 272 U. S. 451, 455; *United States* v. *Norris,* 281 U. S. 619, 622. And like pleas of guilty may be reviewed to determine whether a crime is stated by the indictment. *Hocking Valley R. Co.* v. *United States,* 210 F. 735, 738; *Tucker* v. *United States,* 196 F. 260, 262.

[27] See *Husty* v. *United States,* 282 U. S. 694, 703; *Ashcraft* v. *Tennessee,* 322 U. S. 143, 155–56; *R. F. C.* v. *Prudence Group,* 311 U. S. 579, 582; *Watts, Watts & Co.* v. *Unione Austriaca,* 248 U. S. 9, 21; *Montgomery Ward & Co.* v. *Duncan,* 311 U. S. 243, 254.

MR. JUSTICE FRANKFURTER, with whom THE CHIEF JUSTICE and MR. JUSTICE BURTON concur in result, dissenting.

The issue in this case is clear and simple. It is this. When officers make an arrangement on behalf of their organization, whether a corporation or a union, while acting in the regular course of business and within their general authority as such officers, is the organization liable for what these officers did if the court should subsequently find that such an arrangement is prohibited by the Sherman Law? The issue is clear and it is susceptible of a clear answer. Neither the issue nor the answer should be obscured. Either the organization is subject to the liability that the law in other respects imposes upon organizations for the acts of their agents, or the Norris-LaGuardia Act freed unions and corporations from such liability. The lower courts must apply the law as laid down by this Court and we owe them clarity of pronouncement. They cannot very well guide juries, or even themselves in equity suits, if told that the principles of the law of agency do not apply to unions and corporations under the Sherman Law, but that perhaps they "can" apply. What the Court means to decide ought to be brought out of the twilight of ambiguity. It does not advance the administration of justice to impart new doubts to an old statute. And the Sherman Law is not merely old. It embodies, as this Court has often indicated, a vital policy.

By explicit language Congress forbade "corporations and associations" no less than individuals to engage in combinations and conspiracies in restraint of interstate trade. Section 8 of the Sherman Law. And it has long been settled that trade unions are "associations" under the Sherman Law. *United Mine Workers* v. *Coronado Coal Co.*, 259 U. S. 344. Before the *Coronado* decision and since, repeated efforts were made to have Congress take trade unions from under the Sherman Law. Regard-

less of the political complexion of Congresses, these efforts have consistently failed. Equally futile have been efforts to have this Court read the liability of trade unions out of the Sherman Law by judicial construction. This Court has undeviatingly held that trade unions are within "the general interdict of the Sherman Law," although later enactments have withdrawn "specifically enumerated practices of labor unions" from the scope of that law. See § 20 of the Clayton Act, 38 Stat. 730, 738, 29 U. S. C. § 52; *United States* v. *Hutcheson,* 312 U. S. 219, 230, and *Apex Hosiery Co.* v. *Leader,* 310 U. S. 469, 487–88. In the light of this history it would be strange indeed to find that Congress, by hitherto unsuspected indirection, had, from the point of view of effectiveness, sterilized the Sherman Law as to trade unions and particularly as to those which alone could to any serious extent unreasonably restrain commerce. It is a conclusion which can be reached only by disregarding the circumstances to which § 6 of the Norris-LaGuardia Act was addressed, and by wrenching it from the context of history in which it must be read.[1]

The construction given by the Court to § 6 is based on considerations which move in a world of unreality. The argument is quite unmindful of the way in which trade unions function—their organization, the authority of their international officers, the inevitable influence of the international office upon the affiliated locals. In short, such a construction is unmindful of the anatomy and physiology of trade union life. It is especially the power-

[1] "SEC. 6. No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof." 47 Stat. 70, 71, 29 U. S. C. § 106.

ful international unions who are in strategic positions to impose unreasonable restraints on commerce, and it is these that are especially rendered immune by the construction the Court gives to § 6. It is such unions that can most readily be insulated from responsibility for the acts of their leading officers, although such action be taken in furtherance of the vital concerns of the union and in every other aspect of legal responsibility be deemed within the direct authority of these officers and binding on the union.

It took some time for the law to catch up with reality and to hold that when men aggregated to form an entity, the entity as such acquires power and may therefore be held to responsibility in exerting its power. But it can act only through individuals. Its power is exerted, and its responsibility accrues, through the conduct of individual men entrusted with the power of the entity to achieve its purposes. This conclusion, supported alike by morality and by reason, the early law escaped through empty subtleties that seem fanciful to the modern reader. Arguments not unlike them underlie a reading of § 6 whereby the Sherman Law will be sterilized, certainly so far as national labor unions are concerned. The Court's opinion, to be sure, does not say in words that a national union is not liable under the Sherman Law for acts by its chief officers undertaken in the course of duty and for the furtherance of the union's purposes. But the conditions formulated by the Court, which must now be met before a union may be held to liability, are practically unrealizable, whether in the case of a big or a small union, a local or an international. Escape from responsibility can be easily contrived. It will be difficult to charge a union with culpability unless a convention of its membership, held perhaps every two years or even four, should knowingly authorize or approve a violation of the Sherman Law, or give *carte blanche* to the officers of the union by approving

in advance whatever they may do, no matter what the legal significance. For instance, if the president of an international union should negotiate an agreement with employers regarding hours and wages and working conditions, his union will not be responsible for the agreement, under the rule now laid down by the Court, if it should turn out to run counter to the Sherman Law, although making agreements to promote the economic betterment of its membership is the aim of the union and the job of its president.

The case before us illustrates how an association like the Brotherhood pursues its objectives. The Locals took no action until the General Office of the Brotherhood offered its approval; the President of the Brotherhood himself took an active part in the contract negotiations; a representative of the Brotherhood was present at the time that the contracts were made; no union agreement was forthcoming until the General Office approved the contracts in the routine way for such approval—collective agreements are not ordinarily subject to approval at the quadrennial convention of the Brotherhood; a circular issued by the General Office requested adherence to the contracts by the members of the local. Surely here was active "participation" by the Brotherhood in what has been found to be an outlawed combination, in the normal way in which such a union exerts its authority and "participates" in agreements. On such evidence did the jury find the Brotherhood guilty.

The Court finds that there was error in not giving a requested charge which was in the language of the statute. A trial court does not discharge its duty merely by quoting a statute relevant to the conduct of the trial. The issue before an appellate court is not whether the trial judge might have given a request of abstract correctness, or even charged differently, but whether the judge's instructions were accurate and ample. It might have been wise

for the judge to emphasize the counsel of care embodied in § 6. But the failure to do so or to use the statutory formula is not the Court's basis for upsetting the convictions. The Court upsets the convictions because it deems erroneous the view which the trial court took of § 6. The holding is that the view which the trial court should have taken, which all trial courts will have to take hereafter, and which, whatever the language used in the charge, must control a jury's findings from the evidence, is the elucidation which the Court now gives to § 6. For practical purposes, this elucidation immunizes unions and corporate offenders for acts which their agents perform because they are agents and, as such, endowed with authority. For practical purposes, a union or a corporation could not be convicted on any evidence likely to exist, if the trial court has to charge what the Court now holds to be required by § 6.

The trial court repeatedly warned the jury that to find guilt they must be satisfied beyond a reasonable doubt. It instructed the jury that the guilt or innocence of labor unions should be determined in the same manner as that of corporations. On the question of authorization, it charged that "The act of an agent done for or on behalf of a corporation and within the scope of his authority, or an act which an agent has assumed to do for a corporation while performing duties actually delegated to him, is deemed to be the act of the corporation." That statement correctly expresses the standard of guilt of corporations and unions under all other criminal statutes. If it is not the standard for violations of the Sherman Law it is only because the Court now reads in § 6 an exception to the whole of the criminal law. Presumably trial courts will conscientiously apply the intendment of the opinion of the Court. That means that they will have to charge juries that the rules of agency do not apply in Sherman Law cases—there must be more to hold the union for the acts of its officers. And "more" will not be found in view of

the practical workings of unions, reinforced by the safeguards they will naturally take on the basis of this decision.

Aside from the actualities of trade union practice, the terms of § 6, read in the light of its legislative history and its purpose, repel the result reached by the Court once "we free our minds from the notion that criminal statutes must be construed by some artificial . . . rule." *United States* v. *Union Supply Co.*, 215 U. S. 50, 55. To assure immunity to powerful unions collaborating with employers' associations in disregard of the Sherman Law, was not the purpose of § 6, and the provision should not be so read. This minor provision of the Norris-LaGuardia Act was directed against decisions by some of the federal courts in litigation involving industrial controversies. The abuse was misapplication of the law of agency so that labor unions were held responsible for the conduct of individuals in whom was lodged no authority to wield the power of the union. By undue extension of the doctrine of conspiracy, whereby the act of each conspirator is chargeable to all, unions were on occasion held responsible for isolated acts of individuals, believed in some instances to have been *agents provocateurs* who held a spurious membership in the union during a strike. Congress merely aimed to curb such an abusive misapplication of the principle of agency. It did not mean to change the whole legal basis of collective responsibility. By talking about "actual authorization," Congress merely meant to emphasize that persons for whose acts a corporation or a union is to be held responsible should really be wielding authority for such corporation or union.

The Congressional purpose behind § 6, then, is clear.[2] All that Congress sought to do was to eliminate an extrane-

[2] See the statement of Senator Blaine, a Committee spokesman: "I have this memorandum which I can refer to which gives the purpose of this section 6. This is merely the application of the sound

ous doctrine that had crept into some of the decisions, whereby organizations were held responsible not for acts of agents who had authority to act, but for every act committed by any member of the union merely because he was a member, or because he had some relation to the union although not authorized by virtue of his position to act for the union in what he did. And so Congress charged the federal courts with the duty to look sharply to the relation of the individual to the affairs of the organization, and not to confound individual with union unless the indi-

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principles of the law of agency to labor cases. It has become necessary because the Federal courts in many cases have held the union or members not connected with the unlawful acts responsible for those acts although proof of actual authorization or ratification is wholly lacking.

"Now, that is the law of agency, and we want to apply that. We want to apply that for this reason, that if it is unjust to hold all members of the union responsible for the acts of its officers and their members merely because of such membership, similarly it is unjust to hold the officers responsible during the strike merely because they pass on questions of this kind, that an attempt is here made to recognize the rules of law of agency in labor cases." See Hearings before Subcommittee of Senate Committee on the Judiciary, S. 1482, 70th Cong., 2d Sess., p. 763.

The Senate Committee reported this: "There has been a distinct conflict of opinion in the courts as to the degree of proof required. Mere ex parte affidavits establishing a certain amount of lawless conduct in the prosecution of a strike have been held in some instances to establish a 'presumption' that the entire union and its officers were engaged in an unlawful conspiracy; and, on the other hand, other courts have declined thus to substitute inference for proof, rejecting such a doctrine in language such as the following used in a New York case: 'Is it the law that a presumption of guilt attaches to a labor union association?' Various examples of these different rulings are quoted in The Labor Injunction, by Frankfurter and Greene, pp. 74–75.

"It is appropriate and necessary to define by legislation the proper rule of evidence to be followed in this matter in federal courts. That is the only object of section 6." S. Rep. No. 163, 72d Cong., 1st Sess. (1932) pp. 20–21.

vidual is clothed with power by the union, in the ordinary way of union operation, in doing what he does for the union. A basis for liability which has entered into the warp and woof of our law, as is true of the responsibility of collective bodies for the acts of their agents, should not be deemed to have been uprooted by an enactment which merely emphasizes that basis and rules out its distortions. 1932 was too late in the day for Congress not to have known that unions, like other organizations, act only through officers, and that unions do not, any more than do other organizations, explicitly instruct their officers to violate the Sherman Law. Neither by inadvertence nor on purpose did Congress remove the legal liability of organizations for the conduct of officials who, within the limits of their authority, wield the power of those organizations. It is not lightly to be assumed that Congress would thus turn back the clock of legal history a hundred years and disregard the practicalities of collective action by powerful organizations.

Nor are the debilitating implications for Sherman Law enforcement of the construction now placed on § 6 limited to their bearing on union activities. Congress did not lay down one rule of liability for corporations and another for unions. On the contrary, it subjected both groups of organizations to the same basis and measure of liability. Both can act only through responsible agents and both are responsible as organizations only through the acts of such agents. See § 13 (b) of the Norris-LaGuardia Act.[3] If the

[3] "SEC. 13. When used in this Act, and for the purposes of this Act— . . . (b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation." 47 Stat. 70, 73, 29 U. S. C. § 113 (b).

liability of a union does not flow from the acts of responsible officers acting in the due course of their authority in the pursuit of union purposes, then a corporation "interested in a labor dispute" cannot be held liable for the acts of its responsible officers acting within their customary authority in pursuit of corporate purposes. Violations of the Sherman Law by corporate officers acting on behalf of the corporation and pursuing its economic interest are not usually explicitly authorized by a formal vote of the Board of Directors or by the stockholders in annual meeting assembled.

The teaching of the present case can hardly fail. To come under the Court's indulgent rule of immunity from liability for the acts of its officers, unions will not rest on a lack of affirmative authorization. To make assurance doubly sure they will, doubtless in good conscience, have standing orders disavowing authority on the part of their officers to make any agreements which may be found to be in violation of the Sherman Law. So also, corporations "interested in a labor dispute," as, for instance, by combining to resist what they deem unreasonable labor demands, will, by the formality of a resolution at a directors' meeting, disavow and disapprove any arrangements made by their officers which run afoul of the Sherman Law. This may achieve immunity even though the officers are moving within the orbit of their normal authority and are acting solely in the interests of their corporation.

Words are symbols of meaning. In construing § 6, as in construing other enactments of Congress, meaning must be extracted from words as they are used in relation to their setting, with due regard to the evil which the legislation was designed to cure as well as to the mischievous and startling consequences of one construction as against another. "Doubt, if there can be any, is not likely to survive a consideration of the mischiefs certain to be engendered . . . . The mind rebels against the notion

that Congress . . . was willing to foster an opportunity for juggling so facile and so obvious." Cardozo, J., in *Woolford Realty Co.* v. *Rose,* 286 U. S. 319, 329–30.

Practically speaking, the interpretation given by the Court to § 6 serves to immunize unions, especially the more alert and powerful, as well as corporations involved in labor disputes, from Sherman Law liability. To insist that such is not the result intended by the Court is to deny the practical consequences of the Court's ruling. For those entrusted with the enforcement of the Sherman Law there may be found in the opinion words of promise to the ear, but the decision breaks the promise to the hope.

In our view the judgments below should be affirmed.

JOSEPH, COMPTROLLER, ET AL. *v.* CARTER & WEEKES STEVEDORING CO.

NO. 29. CERTIORARI TO THE SUPREME COURT OF NEW YORK.*

Argued March 1, 1946.—Reargued November 12, 1946.—Decided March 10, 1947.

1. New York City levied an excise tax on the gross receipts of a stevedoring corporation engaged wholly within the territorial limits of the City in loading and unloading vessels moving in interstate and foreign commerce. *Held:* Such a tax is invalid, since it would burden interstate and foreign commerce in violation of the Commerce Clause of the Constitution. Pp. 427, 433–434.
2. Loading and unloading are essential parts of transportation itself. Therefore, stevedoring is essentially a part of interstate and foreign commerce and cannot be separated therefrom for purposes of local taxation. Pp. 427, 433.
3. *Puget Sound Stevedoring Co.* v. *State Tax Comm'n,* 302 U. S. 90, reaffirmed. P. 433.

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*Together with No. 30, *Joseph, Comptroller, et al.* v. *John T. Clark & Son,* also on certiorari to the same Court.

4. *Western Live Stock* v. *Bureau of Revenue,* 303 U. S. 250; *Southern Pacific Co.* v. *Gallagher,* 306 U. S. 167; *McGoldrick* v. *Berwind-White Coal Mining Co.,* 309 U. S. 33; *Department of Treasury* v. *Wood Preserving Corp.,* 313 U. S. 62, distinguished. Pp. 430–433.

294 N. Y. 906, 908, 63 N. E. 2d 112, affirmed.

The Comptroller of the City of New York determined that certain stevedoring companies were liable for taxes on their gross receipts under the general business tax laws of New York City. On review, the Comptroller's determinations were annulled by the Supreme Court of New York, Appellate Division. 269 App. Div. 685, 54 N. Y. S. 2d 380, 383. The New York Court of Appeals affirmed. 294 N. Y. 906, 908, 63 N. E. 2d 112. This Court granted certiorari. 326 U. S. 713. *Affirmed,* p. 434.

Isaac C. Donner argued the cause for petitioners. With him on the brief were *John J. Bennett* and *Harry Katz.*

Samuel M. Lane argued the cause for respondents. With him on the brief was *Roger S. Baldwin.*

Smith Troy, Attorney General, filed a brief on behalf of the State of Washington, as *amicus curiae,* urging reversal.

John Ambler, Ben C. Grosscup and *Albert E. Stephan* filed a brief for the Puget Sound Stevedoring Company, acting on behalf of the Association of Washington Stevedores, as *amicus curiae.*

MR. JUSTICE REED delivered the opinion of the Court.

These two writs of certiorari bring before this Court contentions in regard to the application to the respective respondents, Carter & Weekes Stevedoring Company and John T. Clark & Son, of New York City, of the general

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business tax laws covering, when both cases are considered, the years 1937 to 1941, inclusive.[1] The character of the taxes in issue will appear from a section, set out below, of a local law imposing the tax for 1939 and 1940.[2] The respective taxpayers are liable also for the general income and *ad valorem* taxes of the State and City of New York. Both respondents are corporations engaged in the business of general stevedoring. For these cases, the business of respondents may be considered as consisting only of taking freight from a convenient place on the pier or lighter wholly within the territorial limits of New York City and

[1] The taxes in question were levied by the City of New York by a series of local laws, No. 22 of 1937, No. 20 of 1938, No. 103 of 1939, No. 78 of 1940, No. 47 of 1941. The local laws were passed pursuant to authorization by the State of New York. See Laws of New York 1940, Ch. 245. There is no dispute as to the general validity of the local laws. See *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U. S. 33, and *New York Rapid Transit Corp.* v. *City of New York*, 303 U. S. 573. These cases involved other phases of these local laws.

Certiorari granted, 326 U. S. 713; argued March 1, 1946; restored to the docket for reargument April 22, 1946.

[2] Local Laws of the City of New York (1940), No. 78:

"§ R41–2.0. Imposition of tax. a. For the privilege of carrying on or exercising for gain or profit within the city any trade, business, profession, vocation or commercial activity other than a financial business, or of making sales to persons within such city, for each of the periods of one year, or any part thereof, beginning on July first of the years nineteen hundred thirty-nine and nineteen hundred forty, every person shall pay an excise tax which shall be equal to one-tenth of one percentum upon all receipts received in and/or allocable to the city from such profession, vocation, trade, business or commercial activity exercised or carried on by him during the calendar year in which such period shall commence, ..."

No problem of allocation or apportionment is involved. See § b. No question is raised by petitioner that any part of the tax is allocable to receipts properly attributable to doing business in New York City, if all of the receipts are not subject to the local act. § R41–3.0.

storing it properly for safety and for handling in or on the outgoing vessel alongside, or of similarly unloading a vessel on its arrival. The vessels moved in interstate or foreign commerce, without a call at any other port of New York. We do not find it necessary to consider separately interstate and foreign commerce. The Commerce Clause covers both.

Through statutory proceedings unnecessary to particularize, the Comptroller of the City of New York determined that the respondents were liable for percentage taxes upon the entire gross receipts from the above activities for the years in question under the provisions of the respective local laws to which reference has been made. Review of these determinations was had by respondents in the Supreme Court of New York, Appellate Division. The determinations of the Comptroller were annulled on the authority of *Puget Sound Stevedoring Co.* v. *Tax Commission,* 302 U. S. 90. 269 App. Div. 685, 54 N. Y. S. 2d 380, 383. These orders were affirmed by the Court of Appeals, 294 N. Y. 906, 908, 63 N. E. 2d 112, and remittiturs issued stating that the Court of Appeals affirmed on the ground that the local laws as applied in these cases were in violation of Article I, § 8, Clause 3, of the Constitution of the United States.[3] Writs of certiorari to this Court were sought and granted on the issue of whether or not this tax on these respondents constituted an unconstitutional burden on commerce.

Petitioners recognize the force of the *Puget Sound* case as a precedent. Their argument is that subsequent holdings of this Court have indicated that the reasons which underlay the decision are no longer controlling in judicial examination of the constitutionality of state taxation of

[3] "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . . ."

the gross proceeds derived from commerce, subject to federal regulation. They cite, among others, these later decisions: *Western Live Stock* v. *Bureau of Revenue,* 303 U. S. 250; *Southern Pacific Co.* v. *Gallagher,* 306 U. S. 167; *McGoldrick* v. *Berwind-White Co.,* 309 U. S. 33; *Department of Treasury* v. *Wood Preserving Corp.,* 313 U. S. 62.

In the *Puget Sound* case a state tax on gross receipts, indistinguishable from that laid by New York City in this case, was held invalid as applied to stevedoring activities exactly like those with which we are here concerned. The *Puget Sound* opinion pointed out, p. 92 *et seq.,* that transportation by water is impossible without loading and unloading. Those incidents to transportation occupy the same relation to that commerce whether performed by the crew or by stevedore, contracting independently to handle the cargo. The movement of cargo off and on the ship is substantially a continuation of the transportation. Cf. *Baltimore & O. S. W. R. Co.* v. *Burtch,* 263 U. S. 540.

It is trite to repeat that the want of power in the confederation to regulate commerce was a principal reason for the adoption of the Constitution. The Commerce Clause bears no limitation of power upon its face and, when the Congress acts under it, interpretation has suggested none, except such as may be prescribed by the Constitution. *Gibbons* v. *Ogden,* 9 Wheat. 1, 196; *United States* v. *Carolene Products Co.,* 304 U. S. 144, 147; *North American Co.* v. *S. E. C.,* 327 U. S. 686, 704. On the other hand, the Constitution, by words, places no limitation upon a state's power to tax the things or activities or persons within its boundaries. What limitations there are spring from applications to state tax situations of general clauses of the Constitution. *E. g.,* Art. I, § 10, Cl. 2 and 3; *New York Indians,* 5 Wall. 761; *Board of County Commissioners* v. *United States,* 308 U. S. 343; *Bell's Gap R. Co.* v. *Pennsylvania,* 134 U. S. 232, 237; *Lawrence* v.

State Tax Commission, 286 U. S. 276, 284; *Henderson Bridge Co.* v. *Henderson City,* 173 U. S. 592, 614–15; *New York Rapid Transit Corp.* v. *City of New York,* 303 U. S. 573, 581–82. From the Commerce Clause itself, there comes, also, an abridgment of the state's power to tax within its territorial limits. This has arisen from long-continued judicial interpretation that, without congressional action, the words themselves of the Commerce Clause forbid undue interferences by the states with interstate commerce [4] and that this rule applies in full force to an unapportioned [5] tax on the gross proceeds from interstate business,[6] where the taxes were not in lieu of *ad valorem* taxes on property.[7]

We do not think that a tax on gross income from stevedoring, obviously a "continuation of the transportation," is a tax apportioned to income derived from activities within the taxing state. The transportation in commerce, at the least, begins with loading and ends with unloading. Loading and unloading has effect on trans-

[4] *Southern Pacific Co.* v. *Arizona,* 325 U. S. 761, 767–69, and cases cited; *Morgan* v. *Virginia,* 328 U. S. 373, 379, and cases cited, n. 17; *Freeman* v. *Hewit,* 329 U. S. 249; *Richfield Oil Corp.* v. *State Board of Equalization,* 329 U. S. 69, 75.

[5] Compare *Maine* v. *Grand Trunk R. Co.,* 142 U. S. 217; *Oklahoma* v. *Wells, Fargo & Co.,* 223 U. S. 298, 301; *Underwood Typewriter Co.* v. *Chamberlain,* 254 U. S. 113; *Hans Rees' Sons* v. *North Carolina,* 283 U. S. 123; *Illinois Central R. Co.* v. *Minnesota,* 309 U. S. 157.

[6] *Fargo* v. *Michigan,* 121 U. S. 230; *Ratterman* v. *Western Union Telegraph Co.,* 127 U. S. 411, 428; *Leloup* v. *Port of Mobile,* 127 U. S. 640; *Western Union Telegraph Co.* v. *Alabama,* 132 U. S. 472; *Galveston, Harrisburg & San Antonio R. Co.* v. *Texas,* 210 U. S. 217; *Oklahoma* v. *Wells, Fargo & Co.,* 223 U. S. 298, 300; *Minnesota Rate Cases,* 230 U. S. 352, 400; *Crew Levick Co.* v. *Pennsylvania,* 245 U. S. 292, 295; *Fisher's Blend Station* v. *Tax Comm'n,* 297 U. S. 650, 655; *Adams Mfg. Co.* v. *Storen,* 304 U. S. 307, 312; *Freeman* v. *Hewit, supra.*

[7] *Postal Telegraph Cable Co.* v. *Adams,* 155 U. S. 688, 698; *United States Express Co.* v. *Minnesota,* 223 U. S. 335, 346–48.

portation outside the taxing state because those activities are not only preliminary to but are an essential part of the safety and convenience of the transportation itself.

When we come to weigh the burden or interference of this tax on the gross receipts from interstate commerce, the purposes of that portion of the Commerce Clause—the freeing of business from unneighborly regulations that inhibit the intercourse which supplies reciprocal wants by commerce [8]—is a significant factor for consideration. An interpretation of the text to leave the states free to tax commerce until Congress intervened would have permitted intolerable discriminations. *Nippert* v. *City of Richmond,* 327 U. S. 416, and cases collected in notes 13, 14, 15 and 16. Nevertheless, a proper regard for the authority of the states and their right to require interstate commerce to contribute by taxes to the support of the state governments which make their interstate commerce possible, has led Congress, over a long period, to leave intact the judicial rulings, referred to above, that apportioned, non-discriminatory gross receipt taxes or those fairly levied in lieu of property taxes conformed to the requirements of the Commerce Clause. As the power lies in Congress under the Clause to make any desired adjustment in the taxation area, its acquiescence in our former rulings on state taxation indicates its agreement with the adjustments of the competing interests of commerce and necessary state revenues.[9] There is another reason that may be the basis for the acceptance, almost

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[8] Federalist 7, 22, 42; *Baldwin* v. *G. A. F. Seelig, Inc.,* 294 U. S. 511, 523.

[9] See *Clark Distilling Co.* v. *Western Maryland R. Co.,* 242 U. S. 311, 326; *United States* v. *Hill,* 248 U. S. 420; *Whitfield* v. *Ohio,* 297 U. S. 431; *Kentucky Whip & Collar Co.* v. *Illinois Central R. Co.,* 299 U. S. 334; *Prudential Ins. Co.* v. *Benjamin,* 328 U. S. 408, 430; *Southern Pacific Co.* v. *Arizona,* 325 U. S. 761, 769; *Freeman* v. *Hewit,* 329 U. S. 249, 253.

complete, by Congress of the judicial interpretations in this field. This is that a wide latitude exists for permissible state taxation. This term, in an effort to show that the reach of the Commerce Clause did not destroy the state's power to make commerce pay its way, we elaborated the fact that taxes on the commerce itself was not the sole source of state revenue from that commerce. *Freeman* v. *Hewit, supra,* p. 254; see also *Adams Mfg. Co.* v. *Storen, supra,* 310.

A power in a state to tax interstate commerce or its gross proceeds, unhampered by the Commerce Clause, would permit a multiple burden upon that commerce. This has been noted as ground for their invalidation. *Western Live Stock* v. *Bureau,* 303 U. S. 250, 255. The selection of an intrastate incident as the taxable event actually carries a similar threat to the commerce but, where the taxable event is considered sufficiently disjoined from the commerce, it is thought to be a permissible state levy.[10] This result generally is reached because the local incident selected is one that is essentially local and is not repeated in each taxing unit. In the present case, the threat of a multiple burden, except in the few instances in the record of interstate, in distinction to foreign, commerce, is absent. The multiple burden on interstate transportation from taxation of the gross receipts from stevedoring arises from the possibility of a similar tax for unloading. The actual effect on the cost of carrying on the commerce does not differ from that imposed by any other tax exaction—*ad valorem,* net income or excise. Cf. *Western Live Stock* v. *Bureau, supra,* 254. We need consider only whether or not the loading and unloading is distinct enough from the commerce to permit the tax on the gross.

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[10] *Western Live Stock* v. *Bureau, supra,* 258–260; *Southern Pacific Co.* v. *Gallagher,* 306 U. S. 167, 176; *McGoldrick* v. *Berwind-White Co.,* 309 U. S. 33, 48; *Dept. of Treasury* v. *Wood Corp.,* 313 U. S. 62.

On precedent, the *Puget Sound* case is controlling. It was promptly and recently cited with approval.[11] It appears in *Adams Mfg. Co.* v. *Storen*[12] in support of the possible double tax argument against levies on interstate commerce. In *Western Live Stock* v. *Bureau, supra,* 258, it was adverted to as a case for comparison with a ruling that "preparing, printing and publishing magazine advertising is peculiarly local and distinct from its circulation whether or not that circulation be interstate commerce." The case was not included in the Court's opinion in *Gwin, White & Prince, Inc.* v. *Henneford,*[13] where a state gross receipts tax on income from marketing fruit interstate was invalidated under the Commerce Clause, or in *McGoldrick* v. *Berwind-White Co.,*[14] though relied upon in the concurring opinion in the first at p. 442 and the dissent in the second at p. 62. Upon examination this history gives an impression that there has been a doubt as to the continued vitality of *Puget Sound.* We come now face to face with the problem of overruling or approving the case.

Since *Puget Sound* there has been full consideration of how far a state may go in taxing intrastate incidents closely related in time and movement to the interstate commerce. The cases that lend strongest support to petitioners' argument for overruling the *Puget Sound* decision have been referred to above. We comment further upon them. The 2% excise tax levied by New Mexico on the gross receipts of publishers from advertising, upheld in *Western Live Stock,* was found to be an exaction

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[11] *Coverdale* v. *Pipe Line Co.,* 303 U. S. 604, 609; *Southern Pacific Co.* v. *Gallagher,* 306 U. S. 167, 178; *Freeman* v. *Hewit, supra,* p. 257.

[12] 304 U. S. 307, 312.

[13] 305 U. S. 434.

[14] 309 U. S. 33.

for carrying on a local business.[15] The *Gallagher* case turns expressly on our conclusion that a use tax is validly levied on an intrastate event, "separate and apart from interstate commerce," p. 176, and the *Wood Preserving* case [16] reached a similar result by reason of the fact that the taxpayer sold and delivered its ties intrastate before transportation began, 313 U. S. at 67. This is likewise true of *American Mfg. Co.* v. *St. Louis,* 250 U. S. 459, as explained in the *Storen* case.[17] When we examine the

[15] 303 U. S. at 257.

"All the events upon which the tax is conditioned—the preparation, printing and publication of the advertising matter, and the receipt of the sums paid for it—occur in New Mexico and not elsewhere." P. 260. "So far as the advertising rates reflect a value attributable to the maintenance of a circulation of the magazine interstate, we think the burden on the interstate business is too remote and too attenuated to call for a rigidly logical application of the doctrine that gross receipts from interstate commerce may not be made the measure of a tax. . . . Practical rather than logical distinctions must be sought." P. 259.

The alternate ground, p. 260, that such a local tax cannot be levied elsewhere is inapposite in such a foreign commerce situation as this.

[16] See *Harvester Co.* v. *Dept. of Treasury,* 322 U. S. 340, 348.

[17] 304 U. S. at 312–13:

"The state court and the appellees rely strongly upon *American Mfg. Co.* v. *St. Louis,* 250 U. S. 459, as supporting the tax on appellant's total gross receipts derived from commerce with citizens of the State and those of other States or foreign countries. But that case dealt with a municipal license fee for pursuing the occupation of a manufacturer in St. Louis. The exaction was not an excise laid upon the taxpayer's sales or upon the income derived from sales. The tax on the privilege for the ensuing year was measured by a percentage of the past year's sales. The taxpayer had during the preceding year removed some of the goods manufactured to a warehouse in another State and, upon sale, delivered them from the warehouse. It contended that the city was without power to include these sales in the measure of the tax for the coming year. The court held, however, that the tax was upon the privilege of manufacturing within the State and it was permissible to measure the tax by the sales price

Berwind-White tax on the purchasers of tangible personal property for consumption, there is the same reliance upon the local character of the sale, pp. 43, 47, 49, 58.[18] We there said, p. 48:

> "Certain types of tax may, if permitted at all, so readily be made the instrument of impeding or destroying interstate commerce as plainly to call for their condemnation as forbidden regulations. Such are the taxes already noted which are aimed at or discriminate against the commerce or impose a levy for the privilege of doing it, or tax interstate transportation or communication or their gross earnings, or levy an exaction on merchandise in the course of its interstate journey."

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of the goods produced rather than by their value at the date of manufacture. If the tax there under consideration had been a sales tax the city could not have measured it by sales consummated in another State."

Cf. *Freeman* v. *Hewit*, 329 U. S. 249, 252.

[18] 309 U. S. at 49: "Its only relation to the commerce arises from the fact that immediately preceding transfer of possession to the purchaser within the state, which is the taxable event regardless of the time and place of passing title, the merchandise has been transported in interstate commerce and brought to its journey's end. Such a tax has no different effect upon interstate commerce than a tax on the 'use' of property which has just been moved in interstate commerce, sustained in *Monamotor Oil Co.* v. *Johnson*, 292 U. S. 86; *Henneford* v. *Silas Mason Co., supra; Felt & Tarrant Mfg. Co.* v. *Gallagher*, 306 U. S. 62; *Southern Pacific Co.* v. *Gallagher*, 306 U. S. 167, or the tax on storage or withdrawal for use by the consignee of gasoline, similarly sustained in *Gregg Dyeing Co.* v. *Query*, 286 U. S. 472; *Nashville, C. & St. L. Ry. Co.* v. *Wallace*, 288 U. S. 249; *Edelman* v. *Boeing Air Transport*, 289 U. S. 249, or the familiar property tax on goods by the state of destination at the conclusion of their interstate journey. *Brown* v. *Houston, supra; American Steel & Wire Co.* v. *Speed*, 192 U. S. 500."

Though all of these cases were closely related to transportation in commerce both in time and movement, it will be noted that in each there can be distinguished a definite separation between the taxable event and the commerce itself. We have no reason to doubt the soundness of their conclusions.

Stevedoring is more a part of the commerce than any of the instances to which reference has just been made. Although state laws do not discriminate against interstate commerce or in actuality or by possibility subject it to the cumulative burden of multiple levies, those laws may be unconstitutional because they burden or interfere with commerce. See *Southern Pacific Co.* v. *Arizona,* 325 U. S. 761, 767. Stevedoring, we conclude, is essentially a part of the commerce itself and therefore a tax upon its gross receipts or upon the privilege of conducting the business of stevedoring for interstate and foreign commerce, measured by those gross receipts, is invalid. We reaffirm the rule of *Puget Sound Stevedoring Company.* "What makes the tax invalid is the fact that there is interference by a State with the freedom of interstate commerce." *Freeman* v. *Hewit, supra,* p. 256. Such a rule may in practice prohibit a tax that adds no more to the cost of commerce than a permissible use or sales tax. What lifts the rule from formalism is that it is a recognition of the effects of state legislation and its actual or probable consequences. Not only does it follow a line of precedents outlawing taxes on the commerce itself but it has reason to support it in the likelihood that such legislation will flourish more luxuriantly where the most revenue will come from foreign or interstate commerce. Thus in port cities and transportation or handling centers, without discrimination against out-of-state as compared with local business, larger proportions of necessary revenue could be obtained from the flow of commerce. The avoidance of such a local

toll on the passage of commerce through a locality was one of the reasons for the adoption of the Commerce Clause.

Affirmed.

MR. JUSTICE BLACK dissents.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE RUTLEDGE concurs, dissenting in part.

First. I think the tax is valid insofar as it reaches the gross receipts from loading and unloading vessels engaged in interstate commerce.

Puget Sound Stevedoring Co. v. *Tax Commission,* 302 U. S. 90, makes clear that respondents' activities in loading and unloading the vessels are interstate commerce. That case followed a long line of decisions [1] when it held in 1937 that a State could not tax the privilege of engaging in interstate or foreign commerce by exacting a percentage of the gross receipts.

Those cases, like the present one, involved no exaction by the State of a license to engage in interstate commerce on the payment of a flat license tax or otherwise. Cf. *Leloup* v. *Port of Mobile,* 127 U. S. 640; *Crutcher* v. *Kentucky,* 141 U. S. 47; *Bowman* v. *Continental Oil Co.,* 256 U. S. 642; *Cooney* v. *Mountain States Tel. Co.,* 294 U. S. 384; *Murdock* v. *Pennsylvania,* 319 U. S. 105, 114. Nor did they, any more than the present case, concern legislation which expressed hostility to interstate commerce by discriminating against it. Cf. *Best & Co.* v. *Maxwell,* 311 U. S. 454; *Nippert* v. *City of Richmond,* 327 U. S. 416. Although all or like business of a local nature was subject

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[1] *Philadelphia & Southern S. S. Co.* v. *Pennsylvania,* 122 U. S. 326; *Ratterman* v. *Western Union Tel. Co.,* 127 U. S. 411; *Western Union Tel. Co.* v. *Alabama,* 132 U. S. 472; *Galveston, Harrisburg & S. A. Ry. Co.* v. *Texas,* 210 U. S. 217; *Meyer* v. *Wells, Fargo & Co.,* 223 U. S. 298.

to the same tax, the interstate business was granted immunity. The theory, as expressed in *Philadelphia & Southern S. S. Co.* v. *Pennsylvania,* 122 U. S. 326, 336, was that taxation was one form of regulation and a tax on the gross receipts from interstate transportation would be "a regulation of the commerce, a restriction upon it, a burden upon it. Clearly this could not be done by the state without interfering with the power of Congress."

The tax in that case was a tax on the gross receipts from fares and freight for the transportation of persons and goods in interstate and foreign commerce. It was unapportioned. As we shall see, the holding in the *Philadelphia & Southern S. S. Co.* case has not been impaired. But the principle it announced—that a tax on the gross receipts was forbidden because it was a regulation of interstate or foreign commerce—was not given full scope. For soon gross receipts taxes on businesses engaged in interstate commerce (including transportation or communication) were sustained where they were not discriminatory and where they were fairly apportioned to the commerce carried on in the taxing state.[2] *Maine* v. *Grand Trunk Ry. Co.,* 142 U. S. 217. Their validity was established whether they were employed as a measure of the value of a local franchise (*Maine* v. *Grand Trunk Ry. Co., supra; Wisconsin & M. Ry. Co.* v. *Powers,* 191 U. S. 379) or were used in lieu of all other property taxes to measure the value of the property in the State. *United States Express Co.* v. *Minnesota,* 223 U. S. 335; *Cudahy Packing Co.* v. *Minnesota,* 246 U. S. 450; *Illinois Central R. Co.* v. *Minnesota,* 309 U. S. 157.

The distinction between an apportioned gross receipts tax and a tax on all the gross receipts of an interstate busi-

[2] In *Railroad Co.* v. *Maryland,* 21 Wall. 456, the payment of a percentage of gross receipts was upheld as a condition of the corporate franchise.

ness, such as was involved in *Philadelphia & Southern S. S. Co.* v. *Pennsylvania, supra,* pp. 335–336, was explained in *Western Live Stock* v. *Bureau of Revenue,* 303 U. S. 250, 256, which was decided in 1938. The Court stated that the latter type of tax could be imposed or added to "with equal right by every state which the commerce touches, merely because interstate commerce is being done, so that without the protection of the commerce clause it would bear cumulative burdens not imposed on local commerce. . . . The multiplication of state taxes measured by the gross receipts from interstate transactions would spell the destruction of interstate commerce and renew the barriers to interstate trade which it was the object of the commerce clause to remove." This explanation of the vice of the unapportioned gross receipts tax had been earlier suggested in *Case of the State Freight Tax,* 15 Wall. 232, 280, and has been accepted by our decisions since the *Western Live Stock* case. *Adams Mfg. Co.* v. *Storen,* 304 U. S. 307, 311; *Gwin, White & Prince, Inc.* v. *Henneford,* 305 U. S. 434, 438–440; *McGoldrick* v. *Berwind-White Co.,* 309 U. S. 33, 45–46. In both *Adams Mfg. Co.* v. *Storen, supra,* and *Gwin, White & Prince, Inc.* v. *Henneford, supra,* unapportioned gross receipts taxes as applied to the receipts from interstate sales were held invalid. It was said that the vice of such a tax was that interstate commerce would be subjected "to the risk of a double tax burden to which intrastate commerce is not exposed . . . ." *Adams Mfg. Co.* v. *Storen, supra,* p. 311. Or as stated in *Gwin, White & Prince, Inc.* v. *Henneford, supra,* p. 439:

> "Here the tax, measured by the entire volume of the interstate commerce in which appellant participates, is not apportioned to its activities within the state. If Washington is free to exact such a tax, other states to which the commerce extends may, with equal right,

> lay a tax similarly measured for the privilege of conducting within their respective territorial limits the activities there which contribute to the service. The present tax, though nominally local, thus in its practical operation discriminates against interstate commerce, since it imposes upon it, merely because interstate commerce is being done, the risk of a multiple burden to which local commerce is not exposed."

As was later stated in *Southern Pacific Co.* v. *Gallagher*, 306 U. S. 167, 175, as respects taxes on gross receipts from interstate transactions or interstate transportation, "The measurement of a tax by gross receipts where it cannot result in a multiplication of the levies it upheld."

Under that view the *Philadelphia & Southern S. S. Co.* case would be decided one way and the *Puget Sound Stevedoring Co.* case the other. As we have noted, the tax in the *Philadelphia & Southern S. S. Co.* case was a gross receipts tax on fares and freight for the transportation of persons and goods in interstate and foreign commerce. It was unapportioned. And there was the risk of multiple taxation to which local transportation, though also taxed, was not subjected. The same was true of *Ratterman* v. *Western Union Tel. Co.*, 127 U. S. 411; *Western Union Telegraph Co.* v. *Alabama*, 132 U. S. 472; and *Meyer* v. *Wells, Fargo & Co.*, 223 U. S. 298.

But in the *Puget Sound* case any risk of multiple taxation was absent. The same is true of the present case. For in each the activity of loading and unloading was confined exclusively to the State that imposed the tax. No other State could tax the same activity.[3] The tax

[3] The Court suggests that the fact that similar stevedoring activity will be required at the destination creates a risk of multiple taxation, since the State of destination would be as free to tax the unloading as New York to tax the loading. This is only multiple in the sense that each State taxes what occurs within its borders; the two taxes would

therefore is in its application nothing more than a gross receipts tax apportioned to reach only income derived from activities within the taxing State. The gross receipts reflect values attributable to the business or property wholly within the taxing state. Under the test of our recent decisions (*Western Live Stock* v. *Bureau of Revenue, supra; Adams Mfg. Co.* v. *Storen, supra; Gwin, White & Prince, Inc.* v. *Henneford, supra*), the tax would therefore seem to be unobjectionable.

It is true, however, that taxes on gross receipts of transportation companies and other interstate enterprises were held invalid in cases prior to the *Puget Sound* case, even though all of the activities were confined to the taxing state and could not be taxed by any other state. *Galveston, Harrisburg & S. A. Ry. Co.* v. *Texas,* 210 U. S. 217; *New Jersey Bell Tel. Co.* v. *State Board,* 280 U. S. 338. Cf. *Fargo* v. *Michigan,* 121 U. S. 230. The explanation given in the *Galveston* case was that a tax on the gross receipts was a regulation of commerce, as the *Philadelphia & Southern S. S. Co.* case held. It distinguished *Maine* v. *Grand Trunk Ry. Co., supra,* and the other apportionment cases on the ground that they involved taxes on property, the gross receipts being taken as the measure of the value of the property. The Court said (210 U. S., p. 227):

> "It appears sufficiently, perhaps from what has been said, that we are to look for a practical rather than a logical or philosophical distinction. The State must be allowed to tax the property and to tax it at its actual value as a going concern. On the other hand the State cannot tax the interstate business.

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not be on the same activity. It is no more relevant that stevedoring is involved in both cases, than is the fact that two States may impose property taxes on terminals or trackage within their respective borders.

> The two necessities hardly admit of an absolute logical reconciliation. Yet the distinction is not without sense. When a legislature is trying simply to value property, it is less likely to attempt to or effect injurious regulation than when it is aiming directly at the receipts from interstate commerce. A practical line can be drawn by taking the whole scheme of taxation into account. That must be done by this court as best it can. Neither the state courts nor the legislatures, by giving the tax a particular name or by the use of some form of words, can take away our duty to consider its nature and effect. If it bears upon commerce among the States so directly as to amount to a regulation in a relatively immediate way, it will not be saved by name or form."

The *Galveston* case, like the *Philadelphia & Southern S. S. Co.* case, involved a tax applicable to transportation companies alone.[4] Whatever may be said for the propo-

[4] Moreover, the tax in the *Philadelphia & Southern S. S. Co.* case was restricted not only to transportation companies but also to receipts from transportation. Those facts were emphasized by Mr. Justice Bradley (122 U. S. pp. 344–345): "Can the tax in this case be regarded as an income tax? and, if it can, does that make any difference as to its constitutionality? We do not think that it can properly be regarded as an income tax. It is not a general tax on the incomes of all the inhabitants of the state; but a special tax on transportation companies. Conceding, however, that an income tax may be imposed on certain classes of the community, distinguished by the character of their occupations; this is not an income tax on the class to which it refers, but a tax on their receipts for transportation only. Many of the companies included in it may, and undoubtedly do, have incomes from other sources, such as rents of houses, wharves, stores, and water-power, and interest on moneyed investments. As a tax on transportation, we have already seen from the quotations from the *State Freight Tax Case* that it cannot be supported where that transportation is an ingredient of interstate or foreign commerce, even though the law imposing the tax be expressed in such general

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sition that a gross receipts tax, applicable only to transportation companies, may readily become the instrument for impeding or destroying interstate commerce, that consideration has no relevancy here. For in the present case, as in the *Puget Sound* case, all businesses are taxed alike. There is equality throughout; and interstate commerce is taxed no heavier than local business. Political restraints, perhaps lacking when a particular type of business is singled out for special taxation, would not be absent here.

Moreover, the difference between a tax on property measured by gross receipts and a tax on the gross receipts does not appear significant in constitutional terms when the issue is one of undue burden on interstate commerce. Either might be an instrument to that end. The apportioned gross receipts tax in *Maine* v. *Grand Trunk Ry. Co., supra,* was in terms "an annual excise tax for the privilege of exercising" the corporation's franchises in the State. 142 U. S. p. 219. The Court stated, p. 228, "a resort to those receipts was simply to ascertain the value of the business done by the corporation, and thus obtain a guide to a reasonable conclusion as to the amount of the excise tax which should be levied . . . ." As much can be said of the present case and of the *Puget Sound* case. While the tax is in terms one on the privilege of doing business, resort is made to the gross receipts merely to ascertain the value of the business. No vice of extraterritoriality or multiple taxation is involved. The value taxed is attributable to business within the taxing State and may not be reached by any other State. That value

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terms as to include receipts from transportation which are properly taxable. It is unnecessary, therefore, to discuss the question which would arise if the tax were properly a tax on income. It is clearly not such, but a tax on transportation only." Cf. *United States Glue Co.* v. *Oak Creek,* 247 U. S. 321, which sustained as against an interstate enterprise a net income tax of general application.

is, of course, augmented by the interstate character of the business. But the same is true in any apportionment case. *Galveston, Harrisburg & S. A. Ry. Co.* v. *Texas, supra,* p. 225; *Cudahy Packing Co.* v. *Minnesota, supra,* pp. 455–456.

Respondents pay other taxes to New York City, including the usual property taxes. But so long as a tax does not discriminate against interstate commerce and is fairly apportioned to the activities in the taxing state, taxing the business twice is for constitutional purposes no different than doubling a single tax. If the whole scheme of taxation adopted by a particular State were taken into account, it might be that a case of discrimination against interstate commerce could be made out. But there is no suggestion that this is such a case. Nor can we say that the system which has been adopted here bids fair to be more harmful to interstate commerce than a system designed to raise the same amount of revenue by the use of a gross receipts tax in lieu of property taxes.

Moreover, as noted in *Gwin, White & Prince, Inc.* v. *Henneford, supra,* p. 438, and in *Adams Mfg. Co.* v. *Storen, supra,* pp. 312–313, there have been other cases sustaining a gross receipts tax on interstate enterprises where the gross receipts tax fairly measured the value of a local privilege or franchise and all risk of multiple taxation was absent. *Ficklen* v. *Shelby County Taxing Dist.,* 145 U. S. 1, upheld a state license tax imposed upon the privilege of doing a brokerage business within the State and measured by the gross receipts from sales of merchandise shipped into the State for delivery after sales were made. *American Mfg. Co.* v. *St. Louis,* 250 U. S. 459, upheld a municipal license tax on the gross receipts of a manufacturer who was producing goods for interstate commerce. The tax was sustained as an excise upon the conduct of a manufacturing enterprise. Those taxes, like property taxes or taxes on activities confined solely to

the taxing state (*New York, Lake Erie & W. R. Co.* v. *Pennsylvania,* 158 U. S. 431; *Utah Power & Light Co.* v. *Pfost,* 286 U. S. 165; *Coverdale* v. *Arkansas-Louisiana Pipe Line Co.,* 303 U. S. 604), have no cumulative effect caused by the interstate character of the business. They are apportioned to the activities taxed, all of which are intrastate. Plainly the loading and unloading involved in the present case are activities as local in character as the brokerage activities in the *Ficklen* case or the manufacturing business in the *American Mfg. Co.* case. One has as close and as immediate a relationship to interstate commerce as the other. Cf. *United States* v. *Darby,* 312 U. S. 100. If one gives rise to a taxable event for which the State may exact a portion of the gross receipts, it is difficult to see why the other does not. The practical effect on interstate commerce is the same in each.

In *McGoldrick* v. *Berwind-White Co., supra,* p. 52, we held that a sales tax on the purchase of property at the end of its interstate journey was not to be distinguished from a tax on the property itself. For taxation of the sale was merely taxation of the exercise of one of the constituent elements of the property. Unless formal doctrine is to be restored to this field, the label which the tax bears should not be controlling; and the tax should be sustained unless it evinces hostility to interstate commerce or in practical operation obstructs or impedes it. Either result may obtain whether the tax be called a property tax or a gross receipts tax. As *McGoldrick* v. *Berwind-White Co., supra,* p. 48, states:

> "Certain types of tax may, if permitted at all, so readily be made the instrument of impeding or destroying interstate commerce as plainly to call for their condemnation as forbidden regulations. Such are the taxes already noted which are aimed at or discriminate against the commerce or impose a levy for the privilege of doing it, or tax interstate transporta-

tion or communication or their gross earnings, or levy an exaction on merchandise in the course of its interstate journey. Each imposes a burden which intrastate commerce does not bear, and merely because interstate commerce is being done places it at a disadvantage in comparison with intrastate business or property in circumstances such that if the asserted power to tax were sustained, the states would be left free to exert it to the detriment of the national commerce."

Measured by that test, the present tax is not invalid. "Even interstate business must pay its way . . . ." *Postal Telegraph-Cable Co.* v. *Richmond,* 249 U. S. 252, 259. A non-discriminatory gross receipts tax, apportioned to local activity in the taxing state, is to be judged by its practical effect. As we stated in *Wisconsin* v. *J. C. Penney Co.,* 311 U. S. 435, 444:

> "The Constitution is not a formulary. It does not demand of states strict observance of rigid categories nor precision of technical phrasing in their exercise of the most basic power of government, that of taxation. For constitutional purposes the decisive issue turns on the operating incidence of a challenged tax. A state is free to pursue its own fiscal policies, unembarrassed by the Constitution, if by the practical operation of a tax the state has exerted its power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred by the fact of being an orderly, civilized society."

All local taxes on interstate businesses affect to some degree the commerce and increase the cost of doing it. Matters of form should not be decisive if the tax threatens no harm to interstate commerce.

Prior to *McGoldrick* v. *Berwind-White Co., supra,* it had long been said that "Interstate commerce cannot be taxed

at all, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the state." *Robbins* v. *Shelby County Taxing Dist.*, 120 U. S. 489, 497. That was the philosophy of the *Philadelphia & Southern S. S. Co.* case. And see *Fargo* v. *Michigan, supra,* pp. 246–247. But *McGoldrick* v. *Berwind-White Co., supra,* did not adhere to that formal doctrine. It followed *Wiloil Corp.* v. *Pennsylvania,* 294 U. S. 169, and upheld a "non-discriminatory tax on the sale to a buyer within the taxing state of a commodity shipped interstate in performance of the sales contract, not upon the ground that the delivery was not a part of interstate commerce . . . but because the tax was not a prohibited regulation of, or burden on, that commerce." *Illinois Natural Gas Co.* v. *Central Illinois Public Service Co.*, 314 U. S. 498, 505. The test adopted was whether the tax on the local activity as a practical matter was being used to place interstate commerce at a competitive disadvantage or obstruct or impede it. That should be the approach here; "the logic of words should yield to the logic of realities." Mr. Justice Brandeis dissenting, *Di Santo* v. *Pennsylvania,* 273 U. S. 34, 43. The failure of the Court to adhere to the philosophy of our recent cases corroborates the impression which some of us had that *Freeman* v. *Hewit,* 329 U. S. 249, marked the end of one cycle under the Commerce Clause and the beginning of another.

Second. I think the tax is unconstitutional insofar as it reaches the gross receipts from loading and unloading vessels engaged in foreign commerce. Such a tax is repugnant to Article I, § 10, Clause 2 of the Constitution, which provides that "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws . . . ."

Loading and unloading are a part of "the exporting process" which the Import-Export Clause protects from state taxation. See *Thames & Mersey Ins. Co.* v. *United States,* 237 U. S. 19, 27. Activity which is a "step in exportation" has that immunity. *Spalding & Bros.* v. *Edwards,* 262 U. S. 66, 68. As the Court says, loading and unloading cargo are "a continuation of the transportation." Indeed, the commencement of exportation would occur no later. See *Richfield Oil Corp.* v. *State Board,* 329 U. S. 69. And the gross receipts tax is an impost on an export within the meaning of the Clause, since the incident "which gave rise to the accrual of the tax was a step in the export process." *Richfield Oil Corp.* v. *State Board, supra,* p. 84.

As we pointed out in that case, the Commerce Clause and the Import-Export Clause "though complementary, serve different ends." 329 U. S. p. 76. Since the Commerce Clause does not expressly forbid any tax, the Court has been free to balance local and national interests. Taxes designed to make interstate commerce bear a fair share of the cost of local government from which it receives benefits have been upheld; taxes which discriminate against interstate commerce, which impose a levy for the privilege of doing it, or which place an undue burden on it have been invalidated. But the Import-Export Clause is written in terms which admit of no exception but the single one it contains. Accordingly a state tax might survive the tests of validity under the Commerce Clause and fail to survive the Import-Export Clause. For me the present tax is a good example.

MR. JUSTICE MURPHY joins in this dissent except as to the second part, as to which he is of the opinion that the tax in relation to the gross receipts from loading and unloading vessels engaged in foreign commerce is constitutional.

AMERICAN STEVEDORES, INC. *v.* PORELLO ET AL.

NO. 69. CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.*

Argued December 11, 12, 1946.—Decided March 10, 1947.

1. The Public Vessels Act, 43 Stat. 1112, which provides that a "libel in personam in admiralty may be brought against the United States . . . for damages caused by a public vessel of the United States," authorizes a libel against the United States to recover damages for death or personal injuries caused by a public vessel of the United States. Pp. 450–454, 458–460.
2. Mere acceptance by an injured longshoreman of compensation from his employer pursuant to the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. §§ 901–950, without an award by a deputy commissioner under § 19, does not preclude the longshoreman from thereafter electing to sue a third-party tortfeasor for injuries suffered while working on a vessel. Pp. 454–456.
3. A stevedoring contract being a maritime contract, an admiralty court has jurisdiction to grant indemnity under an indemnity provision thereof. P. 456.
4. A district court awarded indemnity to the extent of half of the damages under an ambiguous indemnity provision of a stevedoring contract without admitting evidence as to the intention of the parties or making any clear finding as to the meaning of the contract. On appeal, the circuit court of appeals held that the stevedoring contractor should indemnify the owner completely. On review in this Court, the case is remanded to the district court for determination of the meaning of the contract, since the district court may have the benefit of such evidence as there is upon the intention of the parties. Pp. 457–458.

153 F. 2d 605, affirmed in part and reversed in part.

No. 69. A longshoreman injured while working on a public vessel of the United States as an employee of a corporation engaged in loading the vessel under a stevedoring contract with the United States filed a libel to recover damages from the United States under the Public

*Together with No. 514, *United States* v. *Lauro, Administratrix,* on certificate from the same Court.

Vessels Act, 46 U. S. C. § 781 *et seq.* The District Court overruled the Government's exceptions to the libel. 53 F. Supp. 569. The Government then impleaded the stevedoring contractor charging it with fault and setting forth an indemnity provision of the contract. The contractor answered the libel, denying fault and asserting as an affirmative defense that, by accepting compensation payments under the Longshoremen's and Harbor Workers' Act, 33 U. S. C. §§ 901–950, the longshoreman had lost his right to sue a third-party tortfeasor. The District Court held that the longshoreman was not barred from maintaining the action, and that both the United States and the contractor were negligent, awarded damages from the United States, and awarded the United States contribution from the contractor as a joint tortfeasor to the extent of half the damages less the compensation payments received by the longshoreman. On cross appeals by the United States and the contractor, the Circuit Court of Appeals held that the contractor was bound by the indemnity provision of the stevedoring contract to make the United States completely whole and affirmed the decree with that modification. 153 F. 2d 605. This Court granted certiorari. 328 U. S. 827. *Affirmed in part, reversed in part, and remanded,* p. 458.

No. 514. A District Court awarded damages against the United States under the Public Vessels Act, 46 U. S. C. § 781 *et seq.,* for the death of a longshoreman resulting from injuries sustained while working aboard a vessel owned by the United States. 63 F. Supp. 538. On appeal, the Circuit Court of Appeals, 157 F. 2d 416, certified to this Court a question which is answered as follows: "The word 'damages' as used in 46 U. S. C. § 781 includes damages under §§ 130–134 of the Decedent Estate Law of the State of New York recoverable by a personal representative because of the death of a human being." P. 460.

Edward Ash argued the cause and filed a brief for petitioner in No. 69.

J. Frank Staley argued the cause for the United States. With him on the brief were *Acting Solicitor General Washington, Assistant Attorney General Sonnett, Paul A. Sweeney* and *W. Leavenworth Colby.*

Jacob Rassner argued the cause and filed briefs for Porello and Lauro.

MR. JUSTICE REED delivered the opinion of the Court.

Porello, a longshoreman, was injured on Sept. 23, 1942, while working in the hold of the U. S. S. Thomas Stone, a public vessel of the United States. His employer, American Stevedores, Inc. (called American hereinafter), was engaged in loading the vessel under a stevedoring contract with the United States. Within two weeks of the accident which caused the injuries, American's insurance carrier, in compliance with § 14 of the Longshoremen's and Harbor Workers' Compensation Act,[1] 33 U. S. C. §§ 901–950, and without the compulsion of an award of compensation by a deputy commissioner under § 19, began compensation payments to Porello, who negotiated the checks he received. In March of 1943 Porello gave notice in accordance with § 33 (a) of election to sue the United States as a third-party tortfeasor rather than to receive compensation. In the same month he filed a libel, amended in November, 1943, to recover damages from the United States under the Public Vessels Act of 1925,[2] 46

[1] 44 Stat. 1424, as amended by 52 Stat. 1164.

[2] 43 Stat. 1112:

". . . a libel in personam in admiralty may be brought against the United States, or a petition impleading the United States, for damages caused by a public vessel of the United States, and for compensation for towage and salvage services, including contract salvage, rendered to a public vessel of the United States . . . ."

U. S. C. § 781 *et seq.*, for the injuries to his person sustained in the accident. Exceptions to the libel being overruled, the United States answered, denying fault on its part and claiming sovereign immunity from suit. Later, by a petition charging American with fault and setting forth an indemnity provision of the stevedoring contract, the United States impleaded American.[3] American then answered the libel, denying fault and asserting as an affirmative defense that, by accepting compensation payments, Porello had lost his right to sue a third-party tortfeasor.

The District Court held that Porello was not barred from maintaining the action. At trial it appeared that a beam lying athwart a hatch had fallen into the hold and struck Porello, causing the injuries complained of. The court held that the United States was negligent in not providing a locking device on the end of the beam, and held that American was negligent through its foreman, whose orders to the operator of a cargo boom caused the beam to be dislodged. Porello was awarded damages from the United States, the United States to receive contribution from American as a joint tortfeasor to the extent of half the damages less the compensation payments received by Porello. On cross appeals by the United States and American the Circuit Court of Appeals held that American was bound by the indemnity provision of the stevedoring contract to make the United States completely whole. With that modification it affirmed the decree below. 153 F. 2d 605. The important issue in this proceeding is whether the Public Vessels Act makes the United States liable for damages on account of personal injuries. The Circuit Court of Appeals thought that this question was decided by the *Canadian Aviator* case,[4] but since the

[3] See Rule 56, Rules of Practice for U. S. Courts in Admiralty and Maritime Jurisdiction.

[4] *Canadian Aviator, Ltd.* v. *United States*, 324 U. S. 215.

issue was not squarely posed in that case we granted certiorari in order to determine it at this time. 328 U. S. 827.

The Public Vessels Act provides that a "libel in personam in admiralty may be brought against the United States . . . for damages caused by a public vessel of the United States . . . ." [5] Petitioner argues that the Act only provides a remedy for damage to property. "Damages," however, have historically been awarded both for injury to property and injury to the person—a fact too well-known to have been overlooked by the Congress in enacting this statute.[6] Nor is it easy to conceive any reason, absent intent to the contrary, not to have inserted the word "property" in the statute, an obvious method of imposing the limitation for which the petitioner here contends. Petitioner nonetheless argues that the legislative history of the statute conclusively shows that the congressional intent was to limit redress to property damage.

The history of the Act may be briefly detailed. Starting in 1920 various bills were introduced which provided for liability of the Government to suit for damages caused by its vessels.[7] We need only consider, however, the bills that were pending in the 68th Congress by which the present Act was passed: H. R. 6989, H. R. 9075 and H. R. 9535. The first provided for suits against the United States "for damages caused by collision by a public vessel." The second, designed as an amendment to the Suits in Ad-

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[5] 43 Stat. 1112, 46 U. S. C. § 781.

[6] It might be noted here that there is a distinction between damage and damages. Black's Law Dictionary cautions that the word "damage," meaning "Loss, injury, or deterioration," is "to be distinguished from its plural,—'damages,'—which means a compensation in money for a loss or damage."

[7] H. R. 15977, 66th Cong., 3d Sess.; H. R. 6256, 67th Cong., 1st Sess.; H. R. 6989, 68th Cong., 1st Sess.; H. R. 9075, 68th Cong., 1st Sess.; H. R. 9535, 68th Cong., 1st Sess.

miralty Act, and supported by the Maritime Law Association of the United States,[8] would have amended that act so that it would not be limited to vessels operated by the Government as merchant vessels, and would thus have made the United States unquestionably liable to suit for personal injuries caused by public vessels.[9] This bill never reached the floor of Congress. The third bill, H. R. 9535, was enacted and became the present Public Vessels Act. Although designed as "a substitute for H. R. 6989," [10] it omitted the words "by collision" which would have limited the liability of the United States to damages resulting from collisions by public vessels. The only discussion of any significance to the present inquiry related to the last of these bills. It is true, as petitioner points out, that the proponent of the bill in the House, Mr. Underhill, said, when the bill was introduced: "The bill I have introduced simply allows suits in admiralty to be brought by owners of vessels whose property has been damaged by collision or other fault of Government vessels

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[8] See Hearing before the Committee on the Judiciary of the House of Representatives, on H. R. 9075, 68th Cong., 1st Sess., May 21, 1924.

[9] 46 U. S. C. §§ 741, 742:

"No vessel owned by the United States . . . shall, in view of the provision herein made for a libel in personam, be subject to arrest or seizure by judicial process in the United States or its possessions . . ."

"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 any corporation mentioned in section 741 of this title, as the case may be, provided that such vessel is employed as a merchant vessel or is a tugboat operated by such corporation. . . ."

Johnson v. *Fleet Corporation,* 280 U. S. 320; *Brady* v. *Roosevelt S. S. Co.,* 317 U. S. 575.

[10] S. Rep. No. 941, 68th Cong., 2d Sess.

and Government agents." [11] Further, on inquiry as to whether suit could be brought only where blame was charged to the Government, he answered: "Not entirely; where a man's property is damaged, he can bring a suit." [12] These statements were not, however, answers to questions whether the Act would provide a remedy for injury to the person as well as to property, nor does it appear that the speaker was at the time attentive to such possible distinctions. It is also true that the Committee report said that "the chief purpose of this bill is to grant private owners of vessels and of merchandise a right of action when their vessels or goods have been damaged as the result of a collision with any Government-owned vessel." [13] However, in the same report a letter from the Attorney General was incorporated, which, while it was addressed to the predecessor bill, H. R. 6989, serves, in the absence of contradiction by the report, as an indication of the Committee's opinion on the intended effect of the Act. That letter explicitly stated that "The proposed bill intends to give the same relief against the Government for damages caused . . . by its public vessels . . . as is now given against the United States in the operation of its merchant vessels, as provided by the suits in admiralty act of March 9, 1920." As the right to sue for personal injuries under the Suits in Admiralty Act was clear, it may be inferred, at least as strongly as the opposite is implied by Mr. Underhill's remarks, that the Committee understood

[11] 66 Cong. Rec. 2087.

[12] 66 Cong. Rec. 2088.

[13] S. Rep. No. 941, 68th Cong., 2d Sess., p. 1. Of course the chief purpose of the bill was to provide a remedy for those who chiefly urged the bill—the vessel owners. But the committee, in so stating, cannot be taken to have made that purpose the only one. By that token the purpose would be to provide a remedy only for collision damages, a limitation clearly discarded by omitting the words "by collision" from the Act. *Canadian Aviator, Ltd.* v. *United States, supra*, n. 4.

that the Act would provide a remedy to persons suffering personal injuries as well as property damage.[14] Moreover, when the bill reached the floor of the Senate there was not the least indication that the members of that body believed that the Act limited relief to owners of damaged property.[15]

The passage of the Suits in Admiralty Act, the Public Vessels Act, and the Federal Tort Claims Act[16] attests to the growing feeling of Congress that the United States should put aside its sovereign armor in cases where federal employees have tortiously caused personal injury or property damage. To hold now that the Public Ves-

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[14] See note 9, *supra.*

[15] So the only pertinent comments follow, 66 Cong. Rec. 3560:

"Mr. Robinson. I think the Senator from Delaware should state briefly to the Senate the effect of the bill. It seems to be a measure of considerable importance.

"Mr. Bayard. Mr. President, the Senator from Arkansas is quite right; it is a measure of great importance. There are continuous applications being made to the Claims Committee of both Houses for the consideration of bills to reimburse people who have suffered damage from maritime accidents in which United States vessels are concerned, to enable them to present their suits in the various district courts. In this last Congress there were nearly 200 such claim bills introduced in the two Houses.

". . . It would give a person aggrieved because of an accident by reason of the shortcomings of a United States ship the right to go into a district court and prosecute his action. It provides for the appearance of the Attorney General of the United States, and all maritime accidents of any kind resulting from collision, and so on, are taken care of. A great deal of money would be saved to the Government.

"Incidentally, the bill would accomplish something which should have been done in this country a long time ago. It would give an opportunity to do justice when Federal employees have committed an offense against an individual. . . .

"Mr. Robinson. If enacted, it would relieve Congress of the consideration of a great many measures in the nature of private claims.

"Mr. Bayard. All claims of this nature."

[16] 60 Stat. 812, §§ 401–424.

sels Act does not provide a remedy against the United States for personal injuries would in the future only throw this form of maritime action under the Federal Tort Claims Act; for that Act excepts from its coverage "Any claim for which a remedy is provided by the Act . . . of March 3, 1925 [The Public Vessels Act] (U. S. C., title 46, secs. 781–790, inclusive) . . . ." [17] We cannot believe that the Public Vessels Act, read in the light of its legislative history evinces a Congressional intent only to provide a remedy to the owners of damaged property.

This determination does not dispose of all the issues raised by the *Porello* case. When impleaded by the United States in the trial court, American, the petitioner here, pleaded as an affirmative defense that Porello, having accepted compensation payments from American, lost whatever right of action he had against the United States as a third-party tortfeasor. The petitioner admits that § 33 (b) of the Longshoremen's Act was amended in 1938 so that mere acceptance of compensation, without an award, does not operate as an assignment to the employer of the injured employee's cause of action against a third-party tortfeasor, a conclusion which courts had reached under the former wording of the Act.[18] But it contends that the amendment did no more, and that acceptance of compensation still operates as a conclusive election

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[17] *Id.*, § 421.

[18] The statute formerly provided, 44 Stat. 1440:

"Acceptance of such compensation shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person, whether or not the person entitled to compensation has notified the deputy commissioner of his election."

Under this form of the statute, courts had held that acceptance of compensation precluded the employee from suing a third-party tortfeasor. *Sciortino* v. *Dimon S. S. Corp.*, 39 F. 2d 210, aff'd 44 F. 2d 1019; *Toomey* v. *Waterman S. S. Corp.*, 123 F. 2d 718; *The*

not to sue. It is quite clear that mere acceptance of compensation is not the kind of election for which provision is made by § 33 (a) of the Act, which provides for notice of intention to the deputy commissioner,[19] so the argument is technically imperfect. But in any event, election not to sue a third party and assignment of the cause of action are two sides of the same coin. Surely the Act was never intended and has never been held to provide that after acceptance of compensation, and until an award, neither employer nor employee could sue the third-party tortfeasor. If so held, an employer who was not responsible over to the third party might lose his chance to recoup compensation payments from the third party, while the third party might escape all liability. American, in the unusual circumstances of this case, could have protected itself by controverting the employee's right to receive compensation.[20] In this way it could probably have forced an award and the consequent assignment of the right of action to itself.

Congress has provided that unless an employer controverts the right of the employee to receive compensation,

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Nako Maru, 101 F. 2d 716; *Freader* v. *Cities Service Transp. Co.,* 14 F. Supp. 456. *Contra: Johnsen* v. *American-Hawaiian S. S. Co.,* 98 F. 2d 847.

As amended the statute provides, 52 Stat. 1168:

"Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person."

[19] 33 U. S. C. § 933 (a):

"If on account of a disability or death for which compensation is payable under this chapter 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."

[20] See 33 U. S. C. § 914 (d) and (h).

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he must begin payments within two weeks of the injury.[21] The employee thus receives compensation payments quite soon after his injury by force of the Act. Yet the Act does not put a time limitation upon the period during which an employee must elect to receive compensation or to sue, save the general limitation of one year upon the time to make a claim for compensation.[22] The apparent purpose of the Act is to provide payments during the period while the employee is unable to earn, when they are sorely needed, without compelling him to give up his right to sue a third party when he is least fit to make a judgment of election. For these reasons we think that mere acceptance of compensation payments does not preclude an injured employee from thereafter electing to sue a third-party tortfeasor.

American further argues that the court below, as an admiralty court, did not have jurisdiction of the indemnity provision of the stevedoring contract, and that therefore the decree granting full indemnity to the United States from American was beyond its power. A stevedoring contract is maritime. *Atlantic Transport Co.* v. *Imbrovek,* 234 U. S. 52, 62; *The Muskegon,* 275 F. 348. And although admiralty jurisdiction over contracts partly maritime and partly non-maritime in nature is doubtful, the cases raising such doubts are concerned only with contracts for the performance of partly non-maritime activities. See *The Richard Winslow,* 71 F. 426; *Pillsbury Flour Mills Co.* v. *Interlake S. S. Co.,* 40 F. 2d 439. To sever a contract provision for indemnity for damages arising out of the performance of wholly maritime activities would only needlessly multiply litigation. Such a provision is a normal clause in contracts to act for others and no more determines the nature of a contract than do conditions on the time and place of payment.

[21] 33 U. S. C. § 914 (b), (e).

[22] 33 U. S. C. § 913 (a).

Whether the indemnity provision was rightly construed by the court below is a more difficult question. It was provided that:

> "The Stevedore performing any service under this schedule shall be responsible for any and all damage or injury to persons and cargo while loading or otherwise handling or stowing the same, to any ship including its apparel and equipment, wharves, docks, lighters, elevators, cars, and car-floats used in connection therewith, through the negligence or fault of the Stevedore, his employees and servants."

The Stevedore, American, contends that it is liable to indemnify the United States only if damages resulted from its negligence alone. Respondent, United States, argues and the court below held, that such an interpretation would render the provision meaningless since the United States would "be liable only if itself at fault" and that the clear meaning of the provision is that the Stevedore would be liable so long as the accident was caused in whole or in part through its negligence.

American, however, insists that the clause merely stated existing law. On this record we cannot answer the contention of either party. As it stands the clause is ambiguous. Evidence might well have been taken as to the intention of the parties, but was not.[23] It may be that the parties only meant American to indemnify the United States should the Government be held liable for damages solely caused by American's negligence. It may be that the intention was that American should fully reimburse the United States for all damages caused

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[23] American moved the Circuit Court of Appeals for an order allowing the parties to take proof and to submit it to the court as to the intent of the parties respecting the indemnity clause of the contract, or in the alternative for an order remanding the proceeding to the District Court for further hearing as to the intent and meaning of the clause. The Circuit Court of Appeals denied the motion.

in any part by American's negligence. Finally, the parties may have intended that American, in case of the joint negligence of the parties, should be responsible for that proportion of the damages which its fault bore to the total fault. Although the usual rule in admiralty, in the absence of contract, is for each joint tortfeasor to pay the injured party a moiety of the damages, *The Alabama,* 92 U. S. 695; *The Atlas,* 93 U. S. 302; *Barbarino* v. *Stanhope S. S. Co.,* 151 F. 2d 553, we do not believe that the last alternative, which provides for a measure of comparative negligence, is necessarily beyond the intent of the parties. Comparative negligence is not unknown to our maritime law. *The Max Morris,* 137 U. S. 1; *The Henry S. Grove,* 22 F. 2d 444; see Robinson on Admiralty, p. 91. From the record it is not clear whether the District Court made any finding as to the meaning of the contract. We believe its interpretation should be left in the first instance to that court, which shall have the benefit of such evidence as there is upon the intention of the parties. If the District Court interprets the contract not to apply to the facts of this case, the court would, of course, be free to adjudge the responsibility of the parties to the contract under applicable rules of admiralty law.

We therefore affirm the decree of the Circuit Court of Appeals as to Porello. We reverse so much of the decree as awards indemnity to the United States under the contract and remand the case to the District Court for determination of the meaning of the contract.

The case of *United States* v. *Lauro,* No. 514, is here on certificate from the Circuit Court of Appeals for the Second Circuit. The certificate is quoted in full in the note.[24] The only question posed by the case is whether a suit for

[24] "*Statement of facts*

"On May 27, 1943, Peter Lauro died as a result of injuries suffered by him on May 26, 1943, while he was employed by Marra Bros., contracting stevedores, on board respondent's vessel, designated as

damages for death by wrongful act will lie under the Public Vessels Act. It is settled that where death "results from a maritime tort committed on navigable waters

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No. 596, which vessel was docked at Pier 4, Staten Island, New York. The death was caused by personal injuries suffered by Lauro when he fell from a hatch cover on the vessel's main deck into the hold. At the time of the accident, the vessel, No. 596, was owned by the United States of America, respondent, and had been allocated by the respondent to the United States Army. It was being loaded with cargo which was owned by the United States, and which consisted of Army and Navy property and Lend-Lease material which was being shipped to North Africa. Marra Bros., the employer of the deceased, was hired by the United States Army to load the vessel.

"Thereafter, Lauro's widow filed a libel in the United States District Court for the Eastern District of New York against United States of America to recover damages under the Public Vessels Act of 1925; 46 U. S. C. Section 781, for wrongfully causing Lauro's death. In this proceeding the District Court rendered a decree awarding damages to the libelant in the sum of $25,000. From this decree an appeal was taken to this court, and the cause came on for argument on March 12, 1946. On this appeal, the respondent-appellant contended that the said Public Vessels Act of 1925 provided a remedy against the United States for damage to property only, but not for damage to a person or damage arising by reason of the death of a human being. The question thus arising is as follows:

"Question certified

"Does the word 'damages,' as it appears in the following sentence of the Public Vessels Act of 1925; 46 U. S. C. § 781:

> 'A libel in personam in admiralty may be brought against the United States, or a petition impleading the United States, for damages caused by a public vessel of the United States, and for compensation for towage and salvage services, including contract salvage, rendered to a public vessel of the United States: Provided, That the cause of action arose after the 6th day of April, 1920'

mean damages to property only, or does it mean, as well, damages under Sections 130 to 134 of the Decedent Estate Law of the State of New York recoverable by a personal representative because of the death of a human being? Which question, arising from the facts aforesaid, is hereby submitted to the Supreme Court."

within a State whose statutes give a right of action on account of death" the admiralty will entertain a libel for damages sustained by those to whom the right is given. *Western Fuel Co.* v. *Garcia,* 257 U. S. 233, 242. See discussion in *Just* v. *Chambers,* 312 U. S. 383, 388–391. Here the death occurred on navigable waters of New York, which has a statute granting a right of action for damages on account of wrongful death. Nor can damages suffered on account of death be distinguished from damages on account of personal injuries. Death is the supreme personal injury. For the reasons stated in the *Porello* case we conclude that the word "damages" in the Public Vessels Act, § 1, 46 U. S. C. § 781, means damages under §§ 130–134 of the New York Decedent Estate Law. Accordingly we answer the certificate as follows: The word "damages" as used in 46 U. S. C. § 781 includes damages under §§ 130–134 of the Decedent Estate Law of the State of New York recoverable by a personal representative because of the death of a human being.

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

Without disregarding the significance which we have heretofore attached to legislative history, I cannot give the Public Vessels Act [1] the scope given it by the Court.

It can hardly be maintained that, in the setting of legal history, the phrase "damages caused by a public vessel" must cover personal injuries due to failure to provide proper working conditions for a longshoreman. The

[1] 43 Stat. 1112, 46 U. S. C. § 781: "That a libel in personam in admiralty may be brought against the United States, or a petition impleading the United States, for damages caused by a public vessel of the United States, and for compensation for towage and salvage services, including contract salvage, rendered to a public vessel of the United States: *Provided,* That the cause of action arose after the 6th day of April, 1920."

problem for construction is not whether the term "damages" may be applied to money compensation for hurt to person or property. What is to be construed is "damages caused by a public vessel." Standing by itself, that phrase, spontaneously read, may well mean damage inflicted by a public vessel rather than "damages" incurred in connection with its operation. All we held in *Canadian Aviator, Ltd.* v. *United States,* 324 U. S. 215, was that its personnel was part of the public vessel for purposes of "causing" damage to another vessel.

The words do not stand alone. They are illumined by the legislative history of the Public Vessels Act. This history has been so accurately summarized in the Government's brief that we shall avail ourselves of it:

"On May 29, 1924, Mr. Underhill introduced H. R. 9535, 68th Cong., 1st Sess., which became the Public Vessels Act without change so far as the present provision is concerned. At that time, there were already pending two other bills, H. R. 6989 and H. R. 9075, both of which would also have authorized suit in case of damage by a public vessel. H. R. 6989, likewise introduced by Mr. Underhill, was the successor of a series of bills introduced at each session of Congress since 1920. It provided for suit 'for damages caused by collision by a public vessel,' and had the approval of all interested Government departments. H. R. 9075, a new measure, was designed to revise the Suits in Admiralty Act and, at the same time, remove its existing limitation to only such vessels as are operated by the Government as merchant vessels. It would have resulted in making the United States liable for personal injuries by all public vessels exactly as it was already for those by its merchant vessels. H. R. 9075 had the powerful support of the Maritime Law Association of the United States and of Judge Hough, then the country's outstanding admiralty judge.

It did not have the unqualified approval of the interested departments, which were insisting on important changes.

"The omission of H. R. 6989 and its predecessors to cover personal injuries had been the subject of criticisms, some of which are cited in the brief of respondent Porello. But protracted delays were apparent if an attempt were made to rewrite H. R. 9075 so as to meet the objections thereto. Instead of proceeding further with either H. R. 6989 or H. R. 9075, Mr. Underhill, for the Committee, introduced H. R. 9535, which, in place of limiting its grant of jurisdiction to suits 'for damages caused by collision by a public vessel,' covered all suits 'for damages caused by a public vessel.' The purpose of this change is nowhere discussed. Mr. Underhill, in explaining the intent of the proposed legislation, stated, however (66 Cong. Rec. 2087): 'The bill I have introduced simply allows suits in admiralty to be brought by owners of vessels whose property has been damaged by collision or other fault of Government vessels and Government agents.' Never at any time in the course of the debates in the House or Senate was it expressly stated that the bill extended to suits for personal injuries. Many statements in the course of the debates, some of which are cited in petitioner's brief, seem to indicate that only relief for property damage was intended. We accordingly submit that, if decisive weight is to be given to the legislative history, it would appear that the Public Vessels Act was not intended to cover suits for personal injury."

In scores of cases in recent years this Court has given "decisive weight" to legislative history. It has done so even when the mere words of an enactment carried a clear meaning. An impressive course of decisions enjoins upon us not to disregard the legislative history of the Public Vessels Act unless it is so completely at war with the terms of the statute itself that we must deny one

or the other. We can find such a conflict only by reading the Act itself with dogmatic inhospitality to the usual illuminations from without.

We cannot escape the conclusion that there was no jurisdiction for this libel in the District Court.[2]

[2] This conclusion is reinforced by the Report of the Senate Committee that "The chief purpose of this bill is to grant private owners of vessels and of merchandise a right of action when their vessels or goods have been damaged as the result of a collision with any Government-owned vessel." S. Rep. No. 941, 68th Cong., 2d Sess., p. 1. The Court's opinion finds overriding significance in a letter by the Attorney General commenting on the Bill, in which he stated that it "intends to give the same relief against the Government for damages caused . . . by its public vessels" as was given by the Suits in Admiralty Act. That Act did afford the right to sue for personal injuries. To prefer the Attorney General's view to that expressed by those in charge of a measure would in itself be not the normal choice. And this letter of the Attorney General antedated the Report of the Committee and the statement of Representative Underhill. Compare *United States* v. *Durkee Famous Foods*, 306 U. S. 68, 71, where the Committee Report "stated that the purpose of the bill was set out in a letter from the Attorney General which it quoted." To reject the subsequent authoritative statements of the Congressional proponents of the legislation and to accept the view of the Attorney General to which the Government now does not even refer, is to discard in favor of dim remote light what heretofore has been deemed controlling illumination.

AETNA CASUALTY & SURETY CO. ET AL. *v.* FLOWERS.

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

No. 432. Argued February 13, 1947.—Decided March 10, 1947.

1. The action of a circuit court of appeals in directing a remand to a state court is reviewable here; and the jurisdiction of this Court is not defeated by the fact that the mandate of the circuit court of appeals has issued. Pp. 466–467.
2. A suit for death benefits in the amount of $5,000 under the Workmen's Compensation Law of Tennessee, *held* to involve the sum of $3,000 requisite to the jurisdiction of a federal district court on the ground of diversity of citizenship, notwithstanding that under the state law an award would be payable in installments and, by operation of conditions subsequent, the payments might be terminated before totaling $3,000. Pp. 467–468.
3. Since the other grounds relied on by the respondent to sustain the judgment of the circuit court of appeals were not passed upon by that court nor adequately presented here, the case is remanded to the circuit court of appeals for consideration of those questions. P. 468.

154 F. 2d 881, reversed.

Respondent's suit against petitioners in a state court, to recover death benefits under the Workmen's Compensation Law of Tennessee, was removed to a federal district court on the ground of diversity of citizenship. The district court dismissed the action for want of proper venue. The Circuit Court of Appeals held that the requisite jurisdictional amount was not involved and directed remand to the state court. 154 F. 2d 881. This Court granted certiorari. 329 U. S. 699. *Reversed and remanded,* p. 468.

Clyde W. Key argued the cause and filed a brief for petitioners.

Respondent submitted on brief *pro se.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This action for death benefits under the Workmen's Compensation Law of Tennessee (Tenn. Code Ann. 1934, § 6851 *et seq.*) was commenced in 1945 by plaintiff-respondent in the Chancery Court of Hawkins County, Tennessee. The defendants-petitioners are the former employer of her deceased husband and the employer's insurance carrier. Service was had on the insurance carrier in Hawkins County, and on the employer in Knox County. Respondent is a citizen of Tennessee, the employer is a North Carolina corporation, and the insurance carrier is a Connecticut corporation. The complaint alleged that respondent's husband died as the result of an accident occurring in the course of his employment. Burial expenses plus benefits in the amount of $5,000, the maximum under the Tennessee statute,[1] were sought on behalf of respondent and her two minor children, aged twelve and fifteen.

On May 28, 1945, petitioners mailed a notice of intention to file a petition for removal to a federal District Court which was received by respondent's attorney on the morning of May 29. The petition for removal was filed in the Chancery Court the same day, and on June 5 the removal order issued. In the federal court the petitioners moved for dismissal on the ground that venue was not properly laid in the Hawkins County Court, so that

[1] Death benefits are provided in the amount of 60% of the average weekly wages of the employee (as computed in accordance with Tenn. Code § 6852 (c)), but payments may not exceed $18 per week, nor continue for more than 400 weeks. § 6880; § 6883 (17). In addition there is a ceiling of $5,000 on total benefits exclusive of burial and certain other expenses. § 6881. See *Haynes* v. *Columbia Pictures Corp.*, 178 Tenn. 648, 162 S. W. 2d 383. The complaint alleged that 60% of the average weekly wages for the statutory period would exceed $5,000.

under Tennessee law that court had lacked jurisdiction.[2] Respondent sought a remand of the case to the state court, contending that the requisites of diversity jurisdiction had not been met either as to jurisdictional amount or as to proper notice of filing of the removal petition, and that the suit was not removable because not one of a civil nature in law or equity. The District Court concluded that Hawkins County was not the proper venue. It thereupon dismissed the action without reaching the questions raised by respondent's motion for a remand.

The judgment was reversed on appeal. 154 F. 2d 881. The Circuit Court of Appeals held that the jurisdictional minimum of $3,000 in controversy (Judicial Code § 24, 28 U. S. C. § 41 (1)) was not present, and therefore ordered the case remanded to the state court. In this disposition the Circuit Court of Appeals reached neither the state venue question raised by petitioners, nor respondent's contention that the required notice of the filing of the removal petition was lacking. We granted certiorari because of an apparent conflict with *Brotherhood of Locomotive Firemen* v. *Pinkston,* 293 U. S. 96, as to the jurisdictional minimum requirement.

First. It is suggested that a decision of a Circuit Court of Appeals ordering remand of a case to a state court is not reviewable. And it is also said that we lack power to review the action of the Circuit Court of Appeals, since the mandate of that court has issued and the District Court has remanded the cause to the state court.

An order of a District Court remanding a cause to the state court from whence it came is not appealable, and hence may not be reviewed either in the Circuit Court

[2] The contention was that proper venue lay only in Roane County where, it was alleged, the accident occurred and the business of the employer is conducted. It was argued that service on the insurer in Hawkins County did not give the Hawkins County Court jurisdiction of the case.

of Appeals or here. Judicial Code § 28, 28 U. S. C. § 71; *Kloeb* v. *Armour & Co.,* 311 U. S. 199; *Metropolitan Casualty Ins. Co.* v. *Stevens,* 312 U. S. 563; *United States* v. *Rice,* 327 U. S. 742. But no such limitation affects our authority to review an action of the Circuit Court of Appeals, directing a remand to a state court. *Gay* v. *Ruff,* 292 U. S. 25. Nor does the fact that the mandate of the Circuit Court of Appeals has issued defeat this Court's jurisdiction. *Carr* v. *Zaja,* 283 U. S. 52, and cases cited.

Second. We think that the jurisdictional amount of $3,000 was involved in this suit. The contrary conclusion of the Circuit Court of Appeals was based on the nature of the award under the Tennessee statute. The award may be paid in installments at regular intervals by the employer or by a trustee with whom the amount of the award, reduced to present value, has been deposited. Tenn. Code § 6893. Moreover, the death or remarriage of respondent, plus the death or attainment of the age of eighteen by the children, would terminate all payments. Tenn. Code § 6883. Since an award to respondent would be payable in installments, and by operation of conditions subsequent the total payments might never reach $3,000, the Circuit Court of Appeals concluded that the jurisdictional amount was lacking.

If this case were one where judgment could be entered only for the installments due at the commencement of the suit (cf. *New York Life Ins. Co.* v. *Viglas,* 297 U. S. 672, 678), future installments could not be considered in determining whether the jurisdictional amount was involved, even though the judgment would be determinative of liability for future installments as they accrued. *Wright* v. *Mutual Life Ins. Co.,* 19 F. 2d 117, aff'd. 276 U. S. 602. Cf. *Button* v. *Mutual Life Ins. Co.,* 48 F. Supp. 168. But this is not that type of case. For the Tennessee statute which creates liability for the award contemplates a single action for the determination of claimant's

right to benefits and a single judgment for the award granted. See Tenn. Code §§ 6880, 6881, 6890, 6891, 6893; *Shockley* v. *Morristown Produce & Ice Co.*, 171 Tenn. 591, 106 S. W. 2d 562.

Nor does the fact that it cannot be known as a matter of absolute certainty that the amount which may ultimately be paid, if respondent prevails, will exceed $3,000, mean that the jurisdictional amount is lacking. This Court has rejected such a restrictive interpretation of the statute creating diversity jurisdiction. It has held that a possibility that payments will terminate before the total reaches the jurisdictional minimum is immaterial if the right to all the payments is in issue. *Brotherhood of Locomotive Firemen* v. *Pinkston, supra; Thompson* v. *Thompson,* 226 U. S. 551. Future payments are not in any proper sense contingent, although they may be decreased or cut off altogether by the operation of conditions subsequent. *Thompson* v. *Thompson, supra,* p. 560. And there is no suggestion that by reason of life expectancy or law of averages the maximum amount recoverable can be expected to fall below the jurisdictional minimum. Cf. *Brotherhood of Locomotive Firemen* v. *Pinkston, supra,* p. 101. Moreover, the computation of the maximum amount recoverable is not complicated by the necessity of determining the life expectancy of respondent.[3] Cf. *Thompson* v. *Thompson, supra,* p. 559; *Brotherhood of Locomotive Firemen* v. *Pinkston, supra,* p. 100.

Third. Respondent, as is her right, *United States* v. *Ballard,* 322 U. S. 78, 88, and cases cited, seeks to support the action of the Circuit Court of Appeals on other grounds. But those questions were not passed upon by that court nor adequately presented here. So we deem it more appropriate to remand the case to the Circuit Court of Appeals so it may consider those questions. *United States* v. *Ballard, supra.*

Reversed.

[3] See note 1, *supra.*

Syllabus.

CARDILLO, DEPUTY COMMISSIONER, UNITED STATES EMPLOYEES' COMPENSATION COMMISSION, *v.* LIBERTY MUTUAL INSURANCE CO. ET AL.

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

No. 265. Argued January 10, 1947.—Decided March 10, 1947.

A resident of the District of Columbia was employed by a District of Columbia employer, had previously worked in the District for six years, and was subject to assignment to work there, but had been working for over three years at Quantico, Virginia, and commuting daily between there and his home in the District, where his wife also resided. An agreement between the employer and the employee's union bound the employer to furnish "transportation . . . for all work outside the District of Columbia." A fixed sum per day was agreed upon as transportation expense to Quantico and was added to the employee's pay. Transportation actually was provided daily by cooperation of employees in a car pool, in which the employer acquiesced but over which he exercised no control. The employee was injured fatally in Virginia while driving his car home from work. *Held:*

1. A claim by the widow for compensation for the death of the employee was within the jurisdiction of the Deputy Commissioner under the District of Columbia Workmen's Compensation Act. Pp. 473–477.

2. As here applied, the District of Columbia Act satisfies any constitutional requirements of due process or full faith and credit. P. 476.

3. Upon the particular facts of this case, the Deputy Commissioner's finding that the death of the employee "arose out of and in the course of employment" was supported by evidence and not inconsistent with the law; it was therefore conclusive and the compensation award must be sustained. Pp. 477–485.

(a) The Deputy Commissioner's conclusion in this case that the employer had agreed to furnish transportation to and from work and had paid the expense of transportation in lieu of actually supplying the transportation itself, and that the case therefore was within a recognized exception to the general rule that injuries received by an employee while traveling between home and work do

not "arise out of and in the course of employment," was not erroneous as a matter of law. Pp. 478–480.

(b) In determining whether an injury suffered by an employee while traveling between home and work is one "arising out of and in the course of employment," the existence or absence of control by the employer over the acts and movements of the employee during the transportation is a factor to be considered but is not decisive. Pp. 480–481.

81 U. S. App. D. C. 72, 154 F. 2d 529, reversed.

An employer and its insurance carrier brought suit to set aside an order of the Deputy Commissioner awarding compensation to a claimant under the District of Columbia Workmen's Compensation Act. The District Court dismissed the complaint. The Court of Appeals reversed. 81 U. S. App. D. C. 72, 154 F. 2d 529. This Court granted certiorari. 329 U. S. 698. *Reversed,* p. 485.

Philip Elman argued the cause for petitioner. With him on the brief were *Acting Solicitor General Washington, Assistant Attorney General Sonnett, Paul A. Sweeney* and *Joseph B. Goldman.*

Arthur J. Phelan argued the cause for respondent. With him on the brief were *Nelson T. Hartson* and *Edward B. Williams.*

Mr. Justice Murphy delivered the opinion of the Court.

Petitioner, Deputy Commissioner of the United States Employees' Compensation Commission, issued an order under the District of Columbia Workmen's Compensation Act [1] awarding compensation to the widow of one Clarence H. Ticer. It was specifically found that the injury which led to Ticer's death "arose out of and in the course of the employment." The propriety and effect

[1] Act of May 17, 1928, 45 Stat. 600, D. C. Code, 1940, § 36–501.

of that finding are the main focal points of our inquiry in this case.

Section 1 of the District of Columbia Workmen's Compensation Act provides in part that "the provisions of the Act entitled 'Longshoremen's and Harbor Workers' Compensation Act,' . . . shall apply in respect to the injury or death of an employee of an employer carrying on any employment in the District of Columbia, irrespective of the place where the injury or death occurs." The Longshoremen's and Harbor Workers' Compensation Act,[2] § 2 (2), in turn defines the term "injury" to include "accidental injury or death arising out of and in the course of employment, . . ." A finding that the injury or death was one "arising out of and in the course of employment" is therefore essential to an award of compensation under the District of Columbia Workmen's Compensation Act.

In support of his order in this case the Deputy Commissioner made various findings of fact. These may be summarized as follows:

Ticer and his wife were residents of the District of Columbia. He had been regularly employed since about 1934[3] as an electrician by E. C. Ernst, Inc., a contractor engaged in electrical construction work in the District of Columbia and surrounding areas. In November, 1940, Ticer was transferred by his employer from a project in the District of Columbia to a project at the Quantico Marine Base at Quantico, Virginia. His work at the Marine Base continued for over three years until the time of his injury in December, 1943.

There was in effect at all times an agreement between the electrical workers' union and the employer. Section 15 (b) of this agreement provided that "Transportation

[2] Act of March 4, 1927, c. 509, 44 Stat. 1424, 33 U. S. C. § 901 *et seq.*

[3] There was one exception. For a period of about 6 months in 1938 or 1939 he worked for the United States Government.

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and any necessary expense such as board and lodging shall be furnished [by the employer] for all work outside the District of Columbia." The sum of $2 a day was fixed by the parties to this agreement as transportation expense and represented the approximate cost of travel from the District of Columbia to the Quantico Marine Base and return. This sum was paid to Ticer and others in addition to the regular hourly rate of pay. And it was paid in lieu of the employer's furnishing transportation.

Because the job site at the Marine Base was several miles away from the Quantico bus or train terminal, it was necessary for Ticer and his co-workers to drive their own automobiles to and from work. The employees formed a car pool. Each morning they started from their respective homes in their own automobiles and drove to a designated meeting place at Roaches Run, Virginia. From that point they would proceed in one car to the job site at the Marine Base. This procedure was repeated in reverse in the evening. The workers alternated in the use of the cars between Roaches Run and the job site. Non-members of the car pool each paid the car owner $1 for the round trip.

The employer was aware of the means of transportation being used and acquiesced therein. On December 13, 1943, Ticer was driving his car on a direct route from his place of employment to his home, following the close of the day's work. Four co-workers were riding with him, two of them being non-members of the car pool. As the car approached Fort Belvoir, Virginia, a large stone, which came from under the rear wheel of a passing truck, crashed through the windshield of the car. It struck Ticer's head, crushing his skull. Death resulted four days later.

Ticer's widow presented a claim for compensation. At the hearing before the Deputy Commissioner, the employer and the insurance carrier contended that the Virginia Compensation Commission had sole jurisdiction over

the claim and that Ticer's injury did not arise out of or in the course of his employment. The Deputy Commissioner ruled against these contentions. After making the foregoing findings, he entered an order awarding death benefits and funeral expenses to the claimant.

The employer and the insurance carrier then brought this action in the District Court to set aside the order of the Deputy Commissioner. They renewed their jurisdictional objection and alleged a lack of substantial evidence to support the finding that Ticer's injury arose out of and in the course of his employment. The District Court dismissed the complaint, holding that the Deputy Commissioner's findings were supported by evidence in the record and that the compensation order was in all respects in accordance with law. On appeal, the Court of Appeals for the District of Columbia reversed, one justice dissenting. 81 U. S. App. D. C. 72, 154 F. 2d 529. Without passing upon the jurisdictional issue, the court held that Ticer's injury had not arisen out of and in the course of his employment. It felt that Ticer had become entirely free of his employer's control at the close of the day's work at the Marine Base and that he had thereafter assumed his own risk in subjecting himself to the hazards of the highway. We granted certiorari on a petition alleging a conflict with the decision of this Court in *Voehl* v. *Indemnity Ins. Co.*, 288 U. S. 162.

As noted, the Court of Appeals deemed it unnecessary to dispose of the question whether the Deputy Commissioner had jurisdiction over the instant claim. But in reviewing an administrative order, it is ordinarily preferable, where the issue is raised and where the record permits an adjudication, for a federal court first to satisfy itself that the administrative agency or officer had jurisdiction over the matter in dispute. At the same time, however, it is needless to remand this case to the Court of Appeals for a determination of the jurisdictional

issue. That issue was considered and determined by the Deputy Commissioner, who was in turn sustained by the District Court. The facts pertinent to that issue are not seriously disputed and the matter has been fully briefed and argued before us. A remand under such circumstances is not warranted. We accordingly turn to a consideration of the jurisdictional issue.

We are aided here, of course, by the provision of § 20 of the Longshoremen's Act that, in proceedings under that Act, jurisdiction is to be "presumed, in the absence of substantial evidence to the contrary"—a provision which applies with equal force to proceedings under the District of Columbia Act. And the Deputy Commissioner's findings as to jurisdiction are entitled to great weight and will be rejected only where there is apparent error. *Davis* v. *Department of Labor,* 317 U. S. 249, 256–257. His conclusion that jurisdiction exists in this case is supported both by the statutory provisions and by the evidence in the record.

The jurisdiction of the Deputy Commissioner to consider the claim in this case rests upon the statement in the District of Columbia Act that it "shall apply in respect to the injury or death of an employee of an employer carrying on any employment in the District of Columbia, irrespective of the place where the injury or death occurs; except that in applying such provisions the term 'employer' shall be held to mean every person carrying on any employment in the District of Columbia, and the term 'employee' shall be held to mean every employee of any such person." There is no question here but that Ticer was employed by a District of Columbia employer; the latter had its place of business in the District and engaged in construction work in the District, as well as in surrounding areas. But the contention is made that, despite the broad sweep of the statutory language, the

Act applies only where the employee, during the whole of his employment, spent more time working within the District than he spent working outside the District. Using that criterion, it is said that the Act is inapplicable to this case since Ticer was employed on a construction job in Virginia continuously for over three years prior to the accident and did nothing within the District for his employer during that period. The implication is that only the Virginia workmen's compensation law is applicable.

But the record indicates that both Ticer and his wife were residents of the District. He had been hired in the District by his employer in 1934 and had worked on various projects in and around the District from that time until 1940, when he was assigned to the Quantico Marine Base project. While at the Marine Base, he was under orders from the District and was subject to being transferred at anytime to a project in the District. His pay was either carried to him from the District or was given to him directly in the District. And he commuted daily between his home in the District and the Marine Base project.

We hold that the jurisdictional objection is without merit in light of these facts. Nothing in the history, the purpose or the language of the Act warrants any limitation which would preclude its application to this case. The Act in so many words applies to every employee of an employer carrying on any employment in the District of Columbia, "irrespective of the place where the injury or death occurs." Those words leave no possible room for reading in an implied exception excluding those employees like Ticer who have substantial business and personal connections in the District and who are injured outside the District. Whether this language covers employees who are more remotely related to the District

is a matter which we need not now discuss and any arguments based upon such hypothetical situations are without weight in this case.

Nor does any statutory policy suggest itself to justify the proposed exception. A prime purpose of the Act is to provide residents of the District of Columbia with a practical and expeditious remedy for their industrial accidents and to place on District of Columbia employers a limited and determinate liability. See *Bradford Elec. Co.* v. *Clapper,* 286 U. S. 145, 159. The District is relatively quite small in area; many employers carrying on business in the District assign some employees to do work outside the geographical boundaries, especially in nearby Virginia and Maryland areas. When such employees reside in the District and are injured while performing those outside assignments, they come within the intent and design of the statute to the same extent as those whose work and injuries occur solely within the District. In other words, the District's legitimate interest in providing adequate workmen's compensation measures for its residents does not turn on the fortuitous circumstance of the place of their work or injury. Nor does it vary with the amount or percentage of work performed within the District. Rather it depends upon some substantial connection between the District and the particular employee-employer relationship, a connection which is present in this case. Such has been the essence of prior holdings of the Court of Appeals. *B. F. Goodrich Co.* v. *Britton,* 78 U. S. App. D. C. 221, 139 F. 2d 362; *Travelers Ins. Co.* v. *Cardillo,* 78 U. S. App. D. C. 392, 141 F. 2d 362; *Travelers Ins. Co.* v. *Cardillo,* 78 U. S. App. D. C. 394, 141 F. 2d 364. And as so applied, the statute fully satisfies any constitutional questions of due process or full faith and credit. *Alaska Packers Assn.* v. *Industrial Accident Commission,* 294 U. S. 532. Cf. *Bradford Elec. Co.* v. *Clapper, supra.*

Hence we conclude that the Deputy Commissioner had jurisdiction under the District of Columbia Act to entertain a claim by the widow of an employee who had been a resident of the District, who had been employed by a District employer and who had been subject to work assignments in the District. We accordingly turn to a consideration of the propriety and effect of the Deputy Commissioner's finding that Ticer's injury arose out of and in the course of his employment.

Our approach to that problem grows out of the provisions of the Longshoremen's Act, as made applicable by the District of Columbia Act. Section 19 (a) of the Longshoremen's Act provides for the filing of a "claim for compensation" and specifies that "the deputy commissioner shall have full power and authority to hear and determine all questions in respect of such claim." Thus questions as to whether an injury arose out of and in the course of employment necessarily fall within the scope of the Deputy Commissioner's authority. Section 21 (b) then provides that compensation orders may be suspended or set aside through injunction proceedings instituted in the federal district courts "if not in accordance with law."

In determining whether a particular injury arose out of and in the course of employment, the Deputy Commissioner must necessarily draw an inference from what he has found to be the basic facts. The propriety of that inference, of course, is vital to the validity of the order subsequently entered. But the scope of judicial review of that inference is sharply limited by the foregoing statutory provisions. If supported by evidence and not inconsistent with the law, the Deputy Commissioner's inference that an injury did or did not arise out of and in the course of employment is conclusive. No reviewing court can then set aside that inference because the opposite one is thought to be more reasonable; nor can the opposite

inference be substituted by the court because of a belief that the one chosen by the Deputy Commissioner is factually questionable. *Voehl* v. *Indemnity Ins. Co., supra,* 166; *Del Vecchio* v. *Bowers,* 296 U. S. 280, 287; *South Chicago Co.* v. *Bassett,* 309 U. S. 251, 257–258; *Parker* v. *Motor Boat Sales,* 314 U. S. 244, 246; *Davis* v. *Department of Labor, supra,* 256; *Norton* v. *Warner Co.,* 321 U. S. 565, 568–569.

It matters not that the basic facts from which the Deputy Commissioner draws this inference are undisputed rather than controverted. See *Boehm* v. *Commissioner,* 326 U. S. 287, 293. It is likewise immaterial that the facts permit the drawing of diverse inferences. The Deputy Commissioner alone is charged with the duty of initially selecting the inference which seems most reasonable and his choice, if otherwise sustainable, may not be disturbed by a reviewing court. *Del Vecchio* v. *Bowers, supra,* 287. Moreover, the fact that the inference of the type here made by the Deputy Commissioner involves an application of a broad statutory term or phrase to a specific set of facts gives rise to no greater scope of judicial review. *Labor Board* v. *Hearst Publications,* 322 U. S. 111, 131; *Commissioner* v. *Scottish American Co.,* 323 U. S. 119, 124; *Unemployment Compensation Commission* v. *Aragon,* 329 U. S. 143, 153–154. Even if such an inference be considered more legal than factual in nature, the reviewing court's function is exhausted when it becomes evident that the Deputy Commissioner's choice has substantial roots in the evidence and is not forbidden by the law. Such is the result of the statutory provision permitting the suspension or setting aside of compensation orders only "if not in accordance with law."

Our attention must therefore be cast upon the inference drawn by the Deputy Commissioner in this case that Ticer's injury and death did arise out of and in the course

of his employment. If there is factual and legal support for that conclusion, our task is at an end.

A reasonable legal basis for the Deputy Commissioner's action in this respect is clear. The statutory phrase "arising out of and in the course of employment," which appears in most workmen's compensation laws, is deceptively simple and litigiously prolific.[4] As applied to injuries received by employees while traveling between their homes and their regular places of work, however, this phrase has generally been construed to preclude compensation. *Voehl* v. *Indemnity Ins. Co., supra,* 169. Such injuries are said not to arise out of and in the course of employment; rather they arise out of the ordinary hazards of the journey, hazards which are faced by all travelers and which are unrelated to the employer's business. But certain exceptions to this general rule have come to be recognized. These exceptions relate to situations where the hazards of the journey may fairly be regarded as the hazards of the service. They are thus dependent upon the nature and circumstances of the particular employment and necessitate a careful evaluation of the employment terms.

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[4] "The few and seemingly simple words 'arising out of and in the course of the employment' have been the fruitful (or fruitless) source of a mass of decisions turning upon nice distinctions and supported by refinements so subtle as to leave the mind of the reader in a maze of confusion. From their number counsel can, in most cases, cite what seems to be an authority for resolving in his favour, on whichever side he may be, the question in dispute." Lord Wrenbury in *Herbert* v. *Fox & Co.* [1916] 1 A. C. 405, 419. See also Dodd, Administration of Workmen's Compensation (1936), pp. 680–687; Horovitz, "Modern Trends in Workmen's Compensation," 21 Ind. L. J. 473, 497–564; Horovitz, Injury and Death Under Workmen's Compensation Laws (1944), pp. 93–173; Brown, " 'Arising Out Of And In The Course Of The Employment' In Workmen's Compensation Laws," 7 Wis. L. Rev. 15, 67, 8 Wis. L. Rev. 134, 217.

Under the District of Columbia Workmen's Compensation Act, at least four exceptions have been recognized by the Court of Appeals: (1) where the employment requires the employee to travel on the highways; (2) where the employer contracts to and does furnish transportation to and from work; (3) where the employee is subject to emergency calls, as in the case of firemen; (4) where the employee uses the highway to do something incidental to his employment, with the knowledge and approval of the employer. *Ward* v. *Cardillo,* 77 U. S. App. D. C. 343, 345, 135 F. 2d 260, 262. See also *Lake* v. *Bridgeport,* 102 Conn. 337, 128 A. 782. In performing his function of deciding whether an injury, incurred while traveling, arose out of and in the course of employment, the Deputy Commissioner must determine the applicability of these exceptions to the general rule. Here he decided that the second exception was applicable, that Ticer's employer had contracted to furnish transportation to and from work and had paid the expense of transportation in lieu of actually supplying the transportation itself. We cannot say that he was wrong as a matter of law.

There are no rigid legal principles to guide the Deputy Commissioner in determining whether the employer contracted to and did furnish transportation to and from work. "No exact formula can be laid down which will automatically solve every case." *Cudahy Packing Co.* v. *Parramore,* 263 U. S. 418, 424; *Voehl* v. *Indemnity Ins. Co., supra,* 169. Each employment relationship must be perused to discover whether the employer, by express agreement or by a course of dealing, contracted to and did furnish this type of transportation. For that reason it was error for the Court of Appeals in this case to emphasize that the employer must have control over the acts and movements of the employee during the transportation before it can be said that an injury arose out of and in the course of employment. The presence or

absence of control is certainly a factor to be considered. But it is not decisive. An employer may in fact furnish transportation for his employees without actually controlling them during the course of the journey or at the time and place where the injury occurs. *Ward* v. *Cardillo, supra.* And in situations where the journey is in other respects incidental to the employment, the absence of control by the employer has not been held to preclude a finding that an injury arose out of and in the course of employment. See *Cudahy Packing Co.* v. *Parramore, supra; Voehl* v. *Indemnity Ins. Co., supra.*[5]

Indeed, to import all the common law concepts of control and to erect them as the sole or prime guide for the Deputy Commissioner in cases of this nature would be to encumber his duties with all the technicalities and unrealities which have marked the use of those concepts in other fields. See *Labor Board* v. *Hearst Publications, supra,* 120–121, 125; *Hust* v. *Moore-McCormack Lines,* 328 U. S. 707, 723–725. That we refuse to do. "The modern development and growth of industry, with the consequent changes in the relations of employer and employee, have been so profound in character and degree as to take away, in large measure, the applicability of the doctrines upon which rest the common law liability of the master for personal injuries to a servant, leaving of necessity a field of debatable ground where a good deal must be conceded in favor of forms of legislation, calculated to establish new bases of liability more in harmony with these changed conditions." *Cudahy Packing Co.* v. *Parramore, supra,* 423.

Nor is there any other formal principle of law which would invalidate the choice made by the Deputy Com-

[5] See also *Gagnebin* v. *Industrial Comm'n,* 140 Cal. App. 80, 34 P. 2d 1052; *Keely* v. *Metropolitan Edison Co.,* 157 Pa. Super. 63, 41 A. 2d 420; *McKinney* v. *Dorlac,* 48 N. M. 149, 146 P. 2d 867; *Exelbert* v. *Klein & Kavanagh,* 243 App. Div. 839, 278 N. Y. S. 377.

missioner in this instance. The fact that Ticer was not being paid wages at the time of the accident is clearly immaterial. *Cudahy Packing Co.* v. *Parramore, supra.*[6] And it is without statutory consequence that the employer here carried out his contract obligation to furnish actual transportation by paying the travel costs and allowing the employees like Ticer to make the journey by whatever means they saw fit. To be sure, there are many holdings to the effect that, where the employer merely pays the costs of transportation, an injury occurring during the journey does not arise out of and in the course of employment; there must be something more than mere payment of transportation costs.[7] But assuming those holdings to be correct and assuming the Deputy Commissioner's findings in this case to be justified, there is more here than mere payment of transportation costs. It was found that Ticer's employer paid the costs as a means of carrying out its contract obligation to furnish the transportation itself. Where there is that obligation, it becomes irrelevant in this setting whether the employer

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[6] "Nor is it ['in the course of employment'] limited to the time for which wages are paid. Indeed the fact that the workman is paid wages for the time when the accident occurs is of little, if any, importance." Bohlen, "A Problem in the Drafting of Workmen's Compensation Acts," 25 Harv. L. Rev. 328, 401, 402. *Turner Day & Woolworth Handle Co.* v. *Pennington,* 250 Ky. 433, 63 S. W. 2d 490.

[7] *Public Service Co. of Northern Illinois* v. *Industrial Commission,* 370 Ill. 334, 18 N. E. 2d 914; *Guenesa* v. *Ralph V. Rulon, Inc.,* 124 Pa. Super. 569, 189 A. 524; *Republic Underwriters* v. *Terrell,* (Tex. Civil App.) 126 S. W. 2d 752; *Orsinie* v. *Torrance,* 96 Conn. 352, 113 A. 924; *Kowalek* v. *New York Consolidated R. Co.,* 229 N. Y. 489, 128 N. E. 888; *Tallon* v. *Interborough Rapid Transit Co.,* 232 N. Y. 410, 134 N. E. 327; *Keller* v. *Reis & Donovan, Inc.,* 195 App. Div. 45, 185 N. Y. S. 741; *Levchuk* v. *Krug Cement Products Co.,* 246 Mich. 589, 225 N. W. 559. See annotations in 20 A. L. R. 319, 49 A. L. R. 454, 63 A. L. R. 469, 87 A. L. R. 250, 100 A. L. R. 1053. Cf. *Netherton* v. *Coles,* [1945] 1 All E. R. 227.

performs the obligation by supplying its own vehicle, hiring the vehicle of an independent contractor, making arrangements with a common carrier, reimbursing employees for the use of their own vehicles, or reimbursing employees for the costs of transportation by any means they desire to use. In other words, where the employer has promised to provide transportation to and from work, the compensability of the injury is in no way dependent upon the method of travel which is employed.[8] From the statutory standpoint, the employer is free to carry out its transportation obligation in any way the parties desire; and the rights of the employees to compensation are unaffected by the choice made.

Turning to the factual support for the Deputy Commissioner's inference that Ticer's injury arose out of and in the course of employment, we find ample sustaining evidence. Ticer's employment was governed by the terms of a long-standing agreement between Local Union No. 26, International Brotherhood of Electrical Workers (of which Ticer was a member) and the Institute of Electrical Contractors of the District of Columbia, Inc. (of which the employer was a member). Rule 15 (b) of the agreement provided that "Transportation and any necessary expense such as board and lodging shall be furnished for all work outside the District of Columbia."

The employer carried out in different ways this obligation to furnish transportation. On certain construction jobs in the past, it actually furnished a station wagon or a

[8] See *Donovan's Case,* 217 Mass. 76, 104 N. E. 431; *Breland* v. *Traylor Engineering & Mfg. Co.,* 52 Cal. App. 2d 415, 126 P. 2d 455; *Lehigh Nav. Coal Co.* v. *McGonnell,* 120 N. J. L. 428, 199 A. 906; *Burchfield* v. *Department of Labor and Industries,* 165 Wash. 106, 4 P. 2d 858; *Swanson* v. *Latham,* 92 Conn. 87, 101 A. 492; *Cary* v. *State Industrial Commission,* 147 Okla. 162, 296 P. 385; *Williams* v. *Travelers Ins. Co. of Hartford, Conn.,* (La. App.) 19 So. 2d 586; *Turner Day & Woolworth Handle Co.* v. *Pennington,* 250 Ky. 433, 63 S. W. 2d 490.

passenger car of its own to transport the employees. At other times, however, it paid the employees an allowance to cover the cost of transportation in lieu of furnishing an automobile. Where the latter course was followed, the written contract was not amended or changed in any way, the employer simply communicating with the union to ascertain the amount necessary to defray the cost of transportation. The amount agreed upon affected all contractors in the Institute; and the cost of transportation was determined before the contractors made their respective bids.

On the Quantico Marine Base project, the sum of $2 per day was agreed upon as the transportation allowance in lieu of furnishing an automobile. This amount was fixed after investigation into the cost of transportation by railroad and was paid to each employee, irrespective of his rate of pay, to cover the cost of transportation to and from the Marine Base. No change was made in the written contract.

There was also evidence that the distant location of the Marine Base project, the hours of work and the inadequacy of public transportation facilities all combined to make it essential, as a practical matter, that the employer furnish transportation in some manner if employees were to be obtained for the job. This was not a case of employees traveling in the same city between home and work. Extended cross-country transportation was necessary. And it was transportation of a type that an employer might fairly be expected to furnish. Such evidence illustrates the setting in which the contract was drawn.

The Court of Appeals felt, however, that the original contract to furnish transportation was not followed and that a new oral contract to pay transportation expenses was substituted in its place. We need not decide whether that view is justified by the record. It is enough that there is sufficient evidence to support the Deputy Com-

missioner's view that the payment of transportation costs was merely one way of carrying out the original contract obligation to furnish the transportation itself.

We therefore hold that, under the particular circumstances of this case, the Deputy Commissioner was justified in concluding that Ticer's injury and death arose out of and in the course of his employment. And since the Deputy Commissioner had jurisdiction over this case, the resulting award of compensation should have been sustained.

Reversed.

MR. JUSTICE FRANKFURTER concurs in the result.

MR. JUSTICE JACKSON and MR. JUSTICE BURTON dissent.

PACKARD MOTOR CAR CO. *v.* NATIONAL LABOR RELATIONS BOARD.

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

No. 658. Argued January 9, 1947.—Decided March 10, 1947.

1. Foremen and other supervisory employees are entitled as a class to the rights of self-organization, collective bargaining, and other concerted activities assured to employees generally by the National Labor Relations Act. Pp. 488–490.
   (a) They are "employees" within the meaning of § 2 (3). P. 488.
   (b) They are not excluded from the term "employees" by § 2 (2) defining the term "employer." Pp. 488–490.
2. When a union of supervisory employees has been duly certified by the National Labor Relations Board as a bargaining representative, the Act requires the employer to bargain with it. P. 490.
3. Where, as in this case, a determination of the National Labor Relations Board under § 9 (b) that a certain union is an appropriate bargaining representative does not exceed the Board's authority, is supported by substantial evidence, and is not so arbitrary or unreasonable as to be illegal, it cannot be set aside by a court in an enforcement proceeding under § 10 (e). Pp. 491–492.

4. Arguments as to the wisdom of permitting foremen to organize should be addressed to Congress, not to the courts. Pp. 490, 493. 157 F. 2d 80, affirmed.

The Circuit Court of Appeals decreed enforcement of an order of the National Labor Relations Board requiring an employer to bargain with a union of foremen. 157 F. 2d 80. This Court granted certiorari. 329 U. S. 707. *Affirmed,* p. 493.

Louis F. Dahling argued the cause and filed a brief for petitioner.

Gerhard P. Van Arkel argued the cause for respondent. With him on the brief were *Acting Solicitor General Washington, Morris P. Glushien, A. Norman Somers, Ruth Weyand* and *Mozart G. Ratner.*

Briefs were filed as *amici curiae* by *Nathan L. Miller, Roger M. Blough, Borden Burr* and *Paul R. Conaghan* for the Carnegie-Illinois Steel Corp. et al.; *Harry P. Jeffrey* for the Foremen's League for Education and Association et al.; and *Nicholas Kelley* for the Chrysler Corporation, urging reversal.

Walter M. Nelson filed a brief for the Foreman's Association of America, urging affirmance.

Mr. Justice Jackson delivered the opinion of the Court.

The question presented by this case is whether foremen are entitled as a class to the rights of self-organization, collective bargaining, and other concerted activities as assured to employees generally by the National Labor Relations Act. The case grows out of conditions in the automotive industry, and so far as they are important to the legal issues here the facts are simple.

The Packard Motor Car Company employs about 32,000 rank-and-file workmen. Since 1937 they have been represented by the United Automobile Workers of America affiliated with the Congress of Industrial Organizations. These employees are supervised by approximately 1,100 employees of foreman rank, consisting of about 125 "general foremen," 643 "foremen," 273 "assistant foremen," and 65 "special assignment men." Each general foreman is in charge of one or more departments, and under him in authority are foremen and their assistant foremen. Special assignment men are described as "troubleshooters."

The function of these foremen in general is typical of the duties of foremen in mass-production industry generally. Foremen carry the responsibility for maintaining quantity and quality of production, subject, of course, to the overall control and supervision of the management. Hiring is done by the labor relations department, as is the discharging and laying off of employees. But the foremen are provided with forms and with detailed lists of penalties to be applied in cases of violations of discipline, and initiate recommendations for promotion, demotion and discipline. All such recommendations are subject to the reviewing procedure concerning grievances provided in the collectively-bargained agreement between the Company and the rank-and-file union.

The foremen as a group are highly paid and, unlike the workmen, are paid for justifiable absence and for holidays, are not docked in pay when tardy, receive longer paid vacations, and are given severance pay upon release by the Company.

These foremen determined to organize as a unit of the Foremen's Association of America, an unaffiliated organization which represents supervisory employees exclusively. Following the usual procedure, after the Board had decided that "all general foremen, foremen, assistant fore-

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men, and special assignment men employed by the Company at its plants in Detroit, Michigan, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act," [1] the Foremen's Association was certified as the bargaining representative. The Company asserted that foremen were not "employees" entitled to the advantages of the Labor Act, and refused to bargain with the union. After hearing on charge of unfair labor practice, the Board issued the usual cease-and-desist order. The Company resisted and challenged validity of the order. The judgment of the court below decreed its enforcement, 157 F. 2d 80, and we granted certiorari. 329 U. S. 707.

The issue of law as to the power of the National Labor Relations Board under the National Labor Relations Act is simple and our only function is to determine whether the order of the Board is authorized by the statute.

The privileges and benefits of the Act are conferred upon employees, and § 2 (3) of the Act, so far as relevant, provides "The term 'employee' shall include any employee . . . ." 49 Stat. 450. The point that these foremen are employees both in the most technical sense at common law as well as in common acceptance of the term, is too obvious to be labored. The Company, however, turns to the Act's definition of employer, which it contends reads foremen out of the employee class and into the class of employers. Section 2 (2) reads: "The term 'employer' includes any person acting in the interest of an employer, directly or indirectly . . . ." 49 Stat. 450. The context of the Act, we think, leaves no room for a construction of this section to deny the organizational privilege to employees because they act in the interest of an employer. Every employee, from the very fact of employment in the master's business, is required to act in his interest. He

[1] 61 N. L. R. B. 4, 26.

owes to the employer faithful performance of service in his interest, the protection of the employer's property in his custody or control, and all employees may, as to third parties, act in the interests of the employer to such an extent that he is liable for their wrongful acts. A familiar example would be that of a truck driver for whose negligence the Company might have to answer.

The purpose of § 2 (2) seems obviously to render employers responsible in labor practices for acts of any persons performed in their interests. It is an adaptation of the ancient maxim of the common law, *respondeat superior,* by which a principal is made liable for the tortious acts of his agent and the master for the wrongful acts of his servants. Even without special statutory provision, the rule would apply to many relations. But Congress was creating a new class of wrongful acts to be known as unfair labor practices, and it could not be certain that the courts would apply the tort rule of *respondeat superior* to those derelictions. Even if it did, the problem of proof as applied to this kind of wrongs might easily be complicated by questions as to the scope of the actor's authority and of variance between his apparent and his real authority. Hence, it was provided that in administering this act the employer, for its purposes, should be not merely the individual or corporation which was the employing entity, but also others, whether employee or not, who are "acting in the interest of an employer."

Even those who act for the employer in some matters, including the service of standing between management and manual labor, still have interests of their own as employees. Though the foreman is the faithful representative of the employer in maintaining a production schedule, his interest properly may be adverse to that of the employer when it comes to fixing his own wages, hours, seniority rights or working conditions. He does not lose his right to serve himself in these respects because he

serves his master in others. And we see no basis in this Act whatever for holding that foremen are forbidden the protection of the Act when they take collective action to protect their collective interests.

The company's argument is really addressed to the undesirability of permitting foremen to organize. It wants selfless representatives of its interest. It fears that if foremen combine to bargain advantages for themselves, they will sometimes be governed by interests of their own or of their fellow foremen, rather than by the company's interest. There is nothing new in this argument. It is rooted in the misconception that because the employer has the right to wholehearted loyalty in the performance of the contract of employment, the employee does not have the right to protect his independent and adverse interest in the terms of the contract itself and the conditions of work. But the effect of the National Labor Relations Act is otherwise, and it is for Congress, not for us, to create exceptions or qualifications at odds with its plain terms.

Moreover, the company concedes that foremen have a right to organize. What it denies is that the statute compels it to recognize the union. In other words, it wants to be free to fight the foremen's union in the way that companies fought other unions before the Labor Act. But there is nothing in the Act which indicates that Congress intended to deny its benefits to foremen as employees, if they choose to believe that their interests as employees would be better served by organization than by individual competition.[2] *N. L. R. B.* v. *Skinner & Kennedy Stationery Co.*, 113 F. 2d 667; see *N. L. R. B.* v. *Armour & Co.*, 154 F. 2d 570, 574.

[2] If a union of vice presidents, presidents or others of like relationship to a corporation comes here claiming rights under this Act, it will be time enough then to point out the obvious and relevant differences between the 1,100 foremen of this company and corporate officers elected by the board of directors.

There is no more reason to conclude that the law prohibits foremen as a class from constituting an appropriate bargaining unit than there is for concluding that they are not within the Act at all. Section 9(b) of the Act confers upon the Board a broad discretion to determine appropriate units. It reads, "The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." 49 Stat. 453. Our power of review also is circumscribed by the provision that findings of the Board as to the facts, if supported by evidence, shall be conclusive. § 10 (e), 49 Stat. 454. So we have power only to determine whether there is substantial evidence to support the Board, or its order oversteps the law. *N. L. R. B.* v. *Link-Belt Co.,* 311 U. S. 584; *Pittsburgh Plate Glass Co.* v. *N. L. R. B.,* 313 U. S. 146.

There is clearly substantial evidence in support of the determination that foremen are an appropriate unit by themselves and there is equal evidence that, while the foremen included in this unit have different degrees of responsibility and work at different levels of authority, they have such a common relationship to the enterprise and to other levels of workmen that inclusion of all such grades of foremen in a single unit is appropriate. Hence the order insofar as it depends on facts is beyond our power of review. The issue as to what unit is appropriate for bargaining is one for which no absolute rule of law is laid down by statute, and none should be by decision. It involves of necessity a large measure of informed discretion, and the decision of the Board, if not final, is rarely to be disturbed. While we do not say that a determination of a unit of representation cannot be so unreasonable and arbitrary as to exceed the Board's power, we are clear that

the decision in question does not do so. That settled, our power is at an end.

We are invited to make a lengthy examination of views expressed in Congress while this and later legislation was pending to show that exclusion of foremen was intended. There is, however, no ambiguity in this Act to be clarified by resort to legislative history, either of the Act itself or of subsequent legislative proposals which failed to become law.

Counsel also would persuade us to make a contrary interpretation by citing a long record of inaction, vacillation and division of the National Labor Relations Board in applying this Act to foremen. If we were obliged to depend upon administrative interpretation for light in finding the meaning of the statute, the inconsistency of the Board's decisions would leave us in the dark.[3] But there are difficult questions of policy involved in these cases which, together with changes in Board membership, account for the contradictory views that characterize their history in the Board. Whatever special questions there are in determining the appropriate bargaining unit for

[3] The Board had held that supervisory employees may organize in an independent union, *Union Collieries Coal Co.*, 41 N. L. R. B. 961, 44 N. L. R. B. 165; and in an affiliated union, *Godchaux Sugars, Inc.*, 44 N. L. R. B. 874. Then it held that there was no unit appropriate to the organization of supervisory employees. *Maryland Drydock Co.*, 49 N. L. R. B. 733; *Boeing Aircraft Co.*, 51 N. L. R. B. 67; *Murray Corp. of America*, 51 N. L. R. B. 94; *General Motors Corp.*, 51 N. L. R. B. 457. In this case, 61 N. L. R. B. 4, 64 N. L. R. B. 1212; in *L. A. Young Spring & Wire Corp.*, 65 N. L. R. B. 298; *Jones & Laughlin Steel Corp.*, 66 N. L. R. B. 386, 71 N. L. R. B. 1261; and in *California Packing Corp.*, 66 N. L. R. B. 1461, the Board re-embraced its earlier conclusions with the same progressive boldness it had shown in the *Union Collieries* and *Godchaux Sugars* cases. In none of this series of cases did the Board hold that supervisors were not employees. See *Soss Manufacturing Co.*, 56 N. L. R. B. 348.

foremen are for the Board, and the history of the issue in the Board shows the difficulty of the problem committed to its discretion. We are not at liberty to be governed by those policy considerations in deciding the naked question of law whether the Board is now, in this case, acting within the terms of the statute.

It is also urged upon us most seriously that unionization of foremen is from many points bad industrial policy, that it puts the union foreman in the position of serving two masters, divides his loyalty and makes generally for bad relations between management and labor. However we might appraise the force of these arguments as a policy matter, we are not authorized to base decision of a question of law upon them. They concern the wisdom of the legislation; they cannot alter the meaning of otherwise plain provisions.

The judgment of enforcement is

Affirmed.

MR. JUSTICE DOUGLAS, with whom THE CHIEF JUSTICE and MR. JUSTICE BURTON concur, dissenting.

First. Over thirty years ago Mr. Justice Brandeis, while still a private citizen, saw the need for narrowing the gap between management and labor, for allowing labor greater participation in policy decisions, for developing an industrial system in which cooperation rather than coercion was the dominant characteristic.[1] In his view, these were

[1] "The greater productivity of labor must not only be attainable, but attainable under conditions consistent with the conservation of health, the enjoyment of work, and the development of the individual. The facts in this regard have not been adequately established. In the task of ascertaining whether proposed conditions of work do conform to these requirements, the laborer should take part. He is indeed a necessary witness. Likewise in the task of

measures of therapeutic value in dealing with problems of industrial unrest or inefficiency.

The present decision may be a step in that direction. It at least tends to obliterate the line between management and labor. It lends the sanctions of federal law to unionization at all levels of the industrial hierarchy. It tends to emphasize that the basic opposing forces in industry are not management and labor but the operating group on the one hand and the stockholder and bondholder group on the other. The industrial problem as so defined comes down to a contest over a fair division of the gross receipts of industry between these two groups. The struggle for control or power between management and labor becomes secondary to a growing unity in their common demands on ownership.

I do not believe this is an exaggerated statement of the basic policy questions which underlie the present decision. For if foremen are "employees" within the meaning of the National Labor Relations Act, so are vice-presidents, managers, assistant managers, superintendents, assistant superintendents—indeed, all who are on the payroll of the company, including the president; all who are commonly referred to as the management, with the exception of the directors. If a union of vice-presidents applied for recognition as a collective bargaining agency, I do not see how we could deny it and yet allow the present application. But once vice-presidents, managers, superintendents, foremen all are unionized, management and labor will become more of a solid phalanx than separate factions in warring camps. Indeed, the thought of some

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determining whether in the distribution of the gain in productivity justice is being done to the worker, the participation of representatives of labor is indispensable for the inquiry which involves essentially the exercise of judgment." Brandeis, Business—A Profession (1933) pp. 52–53.

labor leaders that if those in the hierarchy above the workers are unionized, they will be more sympathetic with the claims of those below them, is a manifestation of the same idea.[2]

I mention these matters to indicate what tremendously important policy questions are involved in the present decision. My purpose is to suggest that if Congress, when it enacted the National Labor Relations Act, had in mind such a basic change in industrial philosophy, it would have left some clear and unmistakable trace of that purpose. But I find none.

Second. "Employee" is defined to include "any" employee. § 2 (3), 49 Stat. 449, 450, 29 U. S. C. § 152. If we stop there, foremen are included as are all employees from the president on down. But we are not warranted in stopping there. The term "employee" must be considered in the context of the Act. *National Labor Relations Board* v. *Hearst Publications,* 322 U. S. 111, 124; *Phelps Dodge Corp.* v. *National Labor Relations Board,* 313 U. S. 177, 191. When it is so considered it does not appear to be used in an all-embracing sense. Rather, it is used in opposition to the term "employer." An "employer" is defined to include "any person acting in the interest of an employer." § 2 (2). The term "employer" thus includes some employees. And I find no evidence that one personnel group may be both employers and employees within the meaning of the Act. Rather, the Act on its face seems to classify the operating group of industry into two classes; what is included in one group is excluded from the other.

It is not an answer to say that the two statutory groups are not exclusive because every "employee" while on duty—whether driving a truck or stoking a furnace or

[2] The Foreman Abdicates, XXXII Fortune, No. 3, p. 150, 152; Levenstein, Labor Today and Tomorrow (1946) ch. VII.

operating a lathe—is "acting in the interest" of his employer and is then an "employer" in the statutory sense. The Act was not declaring a policy of vicarious responsibility of industry. It was dealing solely with labor relations. It put in the employer category all those who acted for management not only in formulating but also in executing its labor policies.[3]

Foremost among the latter were foremen. Trade union history shows that foremen were the arms and legs of management in executing labor policies. In industrial conflicts they were allied with management. Management indeed commonly acted through them in the unfair labor practices which the Act condemns.[4] When we upheld the imposition of the sanctions of the Act against management, we frequently relied on the acts of foremen through whom management expressed its hostility to trade unionism.[5]

Third. The evil at which the Act was aimed was the failure or refusal of industry to recognize the right of workingmen to bargain collectively. In § 1 of the Act, Congress noted that such an attitude on the part of industry led "to strikes and other forms of industrial strife or unrest" so as to burden or obstruct interstate commerce. We know from the history of that decade that the frustrated efforts of workingmen, of laborers, to organize led to strikes, strife, and unrest. But we are pointed to no instances where foremen were striking; nor

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[3] Daykin, The Status of Supervisory Employees under the National Labor Relations Act, 29 Iowa L. Rev. 297; Rosenfarb, The National Labor Policy (1940) pp. 54–56, 116–120; Twentieth Century Fund, How Collective Bargaining Works (1942) pp. 512–514, 547, 557–558, 628, 780.

[4] See cases collected in Daykin, *op. cit. supra,* note 3, pp. 298–299.

[5] *International Association of Machinists* v. *National Labor Rel. Bd.,* 311 U. S. 72, 79–80; *Heinz Co.* v. *National Labor Rel. Bd.,* 311 U. S. 514, 520–521.

are we advised that managers, superintendents, or vice-presidents were doing so.[6]

Indeed, the problems of those in the supervisory categories of management did not seem to have been in the consciousness of Congress. Section 1 of the Act refers to "wage rates," "wage earners," "workers." There is no phrase in the entire Act which is descriptive of those doing supervisory work. Section 2 (3) exempts from the term "employee" any "agricultural laborer." But if "employee" includes a foreman, it would be most strange to find Congress exempting "agricultural laborers," but not "agricultural foremen." The inference is strong that since it exempted only agricultural "laborers," it had no idea that agricultural "foremen" were under the Act.

If foremen were to be included as employees under the Act, special problems would be raised—important problems relating to the unit in which the foremen might be represented. Foremen are also under the Act as employers. That dual status creates serious problems. An act of a foreman, if attributed to the management, constitutes an unfair labor practice; the same act may be part of the foreman's activity as an employee. In that event the employer can only interfere at his peril.[7] The com-

[6] It is true that for many years some unions included supervisory employees, Beatrice and Sidney Webb, Industrial Democracy (1902) p. 546, fn. 2; Union Membership and Collective Bargaining by Foremen, U. S. Dept. of Labor, B. L. S. Bull. No. 745 (1943); Report of Panel of War Labor Board in Disputes Involving Supervisors (1945) IX; Twentieth Century Fund, *op. cit. supra,* note 3, pp. 67, 216; Northrup, Unionization of Foremen, 21 Harv. Bus. Rev. 496. But organization of foremen on a broad scale is a development of the last few years. Daykin, *op. cit. supra,* note 3, p. 314; Rosenfarb, Foremen on the March, 7 Fed. Bar. J. 168; Note, 59 Harv. L. Rev. 606, 607; Comment, 55 Yale L. J. 754, 756; Foremen's Unions, IX Advanced Management Quarterly J. 110.

[7] Cf. *Jones & Laughlin Steel Corp.* v. *National Labor Rel. Bd.,* 146 F. 2d 833; Comment, 55 Yale L. J. 754, 767–774; Rosenfarb, *op. cit. supra, note* 6.

plications of dealing with the problems of supervisory employees strongly suggest that if Congress had planned to include them in its project, it would have made some special provision for them. But we find no trace of a suggestion that when Congress came to consider the units appropriate for collective bargaining,[8] it was aware that groups of employees might have conflicting loyalties. Yet that would have been one of the most important and conspicuous problems if foremen were to be included. The failure of Congress to formulate a policy respecting the peculiar and special problems of foremen suggests an absence of purpose to bring them under the Act. And the notion is hard to resist that the very absence of a declaration by Congress of its policy respecting foremen is the reason the Board has been so much at large in the treatment of the problem under the Act. See the cases collected in note 3 of the opinion of the Court.

Fourth. When we turn from the Act to the legislative history, we find no trace of Congressional concern with the problems of supervisory personnel. The reports and debates are barren of any reference to them, though they are replete with references to the function of the legislation in protecting the interests of "laborers" and "workers." [9]

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[8] Section 9 (b) of the Act provides: "The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof."

[9] See H. Rep. No. 969, 74th Cong., 1st Sess.; H. Rep. No. 972, 74th Cong., 1st Sess.; H. Rep. No. 1147, 74th Cong., 1st Sess.; S. Rep. No. 573, 74th Cong., 1st Sess., pp. 6–7; Hearings, Senate Comm. on Educ. and Labor on S. 2926, 73d Cong., 2d Sess.; Hearings, House Comm. on Labor on H. R. 6288, 74th Cong., 1st Sess.; Hearings, Senate Comm. on Educ. and Labor on S. 1958, 74th Cong., 1st Sess.; 79 Cong. Rec. 2371, 7565, 7648, 7668, 8537, 9676, 9713, 9736, 10720.

Fifth. When we turn to other related legislation, we find that when Congress desired to include managerial officials or supervisory personnel in the category of employees, it did so expressly. The Railway Labor Act of 1926, 44 Stat. 577, 45 U. S. C. § 151, defines "employee" to include "subordinate official." The Merchant Marine Act of 1936, 52 Stat. 953, 46 U. S. C. § 1101 *et seq.*, which deals with maritime labor relations as a supplement to the National Labor Relations Act (see 46 U. S. C. § 1252), defines "employee" to include "subordinate official." 46 U. S. C. § 1253 (c). And the Social Security Act, 49 Stat. 620, 647, 42 U. S. C. § 1301, includes an officer of a corporation in the term employee.[10] The failure of Congress to do the same when it wrote the National Labor Relations Act has some significance, especially where the legislative history is utterly devoid of any indication that Congress was concerned with the collective bargaining problems of supervisory employees.

Sixth. The truth of the matter is, I think, that when Congress passed the National Labor Relations Act in 1935, it was legislating *against* the activities of foremen, not on their behalf. Congress was intent on protecting the right of free association—the right to bargain collectively—by the great mass of workers, not by those who were in authority over them and enforcing oppressive industrial policies. Foremen were instrumentalities of those industrial policies. They blocked the wage earners' path to fair collective bargaining. To say twelve years later that foremen were treated as the victims of that anti-labor policy seems to me a distortion of history.

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[10] Cf. Federal Employers' Liability Act, 35 Stat. 65, as amended, 45 U. S. C. § 51, under which the term "any employee of a carrier" has been applied to foremen. *Owens* v. *Union Pac. R. Co.*, 319 U. S. 715; *Ellis* v. *Union Pac. R. Co.*, 329 U. S. 649.

If we were to decide this case on the basis of policy, much could be said to support the majority view.[11] But I am convinced that Congress never faced those policy issues when it enacted this legislation. I am sure that those problems were not in the consciousness of Congress. A decision on these policy matters cuts deep into our industrial life. It has profound implications throughout our economy. It involves a fundamental change in much of the thinking of the nation on our industrial problems. The question is so important that I cannot believe Congress legislated unwittingly on it. Since what Congress wrote is consistent with a restriction of the Act to workingmen and laborers, I would leave its extension over supervisory employees to Congress.

I have used the terms foremen and supervisory employees synonymously. But it is not the label which is important; it is whether the employees in question represent or act for management on labor policy matters. Thus one might be a supervisory employee without representing management in those respects. And those who are called foremen may perform duties not substantially different from those of skilled laborers.

What I have said does not mean that foremen have no right to organize for collective bargaining. The general law recognizes their right to do so. See *American Steel Foundries* v. *Tri-City Council,* 257 U. S. 184, 209; *Texas & N. O. R. Co.* v. *Railway Clerks,* 281 U. S. 548, 570. And

[11] Daykin, *op. cit. supra,* note 3, p. 313; Rosenfarb, *op. cit. supra,* note 6; Gartenhaus, The Foreman Goes Union, 113 New Republic 563; Comment, 55 Yale L. J. 754; Hearings, House Comm. on Military Affairs on Bills relating to the Full Utilization of Manpower, 78th Cong., 1st Sess., p. 299; Northrup, The Foreman's Association of America, 23 Harv. Bus. Rev. 187; cf. American Management Association, Relations Between Management and Foremen in American Industry (1944); *Id.* The Foreman in Labor Relations (1944); *Id.* Should Management be Unionized? (1945).

some States have placed administrative machinery and sanctions behind that right.[12] But as I read the Federal Act, Congress has not yet done so.

MR. JUSTICE FRANKFURTER agrees with this opinion except the part marked *"First"* as to which he expresses no view.

GULF OIL CORP. *v.* GILBERT, DOING BUSINESS AS GILBERT STORAGE & TRANSFER CO.

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

No. 93. Argued December 18, 19, 1946.—Decided March 10, 1947.

1. A federal district court has power to dismiss an action at law pursuant to the doctrine of *forum non conveniens*—at least where its jurisdiction is based on diversity of citizenship and the state courts have such power. Pp. 502–509, 512.
2. A resident of Virginia brought an action in a federal district court in New York City against a Pennsylvania corporation qualified to do business in both Virginia and New York (where it had designated agents to receive service of process), to recover damages for destruction of plaintiff's public warehouse and its contents in Virginia by fire resulting from defendant's negligence. The court had jurisdiction (based solely on diversity of citizenship) and the venue was correct; but all events in litigation had taken place in Virginia, most of the witnesses resided there, and both state and federal courts in Virginia were available to plaintiff and were able to obtain jurisdiction of defendant. Applying the doctrine of *forum non conveniens,* the court dismissed the suit. *Held:* It did not abuse its discretion in doing so. Pp. 509–512.
3. Important considerations in the application of the doctrine of *forum non conveniens,* from the standpoint of litigants, are relative ease of access to sources of proof, availability of compulsory process for attendance of unwilling witnesses, cost of obtaining attendance

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[12] The state laws are discussed in Northrup, The Foreman's Association of America, 23 Harv. Bus. Rev. 187, 199–200.

of willing witnesses, possibility of view of the premises if that be appropriate, and all other practical problems that make trial of a case easy, expeditious and inexpensive. P. 508.

4. Considerations of public interest in applying the doctrine include the undesirability of piling up litigation in congested centers, the burden of jury duty on people of a community having no relation to the litigation, the local interest in having localized controversies decided at home and the unnecessary injection of problems in conflict of laws. Pp. 508–509.

153 F. 2d 883, reversed.

Applying the doctrine of *forum non conveniens,* a district court dismissed a tort action in New York arising out of events occurring in Virginia. 62 F. Supp. 291. The Circuit Court of Appeals reversed. 153 F. 2d 883. This Court granted certiorari. 328 U. S. 830. *Reversed,* p. 512.

Archie D. Gray and *Bernard A. Golding* argued the cause for petitioner. With them on the brief were *John E. Green, Jr.* and *Matthew S. Gibson.*

Max J. Gwertzman argued the cause and filed a brief for respondent.

Mr. Justice Jackson delivered the opinion of the Court.

The questions are whether the United States District Court has inherent power to dismiss a suit pursuant to the doctrine of *forum non conveniens* and, if so, whether that power was abused in this case.

The respondent-plaintiff brought this action in the Southern District of New York, but resides at Lynchburg, Virginia, where he operated a public warehouse. He alleges that the petitioner-defendant, in violation of the ordinances of Lynchburg, so carelessly handled a delivery of gasoline to his warehouse tanks and pumps as to cause

an explosion and fire which consumed the warehouse building to his damage of $41,889.10, destroyed merchandise and fixtures to his damage of $3,602.40, caused injury to his business and profits of $20,038.27, and burned the property of customers in his custody under warehousing agreements to the extent of $300,000. He asks judgment of $365,529.77 with costs and disbursements, and interest from the date of the fire. The action clearly is one in tort.

The petitioner-defendant is a corporation organized under the laws of Pennsylvania, qualified to do business in both Virginia and New York, and it has designated officials of each state as agents to receive service of process. When sued in New York, the defendant, invoking the doctrine of *forum non conveniens,* claimed that the appropriate place for trial is Virginia, where the plaintiff lives and defendant does business, where all events in litigation took place, where most of the witnesses reside, and where both state and federal courts are available to plaintiff and are able to obtain jurisdiction of the defendant.

The case, on its merits, involves no federal question and was brought in the United States District Court solely because of diversity in citizenship of the parties. Because of the character of its jurisdiction and the holdings of and under *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64, the District Court considered that the law of New York as to *forum non conveniens* applied and that it required the case to be left to Virginia courts.[1] It therefore dismissed.

The Circuit Court of Appeals disagreed as to the applicability of New York law, took a restrictive view of the application of the entire doctrine in federal courts and, one judge dissenting, reversed.[2] The case is here on certiorari. 328 U. S. 830.

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[1] *Gilbert* v. *Gulf Oil Corp.,* 62 F. Supp. 291.

[2] *Gilbert* v. *Gulf Oil Corp.,* 153 F. 2d 883.

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I.

It is conceded that the venue statutes of the United States permitted the plaintiff to commence his action in the Southern District of New York and empower that court to entertain it.[3] But that does not settle the question whether it must do so. Indeed, the doctrine of *forum non conveniens* can never apply if there is absence of jurisdiction or mistake of venue.

This Court, in one form of words or another, has repeatedly recognized the existence of the power to decline jurisdiction in exceptional circumstances. As formulated by Mr. Justice Brandeis, the rule is:

"Obviously, the proposition that a court having jurisdiction must exercise it, is not universally true; else the admiralty court could never decline jurisdiction on the ground that the litigation is between foreigners. Nor is it true of courts administering other systems of our law. Courts of equity and of law also occasionally decline, in the interest of justice, to exercise jurisdiction, where the suit is between aliens or non-residents or where for kindred reasons the litigation can more appropriately be conducted in a foreign tribunal." *Canada Malting Co., Ltd.,* v. *Paterson Steamships, Ltd.,* 285 U. S. 413, 422–23.

We later expressly said that a state court "may in appropriate cases apply the doctrine of *forum non conveniens.*" *Broderick* v. *Rosner,* 294 U. S. 629, 643; *Williams* v. *North Carolina,* 317 U. S. 287, 294, n. 5. Even where federal rights binding on state courts under the Constitution are sought to be adjudged, this Court has sustained state courts in a refusal to entertain a litigation between a nonresident and a foreign corporation or between two foreign corporations. *Douglas* v. *New York, N. H. & H. R. R.,* 279 U. S. 377; *Anglo-American Provision Co.* v.

[3] See 28 U. S. C. § 112; *Neirbo Co.* v. *Bethlehem Shipbuilding Corp., Ltd.,* 308 U. S. 165.

Davis Provision Co. No. 1, 191 U. S. 373. It has held the use of an inappropriate forum in one case an unconstitutional burden on interstate commerce. *Davis* v. *Farmers Co-operative Equity Co.,* 262 U. S. 312. On substantially *forum non conveniens* grounds we have required federal courts to relinquish decision of cases within their jurisdiction where the court would have to participate in the administrative policy of a state. *Railroad Commission* v. *Rowan & Nichols Oil Co.,* 311 U. S. 570; *Burford* v. *Sun Oil Co.,* 319 U. S. 315; but *cf. Meredith* v. *Winter Haven,* 320 U. S. 228. And most recently we decided *Williams* v. *Green Bay & Western R. R. Co.,* 326 U. S. 549, in which the Court, without questioning the validity of the doctrine, held it had been applied in that case without justification.[4]

It is true that in cases under the Federal Employers' Liability Act we have held that plaintiff's choice of a forum cannot be defeated on the basis of *forum non conveniens.* But this was because the special venue act under which those cases are brought was believed to require it. *Baltimore & Ohio R. R.* v. *Kepner,* 314 U. S. 44; *Miles* v. *Illinois Central R. R.,* 315 U. S. 698. Those decisions do not purport to modify the doctrine as to other cases governed by the general venue statutes.

[4] The doctrine did not originate in federal but in state courts. This Court in recognizing and approving it by name has never indicated that it was rejecting application of the doctrine to law actions which had been an integral and necessary part of evolution of the doctrine. And *cf. Slater* v. *Mexican National R. R.,* 194 U. S. 120. Wherever it is applied in courts of other jurisdictions, its application does not depend on whether the action is at law, *Collard* v. *Beach,* 93 App. Div. 339, 87 N. Y. S. 884; *Murnan* v. *Wabash R. Co.,* 246 N. Y. 244, 158 N. E. 508; *Jackson & Sons* v. *Lumbermen's Mutual Casualty Co.,* 86 N. H. 341, 168 A. 895; or in equity, *Langfelder* v. *Universal Laboratories,* 293 N. Y. 200, 56 N. E. 2d 550; *Egbert* v. *Short,* [1907] 2 Ch. 205. See footnote 1, *Koster* v. (*American*) *Lumbermens Mutual Casualty Co.,* decided this day, *post,* p. 518.

But the court below says that "The Kepner case . . . warned against refusal of jurisdiction in a particular case controlled by congressional act; here the only difference is that congressional act, plus judicial interpretation (under the Neirbo case), spells out the result." 153 F. 2d at 885. The Federal Employers' Liability Act, however, which controlled decision in the *Kepner* case, specifically provides where venue may be had in any suit on a cause of action arising under that statute. What the court below refers to as "congressional act, plus judicial interpretation," is the general statute of venue in diversity suits, plus our decision that it gives the defendant "a personal privilege respecting the venue, or place of suit, which he may assert, or may waive, at his election," *Neirbo Co.* v. *Bethlehem Shipbuilding Corp.*, 308 U. S. 165, 168. The Federal Employers' Liability Act, as interpreted by *Kepner,* increases the number of places where the defendant may be sued and makes him accept the plaintiff's choice. The *Neirbo* case is only a declaration that if the defendant, by filing consent to be sued, waives its privilege to be sued at its place of residence, it may be sued in the federal courts at the place where it has consented to be sued. But the general venue statute plus the *Neirbo* interpretation do not add up to a declaration that the court must respect the choice of the plaintiff, no matter what the type of suit or issues involved. The two taken together mean only that the defendant may consent to be sued, and it is proper for the federal court to take jurisdiction, not that the plaintiff's choice cannot be questioned. The defendant's consent to be sued extends only to give the court jurisdiction of the person; it assumes that the court, having the parties before it, will apply all the applicable law, including, in those cases where it is appropriate, its discretionary judgment as to whether the suit should be entertained. In all cases in which the doctrine of *forum non conveniens* comes into

play, it presupposes at least two forums in which the defendant is amenable to process; the doctrine furnishes criteria for choice between them.

II.

The principle of *forum non conveniens* is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute. These statutes are drawn with a necessary generality and usually give a plaintiff a choice of courts, so that he may be quite sure of some place in which to pursue his remedy. But the open door may admit those who seek not simply justice but perhaps justice blended with some harassment. A plaintiff sometimes is under temptation to resort to a strategy of forcing the trial at a most inconvenient place for an adversary, even at some inconvenience to himself.

Many of the states have met misuse of venue by investing courts with a discretion to change the place of trial on various grounds, such as the convenience of witnesses and the ends of justice.[5] The federal law contains no such express criteria to guide the district court in exercising its power. But the problem is a very old one affecting the administration of the courts as well as the rights of litigants, and both in England and in this country the common law worked out techniques and criteria for dealing with it.[6]

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[5] See Foster, *Place of Trial—Interstate Application of Intrastate Methods of Adjustment,* 44 Harv. L. Rev. 41, 47, 62.

[6] See *Logan* v. *Bank of Scotland,* [1906] 1 K. B. 141; *cf. La Société du Gaz de Paris* v. *La Société Anonyme de Navigation "Les Armateurs Français,"* [1926] Sess. Cas. (H. L.) 13. *Collard* v. *Beach,* 93 App. Div. 339, 87 N. Y. S. 884; *Jackson & Sons* v. *Lumbermen's Mutual Casualty Co.,* 86 N. H. 341, 168 A. 895; see *Pietraroia* v. *New Jersey & Hudson R. R. Co.,* 197 N. Y. 434, 91 N. E. 120; *Great Western Railway Co.* v. *Miller,* 19 Mich. 305.

Wisely, it has not been attempted to catalogue the circumstances which will justify or require either grant or denial of remedy. The doctrine leaves much to the discretion of the court to which plaintiff resorts, and experience has not shown a judicial tendency to renounce one's own jurisdiction so strong as to result in many abuses.[7]

If the combination and weight of factors requisite to given results are difficult to forecast or state, those to be considered are not difficult to name. An interest to be considered, and the one likely to be most pressed, is the private interest of the litigant. Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforcibility of a judgment if one is obtained. The court will weigh relative advantages and obstacles to fair trial. It is often said that the plaintiff may not, by choice of an inconvenient forum, "vex," "harass," or "oppress" the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy.[8] But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.

Factors of public interest also have place in applying the doctrine. Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community

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[7] See Dainow, *The Inappropriate Forum,* 29 Ill. L. Rev. 867, 889.

[8] See Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law,* 29 Col. L. Rev. 1.

which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home. There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself.

The law of New York as to the discretion of a court to apply the doctrine of *forum non conveniens,* and as to the standards that guide discretion is, so far as here involved, the same as the federal rule. *Murnan* v. *Wabash R. Co.,* 246 N. Y. 244, 158 N. E. 508; *Wedemann* v. *United States Trust Co.,* 258 N. Y. 315, 179 N. E. 712; see *Gregonis* v. *Philadelphia and Reading Co.,* 235 N. Y. 152, 139 N. E. 223. It would not be profitable, therefore, to pursue inquiry as to the source from which our rule must flow.

III.

Turning to the question whether this is one of those rather rare cases where the doctrine should be applied, we look first to the interests of the litigants.

The plaintiff himself is not a resident of New York, nor did any event connected with the case take place there, nor does any witness, with the possible exception of experts, live there. No one connected with that side of the case save counsel for the plaintiff resides there, and he has candidly told us that he was retained by insurance companies interested presumably because of subrogation. His affidavits and argument are devoted to controverting claims as to defendant's inconvenience rather than to showing that the present forum serves any convenience

of his own, with one exception. The only justification for trial in New York advanced here is one rejected by the district court and is set forth in the brief as follows:

> "This Court can readily realize that an action of this type, involving as it does a claim for damages in an amount close to $400,000, is one which may stagger the imagination of a local jury which is surely unaccustomed to dealing with amounts of such a nature. Furthermore, removed from Lynchburg, the respondent will have an opportunity to try this case free from local influences and preconceived notions which may make it difficult to procure a jury which has no previous knowledge of any of the facts herein."

This unproven premise that jurors of New York live on terms of intimacy with $400,000 transactions is not an assumption we easily make. Nor can we assume that a jury from Lynchburg and vicinity would be "staggered" by contemplating the value of a warehouse building that stood in their region, or of merchandise and fixtures such as were used there, nor are they likely to be staggered by the value of chattels which the people of that neighborhood put in storage. It is a strange argument on behalf of a Virginia plaintiff that the community which gave him patronage to make his business valuable is not capable of furnishing jurors who know the value of the goods they store, the building they are stored in, or the business their patronage creates. And there is no specification of any local influence, other than accurate knowledge of local conditions, that would make a fair trial improbable. The net of this is that we cannot say the District Court was bound to entertain a provincial fear of the provincialism of a Virginia jury. That leaves the Virginia plaintiff without even a suggested reason for transporting this suit to New York.

Defendant points out that not only the plaintiff, but every person who participated in the acts charged to be negligent, resides in or near Lynchburg. It also claims a need to interplead an alleged independent contractor which made the delivery of the gasoline and which is a Virginia corporation domiciled in Lynchburg, that it cannot interplead in New York. There also are approximately 350 persons residing in and around Lynchburg who stored with plaintiff the goods for the damage to which he seeks to recover. The extent to which they have left the community since the fire and the number of them who will actually be needed is in dispute. The complaint alleges that defendant's conduct violated Lynchburg ordinances. Conditions are said to require proof by firemen and by many others. The learned and experienced trial judge was not unaware that litigants generally manage to try their cases with fewer witnesses than they predict in such motions as this. But he was justified in concluding that this trial is likely to be long and to involve calling many witnesses, and that Lynchburg, some 400 miles from New York, is the source of all proofs for either side, with possible exception of experts. Certainly to fix the place of trial at a point where litigants cannot compel personal attendance and may be forced to try their cases on deposition, is to create a condition not satisfactory to court, jury or most litigants. Nor is it necessarily cured by the statement of plaintiff's counsel that he will see to getting many of the witnesses to the trial and that some of them "would be delighted to come to New York to testify." There may be circumstances where such a proposal should be given weight. In others, the offer may not turn out to be as generous as defendant or court might suppose it to be. Such matters are for the District Court to decide in exercise of a sound discretion.

The court likewise could well have concluded that the task of the trial court would be simplified by trial in Vir-

ginia. If trial was in a state court, it could apply its own law to events occurring there. If in federal court by reason of diversity of citizenship, the court would apply the law of its own state in which it is likely to be experienced. The course of adjudication in New York federal court might be beset with conflict of laws problems all avoided if the case is litigated in Virginia where it arose.

We are convinced that the District Court did not exceed its powers or the bounds of its discretion in dismissing plaintiff's complaint and remitting him to the courts of his own community. The Circuit Court of Appeals took too restrictive a view of the doctrine as approved by this Court. Its judgment is

Reversed.

MR. JUSTICE REED and MR. JUSTICE BURTON dissent. They do not set out the factual reasons for their dissent since the Court's affirmance of *Koster* v. *Lumbermens Mutual Casualty Co.*, decided today, *post*, p. 518, would control.

MR. JUSTICE BLACK, dissenting.

The defendant corporation is organized under the laws of Pennsylvania, but is qualified to do business and maintains an office in New York. Plaintiff is an individual residing and doing business in Virginia. The accident in which plaintiff alleges to have been damaged occurred in Lynchburg, Virginia. Plaintiff brought this action in the Federal District Court in New York. Section 11 of the Judiciary Act of 1789, 1 Stat. 78, carried over into the Judicial Code, § 24, 28 U. S. C. § 41 (1), confers jurisdiction upon federal district courts of all actions at law between citizens of different states. The Court does not suggest that the federal district court in New York lacks jurisdiction under this statute or that the venue was improper in this case. 28 U. S. C. § 112. *Cf. Neirbo Co.* v.

Bethlehem Corp., 308 U. S. 165. But it holds that a district court may abdicate its jurisdiction when a defendant shows to the satisfaction of a district court that it would be more convenient and less vexatious for the defendant if the trial were held in another jurisdiction. Neither the venue statute nor the statute which has governed jurisdiction since 1789 contains any indication or implication that a federal district court, once satisfied that jurisdiction and venue requirements have been met, may decline to exercise its jurisdiction. Except in relation to the exercise of the extraordinary admiralty and equity powers of district courts, this Court has never before held contrary to the general principle that "the courts of the United States are bound to proceed to judgment, and to afford redress to suitors before them, in every case to which their jurisdiction extends. They cannot abdicate their authority or duty in any case in favor of another jurisdiction." *Hyde* v. *Stone*, 20 How. 170, 175, quoted with approval in *Chicot County* v. *Sherwood*, 148 U. S. 529, 534. See also *Dennick* v. *Railroad Co.*, 103 U. S. 11; *Baltimore & O. R. Co.* v. *Kepner*, 314 U. S. 44; *Evey* v. *Mexican C. R. Co.*, 81 F. 294.[1] Never until today has this Court held, in actions for money damages for violations of common law or statutory rights, that a district court can abdicate its statutory duty to exercise its jurisdiction for the alleged convenience of the defendant to a lawsuit. Compare *Slater* v. *Mexican National R. Co.*, 194 U. S. 120.

For reasons peculiar to the special problems of admiralty and to the extraordinary remedies of equity, the courts exercising admiralty and equity powers have been per-

[1] In *Mondou* v. *New York, N. H. & H. R. Co.*, 223 U. S. 1, 58, it was stated that: "The existence of the jurisdiction creates an implication of duty to exercise it, and that its exercise may be onerous does not militate against that implication." *Cf. Douglas* v. *New York, N. H. & H. R. Co.*, 279 U. S. 377, 388.

mitted at times to decline to exercise their jurisdiction. *Canada Malting Co.* v. *Paterson S. S. Co.*, 285 U. S. 413; *Rogers* v. *Guaranty Trust Co.*, 288 U. S. 123; *cf. Williams* v. *Green Bay & W. R. Co.*, 326 U. S. 549. This exception is rooted in the kind of relief which these courts grant and the kinds of problems which they solve. See *Meredith* v. *Winter Haven*, 320 U. S. 228, 235; *Burford* v. *Sun Oil Co.*, 319 U. S. 315, 333 n. 29. Courts of equity developed to afford relief where a money judgment in the common law courts provided no adequate remedy for an injured person.[2] From the beginning of equitable jurisdiction up to now, the chancery courts have generally granted or withheld their special remedies at their discretion; and "courts of admiralty . . . act upon enlarged principles of equity." *O'Brien* v. *Miller*, 168 U. S. 287, 297. But this Court has, on many occasions, severely restricted the discretion of district courts to decline to grant even the extraordinary equitable remedies. *Meredith* v. *Winter Haven, supra,* and cases there cited at 234, 235. Previously federal courts have not generally been allowed the broad and indefinite discretion to dispose even of equity cases solely on a trial court's judgment of the relative convenience of the forum for the parties themselves. For a major factor in these equity decisions has been the relative ability of the forum to shape and execute its equitable remedy. *Cf. Rogers* v. *Guaranty Trust Co., supra.*

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[2] Although the distinction between actions at law and suits in equity in federal courts has been abolished by the adoption of the single form of civil action, Rule 2, F. R. C. P., see 1 Moore, Federal Practice (1938) c. 2, there remains to federal courts the same discretion, no more and no less, in the exercise of special equitable remedies as existed before the adoption of the federal rules. Neither the rules, the statutes, tradition, nor practical considerations justify application of equitable discretion to actions for money judgments based on common law or statutory rights.

No such discretionary authority to decline to decide a case, however, has, before today, been vested in federal courts in actions for money judgments deriving from statutes or the common law.[3] To engraft the doctrine of *forum non conveniens* upon the statutes fixing jurisdiction and proper venue in the district courts in such actions, seems to me to be far more than the mere filling in of the interstices of those statutes.[4]

It may be that a statute should be passed authorizing the federal district courts to decline to try so-called common law cases according to the convenience of the parties. But whether there should be such a statute, and determination of its scope and the safeguards which should surround it, are, in my judgment, questions of policy which Congress should decide. There are strong arguments presented by the Court in its opinion why federal courts exercising their common law jurisdiction should have the discretionary powers which equity courts have always possessed in dispensing equitable relief. I think equally strong arguments could be advanced to show that they should not. For any individual or corporate defendant who does part of his business in states other than the one in which he

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[3] This Court, whose jurisdiction is primarily appellate, has held that it need not exercise its constitutionally granted original jurisdiction even at common law where there is another suitable forum. *Georgia* v. *Pennsylvania R. Co.*, 324 U. S. 439, 464–65. But the Constitution, not Congress, fixes this Court's jurisdiction. And it was this Court's duty to interpret its constitutional jurisdiction. It is the duty of Congress to fix the jurisdiction of the district courts by statute. It did so. It is not the duty of this Court to amend that statute.

[4] "I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions." Holmes, J., dissenting in *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205, 218, 221. See also dissenting opinion, *State Tax Commission* v. *Aldrich*, 316 U. S. 174, 185, 202, n. 23 and authorities there collected.

is sued will almost invariably be put to some inconvenience to defend himself. It will be a poorly represented multi-state defendant who cannot produce substantial evidence and good reasons fitting the rule now adopted by this Court tending to establish that the forum of the action against him is most inconvenient. The Court's new rule will thus clutter the very threshold of the federal courts with a preliminary trial of fact concerning the relative convenience of forums. The preliminary disposition of this factual question will, I believe, produce the very kind of uncertainty, confusion, and hardship which stalled and handicapped persons seeking compensation for maritime injuries following this Court's decision in *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205. The broad and indefinite discretion left to federal courts to decide the question of convenience from the welter of factors which are relevant to such a judgment, will inevitably produce a complex of close and indistinguishable decisions from which accurate prediction of the proper forum will become difficult, if not impossible. Yet plaintiffs will be asked "to determine with certainty before bringing their actions that factual question over which courts regularly divide among themselves and within their own membership. As penalty for error, the injured individual may not only suffer serious financial loss through the delay and expense of litigation, but discover that his claim has been barred by the statute of limitations in the proper forum while he was erroneously pursuing it elsewhere." *Davis* v. *Dept. of Labor & Industries,* 317 U. S. 249, 254.

This very case illustrates the hazards of delay. It must be begun anew in another forum after the District Court, the Circuit Court of Appeals, and now this Court, have had their time-consuming say as to the relative convenience of the forum in which the plaintiff chose to seek redress. Whether the statute of limitations has run

against the plaintiff, we do not know. The convenience which the individual defendant will enjoy from the Court's new rule of *forum non conveniens* in law actions may be thought to justify its inherent delays, uncertainties, administrative complications and hardships. But in any event, Congress has not yet said so; and I do not think that this Court should, 150 years after the passage of the Judiciary Act, fill in what it thinks is a deficiency in the deliberate policy which Congress adopted.[5] Whether the doctrine of *forum non conveniens* is good or bad, I should wait for Congress to adopt it.

MR. JUSTICE RUTLEDGE joins in this opinion.

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[5] The very law review articles which are relied upon to document this theory of a federal rule of *forum non conveniens* reveal that judicial adoption of this theory without a new act of Congress would be an unwarranted judicial innovation. Foster, *Place of Trial—Interstate Application of Intrastate Methods of Adjustment*, 44 Harv. L. Rev. 41, 52; Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 Col. L. Rev. 1, 18. For instance, it is stated that "No matter how little dispute there is as to the desirability of such legislation, there is comparatively little chance of overcoming legislative inertia and securing its passage unless some accident happens to focus attention upon it. The best hope is that the courts will feel free to take appropriate action without specific legislation authorizing them to do so." Foster, *supra* at 52.

KOSTER *v.* (AMERICAN) LUMBERMENS MUTUAL CASUALTY CO.

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

No. 206. Argued December 19, 1946.—Decided March 10, 1947.

1. In the circumstances of this case, a federal district court in New York was justified in applying the doctrine of *forum non conveniens* and dismissing a derivative suit brought in his home district on the ground of diversity of citizenship by a policyholder in an Illinois mutual insurance company alleging breaches of trust in the management of the company's affairs and praying for an accounting and restitution. Pp. 521–532.
2. In a derivative suit, a federal district court may refuse to exercise its jurisdiction when a defendant shows much harassment and plaintiff's response not only discloses little countervailing benefit to himself in the choice of forum, but also indicates such disadvantage as to support the inference that the forum chosen would not ordinarily be thought a suitable one to decide the controversy. Pp. 531–532.
3. This Court cannot say that the district court abused its discretion in this case in giving weight to the undenied sworn statements of fact in defendant's motion papers, especially where plaintiff's answering affidavit failed to advance any reason of convenience to the plaintiff. P. 531.
4. Where the doctrine of *forum non conveniens* is invoked in a derivative suit, the complexities and unique features of such suits are relevant to the application of the doctrine. Pp. 522, 525–526.
5. Although a plaintiff's own interest in a derivative suit may be small, if the conditions laid down by Rule 23 of the Rules of Civil Procedure for secondary actions by shareholders are complied with and jurisdiction is established, the federal courts are empowered to entertain such suits; but the peculiarities of such suits should not be overlooked. Pp. 523–524.
6. Where there are hundreds of potential plaintiffs, all equally entitled voluntarily to invest themselves with the corporation's cause of action and all of whom could with equal show of right go into their many home courts, the claim of any one plaintiff that a forum is appropriate merely because it is his home forum is considerably weakened. P. 524.

7. In applying the doctrine of *forum non conveniens*, the ultimate inquiry is where trial will best serve the convenience of the parties and the ends of justice. P. 527.
8. *Rogers* v. *Guaranty Trust Co.*, 288 U. S. 123, considered; *Williams* v. *Green Bay & Western R. Co.*, 326 U. S. 549, distinguished. Pp. 528–529.

153 F. 2d 888, affirmed.

Applying the doctrine of *forum non conveniens*, a federal district court in New York dismissed a derivative suit brought by a policyholder in an Illinois mutual insurance company. 64 F. Supp. 595. The Circuit Court of Appeals affirmed. 153 F. 2d 888. This Court granted certiorari. 329 U. S. 700. *Affirmed*, p. 532.

Julius Levy argued the cause and filed a brief for petitioner.

Stuart N. Updike argued the cause for respondent. With him on the brief were *Weymouth Kirkland, Howard Ellis* and *Louis G. Caldwell.*

Mr. Justice Jackson delivered the opinion of the Court.

This is a derivative action, in equity as are all such derivative actions, begun by plaintiff as a member and policyholder of Lumbermens Mutual Casualty Company "in the right of Lumbermen's and on behalf of all its members and policy holders." It was brought in the United States District Court for the Eastern District of New York, of which plaintiff is a citizen. Jurisdiction rests on diversity of citizenship. The defendants are the Lumbermens Mutual Casualty Company, a nominal defendant, organized under the laws of Illinois; one James S. Kemper, president and manager thereof, a citizen of Illinois, and James S. Kemper & Co., an Illinois corporation. The relief asked is that the other defendants account to Lumbermens, for damages it has sustained and for profits they

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have realized on certain transactions. It is alleged that defendant Kemper, as an officer of the company, has been guilty of breaches of trust by which he, his family corporation and his friends have profited. Plaintiff charges that Kemper's salary was improvidently increased from less than $75,000 to over $251,000; that although Lumbermens was staffed and equipped to write insurance without the intervention of any agency, he employed the Kemper Company and paid it "substantial sums" as "commissions, fees and otherwise" to Lumbermens' prejudice and Kemper's profit, and that Kemper caused assets of Lumbermens to be sold to himself and favorites at prices less than their values. Kemper individually was never served in New York. Unless he should be found within that jurisdiction, some of the alleged causes of action cannot be tried in this action in any event for want of an indispensable party. Some of its issues could be tried without him.

The district court, on motion to dismiss under the doctrine of *forum non conveniens*,[1] found that Lumbermens does business in forty-eight states, but its home and principal place of business are in Illinois. There its directors live; there all records are kept; and no witness shown to be necessary to either side of the case resides outside of Illinois. The plaintiff himself lives in New York, but he does

[1] Some of our cases appear to hold broadly that the federal courts must exercise their jurisdiction, when they have it. *Hyde* v. *Stone*, 20 How. 170, 175; *Suydam* v. *Broadnax*, 14 Pet. 67; *Union Bank* v. *Jolly's Adm'rs*, 18 How. 503. But this is not a case in which it is urged that a state statute restricting remedy to state proceedings defeats federal diversity jurisdiction, as they were, and as was *Chicot County* v. *Sherwood*, 148 U. S. 529. In those cases, the Court held that when a state recognizes a cause of action, suit may be brought on it in federal court if diversity jurisdiction is established. That holding has nothing to do with this case. We are concerned here with the autonomous administration of the federal courts in the discharge of their own judicial duties, subject of course to the control of Congress.

not appear to have attended any meetings of policyholders or to have raised objection to the acts alleged, or otherwise to have personal knowledge so that he could possibly be a witness except as to his ownership of the policy of insurance which is not denied. It would appear necessary for him to make his own case largely from books and records in Chicago and from testimony of officers and witnesses resident there. It also is evident that the legality of many of these transactions will turn on the law of Illinois, under which Lumbermens exists and within whose territory the questioned acts took place. That would be home law if the case were tried in Chicago; it would be foreign law to New York and the case, if tried there, would involve conflict of laws. It also is urged that plaintiff's total of premium payments is less than $250, which would be the maximum possible interest he personally could have in the controversy.

Under these circumstances, two courts below concurred in the view that the case should not be tried in New York as there was ample remedy available in the state and federal courts of Illinois. Both relied upon *Rogers* v. *Guaranty Trust Co.*, 288 U. S. 123. The dissenting judge below considered that our more recent decision in *Williams* v. *Green Bay & Western R. R.*, 326 U. S. 549, implies disapproval of the *Rogers* case and restricts application of the doctrine of *forum non conveniens*. We brought the case here on certiorari. 329 U. S. 700.

This case involves the special problems of *forum non conveniens* which inhere in derivative actions, and which have been little considered by this Court. *Williams* v. *Green Bay & Western R. R.*, 326 U. S. 549, was not a derivative action brought in the right of a nominal defendant corporation. *Rogers* v. *Guaranty Trust Co.*, 288 U. S. 123, was a derivative action, but that feature of the case was given almost no attention and the emphasis was entirely on the extent to which it involved inquiry into

the "internal affairs of a foreign corporation," certainly not the most distinguishing feature of these actions.

The stockholder's derivative action, to which this policyholder's action is analogous, is an invention of equity to supply the want of an adequate remedy at law to redress breaches of fiduciary duty by corporate managers. Usually the wrongdoing officers also possess the control which enables them to suppress any effort by the corporate entity to remedy such wrongs. Equity therefore traditionally entertains the derivative or secondary action by which a single stockholder may sue in the corporation's right when he shows that the corporation on proper demand has refused to pursue a remedy, or shows facts that demonstrate the futility of such a request. With possible rare exceptions, these actions involve only issues of state law and, as in the present case, can get into federal courts only by reason of diversity in citizenship of the parties. Their existence and peculiar character were recognized by this Court in the old Equity Rules. Rule 27, 226 U. S. 656. The complexities and unique features of these actions, however, are relevant to the *forum non conveniens* issue, for in these, as in all other petitions for equitable relief, he who seeks equity must do equity, and the court will be alert to see that its peculiar remedial process is in no way abused.

The cause of action which such a plaintiff brings before the court is not his own but the corporation's.[2] It is the

[2] 28 U. S. C. § 112 provides "that suit by a stockholder on behalf of a corporation may be brought in any district in which suit against the defendant or defendants in said stockholders' action, other than said corporation, might have been brought by such corporation and process in such cases may be served upon such corporation in any district wherein such corporation resides or may be found." 49 Stat. 1214. This reinforces the view that the cause of action is that of the corporation, if reinforcement is necessary. Moreover, it is obvious that the venue statute is not concerned with facilitating suit in the district of the stockholder's residence, but assures only that suit can be

real party in interest and he is allowed to act in protection of its interest somewhat as a "next friend" might do for an individual, because it is disabled from protecting itself. If, however, such a case as this were treated as other actions, the federal court would realign the parties for jurisdictional purposes according to their real interests. In this case, which is typical of many, this would put Lumbermens on the plaintiff's side. Illinois corporations would then appear among plaintiffs and among defendants, and jurisdiction would be ousted. *Indianapolis* v. *Chase National Bank,* 314 U. S. 63. But jurisdiction is saved in this class of cases by a special dispensation because the corporation is in antagonistic hands. *Doctor* v. *Harrington,* 196 U. S. 579.

Plaintiffs also, as in this case, often have only a small financial interest in a large controversy. Plaintiffs, like this one, if their own financial stake were the test, sometimes do not have a sufficient individual interest to make up the required jurisdictional amount. Again this class of cases is favored with the fiction that plaintiffs' possible recovery is not the measure of the amount involved for jurisdictional purposes but that the test is the damage asserted to have been sustained by the defendant corporation. Hence, although a plaintiff's own interest may be small, if the conditions laid down by Rule 23 of the Rules of Civil Procedure for secondary actions by

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brought in any district in which the corporation could have sued. *Greenberg* v. *Giannini,* 140 F. 2d 550. When suit is brought in the district of the stockholder's residence, the venue statute does not provide for service on the corporation "in any district wherein such corporation resides or may be found." Since the corporation is an indispensable party, *Davenport* v. *Dows,* 18 Wall. 626, it must be only the chance stockholder's suit which can be maintained at the stockholder's residence. Corporations which have stockholders in many of the states may not find it necessary to qualify to do business and consent to be sued in all the states in which they have stockholders.

shareholders are complied with and jurisdiction is established, the federal courts are empowered to entertain the case. But the peculiarities of such actions should not be overlooked.

Where there are only two parties to a dispute, there is good reason why it should be tried in the plaintiff's home forum if that has been his choice. He should not be deprived of the presumed advantages of his home jurisdiction except upon a clear showing of facts which either (1) establish such oppressiveness and vexation to a defendant as to be out of all proportion to plaintiff's convenience, which may be shown to be slight or nonexistent, or (2) make trial in the chosen forum inappropriate because of considerations affecting the court's own administrative and legal problems. In any balancing of conveniences, a real showing of convenience by a plaintiff who has sued in his home forum will normally outweigh the inconvenience the defendant may have shown. But where there are hundreds of potential plaintiffs, all equally entitled voluntarily to invest themselves with the corporation's cause of action and all of whom could with equal show of right go into their many home courts, the claim of any one plaintiff that a forum is appropriate merely because it is his home forum is considerably weakened.[3] Such a plaintiff often may represent an important public and stockholder interest in bringing faithless managers to book. The nature of the secondary action is such that without

[3] Before the decision of the circuit court in this case, a similar derivative action was begun against substantially the same defendants and on the same causes of action in the United States District Court for the Northern District of Illinois, Eastern Division. *Schwartz* v. *Kemper,* 69 F. Supp. 152. It assures that this controversy will not be barred from judicial hearing for lack of prosecution within the statutory period. All but two of the defendants in that action have entered a general appearance, and petitioner's lawyers are associated with plaintiff's counsel in that case.

invitation from other stockholders and without their approval or supervision, the plaintiff volunteers in a position that itself creates something of a fiduciary relationship.

While, even in the ordinary action, the residence of the suitor will not fix the proper forum without reference to other considerations, it is a fact of "high significance." *International Milling Co.* v. *Columbia Transportation Co.*, 292 U. S. 511, 520. But, in derivative actions, although the plaintiff may have a substantial interest of his own to protect, he may also be a mere phantom plaintiff with interest enough to enable him to institute the action and little more. He may have taken some active part in the corporate affairs, or have personal knowledge of them, or have had dealings in course of protest and objection which make it requisite or at least expedient for him personally to be present at the trial. Or he may, like this plaintiff, make no showing of any knowledge by which his presence would help to make whatever case can be made in behalf of the corporation.

To entertain such an action places the forum in a position of responsibility toward the whole class which the plaintiff assumes to represent. To prevent collusive settlements and abuses, the Court must approve dismissal or compromise and often must give notice to the other potential plaintiffs, in this case to the other members and policyholders in whose behalf plaintiff sues and who have a right to be heard on the propriety of settlement. Rule 23, Rules of Civil Procedure. It also takes on the troublesome business of fixing allowances to counsel and accountants for the plaintiff payable out of the defendant corporation's recovery against other defendants.[4] Thus, such a

[4] *Trustees* v. *Greenough*, 105 U. S. 527; see federal cases cited throughout Hornstein, *The Counsel Fee in Stockholder's Derivative Suits*, 39 Col. L. Rev. 784. Fees allowed, moreover, vary greatly with local considerations as to professional scales and other determinants of expense.

litigation brings to the court more than an ordinary task of adjudication; it brings a task of administration; and what forum is appropriate for such a task may require consideration of its relation to the whole group of members and stockholders whom plaintiff volunteers to represent as well as to the nominal plaintiff himself.

The nature of the action imports other unusual considerations when trial courts are faced with applications to dismiss for reasons of *forum non conveniens*. It might well be that the books, records and witnesses to establish all or a part of the cause of action are in or near the chosen forum. But in other cases they may all be in some distant jurisdiction, perhaps that of the defendants, as is the case here. In the ordinary suit it is plaintiff's own books and records and transactions that are important—in the derivative action it is more likely that only the corporation's books, records and transactions will be important and only the defendant will be affected by the choice of the place of production of records. In the present case, in response to defendant's motion and supporting affidavits, which *prima facie* established vexation to defendant and the inappropriateness of the court, the plaintiff shows not a single fact provable by record or witness within the district or state where he has brought suit. It is undenied that every source of evidence to prove plaintiff's own case, as well as for defendant to disprove it, is in Illinois.

The District Court also found that "the suit relates to the internal affairs of a foreign corporation" and for that reason also considered that the "courts of the state of domicile of Lumbermens and the Kemper corporation are the appropriate tribunals for the determination of this case." 64 F. Supp. 595, 599. But many kinds of cases may "relate to internal affairs of a corporation," and that fact does not have the same significance as to the doctrine of *forum non conveniens* in all settings.

Every issue of *ultra vires* or proof of officers' authority in a contract action involves inquiry into internal affairs, but that inquiry is not one which must be relegated to home jurisdiction. The contracts of a corporation may make its liabilities turn on such events as realization of net earnings which submit its internal affairs to scrutiny in order to determine liability and which any court with jurisdiction may adjudicate. *Williams* v. *Green Bay & Western R. R.*, 326 U. S. 549. On the other hand, private actions may involve the right of visitation or supervision, a public right existing in the state for the purpose of examining into the conduct of the corporation with a view to keeping it within its legal powers, to correct abuses of authority and nullify irregular proceedings. See *Guthrie* v. *Harkness*, 199 U. S. 148, 159. Such cases present a more persuasive challenge to the jurisdiction of a court foreign to the corporation's domicile under the *forum non conveniens* doctrine. We are presented in this case "with no problem of administration" of the affairs of a foreign corporation of the sort which would lead a court to decline jurisdiction. See dissenting opinion of Stone, J., in *Rogers* v. *Guaranty Trust Co.*, 288 U. S. 123, 145.

There is no rule of law, moreover, which requires dismissal of a suitor from the forum on a mere showing that the trial will involve issues which relate to the internal affairs of a foreign corporation. That is one, but only one, factor which may show convenience of parties or witnesses, the appropriateness of trial in a forum familiar with the law of the corporation's domicile, and the enforceability of the remedy if one be granted. But the ultimate inquiry is where trial will best serve the convenience of the parties and the ends of justice. Under modern conditions corporations often obtain their charters from states where they no more than maintain an agent to comply with local requirements, while every other activity is conducted far

from the chartering state. Place of corporate domicile in such circumstances might be entitled to little consideration under the doctrine of *forum non conveniens,* which resists formalization and looks to the realities that make for doing justice.

Rogers v. *Guaranty Trust Co.,* 288 U. S. 123, holds only that the district court ". . . was free in the exercise of a sound discretion to decline to pass upon the merits of the controversy and to relegate plaintiff to an appropriate forum. . . . Obviously no definite rule of general application can be formulated by which it may be determined under what circumstances a court will assume jurisdiction of stockholders' suits relating to the conduct of internal affairs of foreign corporations. But it safely may be said that jurisdiction will be declined whenever considerations of convenience, efficiency and justice point to the courts of the State of the domicile as appropriate tribunals for the determination of the particular case." 288 U. S. at 130–31. There was disagreement in that case as to whether the facts warranted exercise of the discretion but little as to the general rule by which discretion is governed and none as to existence of the power of the court.

In the *Williams* case we reversed an exercise of discretion by a trial court, but far from laying down a rigid rule to govern discretion we said, "Each case turns on its facts." 326 U. S. at 557. The facts in that case were quite different from those before us now. The action was a class suit brought to recover amounts alleged to be due to plaintiffs on debentures. There was a possibility that under one view as to construction of the debentures, the Court would have to review the corporate internal affairs to determine net earnings which were or should be available as dividends, and under another view, to decide whether under the applicable local law directors' discretion had been abused. In that case, as here, the plaintiffs resided in New York. But the opinion points out that

the defendant, while legally domiciled elsewhere, maintained its financial office in New York; five of its six directors, all of its executive and fiscal officers except the president and general auditor, were found there; directors meetings were customarily held in New York; financial records, transfer books, minute books and the like were kept in New York. Reciting these facts, among others, we concluded "These facts plainly indicate to us that it would not be vexatious or oppressive to entertain this suit in New York, whether the availability of witnesses or any other aspect of a trial be considered." 326 U. S. at 560. Accordingly, we held that the case should not have been dismissed.

Since this case is pending in New York and is a diversity case, it is appropriate to observe that the law of New York, if applicable, is to the same effect as to the considerations to govern *forum non conveniens* questions in this class of cases. The cases on which petitioner relies to establish his contention that in a similar suit the courts of New York would not decline jurisdiction, seem to be ones in which the corporate defendant had its principal place of business in New York or a substantial amount of property there, which would assure the effectiveness of a judgment. *Miller* v. *Quincy,* 179 N. Y. 294, 72 N. E. 116; *Ramsey* v. *Rosenthal,* 242 App. Div. 526, 275 N. Y. S. 783; *Hamm* v. *Christian Herald Corp.,* 236 App. Div. 639, 260 N. Y. S. 743; *Tarlow* v. *Archbell,* 47 N. Y. S. 2d 3, 7–8, *aff'd,* 269 App. Div. 837, 56 N. Y. S. 2d 363.[5] Those cases,

[5] Of the other cases cited by petitioner, *Goldstein* v. *Lightner,* 266 App. Div. 357, 42 N. Y. S. 2d 338, *aff'd,* 292 N. Y. 670, 56 N. E. 2d 98, gave no expressed consideration to the problem of *forum non conveniens,* and in *Jacobs* v. *Mexican Sugar Refining Co.,* 104 App. Div. 242, 93 N. Y. S. 776, the only question raised and decided was the jurisdiction of the court over the subject-matter of the suit. *Cf. Ernst* v. *Rutherford & B. S. G. Co.,* 38 App. Div. 388, 56 N. Y. S. 403. In *Hallenborg* v. *Greene,* 66 App. Div. 590, 73 N. Y. S. 403,

however, do not consider whether the actions brought are vexatious or oppressive or whether the interests of justice require that the trial be had in a more appropriate forum. Their principal attention is given to the inquiry whether the suit concerns the internal affairs of the foreign corporation, and their uniform conclusion is that they do not. But in taking that view of one of the factors to be considered in applying the doctrine of *forum non conveniens,* they say nothing to detract from the general rule of New York as stated by Cardozo, J., in *Travis* v. *Knox Terpezone Co.,* 215 N. Y. 259, 264, 109 N. E. 250, 251: "To trace in advance the precise line of demarcation between the controversies affecting a foreign corporation in which jurisdiction will be assumed and those in which jurisdiction will be declined, would be a difficult and hazardous venture. A litigant is not, however, to be excluded because he is a stockholder, unless considerations of convenience or of efficiency or of justice point to the courts of the domicile of the corporation as the appropriate tribunals." And in *Langfelder* v. *Universal Laboratories,* 293 N. Y. 200, 204, 56 N. E. 2d 550, 552, the court said: "But it is well settled that jurisdiction in any case will be declined either in the absence of jurisdiction in the

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the Appellate Division reversed in part a broad decree of the Supreme Court so as to restrict the exercise of the court's power to conform to its statement of the *forum non conveniens* doctrine: "When a judgment against a foreign corporation would not be effectual without the aid of the courts of a foreign country or of a sister State, and it may contravene the public policy of the foreign jurisdiction or rest upon the construction of a foreign statute, the interpretation of which is not free from doubt—as where the subject-matter of the litigation and the judgment would relate strictly to the internal affairs and management of the foreign corporation—the court should decline jurisdiction because such questions are of local administration, and should be relegated to the courts of the State or country under the laws of which the corporation was organized." 66 App. Div. at 597, 73 N. Y. S. at 408.

strict sense or where a determination of the rights of litigants involves regulation and management of the internal affairs of the corporation dependent upon the laws of the foreign State or where the court in which jurisdiction is sought is unable to enforce a decree if made or where the relief sought may be more appropriately adjudicated in the courts of the State or country to which the corporation owes its existence."

Confronted with defendant's motion and supporting affidavits in this case reciting the facts earlier set forth herein, the plaintiff was utterly silent as to any reason of convenience to himself or to witnesses and as to any advantage to him in expense, speed of trial, or adequacy of remedy if the case were tried in New York. He recited only that Lumbermens and the Kemper Company had been served with process, and that Kemper individually had not, but that plaintiff proposed to serve him on his "next visit to New York." For the rest, he relied on a memorandum of law. That the absence from the case of Kemper makes remedy in New York inadequate, if not impossible, as to some counts is admitted. To that extent, it makes it inappropriate for a court in New York to adjudicate some closely related issues, deciding plaintiff's grievances piecemeal. Petitioner shows not a single witness or source of evidence available to him in New York and does not deny that his complaint will require exhaustive examination of the transactions of these Illinois corporations, all of which occurred in Illinois and are to be tested by its law. The plaintiff demanded trial in New York as matter of right and of law irrespective of the facts set out by defendant. This Court cannot say that the District Court abused its discretion in giving weight to the undenied sworn statements of fact in defendant's motion papers, especially in view of the failure of plaintiff's answering affidavit to advance any reason of convenience to the plaintiff. We hold only that a district court, in a derivative action, may

refuse to exercise its jurisdiction when a defendant shows much harassment and plaintiff's response not only discloses so little countervailing benefit to himself in the choice of forum as it does here, but indicates such disadvantage as to support the inference that the forum he chose would not ordinarily be thought a suitable one to decide the controversy.

Affirmed.

MR. JUSTICE BLACK, dissenting.

I agree substantially with the dissent of MR. JUSTICE REED, but wish to add this thought. Today's decision goes far beyond the dubious doctrine announced in *Rogers* v. *Guaranty Trust Co.*, 288 U. S. 123. There may be rare instances in which a federal court could decline to provide an equitable remedy against multi-state corporate defendants. A prayer for relief which requires the appointment of a receiver or the detailed and continuing supervision of the affairs of a defendant corporation whose headquarters is beyond the jurisdiction of the court would in my view constitute such a situation. *Cf. Pennsylvania* v. *Williams*, 294 U. S. 176.

The whole trend of recent congressional legislation has been to protect corporate stock and security holders. See *e. g.* Securities Act of 1933, 48 Stat. 74, 15 U. S. C. § 77a *et seq.* But this legislation was not intended as a complete substitute for the antidote provided by stockholders' suits for the dangers inherent in the modern development of frequent conflicts of interest between corporate owners and corporate managers. See Lasswell, Dean and Podell, *A Non-Bureaucratic Alternative to Minority Stockholders' Suits*, 43 Col. L. Rev. 1036, 1045, 1047; Koessler, *The Stockholder's Suit: A Comparative View*, 46 Col. L. Rev. 238, 241. Yet the Court's opinion sets up almost insuperable obstacles to many stockholders who would bring such suits. A California or Florida

stockholder cannot easily go to Delaware, New Jersey, or New York to press his claims. And there is no good reason, in most actions brought to curb corporate mismanagement, why a stockholder should not bring such a suit in the state where he lives, bought his stock, and where the corporation has agents and does business. To put him to the inconvenience and disadvantage of going across the continent to the state of the managers to litigate his cause, all but nullifies his opportunity and inclination to sue to protect his interest and that of other owners.

MR. JUSTICE RUTLEDGE joins in this opinion.

MR. JUSTICE REED, dissenting.

For the purposes of this case we may assume, without examining New York law, 153 F. 2d 888, 890, that a Federal District Court, in its discretion, can dismiss a cause on the ground that the forum is vexatiously inconvenient to the defendant. Still we think the exercise of such a power is not warranted in the circumstances of this case.

We need not restate the facts, which are amply set out by the majority. The sole inquiry is whether the exercise of discretion by the trial judge in this case was an abuse of his power. On motion of Lumbermens, joined in by no other defendant, for dismissal of the complaint on the grounds that the action would require interference by the court with the internal management of Lumbermens and that, further, an indispensable party had not been served, the trial court dismissed the complaint because it required interference with the internal affairs of a foreign corporation and because the forum was not convenient. The Circuit Court of Appeals affirmed the order of dismissal on the ground that the forum in which the action was brought was not convenient for the trial of the causes of action asserted by the complaint.

By a venue statute, Congress has provided that an action may be brought in the district where the plaintiff resides against defendants residing in other states than that of the forum. This plaintiff starts with a presumption in his favor that he may maintain this action at his own residence. 28 U. S. C. § 112.

We need not tarry to consider the small interest of the plaintiff in the assets of his corporation, nor the effect of realigning the corporation on the side of the cause where its true interest lies. However interesting the implications of these facts, they have nothing to do with a dismissal on the ground of the inconvenience of the forum. The same facts would exist no matter what the forum, and they are accordingly not pertinent to our inquiry. Nor should we concern ourselves with the possibility that this may be a strike suit. Whatever the motives of the plaintiff, the only inquiry now here is whether the forum is inconvenient or not.

In some cases, which may at the expense of analysis be grouped under the doctrine of *forum non conveniens,* the convenience of the court may be important. In such cases the crowded condition of the court's calendar and its lack of familiarity with the law of another state may be weighty factors. But in those cases neither the defendant nor the plaintiff is a resident of the forum state. *Western Union Telegraph Co.* v. *Russell,* 12 Tex. Civ. App. 82, 83 S. W. 708; *Robinson* v. *Oceanic Steam Nav. Co.,* 112 N. Y. 315, 19 N. E. 625; *Burdick* v. *Freeman,* 120 N. Y. 420, 24 N. E. 949; *Morris* v. *Missouri Pacific R. Co.,* 78 Tex. 17, 14 S. W. 228; see cases collected in 32 A. L. R. at p. 34. Cf. *Smith* v. *Empire State-Idaho Co.,* 127 F. 462. See also *Davis* v. *Farmers Co-operative Co.,* 262 U. S. 312, 317. Such cases have the support of policy which hesitates to give an advantage to parties who do not bear the expense of supporting the courts of the forum. *Douglas* v. *New York, N. H. & H. R. Co.,* 279 U. S. 377, 387.

But where the cause is transitory and the plaintiff a resident of the forum state, the convenience to the court would seem to be outweighed by its duty to entertain actions brought by citizens of the state of which the court is an arm. See *Arizona Commercial Mining Co.* v. *Iron Cap Copper Co.*, 119 Me. 213, 110 A. 429. Cf. *Mexican Nat. R. Co.* v. *Jackson*, 89 Tex. 107, 33 S. W. 857; *Slater* v. *Mexican Nat. R. Co.*, 194 U. S. 120. This would seem particularly true of federal courts whose duty it is to entertain suits between citizens of different states. *Williams* v. *Green Bay & W. R. Co.*, 326 U. S. 549, 553–4.

Since the plaintiff in this action is a resident of the forum state, we are only concerned with the relative convenience of the parties. It is clear that ordinarily a plaintiff may bring his suit in a forum of his choosing regardless of the inconvenience to him of making proof, so long as venue is properly laid. But here, as the Court points out, should the inconvenience to the defendant far outweigh any convenience to the plaintiff, it would not be fair to oppress the defendant, for it is not a legitimate advantage to a plaintiff to vex his opponent. We cannot agree, however, that in assessing the relative convenience of the parties the court may put a burden upon the plaintiff to make a positive showing that it is to his legitimate advantage to bring suit in the forum of his choosing. It is the defendant's burden to convince the court that the forum is both inconvenient to it and not convenient to the plaintiff. Despite the necessity of going elsewhere for evidence, it is hardly capricious for a plaintiff to bring suit in his home state: the advantages of so doing are usually no less real than apparent.

Accordingly we must judge this case from the showing made by the defendant as to the relative convenience of the parties in its affidavits in support of its motion to dismiss. The defendant's affiants urged that the suit be dismissed because all the proof would come from "vast quan-

tities of documents" and witnesses located in Illinois, where the main offices of Lumbermens are situated, and that transporting these documents would put the defendant to great expense. They also urged that the plaintiff had never attended any meetings of the corporation, nor ever protested to the Department of Insurance of Illinois which audited the books of Lumbermens, and that he was in a position where "the only proof personally to come from him is the establishment of his status as a policyholder." They also urged that the court was being asked to pass upon the internal management and affairs of Lumbermens.

As to the last argument: it is recognized of course that a federal court need not entertain a case which involves interference with the internal affairs of a corporation. *Rogers* v. *Guaranty Trust Co.*, 288 U. S. 123; but see *Williams* v. *Green Bay & W. R. Co.*, 326 U. S. 549. The Circuit Court was of the opinion that no interference with the internal affairs of a foreign corporation of a kind "to make the courts of Illinois a more appropriate forum than New York" would be required by this action. This Court specifically concedes there is no problem of corporate administration that leads to refusal of jurisdiction in this case. This Court, however, depends upon the relation of the issues to the internal affairs of a corporation as one factor in the exercise of the court's discretion to dismiss on the ground of *forum non conveniens*. If corporate administration is not involved, the mere fact that the issues relate to the internal affairs of the corporation does not seem significant. Almost any suit against a corporation may involve an examination into corporate affairs. Here the only inquiry, other than the alleged misconduct of the defendant Kemper, has to do with the relationship between Kemper & Co. and Lumbermens. Although this inevitably involves inquiry into internal affairs of a corpo-

ration, as does any suit brought against a corporate fiduciary for breach of trust, that inquiry is hardly an interference with corporate administration.

When there is no showing of interference with corporate administration, the party seeking dismissal is forced to depend upon what "will best serve the convenience of the parties and the ends of justice." This, we think, requires strong and clear proof to overcome the presumption that the place of trial is controlled by the venue statute. Mere inconvenience is not enough.

As for the expense to the defendant of bringing documents and witnesses to New York, even admitting that proof in this action will involve documentary evidence situated in Illinois or testimony of witnesses located in Illinois, it is not amiss to point out that the plaintiff must carry the burden in this action and must make his case before defense is necessary. Since both documents and witnesses are beyond the jurisdiction of the chosen forum, it will be the plaintiff's expense initially to transport such records and witnesses, an inconvenience which he has determined to bear, if it is true that he has no other source of proof. But even supposing that the defendant will have to transport documents and witnesses to meet the plaintiff's proof, a bare allegation to that effect is hardly a showing of such hardship as to make it proper to dismiss this case on the grounds of *forum non conveniens*. The same allegation might be made in any action brought against the defendant in any state other than Illinois on any cause, contract or tort, which involves records of the company, and this even though the corporation has chosen to do business in forty-eight states. To dismiss a cause on such bare allegations without a particular showing of the hardship involved in transporting a mass of documents and witnesses not easily accessible to the forum puts a powerful weapon into the hands of corporations alleged to

have improperly conducted their affairs. It has been the whole course of our law to break down barriers against calling corporations to account in all states where they may do wrong in doing business. *Neirbo Co.* v. *Bethlehem Shipbuilding Corp.*, 308 U. S. 165. Lumbermens qualified in New York to carry on its regular insurance business. It sold plaintiff a policy that shares in the profits of that business and it should require a showing much stronger than any here made to require this policyholder to go away from home for relief.

Petitioner, on behalf of Lumbermens, seeks recovery for excessive payments and services by Lumbermens to those who dominate the company, and for sales of company assets to those persons at inadequate prices. Petitioner must prove these allegations. None are now denied by defendant. That petitioner's success will result in "monetary damage" to Lumbermens seems impossible. Petitioner's success will enrich Lumbermens at the expense of those who are alleged to have mulcted it of large sums. Petitioner speaks for the whole membership and all policyholders of Lumbermens. From this record, we do not see that an adequate basis of fact has been laid by the respondent's affidavits to overcome the right of petitioner to pursue his remedies in the District Court for the Eastern District of New York

MR. JUSTICE BURTON joins in this dissent.

Counsel for Parties.

UNITED STATES DEPARTMENT OF AGRICULTURE, EMERGENCY CROP AND FEED LOANS *v.* REMUND, ADMINISTRATOR.

CERTIORARI TO THE SUPREME COURT OF SOUTH DAKOTA.

No. 417. Argued February 5, 1947.—Decided March 17, 1947.

1. Under R. S. § 3466, which provides that "whenever the estate of any deceased debtor . . . is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied," a claim asserted in a state probate proceeding by an official of the Farm Credit Administration for and on behalf of the United States, on account of unpaid emergency feed and crop loans made pursuant to the Acts of February 23 and June 19, 1934, is entitled to priority. Pp. 541–545.
2. A debt owed the Farm Credit Administration is a debt owed the United States within the meaning of R. S. § 3466. Pp. 541–542.
3. The priority given by R. S. § 3466 to debts due to the United States is unaffected by the fact that a claim based upon such a debt is filed in the name of an agency of the United States or an authorized officer of such an agency. Pp. 542–543.
4. There is no irreconcilable conflict between making emergency loans to distressed farmers and granting priority to the collection of such loans pursuant to R. S. § 3466. Pp. 543–545.
5. Only the plainest inconsistency would warrant an implied exception to the priority established by R. S. § 3466. Pp. 544–545.

70 S. D. —, 23 N. W. 2d 281, reversed.

A claim by an official of the Farm Credit Administration for and on behalf of the United States against the estate of an insolvent decedent in a state probate proceeding was denied priority under R. S. § 3466 by a probate court. The State Supreme Court affirmed. 70 S. D. —, 23 N. W. 2d 281. This Court granted certiorari. 329 U. S. 703. *Reversed,* p. 545.

Paul A. Sweeney argued the cause for petitioner. With him on the brief were *Acting Solicitor General Washing-*

ton, Assistant Attorney General Sonnett, Melvin Richter and *Philip Elman.*

Dwight Campbell submitted on brief for the respondent.

Opinion of the Court by MR. JUSTICE MURPHY, announced by MR. JUSTICE RUTLEDGE.

We are faced here with the problem of whether, in a state probate proceeding, a claim asserted by the Farm Credit Administration through certain of its officials for and on behalf of the United States is entitled to priority under § 3466 of the Revised Statutes, 31 U. S. C. § 191.

The Governor of the Farm Credit Administration, pursuant to the Acts of February 23, 1934,[1] and June 19, 1934,[2] extended emergency feed and crop loans totalling $370.00 to Wilhelm Buttke, a South Dakota farmer. Most of these loans remained unpaid. On December 26, 1941, Buttke died intestate, leaving an estate insufficient to pay all of his debts. Respondent was appointed administrator of the estate. On March 2, 1942, an authorized agent of the Governor of the Farm Credit Administration filed in the County Court of Roberts County, South Dakota, a claim against the estate for $523.80, the amount of the unpaid indebtedness plus interest. This claim was made "for and on behalf of the United States of America" and a priority therefor on behalf of the United States was asserted under § 3466 of the Revised Statutes.

The County Court denied preference to this claim. But it did allow the claim in the amount of $79.53, which represented the pro rata share of a common creditor's claim. This decision was affirmed by the Circuit Court of the Fifth Judicial Circuit of South Dakota and by the Supreme Court of South Dakota. 70 S. D. —, 23 N. W.

[1] 48 Stat. 354.

[2] 48 Stat. 1021, 1056.

2d 281. The latter court felt that the Acts of February 23, 1934, and June 19, 1934, created an exception to § 3466 and that the claimed priority should accordingly be refused on the authority of *United States* v. *Guaranty Trust Co.*, 280 U. S. 478. We granted certiorari because of the important problems thereby raised.

The relevant portion of § 3466 of the Revised Statutes provides that ". . . whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied . . . ."

Initially, it is suggested that § 3466 is inapplicable since the claim in issue is not a debt due to the United States. The claim grows out of the seven notes executed by the deceased to "the Governor of the Farm Credit Administration, or order, at Washington, D. C." These notes stated that they were "given as evidence of a loan made by the Governor of the Farm Credit Administration." On the premise that the Farm Credit Administration is an entity separate and distinct from the United States Government, the argument is made that obligations due the Farm Credit Administration fall outside the priority established by § 3466. We cannot agree.

The Farm Credit Administration is plainly one of the many administrative units of the United States Government, established to carry out the functions delegated to it by Congress. It bears none of the features of a government corporation with a legal entity separate from that of the United States, whatever difference that might make as to the application of § 3466. Cf. *Sloan Shipyards Corp.* v. *United States Fleet Corp.*, 258 U. S. 549. It had its inception in 1933 as an independent agency, assuming the functions of the Federal Farm Board and the Federal Farm Loan Board. Executive Order No. 6084. In 1939,

it was transferred to the Department of Agriculture and placed under the general supervision and direction of the Secretary of Agriculture. Reorganization Plan No. 1, § 401 (a), 53 Stat. 1429, 4 Fed. Reg. 2730. Its functions, personnel and property were then consolidated in 1942 with those of certain other agencies to form the Food Production Administration of the Department of Agriculture. Executive Order No. 9280, 7 Fed. Reg. 10179. At no time has the Farm Credit Administration been other than an unincorporated agency of the United States Government, administering and lending funds appropriated by Congress out of the United States Treasury and returning the money to the Treasury upon repayment. In short, it is an integral part of the governmental mechanism. And the use of a name other than that of the United States cannot change that fact. *United States* v. *Fontenot,* 33 F. Supp. 629; *In re Wilson,* 23 F. Supp. 236; *Federal Reserve Bank of Dallas* v. *Smylie,* (Tex. Civ. App.) 134 S. W. 2d 838; *Helms* v. *Emergency Crop & Seed Loan Office,* 216 N. C. 581, 5 S. E. 2d 822. See also *North Dakota-Montana Wheat Growers' Assn.* v. *United States,* 66 F. 2d 573. Hence any debt owed the Farm Credit Administration is a debt owed the United States within the meaning of § 3466.

Moreover, the priority given by § 3466 to a debt due to the United States is unaffected by the fact that a claim based upon that debt is filed in the name of an agency of the United States or an authorized officer of such an agency. It is enough that there is an obligation owed the United States. Whether the claim is filed in the name of the United States or in the name of an officer or agency is immaterial; in the latter instance, the claim is necessarily filed on behalf of the United States and the legal effect is the same as if it had been filed in that name. Nothing in the language or policy of § 3466 justifies any other conclusion. It follows that the method of filing in

this case cannot be questioned. The claim was filed in the name of the Governor of the Farm Credit Administration "for and on behalf of the United States of America"—an explicit recognition of the legal realities involved.

The main contention, however, is that the purpose of the statutes under which the loans were made is inconsistent with § 3466, thereby rendering it inapplicable. The Acts of February 23, 1934, and June 19, 1934, authorized feed and crop loans to farmers in drought and storm-stricken areas of the nation. It is said that the prime purpose of these Acts was to restore the credit of the farmers and that to give effect to § 3466 would impair that credit. Reliance is placed upon *United States* v. *Guaranty Trust Co., supra.* This Court there held that § 3466 was inapplicable to the collection of loans made by the Government to railroad carriers to rehabilitate and maintain their credit status; it was felt that to give priority under such circumstances would defeat the purpose of the legislation by impairing the credit of the railroads. See also *Cook County National Bank* v. *United States,* 107 U. S. 445.

But it is manifest that the purpose of the Acts of February 23, 1934, and June 19, 1934, was to give emergency relief to distressed farmers rather than to restore their credit status. These were but two of a series of emergency feed and crop loan statutes [3] enacted at various times from 1921 to 1938, a period when farmers were the victims of repeated crop failures and adverse economic conditions. Their credit was often impaired, but their most urgent need was for money to purchase feed and to plant crops; without such money, distress and unemploy-

[3] 41 Stat. 1347; 42 Stat. 467; 43 Stat. 110; 44 Stat. 1245, 1251; 45 Stat. 1306, as amended by 46 Stat. 3; 46 Stat. 78, as amended by 46 Stat. 254; 46 Stat. 1032, as amended by 46 Stat. 1160; 46 Stat. 1276; 47 Stat. 5; 47 Stat. 795; 48 Stat. 354; 48 Stat. 1056; 49 Stat. 28; 50 Stat. 5; 52 Stat. 27.

ment might have been their lot. It was to meet that urgent need that Congress passed these statutes.

More specifically, the two Acts under consideration were designed to make loans available to those farmers who were unable to secure credit from the Production Credit Associations, organized pursuant to the Farm Credit Act of 1933.[4] It was recognized that many farmers could not qualify for loans from those Associations. Some method of lending aid and assistance to those who had no credit and no money with which to buy feed for their livestock and seeds for their crops was essential in the absence of a more direct form of Government relief. S. Rep. 148, 73d Cong., 2d Sess.; H. Rep. 521, 73d Cong., 2d Sess. As was said by Representative Kerr, "Let it be remembered that the Government is not seeking to make an investment; this is simply an endeavor to finance the farmers of this country who are utterly unable to finance themselves." 78 Cong. Rec. 1959. See *United States* v. *Thomas,* 107 F. 2d 765, 766; *Person* v. *United States,* 112 F. 2d 1, 2.

We conclude that there is no irreconcilable conflict between giving emergency loans to distressed farmers and giving priority to the collection of these loans pursuant to § 3466. Such priority could in no way impair the aid which the farmers sought through these loans; nor could it embarrass the farmers in their daily operations. Moreover, these loans called for a first lien on crops growing or to be grown, or on livestock. The conditions prevailing in 1934 made this type of security uncertain and there is no indication that Congress meant such a lien to be the sole security to which the Government could look for repayment.

We reiterate what was said in *United States* v. *Emory,* 314 U. S. 423, 433: "Only the plainest inconsistency

[4] 48 Stat. 257.

would warrant our finding an implied exception to the operation of so clear a command as that of § 3466." In this case, as in that, we think such inconsistency is wholly wanting. *United States* v. *Guaranty Trust Co., supra,* is therefore inapposite.

Reversed.

MR. JUSTICE DOUGLAS would affirm the judgment on the authority of *United States* v. *Guaranty Trust Co.,* 280 U. S. 478.

WALLING, WAGE AND HOUR ADMINISTRATOR, *v.* GENERAL INDUSTRIES CO.

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

No. 564. Argued February 10, 11, 1947.—Decided March 31, 1947.

1. In a suit by the Wage-Hour Administrator to enjoin alleged violations of the overtime compensation requirement of § 7 of the Fair Labor Standards Act, the evidence summarized in the opinion *held* adequate to support a finding by the district court that certain "operating engineers" who had charge of a power plant in the absence of the chief engineer, supervised the work of firemen and coal passers, received monthly salaries in excess of $200, and enjoyed privileges usually reserved for supervisory employees, were exempted by § 13 (a) as employees employed in an "executive" capacity. Pp. 547–550.
2. Where findings of fact made by a district court on conflicting evidence and inferences drawn therefrom are not clearly wrong, they should not be rejected by a circuit court of appeals. P. 550.
3. Upon review of a judgment of a circuit court of appeals on certiorari, the respondent, without filing a cross-petition for certiorari, may seek to sustain the judgment on a ground which the circuit court of appeals rejected as well as upon that which it accepted. P. 547, n. 5.

155 F. 2d 711, affirmed.

The Wage-Hour Administrator sued to enjoin alleged violations of the overtime provisions of the Fair Labor Standards Act. The District Court held that the employees in question were exempt under § 13 (a) and gave judgment for the employer. 60 F. Supp. 549. The Circuit Court of Appeals affirmed on the ground that the employees in question, though not exempt, had been compensated in accordance with the Act. 155 F. 2d 711. This Court granted certiorari. 329 U. S. 704. *Affirmed,* p. 550.

George M. Szabad argued the cause for petitioner. With him on the brief were *Acting Solicitor General Washington, Philip Elman, William S. Tyson, Bessie Margolin* and *Morton Liftin.*

Glen O. Smith argued the cause for respondent. With him on the brief were *M. Reese Dill* and *Carl F. Shuler.*

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

In a complaint filed in the District Court, petitioner charged that respondent was violating the Fair Labor Standards Act[1] by failing to pay some of its employees time and one-half for statutory overtime, as required by § 7 (a) of the Act, and asked an injunction against continued violation. Respondent denied the charge, and separately alleged that any of its employees not compensated in accordance with the requirements of § 7 (a) were exempt from the Act by § 13 (a).

The Court, without a jury, heard witnesses for both parties with respect to the compensation and status of three engineers in respondent's power plant. It made special findings of fact, concluded that these men were

[1] 52 Stat. 1060, 29 U. S. C. § 201 *et seq.*

exempt employees, and entered judgment for respondent.[2] The Circuit Court of Appeals thought the evidence did not sustain the District Court's findings relative to the engineers' exempt status. But it thought that the District Court had also found the engineers' compensation to be in accordance with the Act. It decided that the evidence was adequate to this end, and affirmed the District Court's judgment.[3] We granted certiorari [4] to determine whether the ruling of the Circuit Court of Appeals was not inconsistent with this Court's decision on computation of overtime in *Overnight Motor Co.* v. *Missel,* 316 U. S. 572. On argument here, however, respondent continued to urge that the District Court was warranted in its findings as to the engineers' exempt status.[5] Having heard the argument and examined the record, we agree that it was. Therefore, we need not consider further the question of computation of overtime, and proceed only to state the considerations relevant to the particular ground of our decision.

There is no dispute as to the applicable law. Section 13 (a) exempts from the overtime provisions of the Act any person employed in an "executive capacity" as defined in regulations issued by the Administrator. The Regulations prescribe six conjunctive conditions to an executive capacity, which are set forth in the margin.[6] Respondent

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[2] *Walling* v. *General Industries Co.,* 60 F. Supp. 549.

[3] *Walling* v. *General Industries Co.,* 155 F. 2d 711.

[4] 329 U. S. 704.

[5] Respondent was entitled to make this contention here without filing a cross-petition for certiorari. *Langnes* v. *Green,* 282 U. S. 531, 538; *Public Service Commission of Puerto Rico* v. *Havemeyer,* 296 U. S. 506, 509.

[6] 29 C. F. R. Cum. Supp. § 541.1, 5 Fed. Reg. 4077 (Regulations of the Administrator, Wage and Hour Division, U. S. Dept. of Labor, Oct. 24, 1940, amended Jan. 16, 1942) provides as follows:

"§ 541.1 *Executive.*

"The term 'employee employed in a bona fide executive . . .

had the burden of proving the existence of these conditions, if it would rely on its defense that the engineers were exempt employees.[7]

There was evidence to the following effect. Respondent operates at Elyria, Ohio, a plant engaged in the production of small motors and plastic products. Part of this plant consists of a powerhouse containing a boiler room and engine room. In the former are four boilers. These supply the steam required to drive three large electrical generators which are the source of power for the entire plant, and to create the high steam-pressures and air-pressures employed in molding plastics. In the engine room, besides the generators, are compressors, engines, and other equipment. All this machinery, in both rooms, constitutes an interrelated and interdependent system. It must be carefully and skillfully tended at all times in order to

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capacity' in section 13 (a) (1) of the Act shall mean any employee

"(a) whose primary duty consists of the management of the establishment in which he is employed or of a customarily recognized department or subdivision thereof, and

"(b) who customarily and regularly directs the work of other employees therein, and

"(c) who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight, and

"(d) who customarily and regularly exercises discretionary powers, and

"(e) who is compensated for his services on a salary basis at not less than $30 per week (exclusive of board, lodging, or other facilities), and

"(f) whose hours of work of the same nature as that performed by nonexempt employees do not exceed 20 percent of the number of hours worked in the workweek by the nonexempt employees under his direction; provided that this subsection (f) shall not apply in the case of an employee who is in sole charge of an independent establishment or a physically separated branch establishment."

[7] See *Helliwell* v. *Haberman,* 140 F. 2d 833, 834 (C. C. A. 2); *Fletcher* v. *Grinnell Brothers,* 150 F. 2d 337, 340–341 (C. C. A. 6); *Smith* v. *Porter,* 143 F. 2d 292, 294 (C. C. A. 8).

maintain the power and pressure required for continuous 24-hour operation of the plant, to avoid damage to the tremendous investment in the machinery itself, and to guard against the fearful consequences of an explosion.

During the period covered by the evidence, the powerhouse was manned by the following personnel. At the top was the chief engineer, who apparently adhered to no precise duty-hours, but was customarily present most of the morning and afternoon and subject to call, in the event of an emergency, twenty-four hours a day. Directly under and responsible to him were the three "operating engineers" whose status is in issue. They worked consecutive eight or eight and one-half hour shifts, one of them being present in the powerhouse at all times. Finally, there were an unspecified number of firemen and coal-passers, who, collectively, were also on twenty-four hour duty.

The engineers in question were paid regular monthly salaries of more than $200 per month, for which they regularly worked six-shift weeks. They received sick leave, vacations with pay, bonuses, insurance, and pension rights usually reserved for supervisory employees.

The engineers were in charge of the powerhouse and performed the duties generally incident to direct supervision of a highly mechanized operation. Respondent's vice president and factory manager testified that they acted as foremen of the firemen and coal-passers. This testimony was corroborated by other facts. In July, 1944, two months before the complaint in this case was filed, the engineers signed agreements with respondent stating their desire "to be regarded as Foremen, as in the past, with Foremen privileges and continue on a salary basis." Three weeks later the International Brotherhood of Firemen, Oilers and Helpers abandoned a long-contested claim of right to represent the engineers, thereby formally recognizing their supervisory status. Indeed, the nature of the operations in the powerhouse

was such that the immediate and continuous supervision of trained persons was indispensable, and there were concededly no other employees to give such supervision. The engineers were required to maintain constant observation of all machinery in the powerhouse, and to make regular inspections and necessary repairs. In addition they were required to spend a small part of their time in oiling and cleaning the engines.

The District Court, having made findings substantially as stated above, proceeded to make additional findings of the existence of each of the facts on which an executive status, as defined by the Regulations, is made to depend.

We believe that the evidentiary facts afford an adequate basis for the inferences drawn by the Court in making such additional findings. At the least, we think that in drawing such inferences the Court was not clearly wrong, and conclude that the findings should therefore have been left undisturbed.[8] The Circuit Court of Appeals' rejection of those findings cannot rest on the conflicting testimony of petitioner's witnesses. The District Court heard the witnesses, and was the proper judge of their credibility.[9]

Affirmed.

MR. JUSTICE RUTLEDGE, dissenting.

In my opinion the Circuit Court of Appeals correctly found that the evidence is not sufficient to sustain the findings upon which the District Court concluded that

[8] Rule 52 (a), Federal Rules of Civil Procedure; *Lawson* v. *United States Mining Co.*, 207 U. S. 1, 12; *Butte & Superior Copper Co.* v. *Clark-Montana Realty Co.*, 249 U. S. 12, 30. See *District of Columbia* v. *Pace*, 320 U. S. 698, 701.

[9] Rule 52 (a), Federal Rules of Civil Procedure; *Adamson* v. *Gilliland*, 242 U. S. 350; *United States* v. *United Shoe Machinery Co.*, 247 U. S. 32, 37, 38, 41.

the operating engineers are exempt under § 13 (a) (1) of the Fair Labor Standards Act. It said, unanimously:

> "The District Court found as a fact that Stegman, Page and Spooner were employed as foremen or supervisors of the department, with power to supervise the work of firemen and coal-passers in the boiler-room; that they customarily and regularly directed the work of other employees in the department, and customarily exercised discretionary powers. We think these findings are not sustained by the evidence. The work done by the engineers was highly skilled mechanical work. While the machinery was vital to the plant, dangerous and complicated, its operation involved no exercise of discretion, but merely the proper application of the skilled engineering training which these men had received. Although the three engineers were responsible for the proper operation of the machinery during their shifts, and, as the factory manager testifies, 'in charge of management of the property,' none of them could fire or hire or give orders to any man in the boiler-room. Latteman, the chief engineer, who was present at the plant during one shift and on call 24 hours a day and seven days a week, was in full charge of the department. While Latteman might act on information from Stegman, Page, or Spooner, during the period involved, orders emanated only from him. It is not shown that Stegman, Page or Spooner ever made any recommendation concerning the change in status of the boiler-men. It was essential to have proper steam pressure in the boiler-room, but if the three engineers desired in this connection to secure action from the firemen and coal-passers, they had to secure an order from Latteman. This evidence is not contradicted." 155 F. 2d 711, 714.

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An independent examination of the record confirms the Court of Appeals' conclusions. It discloses that on one or two occasions an operating engineer tried to give orders to firemen or coal passers in the boiler room, but in each instance those men refused to follow them and took their orders solely from Latteman. This falls far short at least of the regular and customary supervision required by §§ 541.1 (a) and (b) of the controlling regulations to make the exemption operative.

Since the Court does not reach other questions presented on the record, I express no opinion concerning them.

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

KOTCH ET AL. *v.* BOARD OF RIVER PORT PILOT COMMISSIONERS FOR THE PORT OF NEW ORLEANS ET AL.

APPEAL FROM THE SUPREME COURT OF LOUISIANA.

No. 291. Argued February 5, 6, 1947.—Decided March 31, 1947.

1. The pilotage law of Louisiana requires that ocean-going vessels, other than coastal vessels whose pilotage is subject exclusively to federal regulation, shall be piloted through the Mississippi River approaches to the port of New Orleans, and in the port, only by pilots appointed by the Governor. Pilots so appointed have the status of state officers. Only those are eligible for appointment as state pilots who, in addition to other specific qualifications, have served an apprenticeship of six months under state pilots and who are certified by a Board composed of state pilots. Appellants, experienced in piloting coastal vessels on the river and in the port, and possessing all of the statutory qualifications except the six months' apprenticeship under state pilots, were denied appointment as state pilots. Seeking judicial relief, appellants alleged that the incumbent pilots generally selected as apprentices only relatives and friends of incumbents; that the selections were made by electing prospective apprentices into a pilots' association, formed under authority of state law; that since "membership . . . has

been closed . . . to all except those having the favor of the pilots" the result is that generally only their relatives and friends have and can become state pilots. *Held:* Considering the entirely unique institution of pilotage in the light of its history in Louisiana and elsewhere, the pilotage law as so administered does not violate the equal protection clause of the Fourteenth Amendment. Pp. 553–564.

2. The Federal Constitution does not require a state governor, or subordinates responsible to him and removable by him for cause, to select state public servants by competitive tests or by any other particular method of selection. Pp. 563–564.

3. The method adopted by Louisiana for the selection of pilots is not without relation to the objective of securing for the State and others interested the safest and most efficiently operated pilotage system practicable. P. 564.

209 La. 737, 25 So. 2d 527, affirmed.

A suit brought by appellants in a state court, challenging the validity under the Federal Constitution of the pilotage law of Louisiana, was dismissed. The Supreme Court of the State affirmed. 209 La. 737, 25 So. 2d 527. An appeal was taken to this Court. *Affirmed,* p. 564.

M. A. Grace and *Charles A. O'Niell, Jr.* argued the cause and filed a brief for appellants.

Arthur A. Moreno argued the cause for appellees. With him on the brief was *Selim B. Lemle.*

MR. JUSTICE BLACK delivered the opinion of the Court.

Louisiana statutes provide in general that all seagoing vessels moving between New Orleans and foreign ports must be navigated through the Mississippi River approaches to the port of New Orleans and within it exclusively by pilots who are State officers.[1] New State pilots

[1] A ship entering the Mississippi River from the Gulf of Mexico is piloted the twenty mile distance from the mouth of the river to "Pilot Town" by one of a group of pilots specially familiar with the

are appointed by the governor only upon certification of a State Board of River Pilot Commissioners, themselves pilots.[2] Only those who have served a six-month apprenticeship under incumbent pilots and who possess other specific qualifications may be certified to the governor by the board.[3] Appellants here have had at least fifteen years experience in the river, the port, and else-

"entrance" to the Mississippi through the so-called "passes." La. Acts 1880, No. 99, § 2, La. Acts 1908, No. 55, § 1, La. Acts 1910, No. 26, § 1, 6 La. Gen. Stat. §§ 9141, 9163 (1939). Between Pilot Town and New Orleans, a distance of approximately ninety miles, ships are piloted exclusively by so-called river port pilots. La. Acts 1908, No. 54, § 1, 6 La. Gen. Stat., tit. 59, c. 8 (1939). By an amendment in 1942 the exclusive jurisdiction of the river port pilots was extended to the piloting of seagoing vessels within the port of New Orleans. La. Acts 1942, No. 134, 6 La. Gen. Stat. § 9155 (Supp. 1946). Appellants here sought appointment as river port pilots.

[2] Sections 2 and 3 of the Act of 1908 provided for the appointment and commissioning of twenty-eight pilots by the governor and prescribed that thereafter there should not be less than twenty. 6 La. Gen. Stat. §§ 9155, 9156 (1939).

The statement of the Louisiana court in this case that pilots so appointed are considered State officers has long been the established State rule. *Williams* v. *Payson,* 14 La. Ann. Rep. 7, 8 (1859); *Louisiana* v. *Follett,* 33 La. Ann. Rep. 228, 230 (1881); *Levine* v. *Michel,* 35 La. Ann. Rep. 1121, 1124 (1883).

From among the pilots the governor was required to appoint three River Port Pilot Commissioners. La. Acts 1908, No. 54, § 1, 6 La. Gen. Stat. § 9154 (1939).

[3] "Whenever there exists a necessity for more pilots . . . the . . . board of river port pilot commissioners shall hold examinations, under such rules and regulations, and with such requirements as they shall have provided, with the governor's approval, provided that no applicant shall be considered by said board, unless he submits proper evidence of moral character and is a voter of this state, and shall have served six months' apprenticeship in his proposed calling, and upon the certificate of the board to the governor that the applicant has complied with the provisions of this act, the governor may, in his discretion, appoint to existing vacancies." La. Acts 1908, No. 54, § 4. 6 La. Gen. Stat. § 9157 (1939).

where, as pilots of vessels whose pilotage was not governed by the State law in question.[4] Although they possess all the statutory qualifications except that they have not served the requisite six months apprenticeship under Louisiana officer pilots,[5] they have been denied appointment as State pilots. Seeking relief in a Louisiana state court, they alleged that the incumbent pilots, having unfettered discretion under the law in the selection of apprentices, had selected, with occasional exception, only the relatives and friends of incumbents; that the selections were made by electing prospective apprentices into the pilots' association, which the pilots have formed by authority of State law; [6] that since "membership . . . has been closed . . . to all except those having the favor of the pilots" the result is that only their relatives and friends have and can become State pilots.[7] The Supreme Court

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[4] Appellants were licensed to pilot coastwise vessels to and through the port under federal law which excludes states from controlling pilotage of coastal shipping. Rev. Stat. §§ 4401, 4444, 46 U. S. C. §§ 215, 364. Also prior to the passage of La. Acts 1942, No. 134, they had piloted all classes of vessels within the port of New Orleans. That Act deprived appellants of authority to pilot within the port and conferred it exclusively upon State river port pilots. Thus appellants allege they have been deprived of an opportunity to make a living unless they can obtain appointment as river port pilots under the pilotage law.

[5] While the Act does not specifically require that the apprenticeships be performed under incumbent officer pilots, the State Supreme Court has so construed it.

[6] La. Rev. Stat. § 2707 (1869), reenacted in § 4 of La. Acts 1928, No. 198, 6 La. Gen. Stat. § 9149 (1939).

[7] Appellants' complaint was dismissed for failure to state a cause of action. Therefore we consider their allegations as facts for the purpose of this decision.

Appellants' prayer had sought an injunction against interference with their serving as pilots, and, in the alternative, sought mandamus to compel the Board to examine appellants as required by law and to certify them to the Governor. The Louisiana Supreme Court

of Louisiana has held that the pilotage law so administered does not violate the equal protection clause of the Fourteenth Amendment, 209 La. 737, 25 So. 2d 527. The case is here on appeal from that decision under 28 U. S. C. § 344 (a).

The constitutional command for a state to afford "equal protection of the laws" sets a goal not attainable by the invention and application of a precise formula. This Court has never attempted that impossible task. A law which affects the activities of some groups differently from the way in which it affects the activities of other groups is not necessarily banned by the Fourteenth Amendment. See *e. g., Tigner* v. *Texas,* 310 U. S. 141, 147. Otherwise, effective regulation in the public interest could not be provided, however essential that regulation might be. For it is axiomatic that the consequence of regulating by setting apart a classified group is that those in it will be subject to some restrictions or receive certain advantages that do not apply to other groups or to all the public. *Atchison, T. & S. F. R. Co.* v. *Matthews,* 174 U. S. 96, 106. This selective application of a regulation is discrimination in the broad sense, but it may or may not deny equal protection of the laws. Clearly, it might offend that constitutional safeguard if it rested on grounds wholly irrelevant to achievement of the regulation's objectives. An example would be a law applied to deny a person a right to earn a living or hold any job because of hostility to his particular race, religion, beliefs, or because of any other reason having no rational relation to the regulated activities. See *American Sugar Rfg. Co.* v. *Louisiana,* 179 U. S. 89, 92.

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affirmed the trial court's refusal to compel the board to examine appellants because they did not possess the qualifications required to take examinations—specifically, they had not served apprenticeships.

The case of *Yick Wo* v. *Hopkins,* 118 U. S. 356, relied on by appellants, is an illustration of a type of discrimination which is incompatible with any fair conception of equal protection of the laws. Yick Wo was denied the right to engage in an occupation supposedly open to all who could conduct their business in accordance with the law's requirements. He could meet these requirements, but was denied the right to do so solely because he was Chinese. And it made no difference that under the law as written Yick Wo would have enjoyed the same protection as all others. Its unequal application to Yick Wo was enough to condemn it. But Yick Wo's case, as other cases have demonstrated, was tested by the language of the law there considered and the administration there shown. *Cf. Crowley* v. *Christensen,* 137 U. S. 86, 93, 94; *Gundling* v. *Chicago,* 177 U. S. 183; *New York ex rel. Lieberman* v. *Van de Carr,* 199 U. S. 552; *Engel* v. *O'Malley,* 219 U. S. 128, 137. So here, we must consider the relationship of the method of appointing pilots to the broad objectives of the entire Louisiana pilotage law. See *Grainger* v. *Douglas Park Jockey Club,* 148 F. 513, and cases there cited. In so doing we must view the appointment system in the context of the historical evolution of the laws and institution of pilotage in Louisiana and elsewhere. *Cf. Otis Co.* v. *Ludlow Mfg. Co.,* 201 U. S. 140, 154; *Jackman* v. *Rosenbaum,* 260 U. S. 22, 31; *Bayside Fish Flour Co.* v. *Gentry,* 297 U. S. 422, 428–430. And an important factor in our consideration is that this case tests the right and power of a state to select its own agents and officers. *Taylor* v. *Beckham,* 178 U. S. 548; *Snowden* v. *Hughes,* 321 U. S. 1, 11–13.

Studies of the long history of pilotage reveal that it is a unique institution and must be judged as such.[8] In

[8] See generally, Report of Departmental Committee on Pilotage (London, 1911); Pilotage in the United States, Special Agents Series, Department of Commerce (1917).

order to avoid invisible hazards, vessels approaching and leaving ports must be conducted from and to open waters by persons intimately familiar with the local waters. The pilot's job generally requires that he go outside the harbor's entrance in a small boat to meet incoming ships, board them and direct their course from open water to the port. The same service is performed for vessels leaving the port. Pilots are thus indispensable cogs in the transportation system of every maritime economy. Their work prevents traffic congestion and accidents which would impair navigation in and to the ports. It affects the safety of lives and cargo, the cost and time expended in port calls, and, in some measure, the competitive attractiveness of particular ports. Thus, for the same reasons that governments of most maritime communities have subsidized, regulated, or have themselves operated docks and other harbor facilities and sought to improve the approaches to their ports, they have closely regulated and often operated their ports' pilotage systems.[9]

The history and practice of pilotage demonstrate that, although inextricably geared to a complex commercial economy, it is also a highly personalized calling.[10] A pilot does not require a formalized technical education so much as a detailed and extremely intimate, almost intuitive, knowledge of the weather, waterways and conformation of the harbor or river which he serves. This seems to be particularly true of the approaches to New Orleans through the treacherous and shifting channel of the Mississippi River.[11] Moreover, harbor entrances

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[9] See *Cooley* v. *Board of Wardens,* 12 How. 299, 308, 312, 316, 326; *Ex parte McNiel,* 13 Wall. 236, 238, 239.

[10] For an excellent description of a pilot's life and duty, see Kane, Deep Delta Country, c. 10 (1944).

[11] See Kane, *op. cit. supra,* note 10. See also *Hearings before House Committee on the Merchant Marine and Fisheries on H. R. 9678,* 64th Cong., 1st Sess., 106, 214, 229, 279 (1916) (compulsory barge pilotage).

where pilots can most conveniently make their homes and still be close to places where they board incoming and leave outgoing ships are usually some distance from the port cities they serve.[12] These "pilot towns" have begun, and generally exist today, as small communities of pilots, perhaps near but usually distinct from the port cities.[13] In these communities young men have an opportunity to acquire special knowledge of the weather and water hazards of the locality and seem to grow up with ambitions to become pilots in the traditions of their fathers, relatives, and neighbors.[14] We are asked, in effect, to say that Louisiana is without constitutional authority to conclude that apprenticeship under persons specially interested in a pilot's future is the best way to fit him for duty as a pilot officer in the service of the State.

The States have had full power to regulate pilotage of certain kinds of vessels since 1789 when the first Congress decided that then existing state pilot laws were satisfactory and made federal regulation unnecessary. 1 Stat. 53, 54 (1789), 46 U. S. C. § 211; *Olsen* v. *Smith,* 195 U. S. 332, 341; *Anderson* v. *Pacific Coast S. S. Co.,* 225 U. S. 187. Louisiana legislation has controlled the activities and appointment of pilots since 1805—even before the Territory was admitted as a State.[15] The State pilotage system, as it has evolved since 1805, is typical of that which grew up

[12] See Giesecke, American Commercial Legislation before 1789 (1910) 118; Kane, *op. cit. supra,* note 10.

[13] See Kane, *op. cit. supra,* note 10. A Louisiana statute provides that "no license shall be granted any person to keep a tavern . . . at the Balize, South West Pass or any other station for pilots, nor within three miles of such station, unless the person applying for such license shall be recommended in writing by a majority of the branch pilots." La. Rev. Stat. § 2704 (1869), 6 La. Gen. Stat. § 9166 (1939).

[14] See Kane *op. cit. supra,* note 10, 128; see also Pilotage in the United States, *op. cit. supra,* note 8, 8, 16.

[15] La. Acts (Territory of New Orleans) 1805, c. 24; see also Surrey, Commerce of Louisiana, 1699–1763, c. III (1916).

in most seaboard states and in foreign countries.[16] Since 1805 Louisiana pilots have been State officers whose work has been controlled by the State.[17] That Act forbade all but a limited number of pilots appointed by the governor to serve in that capacity. The pilots so appointed were authorized to select their own deputies.[18] But pilots, and through them, their deputies, were literally under the command of the master and the wardens of the port of New Orleans, appointed by the governor. The master and wardens were authorized to make rules governing the practices of pilots, specifically empowered to order pilots to their stations, and to fine them for disobedience to orders or rules. And the pilots were required to make official bond for faithful performance of their duty. Pilots' fees were fixed;[19] ships coming to the Mississippi were required to pay pilotage whether they took on pilots or not.[20] The pilots were authorized to organize an association whose membership they controlled in order "to enforce the legal regulations, and add to the efficiency of the service required thereby."[21] Moreover, efficient and adequate

[16] Almost all the maritime states, some as colonies before the Revolution, adopted comprehensive pilotage laws which included unrestricted apprenticeship provisions. Mass. Laws, c. 13 (1783); Mass. Rev. Stat. c. 32, §§ 5–42 (1836); New York Laws, c. XVIII, §§ I, VII, X, XII (1819); Pa. Stats. at Large, c. 536, § VI (1767); N. J. Rev. Laws, tit. 37, c. 7, § 18 (1847); 1 Laws of Md. (Dorsey) c. 63, §§ 2, 20, 23 (1803); Code of Virginia, c. 92, §§ 4, 9 (1849); N. C. Rev. Stat. c. 88, §§ 1, 5, 14 (1837). See also Report of Departmental Committee on Pilotage, *op. cit. supra,* note 8, Part I.

[17] See note 2 *supra.*

[18] The 1805 Act required deputies to obtain a certificate from the master and wardens as a condition precedent to their appointment. But § 1 of La. Acts 1806, c. 26, gave pilots blanket authority to appoint their own deputies. Pilots were, however, made responsible for the neglect or misconduct of their deputies.

[19] La. Acts 1805, c. 24, § 20; La. Acts 1837, No. 106, § 9.

[20] La. Acts 1805, c. 24, § 17.

[21] *Levine* v. *Michel, supra,* at 1125; see also note 6 *supra.*

service was sought to be insured by requiring the Board of Pilot Commissioners to report to the governor and authorizing him summarily to remove any pilot guilty of "neglect of duty, habitual intemperance, carelessness, incompetency, or any act or conduct . . . showing" that he "ought to be removed." La. Act No. 113, § 20 (1857). These provisions have been carried over with some revision into the present comprehensive Louisiana pilotage law. 6 La. Gen. Stat., tit. 59, cc. 6, 8 (1939). Thus in Louisiana, as elsewhere, it seems to have been accepted at an early date that in pilotage, unlike other occupations, competition for appointment, for the opportunity to serve particular ships and for fees, adversely affects the public interest in pilotage.[22]

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[22] See Kane, *op. cit. supra*, n. 10, at 126–128; all of the State and colonial statutes set out in note 10, *supra*, provided for limitation on the number of pilots and fixed the fees they might charge. This is generally true today. See n. 23 *infra*.

The Department of Commerce Report, *supra*, n. 8, at 28 observed that: "The formation of pilots' associations was largely a result of the intense competition that formerly prevailed among the pilots, ... Little effort was made to maintain definite pilot stations. Instead, the desire to be the first to speak a ship frequently led the pilots to cruise great distances from the port.

"One of the unfortunate results of the intense competition of pilots was the fact that frequently pilots could not be had when wanted, although they might be far out to sea in quest of business. Another drawback was that pilots unnecessarily exposed themselves to danger. And a third important disadvantage was that it made the earnings precarious; a pilot might earn a great deal this month and very little the next. . . .

"The pilots themselves were the first to see the disadvantages of the free or competitive system and to take steps toward the organization of associations. These associations soon developed into strong working combinations that eliminated competition and placed on an amicable basis matters that formerly produced much sharp rivalry.

"From the evidence at hand it would appear that the shipping interests as well as the insurance and commercial interests of the

It is within the framework of this long-standing pilotage regulation system that the practice has apparently existed of permitting pilots, if they choose, to select their relatives and friends as the only ones ultimately eligible for appointment as pilots by the governor. Many other states have established pilotage systems which make the selection of pilots on this basis possible.[23] Thus it was noted thirty years ago in a Department of Commerce study of pilotage that membership of pilot associations "is limited to persons agreeable to those already members, generally relatives and friends of the pilots. Probably in pilotage more than in any other occupation in the United States the male members of a family follow the same work from generation to generation." [24]

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ports encouraged the pilots in the formation of these associations. The advantages of a well-organized pilotage system were as apparent to these interests as to the pilots themselves, for the commerce of the port was not only facilitated and expedited but made much safer by reason of the better organization of the pilotage system, which came with the elimination of competition.

"Since associations have been formed along the present lines pilotage grounds have been established . . . These grounds are well known to mariners, who may safely count on finding there at practically all times and in all conditions of weather a pilot boat with a sufficient number of pilots aboard to accommodate any reasonable number of vessels that may come. There is little chance nowadays that a vessel will fail to find a pilot when needed. . . .

"Still another advantage of the present organization of pilotage systems is that it permits the maintenance of a central office which is in constant touch with the pilot boat and arranges for the rotation of pilots. The association generally employs an agent to look after the routine business of the office."

[23] See N. J. Laws 1898, c. 31, N. J. Stat. Ann. Title 12, c. 8 (1939); Pa. P. L. 542 of 1803, Pa. Stats. Ann. (Purdon) Title 55, c. 2 (1930); Md. Ann. Code (Flack), Art. 74 (1939); Del. Rev. Code, c. 35 (1935); Va. Code, c. 142 (1942); Ala. Laws, 1931, p. 154, Ala. Code, Title 38, c. 2 (1940); Ore. Comp. Laws Ann., Title 105, c. 2 (1940). See also note 16, *supra*.

[24] Pilotage in the United States, *supra*, note 8, p. 8.

The practice of nepotism in appointing public servants has been a subject of controversy in this country throughout our history. Some states have adopted constitutional amendments [25] or statutes [26] to prohibit it. These have reflected state policies to wipe out the practice. But Louisiana and most other states have adopted no such general policy. We can only assume that the Louisiana legislature weighed the obvious possibility of evil against whatever useful function a closely knit pilotage system may serve. Thus the advantages of early experience under friendly supervision in the locality of the pilot's training, the benefits to morale and *esprit de corps* which family and neighborly tradition might contribute, the close association in which pilots must work and live in their pilot communities and on the water, and the discipline and regulation which is imposed to assure the State competent pilot service after appointment, might have prompted the legislature to permit Louisiana pilot officers to select those with whom they would serve.

The number of people, as a practical matter, who can be pilots is very limited. No matter what system of selection is adopted, all but the few occasionally selected must of necessity be excluded. *Cf. Olsen* v. *Smith, supra,* 344, 345.[27] We are aware of no decision of this Court holding

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[25] See *e. g.*, Mo. Const., Art. 14, § 13 (1924).

[26] See *e. g.*, Idaho Sess. Laws, 1915, c. 10, Idaho Code Ann., § 57–701 (1932); Fla. Laws, 1933, c. 16088, Fla. Stats. Ann. §§ 116.10, 116.11 (1943); Neb. Laws 1919, c. 190, § 6, Neb. Rev. Stat. § 81–108 (1943); Tex. Acts 1909, p. 85, Tex. Penal Code (Vernon) Arts. 432–438 (1938).

[27] In *Olsen* v. *Smith,* the constitutionality of a Texas statute forbidding all but pilots appointed by the governor to serve was challenged by one who had not been appointed and had been enjoined from serving as a pilot. *Yick Wo* v. *Hopkins, supra,* was relied on as authority for a contention that he had been denied rights protected by the Fourteenth Amendment including equal protection of the

that the Constitution requires a state governor, or subordinates responsible to him and removable by him for cause, to select state public servants by competitive tests or by any other particular method of selection. The object of the entire pilotage law, as we have pointed out, is to secure for the State and others interested the safest and most efficiently operated pilotage system practicable. We cannot say that the method adopted in Louisiana for the selection of pilots is unrelated to this objective. See *Olsen* v. *Smith, supra; cf. Carmichael* v. *Southern Coal Co.*, 301 U. S. 495, 509–510. We do not need to consider hypothetical questions concerning any similar system of selection which might conceivably be practiced in other professions or businesses regulated or operated by state governments. It is enough here that considering the entirely unique institution of pilotage in the light of its history in Louisiana, we cannot say that the practice appellants attack is the kind of discrimination which violates the equal protection clause of the Fourteenth Amendment.

Affirmed.

MR. JUSTICE RUTLEDGE, dissenting.

The unique history and conditions surrounding the activities of river port pilots, shortly recounted in the Court's opinion, justify a high degree of public regulation. But I do not think they can sustain a system of entailment for the occupation. If Louisiana were to provide by statute *in haec verba* that only members of John Smith's family would be eligible for the public calling of pilot, I have no doubt that the statute on its face would infringe the Fourteenth Amendment. And this would be true,

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laws. *Id.* 334. But this Court in sustaining the constitutionality of the statute, did not specifically discuss the question here raised. Therefore we do not depend upon *Olsen* v. *Smith* as a necessarily controlling authority for our decision here.

even though John Smith and the members of his family had been pilots for generations. It would be true also if the right were expanded to include a number of designated families.

In final analysis this is, I think, the situation presented on this record. While the statutes applicable do not purport on their face to restrict the right to become a licensed pilot to members of the families of licensed pilots, the charge is that they have been so administered. And this charge not only is borne out by the record but is accepted by the Court as having been sustained.[1]

The result of the decision therefore is to approve as constitutional state regulation which makes admission to the ranks of pilots turn finally on consanguinity. Blood is, in effect, made the crux of selection. That, in my opinion, is forbidden by the Fourteenth Amendment's guaranty against denial of the equal protection of the laws. The door is thereby closed to all not having blood relationship to presently licensed pilots. Whether the occupation is considered as having the status of "public officer" or of highly regulated private employment, it is beyond legislative power to make entrance to it turn upon such a criterion. The Amendment makes no exception from its prohibitions against state action on account of the fact that public rather than private employment is affected by the forbidden discriminations. That fact simply makes violation all the more clear where those discriminations are shown to exist.

It is not enough to avoid the Amendment's force that a familial system may have a tendency or, as the Court puts it, a direct relationship to the end of securing an efficient pilotage system. Classification based on the pur-

[1] The record shows that in a few instances over a course of several years nonrelatives of licensed pilots have received appointment as apprentices and qualified. But the general course of administration has been that such appointments are limited to relatives.

pose to be accomplished may be said abstractly to be sound. But when the test adopted and applied in fact is race or consanguinity, it cannot be used constitutionally to bar all except a group chosen by such a relationship from public employment. That is not a test; it is a wholly arbitrary exercise of power.

Conceivably the familial system would be the most effective possible scheme for training many kinds of artisans or public servants, sheerly from the viewpoint of securing the highest degree of skill and competence. Indeed, something very worth while largely disappeared from our national life when the once prevalent familial system of conducting manufacturing and mercantile enterprises went out and was replaced by the highly impersonal corporate system for doing business.

But that loss is not one to be repaired under our scheme by legislation framed or administered to perpetuate family monopolies of either private occupations or branches of the public service. It is precisely because the Amendment forbids enclosing those areas by legislative lines drawn on the basis of race, color, creed and the like, that, in cases like this, the possibly most efficient method of securing the highest development of skills cannot be established by law. Absent any such bar, the presence of such a tendency or direct relationship would be effective for sustaining the legislation. It cannot be effective to overcome the bar itself. The discrimination here is not shown to be consciously racial in character. But I am unable to differentiate in effects one founded on blood relationship.

The case therefore falls squarely within the ruling in *Yick Wo* v. *Hopkins,* 118 U. S. 356,[2] not only with relation

[2] To like effect is *Alston* v. *School Board of Norfolk,* 112 F. 2d 992; cf. *Burt* v. *City of New York,* 156 F. 2d 791; Remedies for Discrimination by State and Local Administrative Bodies (1946) 60 Harv. L. Rev. 271.

to the line of discrimination employed, but also in the fact that unconstitutional administration of a statute otherwise valid on its face incurs the same condemnation as if the statute had incorporated the discrimination in terms. Appellants here are entitled, in my judgment, to the same relief as was afforded in the *Yick Wo* case.

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

INTERSTATE COMMERCE COMMISSION *v.* MECHLING, DOING BUSINESS AS A. L. MECHLING BARGE LINE, ET AL.

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

No. 72. Argued February 12, 13, 1947.—Decided March 31, 1947.

1. An order of the Interstate Commerce Commission authorizing, on the Chicago-to-the-east leg of grain shipments originating west of Chicago, a proportional rate 3 cents per hundred pounds higher on ex-barge than on ex-lake or ex-rail shipments, *held* not based on adequate findings and evidence, and therefore unlawful under the Interstate Commerce Act as amended by the Transportation Act of 1940. Pp. 572–573, 583.

(a) The policy and provisions of the Transportation Act of 1940 forbid approval by the Commission of barge rates or barge-rail rates which do not preserve the inherent advantages of cheaper water transportation, but which discriminate against water carriers and the goods they transport. Pp. 574–577.

(b) Chicago-to-the-east railroads can not lawfully charge more for carrying ex-barge than for carrying ex-lake or ex-rail grains to and from the same localities, unless the eastern haul of the ex-barge grain costs the eastern railroads more to haul than does ex-rail or ex-lake grain. P. 577.

(c) Section 307 (d) of Part III of the Interstate Commerce Act, authorizing the Commission to fix differentials as between through water-rail and through all-rail rates, does not authorize the Commission to neutralize the effective prohibitions of other provisions

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which were strengthened in 1940 expressly to prevent discrimination against water carriers. P. 577.

(d) The Commission, no more than it could require the barge carriers to raise rates inbound to Chicago which it accepted as reasonable, can not lawfully bring about the same prohibited result by raising the railroad rates charged by eastern roads for ex-barge grain shipments east from Chicago. Pp. 577–578.

(e) The Commission's order is not supported by its conclusion that it is "inequitable" for the barges to charge a much lower rate for the inbound grain haul than the competitive western railroads can afford to charge for the same haul. P. 578.

(f) It is not within the province of the Commission to so adjust rates as to equalize the transportation cost of barge shippers with that of shippers who do not have access to barge service or to protect the traffic of railroads from barge competition. P. 579.

(g) Congress has not granted the Commission discretionary power to approve any type of rates which would reduce the "inherent advantage" of barge transportation in whole or in part. P. 579.

(h) Partial compensation of eastern roads for additional transit costs can not be made in a manner which singles out ex-barge grain for discriminatory treatment in violation of the Interstate Commerce Act. P. 583.

2. To justify the higher proportional rates on ex-barge grain, the Commission would have to make findings supported by evidence to show how much greater is the cost to the eastern roads of reshipping ex-barge grain than of reshipping ex-lake or ex-rail grain moving from the same localities and requiring the same service as does the ex-barge grain. The "unsifted averages" put forward by the Commission in this case do not measure the allegedly greater costs nor show that they exist. P. 583.

3. Since in this case the United States was a necessary party to the proceedings in the district court, the order of that court requiring the Commission to serve notice of appeal on the United States was not prejudicial error. P. 573, n. 6.

Affirmed.

In 1939 the eastern railroads filed with the Interstate Commerce Commission schedules which imposed on ex-barge grain the local rate from Chicago east, but allowed ex-rail and ex-lake grain the benefit of 8½-cent lower "reshipping" rates on the eastern haul. The Commis-

sion, after a hearing, made an order which left the railroad-proposed higher rates in effect, but stated that "in a proper proceeding we might prescribe proportional rates on the ex-barge traffic lower than local rates or joint barge-rail rates lower than the combinations." 248 I. C. C. 307. A District Court set aside the Commission's order on the ground that fixing higher rates for ex-barge grain than for ex-rail and ex-lake grain "discriminates against water competition by the users of barges." 44 F. Supp. 368. On appeal this Court reversed, but with "no implication of approval of any rates here involved." *I. C. C.* v. *Inland Waterways Corp.*, 319 U. S. 671. In further proceedings, the Commission authorized ex-barge grain rates east from Chicago 3 cents per hundred pounds higher than rates for ex-rail and ex-lake grain. 262 I. C. C. 7. The appellees then brought this suit in the District Court to set aside the order of the Commission, insofar as it permitted the railroads to put the higher ex-barge grain rates into effect. The District Court set aside and enjoined enforcement of the order. The Commission appealed to this Court. *Affirmed,* p. 583.

Daniel H. Kunkel argued the cause for appellant. With him on the brief was *Daniel W. Knowlton.*

David O. Mathews argued the cause for the United States and the Secretary of Agriculture. With him on the brief were *Acting Solicitor General Washington, Assistant Attorney General Berge, Edward Dumbauld, W. Carroll Hunter* and *James K. Knudsen.*

Edward B. Hayes argued the cause for Mechling, appellee.

Nuel D. Belnap argued the cause for the Inland Waterways Corporation, appellee. With him on the brief were *Luther M. Walter, John S. Burchmore* and *Robert N. Burchmore.*

MR. JUSTICE BLACK delivered the opinion of the Court.

A District Court of three judges enjoined in part an order of the Interstate Commerce Commission, and the case is here on appeal under 28 U. S. C. §§ 47, 47a, and 345. The Commission order specifically relates to the railroad rate for grain transported from Chicago, Illinois, to New York and other eastern points,[1] after that grain has been transported to Chicago from the west by connecting rail or water carriers on through bills of lading. In such through shipments the through rate is a combination of distinctly separate rates charged respectively for shipments from the west to Chicago and from Chicago to the east. The charge fixed for the last leg of the shipment is called, in railroad parlance, a "reshipping" or "proportional" rate. It is lower from Chicago to the east than a "local" rate charged for a shipment from Chicago to the east which originates in Chicago. See *Atchison, T. & S. F. R. Co.* v. *United States,* 279 U. S. 768, 771.

For many years eastern railroads have carried grain east from Chicago at reshipping rates 8½ cents per hundred pounds lower than local rates. Up to 1939 this Chicago-to-the-east reshipping rate had been identical for grain, whether brought to Chicago by a connecting railroad, connecting lake steamer, or connecting barge. Although barge lines were much slower than railroads, they were less expensive to operate and therefore could afford to transport freight much more cheaply than railroads. The result was that the barge-rail rate from a point in the west to eastern destinations was considerably cheaper

[1] The eastern points are in New York and adjacent states and in New England. It is around shipments from Chicago to this territory that this rate controversy chiefly revolves. The proposed new rate increases also related to grain shipments from Chicago to the so-called central territory. The reasons supporting the conclusion we reach apply equally to the central territory increases, and consequently we need not treat them separately.

than the all-rail rate from that point—the difference being measured by the relative cheapness of shipping over the barge leg of the through route. Because of the cheaper barge rates, much of the railroads' grain freight business from localities which could be served by either barge or rail shifted to the barges [2] after 1933 when barge service from western grain localities to Chicago was resumed.[3] This was the barge versus rail competitive situation which existed when in 1939 the eastern railroads filed schedules with the Commission which imposed on ex-barge grain the local rate from Chicago east, but allowed ex-rail and ex-lake grain the benefit of the 8½ cent lower "reshipping" rates on the eastern haul. The result of this rate schedule would have been that, although barge lines could still have carried grain from the west to Chicago much more cheaply than the railroads could, by the time the grain had been reshipped to New York or other eastern points, the barge-rail carriage would have been more expensive to the shipper than all-rail carriage. This would have put the barge lines at a competitive disadvantage with railroads in barge-served localities. At the Commission hearing to test the validity of the higher ex-barge grain rates, a railroad representative candidly stated that the purpose of the proposal was to "drive this business off the water and back onto the rails where it belongs." 248 I. C. C. 307, 321. This purpose would most probably have been accomplished had the high ex-barge reshipping rates gone into effect.

The Commission, after a hearing, made an order which left the railroad-proposed higher rates in effect, but stated that "in a proper proceeding we might prescribe proportional rates on the ex-barge traffic lower than local rates

[2] See 246 I. C. C. 353, 361, 364, 383; 262 I. C. C. 7, 41.

[3] There was barge service from the grain section west of Chicago to that city from 1886 to 1907 when it was discontinued. Such barge service was resumed in 1933. See 262 I. C. C. 7, 20.

or joint barge-rail rates lower than the combinations." 248 I. C. C. 307, 311. A District Court set aside the Commission's order on the ground that fixing higher rates for ex-barge grain than for ex-rail and ex-lake grain "discriminates against water competition by the users of barges." *Cargill, Inc.* v. *United States,* 44 F. Supp. 368, 375. On appeal this Court reversed, saying that its decision carried "no implication of approval of any rates here involved." *Interstate Commerce Commission* v. *Inland Waterways Corp.,* 319 U. S. 671, 691. It reserved for future consideration in a proceeding before the Commission the amount, if any, which the eastern railroads could increase "reshipping" rates for ex-barge over those for ex-lake and ex-rail grain. *Id.* at 687–688, 691.

The Commission has now considered and decided that question in a proper proceeding. 262 I. C. C. 7. It found the originally proposed 8½ cent higher rates for ex-barge grain to be unlawful and required the eastern roads to cancel the schedules fixing those increased reshipping rates. This part of the Commission's order has not been challenged. But it also concluded that ex-barge grain rates east from Chicago would be reasonable and lawful even though they were 3 cents per hundred pounds higher than rates for ex-rail and ex-lake grain. Consequently, the Commission provided that its order cancelling the scheduled reshipping rate increase was "without prejudice to the filing of new schedules in conformity with the findings herein." Thus, the effect of the whole order was to permit, if not require, the railroads to charge higher reshipment rates for ex-barge than for ex-lake and ex-rail grain. Under these rates, barge-rail grain shipments would be a trifle less expensive than all-rail transportation between the same points.[4] But the through barge-rail transpor-

[4] The ex-barge proportionals fixed by the Commission were uniformly 5.5 cents lower than local rates from Chicago to the east and 3 cents higher than ex-barge and ex-lake proportionals.

tation would cost more than it would have if the through rates had accurately reflected the cheaper in-bound barge rates. The Commission considered these higher rates for ex-barge grain, which resulted in higher through rates, justified so long as there remained to ex-barge grain "a fair opportunity to move in competition with lake-rail and all-rail traffic."

Appellees [5] then filed this action in the District Court against the Commission and the United States to cancel, annul, and enjoin enforcement of the order, insofar as it permitted the railroads to put these new higher ex-barge grain rates into effect. The complaints charged that the order was in violation of the Interstate Commerce Act as amended by the Transportation Act of 1940, 54 Stat. 898. It was contended that the order was void because it approved railroad rates which penalized ex-barge grain to the extent of 3 cents per hundred pounds, solely because the grain had been transported to Chicago in barges, and without evidence or adequate findings that it cost the railroads 3 cents more to transport ex-barge than it cost to transport ex-rail or ex-lake grain. The United States, represented by the Department of Justice, appearing as a defendant, admitted these allegations. The Interstate Commerce Commission intervened and defended the order. After a hearing, the District Court found that the allegations were sustained. Accordingly, it set aside and enjoined enforcement of the order to the extent that it permitted the 3-cent extra charge.[6] The result of the

[5] Appellees are (1) A. L. Mechling, a barge water carrier between Chicago and points in Illinois, Missouri, and Iowa; (2) Inland Waterways Corporation which transports grain by barges between, among other points, Kansas City and Chicago; (3) the Secretary of Agriculture, who is authorized by statute to make complaints to the Interstate Commerce Commission, and to seek judicial relief with respect to rates and charges for the transportation of farm products.

[6] Two procedural points are raised by the Commission which need not be discussed at length. The first is that the District Court's

District Court's judgment was to leave in effect the long-existing eastern railroad rates which provide the same rates for carrying ex-barge, ex-lake, and ex-rail grain east from Chicago.

Judicial review of the findings of fact and the expert judgments of the Interstate Commerce Commission where the Commission acts within its statutory authority is extremely limited. And § 307 (d) of the 1940 Act[7] authorizes the Commission "in the case of a through route" to "prescribe such reasonable differentials as it may find to be justified between all-rail rates and the joint rates in connection with such common carrier by water." *Cf. United States* v. *Chicago Heights Trucking Co.*, 310 U. S. 344, 352–353; *Board of Trade of Kansas City* v. *United States*, 314 U. S. 534, 546. But the congressional debates and committee reports on the 1940 Act and the statutory provisions which emerged from this legislative background show that Congress enunciated positive policies and specific limiting standards which it expected the Commission to follow in fixing rates, including "differentials" between all-rail and water-rail rates. The provisions of the Trans-

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preliminary injunction was too broad because it enjoined the Commission from permitting the controversial rates to become effective. This question is now moot, but see *Inland Steel Co.* v. *United States*, 306 U. S. 153, 159–160. The second procedural point urged relates to the District Court's order requiring the Commission to serve notice of appeal on the United States. We see no error in this, and even if there were, it could not be prejudicial in connection with the Commission's rights on this appeal. Since the United States was necessarily a party in the District Court, 28 U. S. C. 46, *Lambert Run Coal Co.* v. *Baltimore & O. R. Co.*, 258 U. S. 377, 382, we think the District Court cannot be held in error for requiring service of the notice of the Commission's appeal.

[7] 54 Stat. 898, 937; 49 U. S. C. § 907d. In the original proceedings before the Commission, the last evidence was heard and the record was closed before the 1940 Transportation Act became a law. *Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 U. S. 671, 678. The present proceedings are fully governed by the 1940 Act.

portation Act of 1940 which brought water carriers under Interstate Commerce Commission jurisdiction were vigorously opposed in Congress by those who feared that the Commission might raise barge rates in order to enable railroads better to compete with inherently cheaper water transportation. These opponents were repeatedly assured by sponsors of the 1940 Act who advocated Commission regulation of water transportation that the questioned legislation unequivocally required the Commission to fix rates which would preserve for shippers the inherent advantages of barge transportation: lower cost of equipment, operation, and therefore service.[8] As Senator Wheeler, spokes-

[8] Illustrative of the attitude of Congress is this exchange between Senator Lucas and Senator Wheeler, Chairman of the Interstate Commerce Committee:

"Mr. Lucas. . . . The town in which I live is a focal point for the transportation of wheat and corn down the Illinois. The price of wheat and corn at the elevator there is always 2 or 3 cents higher than it is at elevators some 25 or 30 miles farther inland because of the difference between the rates by rail and those by water.

"Under the bill, as I understand it, the Interstate Commerce Commission would have the power, and it would be its duty, to fix rates on the Illinois River with respect to the transportation of that wheat and corn. Would it be possible for the Interstate Commerce Commission to fix the rate the same as the railroad rate from that point to St. Louis?

"Mr. Wheeler. Not if the Commission does its duty, because the bill specifically provides that it must take into consideration the inherent advantages of the water carrier. Everyone agrees that goods can be shipped more cheaply by water than by rail." 84 Cong. Rec. 5879 (1939).

Chairman Lea of the House Committee on Interstate Commerce stated in debate that:

"The bill very plainly, about as plainly as language can be written, provides for the protection of the inherent advantages of water transportation as contrasted with other means of transportation. In fixing rates the water carrier is assured the advantages of the cheaper rate at which he can transport property." 84 Cong. Rec. 9862 (1939).

See also 84 Cong. Rec. 5883, 6125–6128, 6131, 6149 (1939), and Conference Report, 86 Cong. Rec. 10172 (1940).

man of the Interstate Commerce Committee of which he was chairman, pointed out on the floor of the Senate, the 1940 Act contains at least three separate provisions, a prime purpose of which is to protect the water carrier's natural advantages.[9] The Act's declaration of policy emphasizes that the Act must be "so administered as to recognize and preserve the inherent advantages" of "all modes of transportation subject to . . . this Act." 54 Stat. 898, 899, 49 U. S. C. notes preceding §§ 1, 301, 901. In order that the inherent advantages might be preserved § 305 (c), 54 Stat. 898, 935, 49 U. S. C. § 905 (c), provided that "Differences in . . . rates . . . and practices of a water carrier in respect of water transportation from those in effect by a rail carrier with respect to rail transportation shall not be deemed to constitute unjust discrimination . . . or an unfair or destructive competitive practice . . . ." And § 307 (f), 54 Stat. 898, 938, 49 U. S. C. § 907 (f), requiring the Commission, in fixing rates, to consider "the effect of rates upon the movement of traffic by the . . . carriers for which the rates are prescribed," emphasized that the Commission must consider in fixing rates ". . . the need, in the public interest, of adequate and efficient water transportation service at the lowest cost consistent with the furnishing of such service . . . ." In addition § 3 (4) of the pre-existing Act which forbade carriers to "discriminate in their rates, fares, and charges between connecting lines," 41 Stat. 479, was amended by the 1940 Act specifically to include water carriers, such as these barge lines, within the definition of connecting carriers. 54 Stat. 898, 903–904, 49 U. S. C. § 3 (4). Finally § 2 of the pre-existing Act has long forbidden the Commission to authorize railroads to charge one person more than another for "a like and contemporaneous service in the transportation of a like kind of traffic under substan-

[9] 84 Cong. Rec. 5873–5876, 5883, 6131 (1939).

tially similar circumstances and conditions . . . ." 24 Stat. 379, 380, 40 U. S. C. § 2.

The foregoing provisions flatly forbid the Commission to approve barge rates or barge-rail rates which do not preserve intact the inherent advantages of cheaper water transportation, but discriminate against water carriers and the goods they transport. Concretely, the provisions mean in this case that Chicago-to-the-east railroads cannot lawfully charge more for carrying ex-barge than for carrying ex-lake or ex-rail grains to and from the same localities, unless the eastern haul of the ex-barge grain costs the eastern railroads more to haul than does ex-rail or ex-lake grain. And § 307 (d), authorizing the Commission to fix differentials as between through water-rail and through all-rail rates, does not authorize the Commission to neutralize the effective prohibitions of the other provisions which were strengthened in 1940 expressly to prevent a discrimination against water carriers.

The basic error of the Commission here is that it seemed to act on the assumption that the congressional prohibitions of railroad rate discriminations against water carriers were not applicable to such discriminations if accomplished by through rates. But this assumption would permit the destruction or curtailment of the advantages to shippers of cheap barge transportation whenever the transported goods were carried beyond the end of the barge line. This case proves that. For while Chicago is a great grain center, it cannot consume all barge-transported grain. That grain, like other grain coming to Chicago for marketing or processing, is reshipped to distant destinations. To penalize its transportation in barges by charging discriminatory rates from Chicago to its final destination has precisely the same consequence as would follow from raising barge rates inbound to Chicago. Recognizing that it could not require these barge carriers

to raise these inbound rates which it accepted as reasonable,[10] the Commission has here approved an order which would bring about the same prohibited result by raising the railroad rates charged by eastern roads for ex-barge grain shipments east from Chicago. Congress has forbidden this.

The Commission did not approve increases in these reshipping rates on the ground that the eastern roads were not receiving a fair return for carrying ex-barge grain. And the grounds on which the Commission rested its order do not support the rates approved. Most of the argument of the Commission in support of its conclusions and order treated matters which had no relation to what the reshipping rates from Chicago should be. The length of the total barge-rail haul emphasized by the Commission, however significant it might be under other circumstances, has no relevance here. For the lower rates allowed ex-rail and ex-lake grains include carriage for distances identical with the ex-barge hauls. Nor is the Commission's order supported by its conclusion that it is "inequitable" for the barges to charge a much lower rate for the inbound grain haul than the competitive western railroads can afford to charge for the same haul, resulting in barge-rail rates lower than all-rail rates from the same localities.[11] For this is no reason for authorizing

[10] The Commission stated that "The barge rates yield fair returns to the barge carriers, and, for the purpose of this proceeding, may be accepted as reasonable." 262 I. C. C. 7, 19.

[11] The Commission expressed concern that "the barge-rail rates are far below the all-rail rates from the same and other Illinois origins. This is an inequitable situation giving rise to requests for reductions in the all-rail rates from the Illinois and central territory origins, and it is difficult to see, with such extreme disparities, how such requests could properly be denied. . . . there is a substantial production of corn in central territory. While the farmers therein did not appear at the hearing to show that they were hurt by this situation, such evidence was adduced by others in the same relative position . . .

a higher rate to eastern railroads which do not compete with the barges at all. If the western railroads need relief from the competition of barges, that is a question wholly unrelated to the rates of eastern roads. Furthermore, Congress has decided this question of equitable rates as between railroads and barges. It has declared in unmistakable terms that the "inherent advantage" of the lower cost of barge carriage as compared with that of railroads must be passed on to those who ship by barge. It is therefore not within the province of the Commission to adjust rates, either to equalize the transportation cost of barge shippers with that of shippers who do not have access to barge service or to protect the traffic of railroads from barge competition. For Congress left the Commission no discretionary power to approve any type of rates which would reduce the "inherent advantage" of barge transportation in whole or in part. *Cf. Mitchell* v. *United States,* 313 U. S. 80, 97.

Related to the question just discussed, is the Commission's contention here that permitting reshipping rates for ex-barge grain to remain equal to the rates for

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This is what is meant by the statement . . . that the present ex-barge proportionals from Chicago jeopardize the all-rail rate structure." 262 I. C. C. at 20. In *United States* v. *Chicago, M. & St. P. R. Co.,* 294 U. S. 499, 509, this Court said of an earlier Commission rate decision made on the basis of preserving the over-all rate structure from disruption: "We are warned . . . that a change once permitted has a tendency to spread. The acceptance of the new schedule for Milwaukee will lead, it is said, to requests for proportionate reductions by other lines in Indiana . . . in Illinois and even in Kentucky, the outcome being characterized in the argument of counsel, though not in the report, as a rate war between the roads. . . . The point of the decision is not that present rates are sound, but that they must be maintained, even if unsound, for fear of a rate war which might spread beyond control. The danger is illusory. The whole situation is subject to the power of the Commission, which may keep the changes within bounds."

ex-rail and ex-lake grain will cause "incurable chaos" in and disrupt the national rail rate structure which reflects many interrelated conditions governing the transportation of grain from west of Chicago to eastern markets. The Commission does not show how any possible disruption of railroad rate structure arises from giving shippers the full inherent advantage of cheaper barge rates, other than that competing railroads have lost traffic to the barge lines. As we have pointed out, Congress knew that barge line rates were cheaper than rail rates, wanted the shippers to get full benefit of them, and left the Commission no power to take that benefit away from shippers by adjusting rail-barge traffic competition or rates. But we note incidentally that these rates had been equal prior to 1939 without any apparent disruption of the total structure. The possibility of such a disruption does not remotely justify discriminations against barge traffic which actually deprive shippers and the barge companies of the inherent advantages of water transportation guaranteed to them by Congress. See *United States* v. *Chicago, M. & St. P. R. Co.*, 294 U. S. 499, 506–510. Nor is the fact that barge-rail rates, from certain places in the west through Chicago to the east, are less than local rail rates from Chicago east, an adequate reason for increasing the east-of-Chicago part of the through barge-rail rate. The initiation of new rates with such a disparity in through rail rates as compared with local rail rates would, of course, be forbidden by § 4 of the Act as amended in the absence of Commission approval.[12] But, insofar as the inherent cheapness of the barge leg of the through route produces a disparity between barge-rail rates and local rail rates, Congress has said that the Act must be so administered as to preserve, not eliminate or reduce the disparity.

[12] See § 6, Transportation Act of 1940, 54 Stat. 898, 904, 49 U. S. C. § 4.

Carriage of ex-barge grain by eastern roads may conceivably entail more service and therefore greater costs than are involved in carrying ex-rail or ex-lake grain. If so, the eastern roads may, in certain circumstances, be justified in receiving an extra charge for that extra service wherever it is rendered. But the extra service must fit the extra charge and cannot justify lump sum rate increases which cut into the inherent advantages of cheaper barge transportation which Congress intended to guarantee to shippers. Here the Commission found in broad general terms, without limitation to the localities where barge and rail compete, that "on the average" ex-rail grain from all the west requires less terminal and transit service east of Chicago than does grain moving by barge from the relatively few barge terminals.[13] As to terminal service, it noted that some rail grain traffic going through Chicago without stopping receives no terminal service at all, whereas all barge grain shipments must be unloaded in Chicago and reloaded on freight cars. But all ex-lake grain reshipped from Chicago and an unspecified amount of ex-rail grain stopped in Chicago for processing requires exactly the same terminal service as is rendered there for ex-barge grain.[14] Yet there is no greater rate charged for ex-barge and ex-rail grain which receives this same

[13] The Commission stated that "on the average, as compared with the ex-barge grain, the movement under the ex-rail proportionals . . . requires less terminal service at the gateway . . . less transit service at intermediate points in official territory, and less line-haul service to the southern portion." 262 I. C. C. at 28.

[14] The Commission's statement was that, "Like the lake-rail traffic, the barge-rail traffic requires transfer of lading and a full origin terminal service at the interchange port. . . . it never moves in continuous through transportation." 262 I. C. C. 7, 21.

A similar precise statement does not appear in the Commission's decision with reference to terminal services rendered ex-rail grain. It assumed throughout its discussion, however, as shown by its reliance on averages, that a large but unspecified amount of all-rail grain shipments receive the same terminal services as does ex-barge grain.

terminal service. The formula used here which lumps all through rail grain rates, irrespective of the services rendered, to give rail-carried grain a preferred rate over barge-carried grain, is indistinguishable in cause and consequence from an order which directly raises barge rates to relieve the railroads from barge competition. In any event, there has been no showing by the Commission as to how much, if any, of the 3-cent reshipping rate increase is attributable to the fact that ex-barge grain requires more terminal service on the average than does ex-rail grain.

The Commission also pointed out in its decision that rail rates from the west to Chicago (which we must assume on this record are fair and reasonable for the services performed) permit three transit stops west of Chicago without extra charge. Thus some ex-rail grain, unlike ex-barge and ex-lake grain, has already been processed en route to or in Chicago before it ever reaches the eastern lines, reducing the likelihood that it will require further transit service on the route from Chicago to the east.[15] But ex-lake grain which enjoys the proportional rates with the approval of the Commission apparently is not processed before arriving at Chicago, or before reshipment on the eastern lines, and consequently requires the same transit service on the eastern haul as is required by ex-barge grain. Similar transit service is required for the unspecified amounts of ex-rail grain not processed east of Chicago. But the Commission made no finding that the eastern reshipping rates permit transit service east of Chicago without extra charge. Probably the reason that it did not make such a finding is that carriers usually make

[15] There is apparently no processing of barge-carried grain in Chicago. The railroads there charge 3.25–4.5 cents per hundred lbs. to switch barge grain at Chicago from riverside elevators to processing plants. 262 I. C. C. 7, 24.

a specific extra charge for transit service. See *Central R. Co. of N. J.* v. *United States,* 257 U. S. 247; *Atchison, T. & S. F. R. Co.* v. *United States, supra,* 777, 780. And the record here shows that eastern railroads make extra charges for transit service rendered ex-barge grain east of Chicago. The Commission makes no showing why, if the existing railroad charges for each individual transit operation is insufficient to cover that operation's costs, those charges cannot be adjusted alike for the ex-rail, ex-lake, and ex-barge shipments which require this service. In any event, partial compensation of eastern roads for additional transit costs cannot be made in a manner which singles out ex-barge grain for discriminatory treatment in violation of the Interstate Commerce Act.[16]

To justify increasing the reshipping rates of ex-barge grain the Commission would have to make findings supported by evidence to show how much greater is the cost to the eastern roads of reshipping ex-barge grain than of reshipping ex-lake or ex-rail grain moving from the same localities and requiring the same service as does the ex-barge grain. *Cf. Florida* v. *United States,* 282 U. S. 194, 212; *North Carolina* v. *United States,* 325 U. S. 507, 520. The unsifted averages put forward by the Commission do not measure the allegedly greater costs nor indeed show that they exist.

Affirmed.

MR. JUSTICE FRANKFURTER would sustain the order of the Interstate Commerce Commission, because he deems it amply supported by adequate findings of the Commission differentiating the average circumstances and condi-

[16] It is noteworthy that in its previous consideration of these same ex-barge grain reshipment rates, the Commission was satisfied that "the physical carriage beyond the reshipping point is substantially the same" in ex-rail, ex-lake, and ex-barge shipments. 248 I. C. C. 307, 311.

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tions surrounding all-rail and lake-rail transportation from those affecting barge-rail transportation, 262 I. C. C. 27–28, and these findings are not without support in evidence.

MR. JUSTICE JACKSON, dissenting.

It appears to me that the Court in this case not only ignores findings of fact by the Interstate Commerce Commission contrary to our own oft-repeated pronouncements about the finality of administrative findings, but it also legislates out of the Transportation Act of 1940 at least two specific provisions which Congress put in and departs from the policy laid down in § 1 of the Act. Whether the Congressional law or the Court's amendments are the better for the country is a complicated problem of policy which, in my conception of our judicial function, I am not privileged to decide.

In the Transportation Act of 1940, 54 Stat. 937, *et seq.*, Congress authorized the Commission to establish through rates by water and rail carriers. It also said, "In the case of a through route, where one of the carriers is a common carrier by water, the Commission shall prescribe such reasonable differentials as it may find to be justified between all-rail rates and the joint rates in connection with such common carrier by water." § 307 (d). The Court reads this discretionary power out of the statute and holds that the Commission may not establish any differential other than that created by the carriers themselves; that is to say, the only permissible differential is the difference between barge rates and rail rates for the water leg of the through journey.

The statute also says that in the exercise of its rate-making power "the Commission shall give due consideration, among other factors, to the effect of rates upon the movement of traffic by the carrier or carriers for which the rates are prescribed . . . ." § 307 (f). The Com-

mission has done so and finds that a greater differential than that prescribed would create unjust advantages and diversions of traffic. But the Court ignores the effect of what it orders on existing rate structures and on grain-producing regions and shippers other than barge users. It simply writes in "shall not consider" where Congress said "shall consider."

Because this decision seems to me to deprive the Commission of these discretionary powers to adjust through rates to general shipping conditions and rate structures, I dissent.

MR. JUSTICE FRANKFURTER joins in this opinion.

PENFIELD COMPANY OF CALIFORNIA ET AL. *v.* SECURITIES & EXCHANGE COMMISSION.

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

No. 453. Argued January 16, 1947.—Decided March 31, 1947.

In a contempt proceeding for failure to comply with a court order to enforce a subpoena *duces tecum* issued by the Securities and Exchange Commission in aid of an investigation pursuant to § 20 (a) of the Securities Act of 1933, 48 Stat. 74, a district court adjudged the defendant guilty of contempt and imposed an unconditional fine, but refused to grant any coercive relief designed to force him to produce the subpoenaed documents. He paid the fine and took no appeal. The Commission filed a notice of appeal in the district court and subsequently a statement of points challenging as error the court's action in imposing the fine instead of a remedial penalty to make him produce the documents. The circuit court of appeals held that the district court erred in imposing the fine and directed that the defendant be ordered imprisoned until he produced the documents. *Held:*

1. The appeal was in a suit of a civil nature and was properly taken, under Rule 73 (a) of the Rules of Civil Procedure, by filing a notice of appeal with the district court. Pp. 589–591.

(a) Where a Rule of Civil Procedure conflicts with a prior statute, the Rule prevails. P. 589, n. 5.

(b) The application of the Commission for enforcement of its subpoena posed a problem in civil, not criminal, contempt. *United States* v. *United Mine Workers*, 330 U. S. 258. P. 590.

(c) The order of denial, being final, was appealable, and the right to appeal was not dependent on an appeal from the imposition of the fine. P. 591.

2. The district court abused its discretion in refusing to grant remedial relief, and the circuit court of appeals did not err in granting it. Pp. 591–595.

3. The fact that an unconditional fine had been imposed and paid did not exhaust the jurisdiction of the district court or deprive the circuit court of appeals of authority to reverse the judgment which imposed the fine and substitute a term of imprisonment conditioned upon the continuance of the contempt. Pp. 593–594.

(a) Assuming *arguendo* that § 268 of the Judicial Code authorizing federal courts "to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority" governs civil as well as criminal contempt proceedings, it is no barrier to the imposition of both a fine as a punitive exaction and imprisonment as a coercive sanction. P. 594.

(b) When a court imposes a fine as a penalty, it is punishing yesterday's contemptuous conduct. When it adds the coercive sanction of imprisonment, it is announcing the consequences of tomorrow's contumacious conduct. In that situation, the two offenses are not the same. P. 594.

4. Not having appealed from the adverse judgment in the contempt proceedings in the district court, the defendant may not now raise objections going to the merits of that judgment. P. 594.

5. Assuming that the portion of the order of the circuit court of appeals which set aside the unconditional fine is here for review, that court was correct in setting aside the unconditional fine, since it was imposed in a civil contempt proceeding. P. 595.

157 F. 2d 65, affirmed.

In a contempt proceeding for failure to comply with an order enforcing a subpoena *duces tecum* issued by the Securities and Exchange Commission under the Securities Act of 1933, 48 Stat. 74, a district court adjudged the de-

fendant guilty of contempt and imposed an unconditional fine. On appeal by the Commission, the Circuit Court of Appeals reversed, set aside the fine and directed that the defendant be imprisoned until he produced the documents. 157 F. 2d 65. This Court granted certiorari. 329 U. S. 706. *Affirmed,* p. 595.

Morris Lavine argued the cause and filed a brief for petitioners.

Roger S. Foster argued the cause for respondent. With him on the brief were *Acting Solicitor General Washington, Philip Elman, Robert S. Rubin* and *W. Victor Rodin.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The Securities and Exchange Commission, acting pursuant to its authority under § 20 (a) of the Securities Act of 1933, 48 Stat. 74, 86, 15 U. S. C. § 77t, issued orders directing an investigation to determine whether Penfield Company had violated the Act in the sale of stock or other securities. In the course of that investigation it directed a subpoena *duces tecum* to Young, as an officer of Penfield, requiring him to produce certain books of the corporation covering a four year period ending in April, 1943. See § 19 (b) of the Act. Upon Young's refusal to appear and produce the books and records, the Commission filed an application with the District Court for an order enforcing the subpoena.[1] After a hearing, the court ordered

[1] SEC. 22 (b) provides:

"In case of contumacy or refusal to obey a subpena issued to any person, any of the said United States courts, within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides, upon application by the Commission may issue to such person an order requiring such person to appear

Young, as an officer of Penfield, to produce them.[2] Young persisted in his non-compliance. The Commission then applied to the District Court for a rule to show cause why Young should not be adjudged in contempt—a proceeding which, as we shall see, was one for civil contempt. The District Court delayed action on the motion until after disposition of a criminal case involving Young, Penfield, and others. When that case was concluded, the court, after hearing, adjudged Young to be in contempt. It refused, however, to grant any coercive relief designed to force Young to produce the documents but instead imposed on him a flat, unconditional fine of $50.00 which he paid.[3]

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before the Commission, or one of its examiners designated by it, there to produce documentary evidence if so ordered, or there to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof."

[2] That order was affirmed by the Circuit Court of Appeals. 143 F. 2d 746.

[3] The request of the Commission and the ruling of the court are made clear by the following colloquy:

"MR. CUTHBERTSON: So far as the punishment which the Court might see fit to impose, that is up to the Court. We are still anxious to get a look at these books and records, so I suggest to the Court, if he be so disposed, whatever punishment the Court might see fit to impose would be in connection with or so long as he refused to produce his books and records for our inspection.

"THE COURT: I don't think that I am going to be disposed to do anything like that. I sat here for six weeks and listened to books and records. The Government produced people from all over the United States in connection with the Penfield matter.

"MR. CUTHBERTSON: I might say, your Honor, that we have in mind that these books and records may disclose certain acts other than those charged in the indictment. We don't propose to go over the same matter that the Court went over in connection with the criminal case.

"THE COURT: The Court can take judicial notice of its own books and records, and in that trial the evidence was clear and

That was on July 2, 1945. On September 24, 1945, the Commission filed a notice of appeal in the District Court and subsequently a statement of points challenging as error the action of the District Court in imposing the $50.00 fine instead of a remedial penalty calculated to make Young produce the documents. The Circuit Court of Appeals reversed, holding that the District Court erred in imposing the fine and directing that Young be ordered imprisoned until he produced the documents. 157 F. 2d 65. The case is here on a petition for a writ of certiorari filed by Penfield Co. and Young. Neither the District Court nor the Circuit Court of Appeals rendered judgment against Penfield. Nor is any relief sought by or against it here. Accordingly the writ is dismissed as to Penfield.

First. It is argued that since no application for an allowance of an appeal was made, the Circuit Court of Appeals had no jurisdiction to entertain it.[4] If the appeal was in a suit of a civil nature, the filing of the notice of appeal with the District Court was adequate under the Rules of Civil Procedure.[5]

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definite and positive from all of the Government's witnesses, that during one period of time this defendant had nothing whatsoever to do with the Penfield Company. Whether that period of time is covered by what the Securities and Exchange Commission seeks or not, I don't know.

"The judgment and sentence of the Court is that the defendant pay a fine of $50, and stand committed until paid."

[4] Section 8 (c) of the Act of February 13, 1925, 43 Stat. 936, 940, as amended, 28 U. S. C. § 230, provides: "No appeal intended to bring any judgment or decree before a circuit court of appeals for review shall be allowed unless application therefor be duly made within three months after the entry of such judgment or decree." See *Alaska Packers Assn.* v. *Pillsbury*, 301 U. S. 174; *Georgia Lumber Co.* v. *Compania*, 323 U. S. 334.

[5] Rule 73 (a) provides in part: "When an appeal is permitted by law from a district court to a circuit court of appeals and within the time prescribed, a party may appeal from a judgment by filing with

It is the nature of the relief asked that is determinative of the nature of the proceeding. *Lamb* v. *Cramer,* 285 U. S. 217, 220. This was not a proceeding in which the United States was a party and in which it was seeking to vindicate the public interest. See *Gompers* v. *Bucks Stove & Range Co.,* 221 U. S. 418, 445. The contempt proceedings were instituted as a part of the proceedings in which the Commission sought enforcement of a subpoena. The relief which the Commission sought was production of the documents; and the only sanction asked was a penalty designed to compel their production. Where a fine or imprisonment imposed on the contemnor is "intended to be remedial by coercing the defendant to do what he had refused to do," *Gompers* v. *Bucks Stove & Range Co., supra,* p. 442, the remedy is one for civil contempt. *United States* v. *United Mine Workers,* 330 U. S. pp. 258, 303. Then "the punishment is wholly remedial, serves only the purposes of the complainant, and is not intended as a deterrent to offenses against the public." *McCrone* v. *United States,* 307 U. S. 61, 64. One who is fined, unless by a day certain he produces the books, has it in his power to avoid any penalty. And those who are imprisoned until they obey the order, "carry the keys of their prison in their own pockets." *In re Nevitt,* 117 F. 448, 461. Fine and imprisonment are then employed not to vindicate the public interest but as coercive sanctions to compel the contemnor to do what the law made it his duty to do. See *Doyle* v. *London Guarantee Co.,* 204 U. S. 599; *Oriel* v. *Russell,* 278 U. S. 358; *Fox* v. *Capital Co.,* 299 U. S. 105; *McCrone* v. *United States, supra.*

The Act gives the Commission authority to require the production of books and records in the course of its investi-

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the district court a notice of appeal." Where a Rule of Civil Procedure conflicts with a prior statute, the Rule prevails. 48 Stat. 1064, 28 U. S. C. § 723b.

gations. And in absence of a basis for saying that its demand exceeds lawful limits (*Oklahoma Press Publishing Co.* v. *Walling,* 327 U. S. 186), it is entitled to the aid of the court in obtaining them.[6] A refusal of the court to enforce its prior order for the production of the documents denies the Commission that statutory relief. The issue thus raised poses a problem in civil, not criminal, contempt.[7]

Where a judgment of contempt is embodied in a single order which contains an admixture of criminal and civil elements, the criminal aspect of the order fixes its character for purposes of procedure on review. *Union Tool Co.* v. *Wilson,* 259 U. S. 107. But there was no such admixture here. The District Court refused to grant any remedial relief to the Commission. The denial of that relief was the ground of the Commission's appeal. The order of denial being final, was appealable, *Lamb* v. *Cramer, supra,* pp. 220–221, and the right to appeal from it was in no way dependent on an appeal from the imposition of the fine.

Second. The question on the merits is two-fold: (1) whether the Circuit Court of Appeals erred in granting the Commission remedial relief by directing that Young be required to produce the documents; and (2) whether that court exceeded its authority in reversing the judgment which imposed the fine and in substituting a term of imprisonment conditioned on continuance of the contempt.

As we have already noted, the Act requires the production of documents demanded pursuant to lawful orders of the Commission and lends judicial aid to obtain them. There is no basis in the record before us for saying that

[6] See § 22 (b), *supra,* note 1.

[7] This thus disposes of the further contention that the appeal was not timely under the Criminal Appeals Act, 18 U. S. C. Supp. II § 682. *United States* v. *Hark,* 320 U. S. 531.

the demand of the Commission exceeded lawful limits. There is, however, a suggestion that the District Court was warranted in denying remedial relief since the contempt hearing came after a criminal trial of petitioners in another case, during the course of which many of Penfield's books and records were examined. The thought apparently is that the Commission had probed enough into Penfield's affairs. But the District Court did not hold that the Commission's request had become moot, that the documents produced satisfied its legitimate needs, or that the additional ones sought were irrelevant to its statutory functions.[8] We agree with the Circuit Court of Appeals that at least in absence of such a finding, the refusal of the District Court to grant the full remedial relief which the Act places behind the orders of the Commission was an abuse of discretion. The records might well disclose other offenses against the Securities Act of 1933 which the Commission administers. The history of this case reveals a long, persistent effort to defeat the investigation. The fact that Young paid the fine and did not appeal indicates that the judgment of contempt may have been an easy victory for him. On the other hand, the dilatory tactics employed suggest that if justice was to be done, coercive sanctions were necessary.

When the Circuit Court of Appeals substituted imprisonment for the fine, it put a civil remedy in the place of a criminal punishment. For the imprisonment authorized would be suffered only if the documents were not produced or would continue only so long as Young was recalcitrant. On the other hand, the fine imposed by the District Court, unlike that involved in *Fox* v. *Capital Co.*,

[8] As will be seen from note 3, *supra*, the court, immediately prior to rendering its sentence, noted that there was one period during which Young was not connected with Penfield Co. But the court added: "Whether that period of time is covered by what the Securities and Exchange Commission seeks or not, I don't know."

supra, pp. 106–107, was unconditional and not relief of a coercive nature such as the Commission sought. It was solely and exclusively punitive in character. Cf. *Nye* v. *United States,* 313 U. S. 33, 42–43.

As already noted, Young did not appeal from the order holding him in contempt and subjecting him to a fine. Young maintains, however, that once the fine was imposed and paid, the jurisdiction of the court was exhausted; that the Circuit Court of Appeals was without authority to substitute another penalty or to add to the one already imposed and satisfied. That argument rests on the statute granting federal courts the power to punish contempts of their authority, Judicial Code § 268, 28 U. S. C. § 385, and the decisions construing it. The statute gives the federal courts power "to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority," including violations of their lawful orders. At least in a criminal contempt proceeding both fine and imprisonment may not be imposed since the statute provides alternative penalties. *In re Bradley,* 318 U. S. 50. Hence if a fine is imposed on a contemnor and he pays it, the sentence may not thereafter be amended so as to provide for imprisonment. The argument here is that after a fine for criminal contempt is paid, imprisonment may not be added to, or substituted for the fine, as a coercive sanction in a civil contempt proceeding. If that position is sound, then the statutory limitation of "fine or imprisonment" would preclude a court from imposing a fine as a punitive measure and imprisonment as a remedial measure, or *vice versa.*

The dual function of contempt has long been recognized—(1) vindication of the public interest by punishment of contemptuous conduct; (2) coercion to compel the contemnor to do what the law requires of him. *Gompers* v. *Bucks Stove & Range Co., supra,* pp. 441 *et seq.* *United States* v. *United Mine Workers, supra,* p. 302.

As stated in *Bessette* v. *W. B. Conkey Co.*, 194 U. S. 324, 327, "The purpose of contempt proceedings is to uphold the power of the court and also to secure to suitors therein the rights by it awarded."

We assume, *arguendo,* that the statute allowing fine or imprisonment governs civil as well as criminal contempt proceedings. If the statute is so construed, we find in it no barrier to the imposition of both a fine as a punitive exaction and imprisonment as a coercive sanction, or *vice versa.*[9] That practice has been approved. *Kreplik* v. *Couch Patents Co.*, 190 F. 565, 571. And see *Phillips S. & T. P. Co.* v. *Amalgamated Assn.*, 208 F. 335, 340. When the court imposes a fine as a penalty, it is punishing yesterday's contemptuous conduct. When it adds the coercive sanction of imprisonment, it is announcing the consequences of tomorrow's contumacious conduct. At least in that situation the offenses are not the same. And the most that the statute forbids is the imposition of both fine and imprisonment for the same offense.

Young raises objections that go to the merits of the judgment of contempt. These were considered and determined against him by the District Court. Since he did not appeal from that adverse judgment, he is precluded from renewing the objections at this stage. *Le Tulle* v. *Scofield,* 308 U. S. 415, 421–422; *Helvering* v. *Pfeiffer,* 302 U. S. 247, 250–251.

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[9] Some rules governing criminal contempts are, of course, different from those governing civil contempts. *Gompers* v. *Bucks Stove & Range Co., supra,* pp. 444, 446–449. If those differences are satisfied and if, as in *In re Swan,* 150 U. S. 637; *Matter of Christensen Engineering Co.,* 194 U. S. 458; *In re Merchants' Stock Co.,* 223 U. S. 639; *Farmers Nat'l Bk.* v. *Wilkinson,* 266 U. S. 503, the criminal penalty and the remedial relief are segregated, no problem of the adequacy of the order for purposes of appellate review is presented. No question is raised here as to the propriety of combining civil and criminal contempt in the same proceeding.

There is a difference of view among us whether the portion of the order of the Circuit Court of Appeals which set aside the unconditional fine of $50 imposed on Young is here for review. But if we assume that it is, a majority of the Court is of the opinion that the Circuit Court of Appeals was correct in setting it aside, since the fine was imposed in a civil contempt proceeding. See *Gompers* v. *Bucks Stove & Range Co., supra.*

Affirmed.

MR. JUSTICE RUTLEDGE, concurring.

But for the decision in *United States* v. *United Mine Workers,* 330 U. S. 258, I should have no difficulty in concluding with the Court that this contempt proceeding was exclusively civil in character and that, consequently, no criminal penalty could be imposed, coercive relief alone being allowable in such a case. *Gompers* v. *Bucks Stove & Range Co.,* 221 U. S. 418.[1] That decision held that the imposition of criminal punishment in a civil contempt proceeding "was as fundamentally erroneous as if in an action of 'A. *vs.* B. for assault and battery,' the judgment entered had been that the defendant be confined in prison for twelve months." 221 U. S. at 449.

By every test applied in the *Gompers* case this proceeding was civil, not criminal in character. Here as there the proceeding was entitled, instituted and conducted as collateral to civil litigation. It sought only remedial relief, namely, the production of specified books and records.[2]

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[1] See *In re Fox,* 96 F. 2d 23; *Norstrom* v. *Wahl,* 41 F. 2d 910.

[2] The application in contempt was made by affidavit setting forth the facts alleged to constitute the violation. The contempt proceeding was entered upon the civil docket, being cause "No. 2863, Civil, *Securities and Exchange Commission* v. *Penfield Company of California.*" Young was first commanded to appear and show cause why a further order should not be made directing him "to show cause why

And issuance of the citation was grounded upon disobedience of the court's lawful order for their production.[3]

This act, like the act of disobedience in the *Gompers* case, constituted conduct which would have sustained either civil or criminal penalty in appropriate proceedings. But the unequivocal ruling of that case was that criminal penalties cannot be applied in civil contempt proceedings. 221 U. S. at 444, 449, 451–452. Not only the result, but the whole tenor of the opinion was to the effect that the character of the proceeding as a whole, whether as civil or criminal, must be correlated with the character of the penalty imposed, and that the two cannot be scrambled, regardless of the fact that the conduct constituting the contempt would support the imposition of either type of relief in a proceeding appropriate to the kind of relief given.[4] Not simply the remedy sought but the character of the proceeding in which it is pursued, it was held, determines the validity of the relief afforded.[5]

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an order should not be made holding said A. W. Young in contempt of this Court and to be dealt with accordingly." The order of citation followed in the same terms. At the hearing counsel for the Commission maintained consistently and urgently that the proceeding was exclusively civil, not criminal in character. Not until pronouncement of judgment was any step taken indicating the proceeding to be criminal in nature.

[3] The validity of the order for production was sustained on appeal. 143 F. 2d 746.

[4] See the Court's discussion in *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, particularly at pp. 444–449, 451 ff.; see also discussion in *United States* v. *United Mine Workers*, 330 U. S. 258, dissenting opinion, p. 363, Part III.

[5] The *Gompers* opinion, as I understand it, does not hold that the character of the relief sought is exclusively the criterion of the character of the proceeding. It was said to be a factor to be taken into account. But, in view of the Court's stress upon other factors, including the private or public character of the complainant, whether or not the contempt proceeding arises in and as corollary to civil litigation, and

This ruling, as I have previously maintained, was one not only of historical grounding but of constitutional compulsion.[6] Moreover, it recently has been reinforced by Rule 42 (b) of the Federal Rules of Criminal Procedure, requiring that the notice prescribed for instituting the proceeding "shall state the essential facts constituting the *criminal* contempt charged and *describe it as such.*" [7] (Emphasis added.)

Hence, under the rule of the *Gompers* case and others following it, it is clear that the district judge had no power in this case to impose the criminal penalty of a flat $50 fine and it is equally clear, on the record,[8] that he ex-

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the necessity for observing distinct procedural requirements in the course of trial, the case seems clearly to rule that the character of the proceeding determines the nature of the relief which can be given rather than the reverse.

[6] See the references cited in note 4 *supra;* and see note 5.

[7] "A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. . . ." Rule 42 (b), Federal Rules of Criminal Procedure. See *United States* v. *United Mine Workers,* 330 U. S. 258, dissenting opinion, p. 372, and note 45.

The rule did not become effective until March 21, 1946, hence was not applicable to the present proceeding which was instituted and concluded in the trial court prior to that date.

[8] See text *infra.* The record does not show that the function of the subpoena had been exhausted at the time of the judgment in contempt, although this was Young's contention accepted, apparently, by the District Court. The contrary, in fact, affirmatively appears. The subpoena did not purport to be issued exclusively in connection with and for the purposes of the criminal trial which transpired in the District Court between its issuance and the time of the judgment in con-

ceeded his power in denying the Commission civil coercive relief altogether.[9]

Moreover, I think it is clear that both of these problems are presented for our determination on the state of the record here. It is true that Young did not appeal from the District Court's judgment to the Circuit Court of Appeals, and that he paid the fine. But the Commission appealed from that judgment in its entirety, as it had a right to do,[10] unless the payment of the fine exhausted all judicial power to deal further with the proceeding. This indeed is a basis upon which Young maintains that the Circuit Court of Appeals had no power to reverse the District Court's judgment.[11]

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tempt. Counsel for the Commission expressly stated that the subpoena was not limited to that matter and the court said, after referring to the period of the criminal suit: "Whether that period of time is covered by what the Securities and Exchange Commission seeks or not, I don't know."

The court made no finding that the subpoena's function had been exhausted. The only reason assigned for refusing civil relief was that the court had sat in the criminal trial for six weeks during which it had "listened to books and records," as well as witnesses produced "from all over the United States in connection with the Penfield matter." Taking judicial notice of its own proceedings, the court said: ". . . in that trial the evidence was clear and definite . . . that during one period of time this defendant [Young] had nothing whatsoever to do with the Penfield Company." These grounds, of course, were not the equivalent of finding that the records covered by the subpoena had been produced or that the Commission had no power or valid reason for pursuing its statutory investigation through the subpoena beyond the confines of the closed criminal trial.

[9] See note 8. And see text *infra* preceding note 20.

[10] 28 U. S. C. § 225; see *Clarke* v. *Federal Trade Commission,* 128 F. 2d 542; *Lamb* v. *Cramer,* 285 U. S. 217, 220.

[11] The principal contention in this respect is based on § 268 of the Judicial Code, 28 U. S. C. § 385, and the decision in *In re Bradley,* 318 U. S. 50. The *Bradley* case, however, was one in criminal contempt and the decision was that in such a case § 268 forbids imposition as penalty of both fine and imprisonment. The penalties being al-

But clearly, as the Court holds, such power could not be wanting, if the litigation was exclusively civil in character. On the contrary the action of the Circuit Court of Appeals was exactly in accordance with the ruling in the *Gompers* case and was required by it. In both cases the proceedings were wholly civil in character. In both a criminal penalty was imposed. And in both the judgment laying it was reversed and the cause was remanded to the trial court for further proceedings looking only to the giving of civil relief.

The only difference is that in the *Gompers* case the contemnors had not entered upon the service of the void criminal sentence of imprisonment but appealed from it, while here Young paid the fine and did not appeal. That action on his part, however, cannot oust the Commission of its statutory right of appeal and review or of its right to civil relief.[12] If the contempt proceeding were criminal in character, a different question might be presented.[13] But compliance with a void criminal penalty, void because imposed in a wholly civil proceeding, cannot

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ternative by the section's terms, it was held that payment of the fine exhausted the court's power.

The *Bradley* case therefore presented no question of the applicability of § 268 in civil contempt proceedings or of its effect if applicable. Compare the majority and concurring opinions in *In re Sixth & Wisconsin Tower, Inc.*, 108 F. 2d 538. It cannot be taken as having ruled that the court's invalid imposition of criminal punishment in civil contempt proceedings or satisfaction of such a void sentence exhausts either the trial court's power or that of an appellate court on review to deal with the civil contempt by affording civil relief or to avoid the invalid criminal judgment.

Whether or not § 268, if applicable to a so-called mixed civil-criminal contempt proceeding, would forbid the imposition of relief both by way of fine and imprisonment, one punitive, the other coercive and remedial, need not be considered in view of the holding that this proceeding was exclusively civil in character.

[12] See notes 10, 14.

[13] See note 11 *supra*.

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make it valid or oust either the courts of their civil jurisdiction in matters of relief or opposing parties of their rights in that respect.

In short, the Commission was forced to appeal from the judgment rendered, if it was not to acquiesce in what the court had done and thereby suffer unauthorized thwarting of its statutory investigating power. That judgment was rightfully taken in its entirety to the Circuit Court of Appeals, was reviewed by that court, and was reversed not partially but completely.[14] Our action in granting certiorari brought here for review the entire judgment of the Circuit Court of Appeals, including its reversal of the criminal judgment rendered by the District Court as well

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[14] The opinion of the Circuit Court of Appeals states: "Young did not appeal from the order holding him in contempt. That decision is final and the only question before us is the extent of the remedy to which the Commission is entitled." 157 F. 2d 65, 66. Ruling that the cause did not become moot by reason of Young's payment of the fine, the court further held the District Court had abused its "discretion" in not granting the full relief sought by the Commission. The concluding paragraph of the opinion stated: "The order imposing the fine is reversed and the case remanded to the district court for an order requiring Young's imprisonment to compel his obedience to the order to produce the documents in question." The opinion concluded: "The order of the district court is reversed," 157 F. 2d at 67, and the formal order for judgment entitled "decree" directed "that the order of the said District Court in this cause be, and hereby is, reversed, and that this cause be, and hereby is remanded to the said District Court for further proceedings in accordance with the opinion of this Court."

The notice of appeal filed in the District Court is not set forth in the printed record here. But the "Statement of Points on Which the Appellant Intends to Rely," filed in the Court of Appeals, specifies that "the District Court erred in ordering Young to pay a fine of $50.00 instead of imposing a remedial penalty calculated to coerce Young to produce or allow inspection of the books and records . . . ."

In this state of the record it cannot be taken that the appeal and the judgment of the Court of Appeals did not comprehend the criminal penalty.

as its mandate for civil relief.[15] Hence in my opinion we are forced to take action upon the judgment as a whole, in both civil and criminal phases.

Since I am in agreement with the Court's view that the *Gompers* ruling and others in accord with it are controlling in this case, I think the judgment of the Circuit Court of Appeals should be affirmed, though with modification in one respect.[16] I find it difficult, however, to reconcile the action taken here with what was done in the *Mine Workers* decision. A majority there held, as I thought contrary to the *Gompers* ruling, that civil and criminal contempt could be prosecuted in a single contempt proceeding conducted according to the rules of procedure applicable in equity causes,[17] and that both types of relief, civil and criminal, could be imposed in such a mixed proceeding. It was also held that on review the appellate court is free to substitute its own judgment concerning the nature and extent of both types of relief for that of the trial court, and therefore that in remanding the cause for further proceedings there was no necessity to leave room for the further exercise of the trial court's discretion in relation to either type of relief.

If in that case a single mixed proceeding could suffice without regard to the requirements of Rule 42 (b) and the

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[15] This Court's action in granting certiorari, 329 U. S. 706, was not limited to any question or phase of the Court of Appeals' action, but brought up the judgment in its entirety. Since that court's judgment comprehended the reversal of the criminal penalty imposed by the District Court, that phase of the Court of Appeals' judgment is necessarily here for review and determination.

[16] See text at note 20.

[17] See *United States* v. *United Mine Workers*, 330 U. S. 258, dissenting opinion, p. 363, Part III. The rule to show cause issued in that case provided: "IT IS FURTHER ORDERED, that the accused, and each of them, *shall, unless waived by them, be tried* upon said charges of contempt by the court *with an advisory jury* to be empanelled by this court." (Emphasis added.) The advisory jury was waived.

Gompers line of decisions concerning procedures to be followed in instituting and conducting contempt proceedings, for the imposition of both civil and criminal penalties, I see no valid reason why the same thing could not be done in this cause or why both the criminal fine imposed by the District Court and the civil relief given by the Circuit Court of Appeals should not be allowed to stand.

It is true that if the proceeding is to be taken as having been both civil and criminal a serious question would be presented on the terms of § 268 of the Judicial Code whether imposition and payment of the fine here did not exhaust judicial power to deal further with the proceeding, more especially in its criminal phase.[18] But that question too, I take it, necessarily would be settled if the *Mine Workers* ruling were to govern here.

It is also true that in this case the United States was not a party by that name, as it was in the *Mine Workers* case, to the civil litigation in which the contempt proceeding arose or to the contempt proceeding itself. But the Commission was the moving party in both, representative as such of the public interest as the trial court pointed out.[19] And, in view of the vast liberality allowed by the *Mine Workers* decision concerning matters of procedure and relief in contempt proceedings, it hardly can be a solid ground for distinguishing the cases that in one the public interest was represented, as to the criminal phase, *eo nomine* United States, in the other under the name of the Securities and Exchange Commission. Cf. *In re Bradley,*

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[18] See note 11 *supra* and text.

[19] The court inquired of Commission counsel, in response to argument that the proceeding was exclusively civil, since it arose in the course of civil litigation and sought only remedial relief for one of the parties, and not as an independent proceeding in the public interest to vindicate the court's power: "The Securities and Exchange Commission does not operate for itself, does it? I mean it operates in the public interest, doesn't it?"

318 U. S. 50. Indeed the record shows that in the present case the United States Attorney and the Assistant United States Attorney participated in the contempt proceeding in the District Court.

Notwithstanding these difficulties, since the Court rests the decision in this cause upon the *Gompers* rule, which in my opinion represents the settled law, I join in the affirmance of the judgment of the Circuit Court of Appeals, both insofar as it reversed the District Court's judgment because of the denial of coercive relief and in relation to its reversal of the criminal penalty imposed by the District Court.

But, while there can be no question of the Court of Appeals' power in proper cases to review and revise civil relief given in the District Court, in this case no such relief had been awarded. In my opinion the question of the character and scope of that relief was a matter, in the first instance, for the District Court's judgment rather than for the Court of Appeals. Accordingly, I would modify the judgment of reversal in the civil phase so that the cause would be remanded to the District Court with directions to exercise its discretion in framing the relief adequate and appropriate to make effective the Commission's right to disclosure.[20]

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

Beginning with the Interstate Commerce Act in 1887, it became a conventional feature of Congressional regulatory legislation to give administrative agencies authority to issue subpoenas for relevant information. Congress has never attempted, however, to confer upon an administrative agency itself the power to compel obedience to such a subpoena. It is beside the point to consider

[20] *E. Ingraham Co.* v. *Germanow,* 4 F. 2d 1002, 1003.

whether Congress was deterred by constitutional difficulties. That Congress should so consistently have withheld powers of testimonial compulsion from administrative agencies discloses a policy that speaks with impressive significance.

Instead of authorizing agencies to enforce their subpoenas, Congress has required them to resort to the courts for enforcement. In the discharge of that duty courts act as courts and not as administrative adjuncts. The power of Congress to impose on courts the duty of enforcing obedience to an administrative subpoena was sustained precisely because courts were not to be automata carrying out the wishes of the administrative. They were discharging judicial power with all the implications of the judicial function in our constitutional scheme. *Interstate Commerce Commission* v. *Brimson,* 154 U. S. 447; 155 U. S. 3. Accordingly, an order directing obedience to a subpoena by the Securities and Exchange Commission, like a subpoena of any other federal agency, does not issue as a matter of course. An administrative subpoena may be contested on the ground that it exceeds the bounds set by the Fourth Amendment against unreasonable search and seizure; that the inquiry is outside the scope of the authority delegated to the agency; that the testimony sought to be elicited is irrelevant to the subject matter of the inquiry; that the person to whom it is directed cannot be held responsible for the production of the papers. See *Interstate Commerce Commission* v. *Brimson, supra,* at 479 and 489; *Harriman* v. *Interstate Commerce Commission,* 211 U. S. 407; *Ellis* v. *Interstate Commerce Commission,* 237 U. S. 434; *Smith* v. *Interstate Commerce Commission,* 245 U. S. 33; *Federal Trade Commission* v. *American Tobacco Co.,* 264 U. S. 298; *Oklahoma Press Publishing Co.* v. *Walling,* 327 U. S. 186. And see Lilienthal, *The Power to Compel Testimony,* 39 Harv. L. Rev. 694.

In this case, the Securities and Exchange Commission issued a subpoena to Young, as officer of the Penfield Company, for the production of books and records of the company covering the period May 1, 1939, to April 9, 1943. Upon Young's failure to comply, the Commission applied to the District Court, on April 13, 1943, for an order compelling obedience. From this order an appeal was taken to the Circuit Court of Appeals which affirmed the order on June 30, 1944, 143 F. 2d 746, its mandate being spread on the record of the District Court on December 7, 1944. Young having persisted in his refusal to comply, the Securities and Exchange Commission, on January 24, 1945, applied for a rule to show cause why he should not be cited for contempt. The District Court postponed final hearings on the order to show cause, pending, apparently, the completion of a criminal trial of Young and the Penfield Company then before the Court, on an indictment growing out of the inquiry for which the subpoena had been issued. It was not until July 2, 1945, after the petitioners had been acquitted in the criminal proceeding, that the rule to show cause was heard.

The District Court found petitioner Young guilty of contempt of court for disobedience of its order of June 1, 1943, requiring the production of records called for by the subpoena issued by the S. E. C. But the Court refused the Government's request to impose a contingent punishment to secure production of the records. Instead, it sentenced Young to the payment of a fine of $50. Without objection Young paid this fine, and consistently thereafter maintained that by such payment judicial power had exhausted itself. See *In re Bradley,* 318 U. S. 50. The Government appealed from this disposition by the District Court on the ground that the District Court, having adjudged Young to be in contempt, erred in ordering Young to pay a fine of $50 and stand committed until the fine was paid, instead of imposing

a remedial penalty, calculated to coerce Young to produce or allow inspection of the books and records of the Penfield Co., pursuant to the order of June 1, 1943. On the basis of this appeal, which challenged what the District Court did and what it refused to do, the Circuit Court of Appeals, one judge dissenting, reversed the order of the lower court: "The order imposing the fine is reversed and the case remanded to the district court for an order requiring Young's imprisonment to compel his obedience to the order to produce the documents in question." 157 F. 2d 65, 67. This Court then granted certiorari, the petition for which asked this Court to "reverse the judgment and order of the Circuit Court of Appeals in this case." There was thus properly before the Circuit Court of Appeals the judgment imposing the fine of $50 and refusing to give coercive remedy, and there is accordingly before us the correctness of the judgment of the Circuit Court of Appeals setting aside the $50 fine and ordering a coercive decree.

The judgment immediately before us is that of the Circuit Court of Appeals setting aside the fine imposed by the District Court and reversing its refusal to issue a coercive order. The ultimate question is the correctness of what the District Court did and what it refused to do. It is essential therefore to focus attention on the precise circumstances in which the District Court acted as it did. This is what the record tells us:

> "Mr. Cuthbertson: So far as the punishment which the Court might see fit to impose, that is up to the Court. We are still anxious to get a look at these books and records, so I suggest to the Court, if he be so disposed, whatever punishment the Court might see fit to impose would be in connection with or so long as he refused to produce his books and records for our inspection.

"The Court: I don't think that I am going to be disposed to do anything like that. I sat here for six weeks and listened to books and records. The Government produced people from all over the United States in connection with the Penfield matter.

"Mr. Cuthbertson: I might say, your Honor, that we have in mind that these books and records may disclose certain acts other than those charged in the indictment. We don't propose to go over the same matter that the Court went over in connection with the criminal case.

"The Court: The Court can take judicial notice of its own books and records, and in that trial the evidence was clear and definite and positive from all of the Government's witnesses, that during one period of time this defendant had nothing whatsoever to do with the Penfield Company. Whether that period of time is covered by what the Securities and Exchange Commission seeks or not, I don't know.

"The judgment and sentence of the Court is that the defendant pay a fine of $50, and stand committed until paid."

Bearing in mind that the District Court was not an automaton which must unquestioningly compel obedience to a subpoena simply because the Commission had issued it, we must consider whether the District Court had abused the fair limits of judicial discretion. If a district court believes that howsoever relevant a demand for documents may have been at the time it was made, circumstances had rendered the subpoena obsolete, it is entitled to consider the merits of the subpoena as of the time that its enforcement is sought and not as of the time that it was issued. The above colloquy means nothing unless it means that Judge Hall was of the view that events had apparently rendered needless the call from Young for the

documents. He may have been wrong in that belief. At all events it was the view of a judge who had presided for six weeks over a trial in which these matters were canvassed. The Circuit Court of Appeals did not have before it, nor have we, the knowledge or the basis for knowledge that Judge Hall had, and so neither court can say with any confidence that he did not have ground for thinking that the change in circumstances revealed in the course of the trial obviated the need for the demand that was made upon Young. We surely ought not to reverse the action of the district judge on the abstract assumption that papers ordered to be produced as relevant to an inquiry at the time the subpoena issued continued relevant several months later. We ought not to assume that a subpoena was proper months later when a proceeding lasting more than six weeks before the judge who had approved the subpoena in the first instance persuaded him that the circumstances no longer called for carrying out the terms of the subpoena. When the trial judge stated his understanding that the intervening circumstances had rendered inappropriate the use of his coercive powers, counsel for the Government did not gainsay the judge's view. The failure of Government counsel to contradict the interpretation of facts by the Court does not present any technical ground of not allowing a point to be raised on appeal to which no exception was taken. The significance of counsel's silence is its confirmation of the judge's interpretation of the circumstances. At least in the absence of contradiction, the interpretation of the facts by the trial judge was a proper basis for the exercise of his judicial discretion.

On the record before us, Judge Hall exercised allowable discretion in finding that the subpoena had spent its force, and in concluding not to compel obedience to it. At the same time, he was justified in finding that because Young had disobeyed the subpoena while it was still alive, he

should be fined and made to feel that one cannot flout a court's authority with impunity.

The question, then, is whether the Court could impose what constituted a fine for criminal contempt, that is, to vindicate the law as such, without a formal pleading charging Young with such disobedience. We do not think Judge Hall had to direct the clerk to issue an attachment against Young to inform him of that which he obviously knew and which the proceedings had made abundantly clear to him. The true significance of our opinion in *United States* v. *United Mine Workers,* 330 U. S. 258, as we understand it, is that contempt proceedings are *sui generis* and should be treated as such in their practical incidence. They are not to be circumscribed by procedural formalities, or by traditional limitations of what are ordinarily called crimes, except insofar as due process of law and the other standards of decency and fairness in the administration of federal justice may require. On this record we find not the faintest denial of any safeguard or of appropriate procedural protection.

We think the judgment of the Circuit Court of Appeals should be reversed and that of the District Court reinstated.

NEW YORK EX REL. HALVEY *v.* HALVEY.

CERTIORARI TO THE COURT OF APPEALS OF NEW YORK.

No. 384. Argued February 5, 1947.—Decided March 31, 1947.

After a man and wife had been married in New York, had a child born there, and had lived there seven years, the wife took the child to Florida without the husband's consent and established a residence there. The next year, she instituted suit for divorce in Florida. Service of process on the husband was had by publication and he made no appearance. The Florida court granted the wife a divorce and awarded her permanent care, custody, and control of the child; but, the day before the decree was granted, the husband took the child to New York without the knowledge or approval of the wife. The wife instituted *habeas corpus* proceedings in New York, challenging the legality of the detention of the child. The New York court ordered (1) that the custody of the child remain with the mother, (2) that the father have rights of visitation including the right to keep the child with him during stated vacation periods each year, and (3) that the mother give a surety bond conditioned on the delivery of the child in Florida for removal by the father to New York for the period when he was entitled to keep it with him. *Held:* The order of the New York court did not fail to give the Florida decree the full faith and credit required by Article IV, § 1 of the Constitution. Pp. 612–616.

(a) Under Florida law, custody decrees of Florida courts ordinarily are not *res judicata* in Florida or elsewhere, except as to facts before the court at the time of judgment. Pp. 612–613.

(b) The Florida court would have been empowered to modify the decree in the interests of the child and to grant the father the right of visitation, had he applied to it rather than the New York court and presented his version of the controversy for the first time in his application for modification of the Florida decree. Pp. 613–614.

(c) So far as the Full Faith and Credit Clause of the Constitution is concerned, what Florida can do in modifying the decree, New York also may do. Pp. 614–615.

295 N. Y. 836, 66 N. E. 2d 851, affirmed.

A Florida court having granted a divorce and awarded custody of a child to a mother and the child having been removed to New York by the father without the mother's consent, the mother instituted *habeas corpus* proceedings in New York. The New York court ordered (1) that the custody of the child remain with the mother, (2) that the father have rights of visitation including the right to keep the child with him during stated vacation periods each year, and (3) that the mother give a surety bond conditioned on delivery of the child in Florida for removal by the father to New York for the periods when he was entitled to keep it with him. 185 Misc. 52, 55 N. Y. S. 2d 761. Both the Appellate Division, 269 App. Div. 1019, 59 N. Y. S. 2d 396, and the Court of Appeals affirmed, 295 N. Y. 836, 66 N. E. 2d 851. This Court granted certiorari. 329 U. S. 697. *Affirmed,* p. 616.

B. E. Hendricks argued the cause, and *Robert S. Florence* filed a brief, for petitioner.

Samuel Shapiro argued the cause and filed a brief for respondent.

Mr. Justice Douglas delivered the opinion of the Court.

The Halveys were married in 1937 and lived together in New York until 1944. In 1938 a son was born. Marital troubles developed. In 1944 Mrs. Halvey, without her husband's consent, left home with the child, went to Florida, and established her residence there. In 1945 she instituted a suit for divorce in Florida. Service of process on Mr. Halvey was had by publication, he making no appearance in the action. The day before the Florida decree was granted, Mr. Halvey, without the knowledge or approval of his wife, took the child back to New York. The

next day the decree was entered by the Florida court, granting Mrs. Halvey a divorce and awarding her the permanent care, custody, and control of the child.

Thereupon she brought this *habeas corpus* proceeding in the New York Supreme Court, challenging the legality of Mr. Halvey's detention of the child. After hearing, the New York court ordered (1) that the custody of the child remain with the mother; (2) that the father have rights of visitation including the right to keep the child with him during stated vacation periods in each year, and (3) that the mother file with the court a surety bond in the sum of $5,000, conditioned on the delivery of the child in Florida for removal by the father to New York for the periods when he had the right to keep the child with him. 185 Misc. 52, 55 N. Y. S. 761. Both the Appellate Division, 269 App. Div. 1019, 59 N. Y. S. 2d 396, and the Court of Appeals, 295 N. Y. 836, 66 N. E. 2d 851, affirmed without opinion. The case is here on a petition for a writ of certiorari which we granted because it presented an important problem under the Full Faith and Credit Clause of the Constitution. Article IV, § 1.

The custody decree was not irrevocable and unchangeable; the Florida court had the power to modify it at all times.[1] Under Florida law the "welfare of the child" is the "chief consideration" in shaping the custody decree or in subsequently modifying or changing it. *Frazier* v. *Frazier,* 109 Fla. 164, 169, 147 So. 464, 466; See *Phillips* v. *Phillips,* 153 Fla. 133, 134–135, 13 So. 2d 922, 923.

[1] "In any suit for divorce or alimony, the court shall have power at any stage of the cause to make such orders touching the care, custody and maintenance of the children of the marriage, and what, if any, security to be given for the same, as from the circumstances of the parties and the nature of the case may be fit, equitable and just, and such order touching their custody as their best spiritual as well as other interests may require." Fla. Stats. (1941) § 65.14.

But "the inherent rights of parents to enjoy the society and association of their offspring, with reasonable opportunity to impress upon them a father's or a mother's love and affection in their upbringing, must be regarded as being of an equally important, if not controlling consideration in adjusting the right of custody as between parents in ordinary cases." *Frazier* v. *Frazier,* 109 Fla., p. 169, 147 So., p. 466. Facts which have arisen since the original decree are one basis for modification of the custody decree. *Frazier* v. *Frazier,* 109 Fla., p. 168, 147 So., p. 465; *Jones* v. *Jones,* 156 Fla. 524, 527, 23 So. 2d 623, 625. But the power is not so restricted. It was held in *Meadows* v. *Meadows,* 78 Fla. 576, 83 So. 392–393, that "the proper custody of the minor child is a proper subject for consideration by the chancellor at any time, even if facts in issue could have been considered at a previous hearing, *if such facts were not presented or considered at a former hearing.*" (Italics added.) Or, as stated in *Frazier* v. *Frazier,* 109 Fla., p. 168, 147 So., p. 465, a custody decree "is not to be materially amended or changed afterward, unless on altered conditions shown to have arisen since the decree, or because of material facts bearing on the question of custody and existing at the time of the decree, but which were unknown to the Court and then only for the welfare of the child." The result is that custody decrees of Florida courts are ordinarily not *res judicata* either in Florida or elsewhere, except as to the facts before the court at the time of judgment. *Minick* v. *Minick,* 111 Fla. 469, 490–491, 149 So. 483, 492.

Respondent did not appear in the Florida proceeding. What evidence was adduced in that proceeding bearing on the welfare of the child does not appear. But we know that the Florida court did not see respondent nor hear evidence presented on his behalf concerning his fitness

or his claim "to enjoy the society and association" of his son. *Frazier* v. *Frazier,* 109 Fla., p. 169, 147 So., p. 466. It seems to us plain, therefore, that under the rule of *Meadows* v. *Meadows, supra,* the Florida court would have been empowered to modify the decree in the interests of the child and to grant respondent the right of visitation, if he had applied to it rather than to the New York court and had presented his version of the controversy for the first time in his application for modification.

So far as the Full Faith and Credit Clause is concerned, what Florida could do in modifying the decree, New York may do. Article IV, § 1 of the Constitution provides that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." Congress by the Act of May 26, 1790, c. 11, as amended, R. S. § 905, 28 U. S. C. § 687 declared that judgments "shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken." The general rule is that this command requires the judgment of a sister State to be given full, not partial, credit in the State of the forum. See *Davis* v. *Davis,* 305 U. S. 32; *Williams* v. *North Carolina,* 317 U. S. 287. But a judgment has no constitutional claim to a more conclusive or final effect in the State of the forum than it has in the State where rendered. See *Reynolds* v. *Stockton,* 140 U. S. 254, 264. If the court of the State which rendered the judgment had no jurisdiction over the person or the subject matter, the jurisdictional infirmity is not saved by the Full Faith and Credit Clause. See *Thompson* v. *Whitman,* 18 Wall. 457; *Griffin* v. *Griffin,* 327 U. S. 220. And if the amount payable under a decree—as in

the case of a judgment for alimony—is discretionary with the court which rendered it, full faith and credit does not protect the judgment. *Sistare* v. *Sistare,* 218 U. S. 1, 17. Whatever may be the authority of a State to undermine a judgment of a sister State on grounds not cognizable in the State where the judgment was rendered (Cf. *Williams* v. *North Carolina,* 325 U. S. 226, 230), it is clear that the State of the forum has at least as much leeway to disregard the judgment, to qualify it, or to depart from it as does the State where it was rendered.

In this case the New York court, having the child and both parents before it, had a full hearing and determined that the welfare of the child and the interests of the father warranted a modification of the custody decree. It is not shown that the New York court in modifying the Florida decree exceeded the limits permitted under Florida law. There is therefore a failure of proof that the Florida decree received less credit in New York than it had in Florida.

The narrow ground on which we rest the decision makes it unnecessary for us to consider several other questions argued, *e. g.,* whether Florida at the time of the original decree had jurisdiction over the child,[2] the father having removed him from the State after the proceedings started but before the decree was entered; whether in absence of personal service the Florida decree of custody had any binding effect on the husband; whether the power of New York to modify the custody decree was greater

[2] The legal domicile of the child is usually the domicile of his father. *Minick* v. *Minick,* 111 Fla., p. 490, 149 So., p. 492; *Dorman* v. *Friendly,* 146 Fla. 732, 738, 1 So. 2d 734, 736. The power of the Florida courts to award custody of a child is dependent either on the child being legally domiciled in Florida or physically present there. *Dorman* v. *Friendly, supra; State ex rel. Clark* v. *Clark,* 148 Fla. 452, 4 So. 2d 517.

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than Florida's power; whether the State which has jurisdiction over the child may, regardless of a custody decree rendered by another State, make such orders concerning custody as the welfare of the child from time to time requires. On all these problems we reserve decision.

Affirmed.

MR. JUSTICE JACKSON concurs in the result on the ground that the record before us does not show jurisdiction in the Florida court.

MR. JUSTICE FRANKFURTER, concurring.

Conflicts arising out of family relations raise problems and involve considerations very different from controversies to which debtor-creditor relations give rise. Such cardinal differences in life are properly reflected in law. And so, the use of the same legal words and phrases in enforcing full faith and credit for judgments involving the two types of relations ought not to obliterate the great difference between the interests affected by them, and should not lead to an irrelevant identity in result.

The constitutional policy formulated by the Full Faith and Credit Clause cannot be fitted into tight little categories or too abstract generalities. That policy was the nation-wide restriction of litigiousness, to the extent that States, autonomous for certain purposes, should not be exploited to permit repetitive litigation. In substance, the Framers deemed it against the national welfare for a controversy that was truly litigated in one State to be relitigated in another. Such limitation does not foreclose inquiry into what was litigated and what was adjudicated. The scope of the Full Faith and Credit Clause is bounded by its underlying policy and not by procedural considerations unrelated to it. Thus, in judgments affecting domestic relations technical questions of "finality" as to alimony and custody seem to me irrelevant

in deciding the respect to be accorded by a State to a valid prior judgment touching custody and alimony rendered by another State. See the concurring opinion in *Barber* v. *Barber,* 323 U. S. 77, 86, and the dissenting opinions in *Griffin* v. *Griffin,* 327 U. S. 220, at 236 and 248. Compare *Yarborough* v. *Yarborough,* 290 U. S. 202.

Which brings me to the present case. If there were no question as to the power of Florida to provide for the custody of this child in the manner in which the Florida decree of divorce did, I think New York would have to respect what Florida decreed, unless changed conditions affecting the welfare of the child called for a change in custodial care. New York could respond to such changed circumstances. The child's welfare must be the controlling consideration whenever a court which can actually lay hold of a child is appealed to on behalf of the child. Short of that, a valid custodial decree by Florida could not be set aside simply because a New York court, on independent consideration, has its own view of what custody would be appropriate.

Here the lower New York court did not provide for the child's custody on the basis of changed circumstances. While it professed to respect the Florida custody decree, the court acted as though it had independent authority because of the dispersion of the family. Its action seemed to be controlled by the father's right, on the assumption that that was the test of the child's welfare in the circumstances. The order of the lower court was affirmed by the Appellate Division, but that court specifically noted that it did "not adopt in their entirety the views expressed" by the court below. The intermediate tribunal was, in turn, affirmed by the Court of Appeals. Of course, if the Florida decree is entitled to no respect, it is not for us to upset the custodial provisions sanctioned by the highest court of New York. Although we are not afforded the guidance that an opinion would give as to

the considerations that moved the New York Court of Appeals to sustain the custodial decree, on the slim record before us I am not justified in finding that the New York Court of Appeals was unmindful of its duty under the Full Faith and Credit Clause to respect a valid Florida judgment.

In determining whether the New York judgment should stand or fall account must be taken of two competing considerations. There is first the presumptive jurisdiction of the court of a sister State—here Florida—to render the judgment for which full faith and credit is asked. The other is the power of a State court—here New York—which has actual control of the child to make provision for the child's welfare. Where, as here, both considerations cannot prevail one must yield. Since the jurisdiction of the Florida court in making the custodial decree is doubtful, New York was justified in exercising its power in the interest of the child. *Williams* v. *North Carolina,* 325 U. S. 226.

A close analysis of the precise issue before us seems to me to require this conclusion. The problem before this Court is the validity of a New York judgment providing for the custody of a child subject to its jurisdiction because within its power. It is our duty to sustain that judgment unless there is clear ground for upsetting it. Apart from the effect of what Florida had previously done, New York's authority to enter this judgment is unquestioned. New York's power is qualified only by her duty under the Full Faith and Credit Clause to respect a Florida judgment. But this duty arises only if there was legal power in the Florida Court to enter the custodial decree, and if in the Florida courts themselves the decree was not subject to the kind of modification which New York here made. On the basis of the meager record before us and in view of the uncertainties of Florida law, we do not have the necessary assurance that Florida had jurisdiction to issue the

custodial decree, or that the Florida courts could not enter a modifying decree precisely like the New York decree before us. So long as there is this uncertainty, we are not justified in finding that New York's judgment was vitiated because of a failure in her duty under the Full Faith and Credit Clause. A full record of the Florida proceedings in the light of applicable Florida law, more securely ascertained than by our independent inquiry, might lead to a different conclusion. As it is, I concur in affirmance of the judgment.

MR. JUSTICE RUTLEDGE, concurring.

I join in the judgment *dubitante,* in the view that under Florida law *res judicata* has no application to an award of custody[1] and the decree therefore is lacking in any quality of finality which would prevent the court rendering it, or another acquiring jurisdiction of the child's status, from altering it.[2]

The result seems unfortunate in that, apparently, it may make possible a continuing round of litigation over custody, perhaps also of abduction, between alienated parents. That consequence hardly can be thought conducive to the child's welfare. And, if possible, I would avoid such

[1] In *Minick* v. *Minick,* 111 Fla. 469, 491, the Florida Supreme Court quoted with approval the statement in Schouler on Marriage and Divorce (6th ed.) § 1896: "These judgments [of custody] are necessarily provisional and temporary in character, and are ordinarily not *res judicata,* either in the same court or that of a foreign jurisdiction, except as to facts before the court at the time of the judgment." See also *Meadows* v. *Meadows,* 78 Fla. 576.

[2] The trial court in New York gave lip service to observing the Florida award of custody to the mother, but awarded the father rights "of visitation" not allowed under the Florida decree; and these included not only visitation during specified hours while the child is to remain in the mother's custody, but also the right to have the custody during more than three months of each year, during which time the mother was given specified visiting rights. The New York appellate courts affirmed the award as made by the trial court.

a distressing result, since I think that the controlling consideration should be the best interests of the child, not only for disposing of such cases as a matter of local policy, as it is in Florida and New York,[3] but also for formulating federal policies of full faith and credit as well as of jurisdiction and due process in relation to such dispositions.

I am not sure but that the effect of the decision may be that the mother, once the child has been returned to Florida,[4] will then be able to secure another decree there nullifying the father's rights of visitation and custody given by the New York decree,[5] or that in such an event he might lawfully repeat the abduction and secure restoration of those rights in New York. If so, the effect of the decision may be to set up an unseemly litigious competition between the states and their respective courts as well as between parents. Sometime, somehow, there should be an end to litigation in such matters.

But our function here is limited to application of the full faith and credit clause. I agree that technical notions

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[3] See Fla. Stat. Ann. (1943) § 65.14; *Jones* v. *Jones,* 156 Fla. 524, 527; *Green* v. *Green,* 137 Fla. 359, 361.

See *Matter of Rich* v. *Kaminsky,* 254 App. Div. 6; *Matter of Bull,* 266 App. Div. 290, aff'd, 291 N. Y. 792; see also N. Y. Domestic Relations Law § 70; *Finlay* v. *Finlay,* 240 N. Y. 429, 433.

[4] The New York judgment permits the mother to take the child to Florida during the time she is to have custody, see note 2, but requires her to give a surety bond conditioned upon her surrendering the child to the father at the beginning of the periods prescribed for his having custody.

The mother therefore consistently with the New York decree may lawfully remove the child to Florida. Once he is physically and lawfully present there, it would seem that the courts of that state would be able to acquire jurisdiction over his status and to make further awards concerning it, unless indeed personal service of process upon the father is required for that purpose.

[5] See notes 2, 4. The question would remain whether the Florida courts by making a further decree could relieve the mother of the compulsion of the surety bond.

of finality applied generally to other types of judgment for such purposes have no proper strict application to these decrees.[6] But, even so, full faith and credit is concerned with finality and only with finality when the question arises in relation to the binding effects of judgments. And the law is clearly settled that while generally the clause requires other states to give judgments as much effect as they have where rendered, it does not require them to give more.[7]

Accordingly, if the state rendering the judgment gives it no final effect to prevent its alteration, I am unable to see how others having jurisdiction of the parties and the subject matter may be required to give it finality in this respect by virtue of the provision for full faith and credit.[8] But this is what we would have to require, in view of the state of Florida law, in order to hold that New York could not make the changes which were incorporated in its judgment.

Whether Florida will be bound to observe those changes, in the event of another application by Mrs. Halvey, is a question upon which however I desire to reserve judgment, along with the other questions reserved in the Court's opinion.

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[6] See the opinion dissenting in part in *Griffin* v. *Griffin,* 327 U. S. 220, at 247; also the concurring opinion in *Barber* v. *Barber,* 323 U. S. 77, at 86.

[7] Rev. Stat. § 905, 28 U. S. C. § 687, and cases cited in *Griffin* v. *Griffin,* 327 U. S. 220, 236, note 1.

[8] Commentators who have suggested that full faith and credit be given to custody decrees have assumed that such awards could be modified only on the basis of new facts occurring subsequent to the original custody decree. See, *e. g.,* Effect of Custody Decree in a State Other Than Where Rendered (1933) 81 U. Pa. L. Rev. 970, 972. As the opinion of the Court points out, the power of Florida to modify such a decree is not limited to change of circumstance. See also note 1.

INDUSTRIAL COMMISSION OF WISCONSIN ET AL. *v.* McCARTIN ET AL.

CERTIORARI TO THE SUPREME COURT OF WISCONSIN.

No. 270. Argued January 17, 1947.—Decided March 31, 1947.

An employee was injured in Wisconsin while working under an Illinois contract of employment and while both he and his employer were residents of Illinois. He applied to the Wisconsin Industrial Commission for adjustment of claim and shortly thereafter applied to the Illinois Industrial Commission, stating that the general nature of the dispute was, "Whether Illinois or Wisconsin has jurisdiction in my case." A settlement contract expressly reserving any right the employee "may have" under the Wisconsin Act was filed with the Illinois Commission, which approved it and issued a formal settlement order. After full payment of the amount awarded in Illinois had been made, the Wisconsin Commission awarded the employee certain benefits, less the amount received under the Illinois award. *Held:* The Illinois award is final and conclusive only as to rights arising in Illinois, and Wisconsin is free under the Full Faith and Credit Clause to award additional compensation in accord with its own laws. *Magnolia Petroleum Co.* v. *Hunt*, 320 U. S. 430, distinguished. Pp. 626–630.

(a) The fact that the Illinois statute expressly applies to persons whose employment is outside the State (where the contract of employment is made in Illinois) and precludes recovery under any "common law or statutory right" did not preclude recovery under the Wisconsin statute, because the Illinois statute had been interpreted by the Supreme Court of Illinois as abolishing rights of action against the employer under the Illinois common law or under the Illinois Personal Injuries Act and contained nothing to indicate that it was completely exclusive or was designed to preclude any recovery under proceedings in another state for injuries received there in the course of an Illinois employment. Pp. 627–628.

(b) The provision in the settlement contract saving the rights of the employee in Wisconsin became a part of the Illinois award, which had become final. Therefore, the Illinois award did not foreclose an additional award under the laws of Wisconsin. Pp. 628–630.

248 Wis. 570, 22 N. W. 2d 522, reversed.

An employee injured in Wisconsin while working under an Illinois contract of employment and while both he and his employer were residents of Illinois accepted settlement under the Illinois Workmen's Compensation Act, reserving any rights he might have under the Wisconsin Compensation Act, and later obtained an award for additional benefits under the Wisconsin Act. A Wisconsin court set aside the Wisconsin award and this action was affirmed by the Supreme Court of Wisconsin. 248 Wis. 570, 22 N. W. 2d 522. This Court granted certiorari. 329 U. S. 696. *Reversed,* p. 630.

Mortimer Levitan, Assistant Attorney General of Wisconsin, argued the cause and filed a brief for petitioners.

Lawrence E. Hart argued the cause for respondents. With him on the brief was *Harold M. Wilkie.*

MR. JUSTICE MURPHY delivered the opinion of the Court.

In *Magnolia Petroleum Co.* v. *Hunt,* 320 U. S. 430, this Court had occasion to consider the effect of the full faith and credit clause of the Constitution of the United States where awards are sought under the workmen's compensation laws of two states. This case presents another facet of that problem.

The facts are undisputed. Leo Thomas Kopp worked as a bricklayer for E. E. McCartin. Both were residents of Illinois. Pursuant to a contract made in Illinois, Kopp worked for McCartin on a building job in Wisconsin. He drove back and forth between his home in Illinois and his work in Wisconsin. While thus employed in Wisconsin, Kopp suffered an injury to his left eye. On June 7, 1943, he filed an application for adjustment of claim with the Industrial Commission of Wisconsin. McCartin and his insurance carrier entered an objection to the jurisdiction

of the Wisconsin Commission to hear the claim. Then on July 20, 1943, Kopp filed an application for adjustment of claim with the Industrial Commission of Illinois, in which the general nature of the dispute was given as "Whether Illinois or Wisconsin has jurisdiction in my case."

Under date of October 11, 1943, the Wisconsin Commission wrote the insurance carrier that Kopp had been informed that, so far as Wisconsin law was concerned, he was entitled to proceed under the Illinois Workmen's Compensation Act (Ill. Rev. Stat. 1943, Ch. 48, §§ 138–172) and thereafter claim compensation under the Wisconsin Workmen's Compensation Act (Wis. Stat. 1945, Ch. 102), with credit to be given for the amount paid him pursuant to the Illinois Act. A copy of this letter was sent to Kopp. Counsel for the insurance carrier replied on November 3, 1943. It was there stated that the insurance carrier understood that if payments were made by it to Kopp under the Illinois statute credit would be given for those payments in the event an award was made to Kopp under the Wisconsin Act; and with that understanding, the insurance carrier was proceeding to pay Kopp compensation under the Illinois statute.

On November 3, 1943, a settlement contract was signed by Kopp and McCartin. The parties therein agreed that the sum of $2,112 was to be paid to Kopp in full and final settlement of any and all claims arising out of Kopp's injury by virtue of the Illinois Workmen's Compensation Act. The contract also stated: "This settlement does not affect any rights that applicant may have under the Workmen's Compensation Act of the State of Wisconsin."

The settlement contract and a petition by Kopp that the amount due be paid to him in a lump sum were filed with the Illinois Commission on November 29, 1943. A hearing was held before a Commissioner on December 3,

in the course of which attention was called to the reservation of rights in Wisconsin. The presiding Commissioner informed Kopp that he did not know what effect the reservation had or what Kopp's rights were under the Wisconsin statute. Kopp replied that he would appreciate receiving the lump sum under the Illinois law and that he would "take chances on Wisconsin." Following the hearing, the Commissioner approved the settlement contract and the petition for a lump sum payment. Kopp received payment on December 7 in the amount specified in the settlement contract plus a small additional sum for temporary disability. Thereafter, on January 10, 1944, a formal order was entered by the Illinois Commission directing payment of the lump sum of $2,112. The circumstances of the entry of this later order, after payment had been made in fact, are not disclosed. No petition to review the settlement contract or lump sum payment was filed and no action to secure a review of the formal order was taken.

In the meantime, on December 20, 1943, this Court's decision in *Magnolia Petroleum Co.* v. *Hunt, supra,* was rendered. The Wisconsin Commission then held a hearing on February 20, 1944, on Kopp's application before it. McCartin and the insurance carrier filed an amended answer, contending that under the full faith and credit clause the Wisconsin proceedings were barred by the award and payment under the Illinois Act; reliance was placed upon the *Magnolia Petroleum Co.* case. The Commission overruled this objection and ordered the payment to Kopp of certain benefits, after giving credit for the sums paid under the Illinois Act.

The Circuit Court for Dane County, Wisconsin, set aside the Wisconsin Commission's order on the authority of the *Magnolia Petroleum Co.* case. On appeal, the Supreme Court of Wisconsin affirmed the lower court's judgment

on the same authority. 248 Wis. 570, 22 N. W. 2d 522. We granted certiorari to determine the applicability of the full faith and credit clause, as interpreted in the *Magnolia Petroleum Co.* case, to the facts of this case.

It is clear, in the absence of a prior award in Wisconsin, that the compensation paid to the employee under the Illinois Workmen's Compensation Act was constitutionally proper from the full faith and credit standpoint. Illinois was the state where the parties entered into the employment contract and its legitimate concern with that employer-employee relationship permitted it to apply its own statute even though the injury occurred elsewhere. *Alaska Packers Assn.* v. *Industrial Accident Comm'n,* 294 U. S. 532; *Cardillo* v. *Liberty Mutual Ins. Co.,* 330 U. S. 469. At the same time, in view of the fact that the accident took place in Wisconsin, any full faith and credit questions that might have been raised had compensation first been awarded under the Wisconsin Workmen's Compensation Act are answered by *Pacific Employers Ins. Co.* v. *Industrial Accident Commission,* 306 U. S. 493. The troublesome problem that arises here is whether the compensation paid under the Illinois statute raises a full faith and credit bar to a subsequent award in Wisconsin for an additional amount.

If it were apparent that the Illinois award was intended to be final and conclusive of all the employee's rights against the employer and the insurer growing out of the injury, the decision in the *Magnolia Petroleum Co.* case would be controlling here. The Court there found that the compensation award under the Texas Workmen's Compensation Law was made explicitly in lieu of any other recovery for injury to the employee, precluding even a recovery under the laws of another state. See *Bradford Elec. Co.* v. *Clapper,* 286 U. S. 145, 153. And since the Texas award had the degree of finality contemplated by the full faith and credit clause, it was held that Louisiana

was constitutionally forbidden from entering a subsequent award under its statute. But we do not believe that the same situation exists in this case, the Illinois award being different in its nature and effect from the Texas award in the *Magnolia* case.

The Illinois Workmen's Compensation Act was concededly applicable under the circumstances of this case. Section 3 of that Act provides that it shall apply automatically and without election to all employers and employees engaged in businesses or enterprises such as those involving the erection or construction of any structure. At the time when he was injured, Kopp was doing mason work for his employer in connection with the erection of houses. Section 5 then provides that the term "employee" includes those persons "whose employment is outside of the State of Illinois where the contract of hire is made within the State of Illinois . . . ." Kopp was such an employee, having been hired in Illinois and injured while employed in Wisconsin.

Section 6 states that "No common law or statutory right to recover damages for injury or death sustained by any employe while engaged in the line of his duty as such employe, other than the compensation herein provided, shall be available to any employe who is covered by the provisions of this act, . . ." This section has been interpreted to mean that, in situations to which the Act applies, the right of action against the employer under the Illinois common law or under the Illinois Personal Injuries Act (Ill. Rev. Stat. 1943, Ch. 70, §§ 1, 2) has been abolished. *Mississippi River Power Co.* v. *Industrial Commission,* 289 Ill. 353, 124 N. E. 552; *Faber* v. *Industrial Commission,* 352 Ill. 115, 185 N. E. 255. To that extent, the Act provides an exclusive remedy.

But there is nothing in the statute or in the decisions thereunder to indicate that it is completely exclusive, that it is designed to preclude any recovery by proceedings

brought in another state for injuries received there in the course of an Illinois employment. Cf. *Bradford Elec. Co.* v. *Clapper, supra; Cole* v. *Industrial Commission,* 353 Ill. 415, 187 N. E. 520. And in light of the rule that workmen's compensation laws are to be liberally construed in furtherance of the purpose for which they were enacted, *Baltimore & Phila. Steamboat Co.* v. *Norton,* 284 U. S. 408, 414, we should not readily interpret such a statute so as to cut off an employee's right to sue under other legislation passed for his benefit. Only some unmistakable language by a state legislature or judiciary would warrant our accepting such a construction. Especially is this true where the rights affected are those arising under legislation of another state and where the full faith and credit provision of the United States Constitution is brought into play. See *Ohio* v. *Chattanooga Boiler Co.,* 289 U. S. 439.

We need not rest our decision, however, solely upon the absence of any provision or construction of the Illinois Workmen's Compensation Act forbidding an employee from seeking alternative or additional relief under the laws of another state. There is additional evidence that the employee is free to ask for additional compensation in Wisconsin. That evidence is in the Illinois award itself, an award which is acknowledged to have been made in compliance with the Illinois statute.

Here the employer and the employee entered into a settlement contract fixing the amount of compensation to which the employee was entitled under the Illinois statute, thereby avoiding the expense and delay of litigating the matter. This contract, together with the employee's petition for a lump sum payment, was approved by one of the Commissioners of the Illinois Industrial Commission. By that approval, the agreement became "in legal effect an award." *Hartford Accident Co.* v. *Industrial Commission,* 320 Ill. 544, 546, 151 N. E. 495, 496; *Michelson* v.

Industrial Commission, 375 Ill. 462, 31 N. E. 2d 940. Under Illinois law, such awards are described as *res judicata* on the matters thus adjudicated and agreed upon, precluding the Commission from subsequently reviewing the awards or setting them aside. *Centralia Coal Co.* v. *Industrial Commission,* 297 Ill. 451, 130 N. E. 727; *Stromberg Motor Device Co.* v. *Industrial Commission,* 305 Ill. 619, 137 N. E. 462; *Lewin Metals Corp.* v. *Industrial Commission,* 360 Ill. 371, 196 N. E. 482; *Trigg* v. *Industrial Commission,* 364 Ill. 581, 5 N. E. 2d 394.

One of the provisions in the settlement contract which became the award was the statement that "This settlement does not affect any rights that applicant may have under the Workmen's Compensation Act of the State of Wisconsin." That statement was made a part of the contract at the request of the employee, who had been informed by the Wisconsin Commission that he was entitled to claim an additional amount of compensation in Wisconsin after recovering in Illinois. See *Interstate Power Co.* v. *Industrial Commission,* 203 Wis. 466, 234 N. W. 889; *Salvation Army* v. *Industrial Commission,* 219 Wis. 343, 263 N. W. 349; *Wisconsin Bridge & Iron Co.* v. *Industrial Commission,* 222 Wis. 194, 268 N. W. 134. The employer's insurance carrier was likewise informed, and all the parties proceeded on the assumption that the employee was attempting to recover compensation under the statutes of both Illinois and Wisconsin, with credit to be given in Wisconsin for any sum recovered in Illinois. In furtherance of this common understanding, the above statement was inserted in the Illinois settlement contract and was brought to the attention of the Industrial Commissioner before he approved the contract. The Commissioner confessed that he did not know the meaning of this provision, but he did not order it stricken. Rather he approved it for whatever it was worth.

This contract provision saving the rights of the employee in Wisconsin thus became part of the Illinois award, an award which has achieved finality in the absence of a timely appeal. This provision means more than might be implied in the case of an ordinary judgment or decree. Any party, of course, has the right to seek another judgment or decree, however inconsistent or futile such an attempt might be; and it takes no reservation in the original judgment or decree to give him that right. But when the reservation in this award is read against the background of the Illinois Workmen's Compensation Act, it becomes clear that the reservation spells out what we believe to be implicit in that Act—namely, that an Illinois workmen's compensation award of the type here involved does not foreclose an additional award under the laws of another state. And in the setting of this case, that fact is of decisive significance.

Since this Illinois award is final and conclusive only as to rights arising in Illinois, Wisconsin is free under the full faith and credit clause to grant an award of compensation in accord with its own laws. *Magnolia Petroleum Co.* v. *Hunt, supra,* thus does not control this case.

Reversed.

MR. JUSTICE RUTLEDGE concurs in the result.

HAUPT *v.* UNITED STATES.

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

No. 49. Argued November 21, 22, 1946.—Decided March 31, 1947.

1. In a trial for treason, proof by the direct testimony of two witnesses that defendant gave shelter for a period of six days to an enemy agent who had entered this country for purposes of sabotage, helped him to buy an automobile and helped him to obtain employment in a plant manufacturing military equipment, all in aid of his known purpose of sabotage, was sufficient proof of overt acts to satisfy the requirements of Article III, § 3 of the Constitution. *Cramer* v. *United States*, 325 U. S. 1, distinguished. Pp. 634–636.
2. Proof by direct testimony of two witnesses (detailed in the opinion) that the saboteur spent the nights in the house where the defendant lived and with the defendant's knowledge was sufficient proof of the overt act of harboring and sheltering. Pp. 636–638.
3. Proof by direct testimony of two witnesses (detailed in the opinion) that the defendant purchased an automobile and that the saboteur took it and drove it away was sufficient proof of the overt act of assisting in the purchase of an automobile—even though the testimony of the two witnesses was not identical and some of their testimony related to different parts of the same transaction. Pp. 638–640.
4. It was for the jury to determine upon the evidence whether the acts of defendant were motivated by parental solicitude for his son, the saboteur, or by adherence to the enemy cause. Pp. 641–642.
5. The jury were properly instructed that, if they found that defendant's intention was not to injure the United States but merely to aid his son "as an individual, as distinguished from assisting him in his purposes, if such existed, of aiding the German Reich, or of injuring the United States, the defendant must be found not guilty." Pp. 641–642.
6. Conversations and occurrences evidencing the defendant's sympathy with Germany and with Hitler and hostility to the United States, though long prior to the indictment, were admissible on the question of intent and adherence to the enemy, and their weight was for the jury. Pp. 642–643.
7. When legal basis for a conviction of treason has been laid by the testimony of two witnesses to the same overt act, there is nothing

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in the text or policy of the Constitution precluding the use of corroborative out-of-court admissions or confessions. P. 643.

8. Other errors assigned by petitioner relative to the conduct of the trial—such as permitting the indictment to go to the jury room, allowing the jury to have a typewritten copy of the court's charge, holding the jury together for a long time, reading the testimony of certain witnesses to the jury at its request, failing to order a special verdict, and improper appeals to passion by the prosecutor—are examined and found not to involve such unfairness or irregularity as would warrant reversal. P. 643.

152 F. 2d 771, affirmed.

Petitioner was indicted and convicted of treason. The Circuit Court of Appeals reversed. 136 F. 2d 661. On a second trial, petitioner was again convicted. The Circuit Court of Appeals affirmed. 152 F. 2d 771. This Court granted certiorari. 328 U. S. 831. *Affirmed,* p. 644.

Paul A. F. Warnholtz 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 *Acting Solicitor General Washington, Robert S. Erdahl, Irving S. Shapiro* and *Beatrice Rosenberg.*

Mr. Justice Jackson delivered the opinion of the Court.

Petitioner, Hans Max Haupt was indicted for treason, convicted and sentenced to life imprisonment and to pay a fine of $10,000. From this judgment of the District Court for the Northern District of Illinois he appealed to the United States Circuit Court of Appeals for the Seventh Circuit, which by a divided court affirmed. 152 F. 2d 771. A previous conviction of the same offense predicated on the same acts had been reversed. *United States* v. *Haupt,* 136 F. 2d 661.

Petitioner is the father of Herbert Haupt, one of the eight saboteurs convicted by a military tribunal. See *Ex*

parte Quirin, 317 U. S. 1. Sheltering his son, assisting him in getting a job, and in acquiring an automobile, all alleged to be with knowledge of the son's mission, involved defendant in the treason charge.

The background facts are not in dispute. The defendant is a naturalized citizen, born in Germany. He came to this country in 1923 and lived in or near Chicago. In 1939 the son, Herbert, who had also been born in Germany, worked for the Simpson Optical Company in Chicago which manufactured lenses for instruments, including parts for the Norden bomb sight. In the spring of 1941 Herbert went to Mexico and, with the aid of the German Consul, from there to Japan and thence to Germany where he entered the employ of the German Government and was trained in sabotage work.

On the 17th of June 1942, Herbert returned to the United States by submarine. His mission was to act as a secret agent, spy and saboteur for the German Reich. He was instructed to proceed to Chicago, to procure an automobile for the use of himself and his confederates in their work of sabotage and espionage, to obtain reemployment with the Simpson Optical Company where he was to gather information, particularly as to the vital parts and bottlenecks of the plant, to be communicated to his coconspirators to guide their attack. He came with various other instructions, equipped with large sums of money, and went to Chicago.

After some six days there, Herbert was arrested on June 27, 1942, having been under surveillance by Government agents during his entire stay in Chicago. This petitioner was thereafter taken into custody and was arraigned on July 21, 1942. He later asked to talk to an F. B. I. agent, two of whom were summoned, and he appears to have volunteered considerable information and to have given more in answer to their questions. He blamed certain others for the predicament of his son and wanted to testify against

them. For this purpose, he disclosed that he had been present when Herbert had told the complete story of his trip to Mexico, Japan, his return to the United States by submarine, and his bringing large sums of money with him. During his confinement in the Cook County jail, he also talked with two fellow prisoners concerning his case and they testified as to damaging admissions made to them.

The indictment alleged twenty-nine overt acts of treason. Its sufficiency was challenged by demurrer which was overruled and by a motion to quash which was denied. The defendant, at the close of the Government's case and again at the close of all the evidence, made motions for a directed verdict generally and also specifically as to each overt act charged, all of which were denied. Seventeen of the overt acts were withdrawn before submission and twelve were submitted to the jury. Generally stated, the overt acts submitted fall into three groups of charges: First, the charge that this defendant accompanied his son to assist him in obtaining employment in a plant engaged in manufacturing the Norden bomb sight; second, the charge of harboring and sheltering Herbert Haupt; and third, the charge of accompanying Herbert to an automobile sales agency, arranging, making payment for and purchasing an automobile for Herbert. Each of these was alleged to be in aid of Herbert's known purpose of sabotage.

The defendant argues here that the overt acts submitted do not constitute acts of treason, but that each is commonplace, insignificant and colorless, and not sufficient, even if properly proved, to support a conviction. We have held that the minimum function of the overt act in a treason prosecution is that it show action by the accused which really was aid and comfort to the enemy. *Cramer* v. *United States,* 325 U. S. 1, 34. This is a separate inquiry from that as to whether the acts were done because of

adherence to the enemy, for acts helpful to the enemy may nevertheless be innocent of treasonable character.

Cramer's case held that what must be proved by the testimony of two witnesses is a "sufficient" overt act. There the only proof by two witnesses of two of the three overt acts submitted to the jury was that the defendant had met and talked with enemy agents. We did not set aside Cramer's conviction because two witnesses did not testify to the treasonable character of his meeting with the enemy agents. It was reversed because the Court found that the act which two witnesses saw could not on their testimony be said to have given assistance or comfort to anyone, whether it was done treacherously or not. To make a sufficient overt act, the Court thought it would have been necessary to assume that the meeting or talk was of assistance to the enemy, or to rely on other than two-witness proof. Here, on the contrary, such assumption or reliance is unnecessary—there can be no question that sheltering, or helping to buy a car, or helping to get employment is helpful to an enemy agent, that they were of aid and comfort to Herbert Haupt in his mission of sabotage. They have the unmistakable quality which was found lacking in the *Cramer* case of forwarding the saboteur in his mission. We pointed out that Cramer furnished no shelter, sustenance or supplies. 325 U. S. 1, 37. The overt acts charged here, on the contrary, may be generalized as furnishing harbor and shelter for a period of six days, assisting in obtaining employment in the lens plant and helping to buy an automobile. No matter whether young Haupt's mission was benign or traitorous, known or unknown to defendant, these acts were aid and comfort to him. In the light of his mission and his instructions, they were more than casually useful; they were aid in steps essential to his design for treason. If proof be added that the defendant knew of his son's instructions, preparation

and plans, the purpose to aid and comfort the enemy becomes clear. All of this, of course, assumes that the prosecution's evidence properly in the case is credited, as the jury had a right to do. We hold, therefore, that the overt acts laid in the indictment and submitted to the jury do perform the functions assigned to overt acts in treason cases and are sufficient to support the indictment and to sustain the conviction if they were proved with the exactitude required by the Constitution.

The most difficult issue in this case is whether the overt acts have been proved as the Constitution requires, and several grounds of attack on the conviction disappear if there has been compliance with the constitutional standard of proof. The Constitution requires that "No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act . . . ." Art. III, § 3. We considered the application of this provision to the problems of proof in the *Cramer* case. Defendant claims this case in two respects falls short of the requirements there laid down as to all the overt acts which comprise harboring and sheltering the saboteur: First, that there was no direct proof that the saboteur was actually in the defendant's apartment, and second, that there is no direct proof that the defendant was in the apartment at any time when the saboteur was there. Both of these we find to be without merit.

The act to be proved is harboring and sheltering in the house at No. 2234 North Fremont Street. The defendant and his wife lived there in a third-floor front apartment, which had but one bedroom. Federal Bureau of Investigation agents, never less than two, had the place under continuous surveillance from 10:30 a. m., June 22 to the arrest of the saboteur on June 27, and at least two testified in minute detail to each of repeated arrivals and departures of the saboteur, on some occasions accompanied by

the defendant, on others by the defendant's wife, and on some by both. He entered each night and left each day. On some occasions he came out wearing different clothes from those he wore when he went in. When he went in at night the lights in the defendant's apartment were turned on and after a time extinguished. Two witnesses who were callers at the apartment testified that on one occasion defendant and Herbert were there together at supper time, the three Haupts being together in the kitchen, Herbert later coming into the parlor and one of the guests going into the kitchen. The defendant contends that this does not constitute the required two witnesses' direct proof that the saboteur was harbored and sheltered in the defendant's apartment. It is true that the front entrance, where all of this testimony shows the saboteur to have entered, connected with two other apartments. The occupants of each of the other apartments, two witnesses as to each, testified that the saboteur did not at any time occupy their respective apartments.

It is sufficiently proved by direct testimony of two witnesses that the saboteur stayed in the house where the father lived and with the latter's knowledge. But it is said that this is not enough, that it fails because the two witnesses did not see him enter his parents' apartment therein. But the hospitality and harboring did not begin only at the apartment door. It began when he entered the building itself where he would have no business except as a guest or member of the family of one of the tenants. It is not necessary to show that he slept in the defendant's bed. Herbert was neither trespasser nor loiterer. He entered as the licensee of his father, and was under the privileges of the latter's tenancy even in parts of the building used in common with other tenants. His entrance to and sojourn in the building were made possible by the defendant, and the saboteur slept and stayed in

some part of it with the father's knowledge and by his leave. We think the proof is sufficient to comply with the constitutional requirement that two witnesses testify to the overt acts in that group which charges harboring and sheltering of the saboteur.

The other group of submitted overt acts as to which it is claimed there is a deficiency of testimony relates to assistance which the defendant rendered to the saboteur in purchasing an automobile as alleged in Acts Nos. 15 and 16 of the indictment. According to the testimony of an automobile salesman, Farrell, the defendant came to his salesroom and said he wanted to buy a good used car of late model. Defendant selected a 1941 model Pontiac and asked about installment payments. After considerable discussion of terms, defendant paid $10 deposit on the price of $1045 and said he would come in next day to make a further payment. He signed an order for the car and gave financial references. On the next day, defendant came to the salesroom and paid an additional $405, executing notes and finance contract. The son took the car and drove it away.

A second witness, Vinson, sales manager, corroborated the earlier parts of this transaction, but defendant claims his testimony is not sufficiently comprehensive to comply with the two-witness rule, especially as to overt acts 15 and 16, relating to events of the second day. Vinson at first said he did not see defendant and his son on that day. The trial court allowed counsel to refresh Vinson's recollection from his testimony given at the former trial of defendant. Vinson then testified that he did see the defendant and his son come in together and be together in the salesroom that evening but did not talk with them; that he received "the money that had been put down" on that evening and the note signed by the defendant. By approval of his answers at the former trial he affirmed that

he receipted for the money. He also saw the invoice made that evening for the purchase and identified a copy of the bill of sale of the car to the defendant. He testified Farrell was there when the Haupts were.

It is said that Vinson's testimony falls short because it is not explicit as to who paid the money. Taking the testimony as a whole, Vinson has corroborated Farrell's testimony that the defendant came that night to the automobile salesroom, that he was accompanied by the saboteur, that a purchase of the automobile had been started and was pending. The partially completed transaction was one in which defendant himself became purchaser, signed his own name to the purchase note and furnished his own, not his son's, financial references. Vinson's testimony shows that this pending transaction was consummated on the latter night. It involved "a further payment in cash toward the purchase" and completing "arrangements for the purchase" which are alleged as the sixteenth act. Vinson said that he received the money. Whoever actually handed over the money, it was apparently in defendant's presence and was paid on account of his obligation incurred the previous evening in signing the purchase contract.

The testimony of Vinson in its interpretation most favorable to the jury's verdict seems clearly to have been testimony to the same overt act as that by Farrell. Defendant's counsel made no effort to correct any ambiguity in it by cross-examination. The defense of course is under no duty to do so; it may rely upon weakness in the prosecution's case. But it takes the risk, when it relies on an ambiguity rather than on a complete lack of legal proof, that the jury will resolve the meaning in favor of the prosecution. When enough has been shown to make a case for the jury, we may not impeach the verdict by differing from them on equally reasonable views of a wit-

ness' meaning. We think the court was justified in submitting this overt act and the jury was justified in finding it proved.

The Constitution requires testimony to the alleged overt act and is not satisfied by testimony to some separate act from which it can be inferred that the charged act took place. And while two witnesses must testify to the same act, it is not required that their testimony be identical. Most overt acts are not single, separable acts, but are combinations of acts or courses of conduct made up of several elements. It is not easy to set by metes and bounds the permissible latitude between the testimony of the two required witnesses. It is perhaps easier to say on which side of the line a given case belongs than to draw a line that will separate all permissible disparities from forbidden ones. Concrete even if hypothetical cases may illustrate this.

One witness might hear a report, see a smoking gun in the hand of defendant and see the victim fall. Another might be deaf, but see the defendant raise and point the gun, and see a puff of smoke from it. The testimony of both would certainly be "to the same overt act," although to different aspects. And each would be to the overt act of shooting, although neither saw the movement of a bullet from the gun to the victim. It would still be a remote possibility that the gun contained only a blank cartridge and the victim fell of heart failure. But it is not required that testimony be so minute as to exclude every fantastic hypothesis that can be suggested.

We think two witnesses testified to these overt acts and petitioner cannot seriously contend that two did not testify to each of the overt acts comprising the group of charges on obtaining a job. Since this was the constitutional measure of evidence as to each overt act submitted to the jury, we do not reach the question whether

the conviction could stand on some sufficiently proven acts if others failed in proof.[1]

It is urged that the conviction cannot be sustained because there is no sufficient proof of adherence to the enemy, the acts of aid and comfort being natural acts of aid for defendant's own son. Certainly that relationship is a fact for the jury to weigh along with others, and they were correctly instructed that if they found that defendant's intention was not to injure the United States but merely to aid his son "as an individual, as distinguished from assisting him in his purposes, if such existed, of aiding the German Reich, or of injuring the United States, the defendant must be found not guilty." The defendant can complain of no error in such a submission. It was for the jury to weigh the evidence that the acts proceeded from parental solicitude against the evidence of adherence to the German cause. It is argued that Haupt merely had

[1] When, speaking of a general verdict of guilty in *Cramer* v. *United States*, 325 U. S. 1, 36, n. 45, we said "Since it is not possible to identify the grounds on which Cramer was convicted, the verdict must be set aside if any of the separable acts submitted was insufficient," of course we did not hold that one overt act properly proved and submitted would not sustain a conviction if the proof of other overt acts was insufficient. One such act may prove treason, and on review the conviction would be sustained, provided the record makes clear that the jury convicted on that overt act. But where several acts are pleaded in a single count and submitted to the jury, under instructions which allow a verdict of guilty on any one or more of such acts, a reviewing court has no way of knowing that any wrongly submitted act was not the one convicted upon. If acts were pleaded in separate counts, or a special verdict were required as to each overt act of a single count, the conviction could be sustained on a single well-proved act. As the acts were here pleaded in a single count, and the jury were instructed that they could convict on any one, we would have to reverse if any act were insufficient or insufficiently proved. *Cf. Stromberg* v. *California*, 283 U. S. 359, 368; *Williams* v. *North Carolina*, 317 U. S. 287, 292, and *Cramer* v. *United States*, *supra*.

the misfortune to sire a traitor and all he did was to act as an indulgent father toward a disloyal son. In view however of the evidence of defendant's own statements that after the war he intended to return to Germany, that the United States was going to be defeated, that he would never permit his boy to join the American Army, that he would kill his son before he would send him to fight Germany, and others to the same effect, the jury apparently concluded that the son had the misfortune of being a chip off the old block—a tree inclined as the twig had been bent—metaphors which express the common sense observation that parents are as likely to influence the character of their children as are children to shape that of their parents. Such arguments are for the jury to decide.

It is also urged that errors were made in admission of evidence. Some of this concerned conversations and occurrences long prior to the indictment which were admitted to prove intent. They consisted of statements showing sympathy with Germany and with Hitler and hostility to the United States. Such testimony is to be scrutinized with care to be certain the statements are not expressions of mere lawful and permissible difference of opinion with our own government or quite proper appreciation of the land of birth. But these statements were explicit and clearly were admissible on the question of intent and adherence to the enemy. Their weight was for the jury.

Evidence of F. B. I. agents and of defendant's fellow prisoners as to conversations is also said to be inadmissible. The Constitution requires that "No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court." It is claimed that the statements of defendant were confessions, and as they were not made in open court were inadmissible as evidence. If there were not

the required two-witness testimony and it was sought to supply that defect by confession, we would have a different question. But having found the legal basis for the conviction laid by the testimony of two witnesses, we find nothing in the text or policy of the Constitution to preclude using out-of-court admissions or confessions.

It may be doubted whether the Constitutional reference to confession in open court has application to any admission of a fact other than a complete confession to guilt of the crime. The statements of defendant did not go so far. They were admissions of specific acts and knowledge as to which, insofar as they were overt acts charged, the required two witnesses also testified. There has been no attempt to convict here on such admissions alone, or to use the admissions to supply defects in the Constitutional measure of proof. If such an attempt were made we would be faced with a novel question. But here the admissions are merely corroborative of a legal basis laid by testimony and the Constitution does not preclude using out-of-court admissions or confessions in this way. *Cf. Respublica* v. *Roberts,* 1 Dall. 39; *Case of Fries,* Fed. Case No. 5126, 9 Fed. Cas. 826, 909.

There are many other complaints about the conduct of the trial, such as permitting the indictment to go to the jury room, allowing the jury to have a typewritten copy of the court's charge, holding the jury together for a long time, reading the testimony of certain witnesses to the jury at its request and failing to order a special verdict. We find nothing in any of them to warrant the inference of unfairness or irregularity in the trial. It is also claimed that the prosecution made improper appeals to passion. Unfortunately it is the nature of the charge of betrayal that it easily stirs feelings, and that is one of the reasons such safeguards have been thrown around its trial. But we find no such conduct as would invalidate the conviction.

Haupt has been twice tried and twice found guilty. The law of treason makes, and properly makes, conviction difficult but not impossible. His acts aided an enemy of the United States toward accomplishing his mission of sabotage. The mission was frustrated but defendant did his best to make it succeed. His overt acts were proved in compliance with the hard test of the Constitution, are hardly denied, and the proof leaves no reasonable doubt of the guilt.

The judgment is

Affirmed.

MR. JUSTICE DOUGLAS.

There is a close parallel between this case and *Cramer* v. *United States,* 325 U. S. 1.

Two witnesses saw Cramer talking with an enemy agent. So far as they knew, the conversation may have been wholly innocent, as they did not overhear it. But Cramer, by his own testimony at the trial, explained what took place: he knew or had reason to believe that the agent was here on a mission for the enemy and arranged, among other things, to conceal the funds brought here to promote the project. Thus there was the most credible evidence that Cramer was guilty of "adhering" to the enemy, giving him "aid and comfort." Article III, § 3 of the Constitution. And the overt act which joined him with the enemy agent was proved by two witnesses. Cramer's conviction, however, was set aside because two witnesses did not testify to the treasonable character of Cramer's meeting with the enemy agent.

Two witnesses saw the son enter Haupt's apartment house at night and leave in the morning. That act, without more, was as innocent as Cramer's conversation with the agent. For nothing would be more natural and normal, or more "commonplace" (325 U. S. p. 34), or less suspicious, or less "incriminating" (325 U. S. p. 35), than

the act of a father opening the family door to a son. That act raised, therefore, no more implication that the father was giving his son aid and comfort in a treasonable project than did the meeting of the defendant with the enemy agent in the *Cramer* case. But that act, wholly innocent on its face, was shown to be of a treasonable character, not by the two witnesses, but by other evidence: that Haupt was sympathetic with the Nazi cause, that he knew the nature of his son's mission to this country. Haupt's conviction is sustained, though the conversion of an innocent appearing act into a treasonable act is not made by two witnesses.

The Constitution provides:

> "Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court." Article III, § 3.

As the *Cramer* case makes plain, the overt act and the intent with which it is done are separate and distinct elements of the crime. Intent need not be proved by two witnesses but may be inferred from all the circumstances surrounding the overt act. But if two witnesses are not required to prove treasonable intent, two witnesses need not be required to show the treasonable character of the overt act. For proof of treasonable intent in the doing of the overt act necessarily involves proof that the accused committed the overt act with the knowledge or understanding of its treasonable character.

The requirement of an overt act is to make certain a treasonable project has moved from the realm of thought into the realm of action. That requirement is undeniably met in the present case, as it was in the case of *Cramer*.

The *Cramer* case departed from those rules when it held that "The two-witness principle is to interdict impu-

tation of *incriminating acts* to the accused by circumstantial evidence or by the testimony of a single witness." 325 U. S. p. 35. The present decision is truer to the constitutional definition of treason when it forsakes that test and holds that an act, quite innocent on its face, does not need two witnesses to be transformed into an incriminating one.

MR. JUSTICE MURPHY, dissenting.

This case grows out of a singular set of circumstances that, when combined with the serious nature of the alleged crime, warrants extraordinary scrutiny. Petitioner's son was tried as a saboteur before a military tribunal, convicted and executed. See *Ex parte Quirin,* 317 U. S. 1. Petitioner, his wife and four others were then jointly tried for treason. All were convicted, petitioner being sentenced to death and his wife to 20 years' imprisonment. *United States* v. *Haupt,* 47 F. Supp. 832; 47 F. Supp. 836. These convictions, however, were reversed upon appeal. *United States* v. *Haupt,* 136 F. 2d 661. Petitioner has now been retried separately for treason; again he has been found guilty, with the sentence being reduced to life imprisonment and a $10,000 fine. 152 F. 2d 771.

Petitioner was charged with having committed three general types of overt acts of treason: (1) harboring and sheltering his son; (2) assisting his son in obtaining reemployment; (3) accompanying and assisting his son in the purchase of an automobile. All of these alleged overt acts were contained in a single count of the indictment and the jury's verdict was a general one. The Court indicates that a fatal deficiency as to any of the alleged overt acts under such circumstances invalidates the conviction. Since the acts relating to the harboring and sheltering of petitioner's son did not, in my opinion, amount to overt acts of treason, I would accordingly reverse the judgment below, regardless of the sufficiency of the other acts.

The high crime of treason, as I understand it, consists of an act rendering aid and comfort to the enemy by one who adheres to the enemy's cause. *Cramer* v. *United States,* 325 U. S. 1. The act may be one which extends material aid; or it may be one which merely lends comfort and encouragement. The act may appear to be innocent on its face, yet prove to be treasonable in nature when examined in light of its purpose and context.

It does not follow, however, that every act that gives aid and comfort to an enemy agent constitutes an overt act of treason, even though the agent's status is known. The touch of one who aids is not Midas-like, giving a treasonable hue to every move. An act of assistance may be of the type which springs from the well of human kindness, from the natural devotion to family and friends, or from a practical application of religious tenets. Such acts are not treasonous, however else they may be described. They are not treasonous even though, in a sense, they help in the effectuation of the unlawful purpose. To rise to the status of an overt act of treason, an act of assistance must be utterly incompatible with any of the foregoing sources of action. It must be an act which is consistent only with a treasonable intention and with the accomplishment of the treasonable plan, giving due consideration to all the relevant surrounding circumstances. Thus an act of supplying a military map to a saboteur for use in the execution of his nefarious plot is an overt act of treason since it excludes all possibility of having been motivated by non-treasonable considerations. But an act of providing a meal to an enemy agent who is also one's son retains the possibility of having a non-treasonable basis even when performed in a treasonable setting; accordingly, it cannot qualify as an overt act of treason.

It is true that reasonable doubts may be raised as to whether or not the prime motive for an act was treasonous.

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Yet the nature of some acts is such that a non-treasonous motive cannot be completely dismissed as a possibility. An overt act of treason, however, should rest upon something more substantial than a reasonable doubt. Treason is different from ordinary crimes, possessing unique and difficult standards of proof which confine it within narrow spheres. It has such serious connotations that its substance cannot be left to conjecture. Only when the alleged overt act manifests treason beyond all reasonable doubt can we be certain that the traitor's stigma will be limited to those whose actions constitute a real threat to the safety of the nation.

Tested by that standard, the conviction in the instant case cannot be sustained. Petitioner, it is said, had the misfortune to sire a traitor. That son lived with petitioner and his wife in their Chicago apartment. After a sojourn in Germany for training as a saboteur, the son returned to the Chicago apartment and began to make preparations to carry out his mission of sabotage. It is claimed that petitioner knew of his son's activities and desired to help him. For six days prior to his arrest, the son lived in petitioner's apartment; he was not secreted in any way, coming and going as he normally would have done.

The indictment alleged that petitioner committed an overt act of treason by sheltering and harboring his son for those six days. Concededly, this was a natural act for a father to perform; it is consistent with parental devotion for a father to shelter his son, especially when the son ordinarily lives with the father. But the Court says that the jury might find, under appropriate instructions, that petitioner provided this shelter, not merely as an act of an indulgent father toward a disloyal son, but as an act designed to injure the United States. A saboteur must be lodged in a safe place if his mission is to be effected and the jury might well find that petitioner lodged his son for that purpose.

631 Syllabus.

But the act of providing shelter was of the type that might naturally arise out of petitioner's relationship to his son, as the Court recognizes. By its very nature, therefore, it is a non-treasonous act. That is true even when the act is viewed in light of all the surrounding circumstances. All that can be said is that the problem of whether it was motivated by treasonous or non-treasonous factors is left in doubt. It is therefore not an overt act of treason, regardless of how unlawful it might otherwise be.

LEVINSON *v.* SPECTOR MOTOR SERVICE.

CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

No. 22. Argued December 11, 1945. Reargued October 21, 22, 1946.—Decided March 31, 1947.

1. The Interstate Commerce Commission "has power," under § 204 of the Motor Carrier Act, 1935, to establish qualifications and maximum hours of service with respect to a "checker" or "terminal foreman," a substantial part of whose activities consists of doing, or immediately directing, the work of one or more "loaders" of freight for an interstate motor carrier, as such class of work has been defined by the Commission and found by it to affect the safety of operation; and such an employee is expressly excluded by § 13 (b) (1) of the Fair Labor Standards Act from the overtime compensation requirements of § 7, although the Commission has not exercised its power affirmatively by establishing qualifications and maximum hours of service with respect to "loaders." Pp. 651–653, 670–685.
2. In order to establish that an employee is excluded by § 13 (b) (1) of the Fair Labor Standards Act from a right to increased pay for overtime services under § 7, it is not necessary as a condition precedent to find that the Commission has exercised or should exercise its power to establish qualifications and maximum hours of service. The existence of the power is enough. P. 678.
3. From the point of view of the Commission and its jurisdiction over safety of operation, it is the character of an employee's activities rather than the proportion of his time or of his activities that determines the need for the Commission's power to establish quali-

fications and maximum hours of service. Pp. 674–675. [See also *Pyramid Motor Freight Corp.* v. *Ispass, post,* p. 695.]

4. For the purposes of this case, it is enough that a substantial part of the employee's activities consisted of doing, or immediate direction of, the very kind of activities of a "loader" which the Commission found to affect safety of operation—although it does not appear what fraction of his time was spent in such activities. P. 681.
5. The scope of the power of the Commission under § 204 to establish qualifications and maximum hours of service with respect to classes of employees of interstate motor carriers depends upon an interpretation of that section in accordance with the purposes of the Motor Carrier Act and the regulations issued pursuant to it—not upon a restrictive interpretation of the exemption created by § 13 (b) (1) of the Fair Labor Standards Act. Pp. 676–677.
6. In reconciling these two Acts, it is necessary to put safety first and to limit the authority of the Wage and Hour Administrator to those employees of motor carriers whose activities do *not* affect the safety of operation. P. 677.
7. The Wage and Hour Administrator has no authority to expand his jurisdiction under the Fair Labor Standards Act by administrative interpretations which reduce the jurisdiction of the Commission under the Motor Carrier Act. P. 684.

389 Ill. 466, 59 N. E. 2d 817, affirmed.

An employee of an interstate motor carrier obtained judgment in a state court for unpaid overtime compensation under the Fair Labor Standards Act. The Appellate Court of Illinois reversed. 323 Ill. App. 505, 56 N. E. 2d 142. The Supreme Court of Illinois affirmed. 389 Ill. 466, 59 N. E. 2d 817. This Court granted certiorari. 326 U. S. 703. *Affirmed,* p. 685.

Harry L. Yale argued the cause for petitioner. With him on the brief was *Richard S. Folsom.*

David Axelrod argued the cause for respondent on the original argument and *Roland Rice* on the reargument. With them on the briefs were *Harry J. Lurie* and *Maurice P. Golden.* *Peter T. Beardsley* was also on the brief on the reargument.

By special leave of Court, *Jeter S. Ray* argued the cause for the Administrator of the Wage and Hour Division, United States Department of Labor, as *amicus curiae,* on the reargument. With him on the brief was *William S. Tyson.*

By special leave of Court, *Daniel W. Knowlton* argued the cause and filed a brief for the Interstate Commerce Commission, as *amicus curiae,* on the reargument.

Solicitor General McGrath filed a memorandum, as *amicus curiae,* on the original argument.

Mr. Justice Burton delivered the opinion of the Court.

This case presents the question whether the Interstate Commerce Commission has the power, under § 204 of the Motor Carrier Act, 1935,[1] to establish qualifications and maximum hours of service with respect to any "checker" or "terminal foreman," a substantial part of whose activities in that capacity consists of doing, or immediately

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[1] The material parts of § 204 are:

"Sec. 204 (a) It shall be the duty of the Commission—

"(1) To regulate *common carriers* by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records, and reports, preservation of records, *qualifications and maximum hours of service of employees, and safety of operation and equipment.*

"(2) To regulate *contract carriers* by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to uniform systems of accounts, records, and reports, preservation of records, *qualifications and maximum hours of service of employees, and safety of operation and equipment.*

"(3) To establish for *private carriers of property* by motor vehicle, if need therefor is found, reasonable requirements to promote *safety of operation, and to that end prescribe qualifications and maximum hours of service of employees, and standards of equipment. . . .*" (Italics supplied.) 49 Stat. 546, 49 U. S. C. § 304 (a) (1), (2) and (3).

directing, the work of one or more "loaders" of freight for an interstate motor carrier as such class of work is defined by the Interstate Commerce Commission in *Ex parte No. MC–2,* 28 M. C. C. 125, 133–134,[2] although the rest of his activities do not affect the safety of operation of any such motor carrier.[3]

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[2] "(*2*) *Loaders.*— . . .

"The large carriers, . . . particularly those who have important operations from terminal to terminal, employ men variously called loaders, dockmen, or helpers, and hereinafter called loaders, whose sole duties are to load and unload motor vehicles and transfer freight between motor vehicles and between the vehicles and the warehouse.

"The evidence makes it entirely clear that a motor vehicle must be properly loaded to be safely operated on the highways of the country. If more weight is placed on one side of the vehicle than on the other, there is a tendency to tip when rounding curves. If more weight is placed in the rear of the vehicle, the tendency is to raise the front wheels and make safe operation difficult. Further, it is necessary that the load be distributed properly over the axles of the motor vehicle.

"Proper loading is not only necessary when heavy machinery, steel, and other like commodities are being transported, but is of importance when normal package freight is handled. If several packing cases weighing from 150 to 200 pounds are loaded on one side of a motor vehicle or at one end thereof, and lighter freight on the other side or at the other end, safe operation is difficult. The great majority, if not all, of the carriers whose operations are of sufficient size or character to justify the employment of loaders handle freight of such weight that proper loading is necessary." *Ex parte No. MC–2,* 28 M. C. C. 125, 133–134.

[3] Throughout this case it has been recognized that it was within the power of the Commission to establish the qualifications and maximum hours of service for the regular "loaders" who served under the immediate direction of the petitioner. No claim has been made on their behalf to the benefits of § 7 of the Fair Labor Standards Act. The present controversy is limited to the status of the petitioner himself. His status is referred to throughout this opinion as that of a "partial-duty loader," except where he is referred to by his own designation of himself as a "checker" or "terminal foreman." The term "partial-duty loader" is used in preference to that of "part-

We hold that the Commission has that power and that § 13 (b) (1) of the Fair Labor Standards Act [4] therefore expressly excludes any such employee from a right to the increased pay for overtime service prescribed by § 7 of that Act.[5]

In this action, brought in the Municipal Court of Chicago, pursuant to § 16 (b) of the Fair Labor Standards Act,[6] the petitioner recovered judgment against his em-

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time loader," so as to avoid the implication that time spent in certain activities, rather than the character of those activities, is to be the conclusive factor in deciding whether or not the individual is subject to the jurisdiction of the Commission.

[4] "SEC. 13. . . .

"(b) The provisions of section 7 shall not apply with respect to (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act, 1935; . . . ." 52 Stat. 1068, 29 U. S. C. § 213 (b) (1).

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

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

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

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

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

[6] "SEC. 16. . . .

"(b) Any employer who violates the provisions of . . . section 7 of this Act shall be liable to the employee or employees affected in the amount of . . . their unpaid overtime compensation, . . . and in an additional equal amount as liquidated damages. . . . The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action." 52 Stat. 1069, 29 U. S. C. § 216 (b).

ployer, the respondent, for $487.44 for unpaid overtime compensation for petitioner's services, as a "checker" or "terminal foreman," computed in accordance with § 7 of that Act. In addition, the judgment included $487.44, as liquidated damages, and $175 as an attorney's fee, making a total of $1,149.88 and costs. The defense was that, under § 13 (b) (1), the provisions of § 7 did not apply to the petitioner's service. On that ground, the judgment was reversed by the Appellate Court of Illinois and the cause remanded with directions to enter judgment, with costs, for the respondent. 323 Ill. App. 505, 56 N. E. 2d 142. The Supreme Court of Illinois affirmed. 389 Ill. 466, 59 N. E. 2d 817. We granted certiorari because of the importance of the question in interpreting the Motor Carrier Act and Fair Labor Standards Act. 326 U. S. 703. It was argued at the October Term, 1945, of this Court and, on January 2, 1946, was restored to the docket for reargument before a full bench at this Term. It was so argued on October 21 and 22, 1946. In addition to the briefs and arguments on behalf of the parties, we have had the benefit of those presented, at our request, on behalf of *amici curiae*. These were from the Administrator of the Wage and Hour Division, United States Department of Labor, who supported the position of the petitioner, and, on the other hand, from the Interstate Commerce Commission which claimed that it possessed, under the Motor Carrier Act, the power to establish qualifications and maximum hours of service with respect to the petitioner. The Solicitor General, also at our request, filed a memorandum. In it he supported the petition for certiorari and took what he has described as "a position somewhat between that of the Commission and that of the Wage and Hour Administrator."

The respondent is a Missouri corporation, licensed in Illinois, and engaged in interstate commerce as a motor carrier of freight. It does not appear whether the re-

spondent is a common carrier, contract carrier or private carrier of property. The result, however, does not turn upon differences between those classifications. The petitioner was employed by the respondent from October 1, 1940, through October 6, 1941, in one or more capacities which he designates generally as those of a "checker" or "terminal foreman." While the evidence is conflicting as to some of his duties, there is ample to sustain the judgment of the Supreme Court of Illinois on the basis that a substantial part of his activities consisted of doing, or immediately directing, the work of one or more "loaders" of freight for an interstate motor carrier as that class of work is defined by the Interstate Commerce Commission. The Supreme Court of Illinois accepted the Appellate Court's description of petitioner's activities.[7] The power of the

[7] See note 2 for the Commission's general definition of the work of "loaders." The Appellate Court of Illinois described the petitioner's activities as follows:

"Plaintiff [petitioner] contends he is a checker, not a loader, and therefore, not within the Commission's interpretation. We believe that his duties—not the name given his position—are determinative. . . .

"Defendant Terminal at 600 West 25th Street, Chicago, is the scene of three phases of motor carrier business—inbound freight, outbound freight and local freight. Trucks carrying freight originating locally and in foreign cities and States, are unloaded by gangs of defendant's employees. A gang usually consists of 3 or 4 men—a checker, caller, sorter and packer. The checker directs the gang's operation. Day and night foremen supervise the activities of all the gangs. Incoming freight is unloaded and deposited according to its destination on the dock in various sections at the direction of the checker; likewise under the direction of the checker, it is removed from these sections and loaded on appropriate outgoing trucks. It is loaded according to size and weight; heavy weighted or 'bottom freight' being distributed in the lower part of the truck and lighter weighted or 'balloon freight' is placed at the top. This plan is followed in the interest of safety of equipment and of freight. Testimony pertinent to the issue on the merits is that, as checker, plaintiff supervised and directed the unloading and disposition of incoming freight and the collecting and loading of the outgoing freight and

Commission to establish qualifications and maximum hours of service with respect to such "loaders" has been defined and delimited by it in a series of well-considered decisions, dating from the extension of its jurisdiction, in 1935, so as to include motor carriers.

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that he watched the disposition of the weight of the freight in loading. The dispute in the testimony arises as to the quantity of plaintiff's activities devoted to these particular duties. Plaintiff says that most of the outbound freight was handled at night, while he worked mostly days; that not much loading was done during his hours, but that, whatever took place, was under his direct charge. The defense testimony is that inbound and outbound freight was equally divided during the day—inbound usually during the night and outbound between 8 a. m. and midnight.

". . . There is no question that some part of plaintiff's work week was devoted to the direction and supervision of the loading of interstate motor freight carriers. There is no question either that the loaders in his gang were exempted from section 7 of the Fair Labor Standards Act. We think, therefore, that with greater force, plaintiff comes within the exemption for, if the loaders are exempt because the manner in which they work affects the safety of the operation of defendant's motor vehicles, certainly the duties of plaintiff, who planned and directed the loading, affect that safety. Considering the purpose of the Motor Carriers Act, we believe that the true determinant is whether an employee performs any duties which substantially affect the safety of operation, rather than whether the duties affecting safety are substantial." *Levinson* v. *Spector Motor Service,* 323 Ill. App. 505, 507, 508–509, 56 N. E. 2d 142, 143, 144.

The Supreme Court of Illinois said:

"We think the question of fact to be properly determined in this case is whether or not a substantial part of plaintiff's work affects safety of operation of motor vehicles, and that this question of fact controls this case. If it be determined from the evidentiary facts that plaintiff, in a substantial part of his work, was engaged in safety of operation of motor vehicles, or the cargo thereof, he would be exempted from the Fair Labor Standards Act, as a matter of law.

. . . . . .

". . . under the facts as found by the [Appellate] court, the employee came within the same exemption as loaders, dockmen and helpers." *Levinson* v. *Spector Motor Service,* 389 Ill. 466, 473–474, 59 N. E. 2d 817, 820.

The history of the development of the congressional safety program in interstate commerce, up to and including the enactment of the Motor Carrier Act in 1935 and the Fair Labor Standards Act in 1938, tells the story.

In comparable fields, Congress previously had prescribed safety equipment, limited maximum hours of service and imposed penalties for violations of its requirements.[8] In those Acts, Congress did not rely upon increases in rates of pay for overtime service to enforce the limitations it set upon hours of service. While a requirement of pay that is higher for overtime service than for regular service tends to deter employers from permitting such service, it tends also to encourage employees to seek it. The requirement of such increased pay is a remedial measure adapted to the needs of an economic and social program rather than a police regulation adapted to the rigid enforcement required in a safety program. *Overnight Motor Co.* v. *Missel*, 316 U. S. 572, 577–578.

By 1935, 40 states had attempted to regulate safety of operation of carriers by motor vehicle. Some had established qualifications and maximum hours of service for

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[8] The *Safety Appliance Acts*, approved March 2, 1893, 27 Stat. 531; March 2, 1903, 32 Stat. 943; April 14, 1910, 36 Stat. 298; and February 28, 1920, 41 Stat. 499; see Title 45, U. S. C.—Railroads, and 49 U. S. C. § 26, all relate to railroads and are enforced by the Interstate Commerce Commission.

The *Hours of Service Act*, approved March 4, 1907, 34 Stat. 1415, 45 U. S. C. § 61, requires the Interstate Commerce Commission to enforce maximum hours of service for railroad employees engaged in the movement of trains. It includes also operators, train dispatchers and others having much to do with the safety of train movements although not riding the trains.

The *Seamen's Act*, approved March 4, 1915, 38 Stat. 1164, see 46 U. S. C. § 673, prescribes maximum hours of service at sea and at anchor for sailors, firemen, oilers and others engaged in sailing or managing vessels. It establishes qualifications for seamen and prescribes crew requirements, safety equipment and sanitary facilities for certain types of vessels.

drivers and helpers. Increased interstate movements of motor carriers then made necessary the *Motor Carrier Act, 1935,* approved August 9, 1935, as Part II of the Interstate Commerce Act, 49 Stat. 543. This Act vested in the Interstate Commerce Commission power to establish reasonable requirements with respect to qualifications and maximum hours of service of employees and safety of operation and equipment of common and contract carriers by motor vehicle. § 204 (a) (1) (2). Similar, but not identical, language was used as to private carriers of property by motor vehicle. § 204 (a) (3). The Act expressly superseded "any code of fair competition for any industry embracing motor carriers . . . ." § 204 (b). Section 203 (b) listed many types of motor carriers which were exempted in general from the Act but that Section significantly applied to all of them the provisions of § 204 as to qualifications, maximum hours of service, safety of operation and equipment.[9]

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[9] "SEC. 203. . . .

"(b) Nothing in this part, *except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment* shall be construed to include (1) motor vehicles employed solely in transporting school children and teachers to or from school; or (2) taxicabs, or other motor vehicles performing a bona fide taxicab service, having a capacity of not more than six passengers and not operated on a regular route or between fixed termini; or (3) motor vehicles owned or operated by or on behalf of hotels and used exclusively for the transportation of hotel patrons between hotels and local railroad or other common carrier stations; or (4) motor vehicles operated, under authorization, regulation, and control of the Secretary of the Interior, principally for the purpose of transporting persons in and about the national parks and national monuments; or (4a) motor vehicles controlled and operated by any farmer, and used in the transportation of his agricultural commodities and products thereof, or in the transportation of supplies to his farm; or (4b) motor vehicles controlled and operated by a cooperative association as defined in the Agricultural Marketing Act, approved June 15, 1929, as amended; or (5) trolley busses operated by electric power derived from a fixed overhead wire,

It is even more significant that in 1942, several years after enactment of the Fair Labor Standards Act of 1938, Congress slightly, but expressly, expanded the jurisdiction of the Commission over these subjects of qualifications, maximum hours of service, safety of operation and equipment and thereby restricted, to a corresponding degree, the application of the compulsory overtime provisions of the Fair Labor Standards Act.[10]

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furnishing local passenger transportation similar to street-railway service; or (6) motor vehicles used exclusively in carrying livestock, fish (including shell fish), or agricultural commodities (not including manufactured products thereof); or (7) motor vehicles used exclusively in the distribution of newspapers; nor, unless and to the extent that the Commission shall from time to time find that such application is necessary to carry out the policy of Congress enunciated in section 202, shall the provisions of this part, *except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment apply to:* (8) The transportation of passengers or property in interstate or foreign commerce wholly within a municipality or between contiguous municipalities or within a zone adjacent to and commercially a part of any such municipality or municipalities, except when such transportation is under a common control, management, or arrangement for a continuous carriage or shipment to or from a point without such municipality, municipalities, or zone, and provided that the motor carrier engaged in such transportation of passengers over regular or irregular route or routes in interstate commerce is also lawfully engaged in the intrastate transportation of passengers over the entire length of such interstate route or routes in accordance with the laws of each State having jurisdiction; or (9) the casual, occasional, or reciprocal transportation of passengers or property in interstate or foreign commerce for compensation by any person not engaged in transportation by motor vehicle as a regular occupation or business." (Italics supplied.) 49 Stat. 545, 49 U. S. C. § 303 (b).

[10] A new § 202 (c) was inserted in the Motor Carrier Act by the Transportation Act of 1940, 54 Stat. 920, so as to exclude from the Motor Carrier Act certain motor vehicle pickup and delivery service within terminal areas. This exclusion automatically put certain employees, who were engaged in that service, beyond the power of the Interstate Commerce Commission to establish their qualifications and maximum hours of service under § 204 of the Motor

In 1940, this Court, in *United States* v. *Amer. Trucking Assns.*, 310 U. S. 534, recognized the emphasis given by Congress to the clause "qualifications and maximum hours of service" in §§ 204 (a) and 203 (b). That decision reviewed the legislative history of the Act and held "that the meaning of employees in § 204 (a) (1) and (2) is limited to those employees whose activities affect the safety of operation. The Commission has no jurisdiction to regulate the qualifications or hours of service of any others." *Id.* at 553. The opinion dealt with employees who devoted themselves exclusively to their respective assignments, such as those of drivers on the one hand or of clerks on the other. It demonstrated that § 204 (a) (1) and (2) related to the former but not to the latter.[11] It did not discuss its relation to employees who, as in the present case, are required to divide their activities between those affecting safety of operation and those not affecting it.

Carrier Act. The Administrator of the Wage and Hour Division, United States Department of Labor, thereupon regarded some of them as entitled to the benefits of § 7 of the Fair Labor Standards Act as to compulsory overtime pay. However, when this new § 202 (c) was amended by the Act of May 16, 1942, 56 Stat. 300, 49 U. S. C. Supp. V, § 302 (c), to include freight forwarders, Congress also added to it a general clause to the effect that "the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation and equipment" should apply to the exempted operations. This amendment was an express recognition by Congress of the need for control by the Commission over the qualifications and maximum hours of service of these employees in the interests of public safety, although its provision for that control automatically deprived those employees of their recently acquired private rights to higher overtime pay under § 7 of the Fair Labor Standards Act.

[11] In *Overnight Motor Co.* v. *Missel*, 316 U. S. 572, an employee who served an interstate motor carrier as a rate clerk and performed other incidental duties, none of which were connected with safety of operation, was given judgment for the overtime compensation prescribed by § 7 of the Fair Labor Standards Act.

In *Southland Co.* v. *Bayley,* 319 U. S. 44, this Court applied similar reasoning to an employee of a private carrier of property under § 204 (a) (3). It recognized the Commission's power to find a need for its action and, having found it, to establish qualifications and maximum hours of service for employees of private motor carriers of property affecting the safety of operation of such carriers. It held that, under § 13 (b) (1) of the Fair Labor Standards Act, the Commission's mere possession of that power, whether exercised or not, necessarily excluded all employees, with respect to whom the power existed, from the benefits of the compulsory overtime provisions of § 7 of that Act. The present case involves a comparable situation in that the Commission has found here that it has the power to establish qualifications and maximum hours of service for those doing the work of loaders for common or contract motor carriers or private motor carriers of property, but it has not found it advisable, as yet, to establish qualifications and maximum hours of service for that work.

The logic of the situation is that Congress, as a primary consideration, has preserved intact the safety program which it and the Interstate Commerce Commission have been developing for motor carriers since 1936. To do this, Congress has prohibited the overlapping of the jurisdiction of the Administrator of the Wage and Hour Division, United States Department of Labor, with that of the Interstate Commerce Commission as to maximum hours of service. Congress might have done otherwise. It might have permitted both Acts to apply. There is no necessary inconsistency between enforcing rigid maximum hours of service for safety purposes and at the same time, within those limitations, requiring compliance with the increased rates of pay for overtime work done in excess of the limits set in § 7 of the Fair Labor Standards Act. Such

overlapping, however, has not been authorized by Congress [12] and it remains for us to give full effect to the safety program to which Congress has attached primary importance, even to the corresponding exclusion by Congress of certain employees from the benefits of the compulsory overtime pay provisions of the Fair Labor Standards Act. When examined from the point of view of the Motor Carrier Act alone, much light is thrown on the meaning of its § 204 by the interpretation given to it and the applications made of it by the Interstate Commerce Commission.

The reports and regulations of that Commission, issued under authority of Part II of the Interstate Commerce Act, both before and after the enactment of the Fair Labor Standards Act, deal so thoroughly and expertly with the safety of operation of interstate motor transportation as to entitle them to especially significant weight in the interpretation of this Act, the enforcement of which has been committed by Congress solely to that Commission.

The principal reports and regulations of the Commission, bearing upon the present controversy, are the following: [13]

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[12] See note 27, *infra*.

[13] Shortly after the Act became effective, the Commission, on its own motion, instituted the *Ex parte* proceedings listed below. These resulted in many hearings, examiners' reports and divisional and Commission reports thoroughly and comprehensively covering the subjects investigated. Further comparable investigations directed by the Section of Safety of the Bureau of Motor Carriers of the Interstate Commerce Commission are pending. One of these is to determine what, if any, qualifications and maximum hours of service should be established by the Commission for mechanics, loaders and helpers.

Ex parte No. MC–2, Order of July 30, 1936. This related to *maximum hours of service* of employees engaged in motor carrier transportation and to regulations as to such hours of service pursuant to § 204 (a) (1), (2) and (3). See 3 M. C. C. 665, 666. It dealt with *drivers* for common and contract carriers. It led to the holding that *mechanics, loaders* and *helpers* are within the jurisdiction of the Com-

December 23, 1936. 1 M. C. C. 1. *Ex parte No. MC–4* established qualifications for drivers of interstate, common or contract carriers by motor vehicle, outlined a long-term safety program and issued regulations as to safety of operation and equipment, constituting Parts, I, II, III and IV of motor carrier safety regulations.

December 29, 1937. 3 M. C. C. 665. *Ex parte No. MC–2* established maximum hours of service for drivers of interstate, common or contract carriers by motor vehicles, Part V of such regulations.

July 9, 1938. 8 M. C. C. 162. *Ex parte No. MC–4* modified Part III of such regulations as to safety glass.

July 12, 1938. 6 M. C. C. 557. *Ex parte No. MC–2,* in the light of current experience, modified Part V of the regulations as to maximum hours of service for such drivers.

December 3, 1938. 10 M. C. C. 533. *Ex parte No. MC–4* adapted the Commission's general qualifications and regulations to those types of carriers which were ex-

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mission because of their activities affecting the safety of motor carrier transportation. 28 M. C. C. 125.

Ex parte No. MC–3, Orders of July 30, 1936, December 23, 1936, and July 12, 1938. This related to *qualifications, maximum hours of service* of employees, safety of operation and equipment of *private carriers of property* by motor vehicle. 23 M. C. C. 1, and see 1 M. C. C. 1, 16.

Ex parte No. MC–4, Order of August 21, 1936. This related to *qualifications* of employees, safety of operation and equipment of common and contract motor carriers. It dealt especially with *drivers.* 1 M. C. C. 1.

Ex parte No. MC–28, Order of November 2, 1938. This related to the jurisdiction of the Commission over the establishment of *qualifications and maximum hours of service* of employees of common, contract and private carriers of property by motor vehicle under § 204 (a). The decision limited such jurisdiction to *employees affecting safety of operation* by motor vehicles. 13 M. C. C. 481.

The results of these proceedings are summarized in the text of this opinion in the order in which such results have been announced.

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empted from the Motor Carrier Act by § 203 (b), but which had remained subject to the jurisdiction of the Commission, under § 204, as to qualifications and maximum hours of service of employees, safety of operation and equipment.

January 27, 1939. 11 M. C. C. 203. *Ex parte No. MC–2* further modified Part V of regulations as to maximum hours of service of drivers for common and contract carriers by motor vehicle.

May 9, 1939. 13 M. C. C. 481. *Ex parte No. MC–28* interpreted § 204 (a) as giving the Commission authority to prescribe qualifications and maximum hours of service of employees of common, contract and private carriers of property by motor vehicle only as to those employees whose activities affected safety of operation. It said:

> "Our experience and the study we necessarily made in connection with the administration of the Motor Carrier Act qualify us to prescribe such regulations [i. e., as to drivers], to promote safety of operation. Quite the contrary would be true if we were called upon to prescribe general qualifications for all employees of such carriers." *Id.* at 485.

Clerks, salesmen and executives were named as not being within the Commission's jurisdiction. Referring further to its power to prescribe qualifications and maximum hours of service with respect to drivers and others, the Commission said:

> "That power undoubtedly extends to drivers of such vehicles. It may well be that the activities of some employees other than drivers likewise affect the safety of operation of motor vehicles engaged in interstate and foreign commerce. If common and contract carriers, or private carriers of property, or their employees believe that the activities of employees other than drivers affect the safety of operation of motor

vehicles engaged in interstate and foreign commerce, they may file an appropriate petition, asking that a hearing be held and the question determined." *Id.* at 488.

May 27, 1939. 14 M. C. C. 669. *Ex parte No. MC–4.* The "Motor Carrier Safety Regulations, Revised," were found to be "reasonable requirements with respect to qualifications of employees and safety of operation and equipment of common carriers and contract carriers subject to the Motor Carrier Act, 1935, and that said revised regulations should be approved, adopted, and prescribed." *Id.* at 683. These revisions strengthened the provisions as to qualifications of drivers, for common and contract carriers, as to eyesight, physical condition, age, and ability to read and speak English. They extended the maximum hours of service regulations to drivers for the "exempt carriers" enumerated in § 203 (b), excepting only those referred to in subparagraph (4a) relating to farmers.[14]

June 15, 1939. 16 M. C. C. 497. *No. MC–C–139.* Upon petition of American Trucking Associations, Incorporated, et al., the Commission reaffirmed its decision of May 9, 1939, in *Ex parte No. MC–28,* and stated the negative side of the proposition there established. It said that § 204 (a) "does not empower us to prescribe maximum hours of service for employees of motor carriers whose activities do not affect the safety of operation." *Id.* at 497.

May 1, 1940. 23 M. C. C. 1. *Ex parte No. MC–3.* Following extended hearings, the Commission made findings that are important here. First, it found, as required by § 204 (a) (3), that "there is need for Federal regulation of private carriers of property to promote safety of operation of motor vehicles used by such carriers in the transportation of property in interstate or foreign com-

[14] See note 9, *supra.*

merce." *Id.* at 42. With comparatively few exceptions, such as those relating to farm trucks and industry trucks, the Commission then applied to drivers for private carriers of property by motor vehicle in interstate and foreign commerce the same qualifications, maximum hours of service and regulations as to safety of operation and equipment that it previously had prescribed, by its orders in *Ex parte No. MC–2, supra,* and *Ex parte No. MC–4, supra,* for drivers of common and contract carriers. *Id.* at 22, 42.

The significance of this action in relation to the present case is that, in considering the classes of work done by drivers for private motor carriers, the Commission found many instances where only a part of the driver's activities related to driving or to other operations affecting safety of transportation. For example, the Commission dealt with drivers of farm trucks. Section 203 (b) (4a) of the Motor Carrier Act exempts farm trucks, for most purposes, from the provisions of that Act. Nevertheless, § 204 retains them within the jurisdiction of the Commission with respect to the qualifications and maximum hours of service of employees whose activities affect the safety of operation of interstate carriers by motor vehicle. The Commission recognized that such drivers have many duties unrelated to those of driving or safety of operation; that farm trucks, to a large extent, do not travel public highways; that the work is not a year-round operation but generally is confined to the harvest season; but that, nevertheless, whenever such a truck is being operated in interstate transportation on the public highway, the hazards involved in such operation are comparable to those faced by drivers who devote their entire time to interstate truck driving of all kinds. With appropriate modifications, the Commission thereupon prescribed for drivers of farm trucks qualifications and maximum hours of service different from, but comparable to, those it had prescribed for

drivers of common and contract carrier trucks in general. Instead of its standard minimum requirement of 21 years of age, it set the minimum age requirement for drivers of farm trucks at 18, when the gross weight of the vehicle and load combined did not exceed 10,000 pounds. It declined to approve a minimum age of 16, although that had been accepted by some states. It eliminated the usual physical examinations. It relaxed its rule against transportation of passengers. It eliminated its requirement of keeping a driver's log showing a written record of the trips and stops made by each driver. It retained, however, its restriction against driving more than 10 hours in any one day and, in place of the prohibition against a total of more than 60 hours on duty in a week, it limited the total hours of driving, as distinguished from other duties, to 50 hours in a week. *Ex parte No. MC–3,* 23 M. C. C. 1, 27–28, 43.

The Commission took comparable action as to industry trucks. It recognized, for example, that a bakery driver-salesman devotes much of his effort and time to selling baked goods rather than to activities affecting the safety of operation of his truck. The Commission, however, did not relinquish jurisdiction over the qualifications of driver-salesmen nor did it refrain from regulating their driving time. It modified its usual rule by providing that, if a driver-salesman "spends more than 50 percent of his time in selling and less than 50 percent in performing such duties as driving, loading, and unloading," he may be permitted to exceed the usual limit of 60 hours on duty in any week of 168 consecutive hours, provided only that "his hours of driving are limited to a total of not more than 40 in any such week." *Id.* at 44, and see 31 (recommending 50 hours). This use by the Commission of a percentage of the driver's time as a basis for the adjustment of his permissible maximum hours of service is to be distinguished from the suggestion of the Administrator of the Wage and Hour Division, United States Department of Labor,

that the entire power of the Commission over safety regulations must be denied as a matter of law whenever, in any given week, an employee has devoted over 50% of his working time to activities not affecting safety, although he may have devoted the rest of his working time to driving a common carrier truck in interstate commerce.[15] It is essential to the Commission's safety program whenever and wherever hazardous activities are engaged in that affect safety of operation of an interstate motor carrier, that those who engage in them shall be qualified to do so and that maximum hours of service affecting such safety of operation shall be established and enforced. This means retaining and using, rather than relinquishing, the Commission's jurisdiction over partial-duty drivers and partial-duty loaders, a substantial part of whose activities affects the safety of interstate motor carrier operations, although the rest of their activities may not affect the safety of such operations.

Recognizing its potential jurisdiction over others than drivers, the Commission, in that proceeding, invited private carriers of property or their employees who "believe that the activities of employees other than drivers affect the safety of operation of motor vehicles engaged in interstate or foreign commerce" to institute proceedings in order that the question be determined. *Id.* at 44.

March 4, 1941. 28 M. C. C. 125, *Ex parte Nos. MC–2* and *MC–3*. In the light of the foregoing experience and hearings, together with the decision of this Court in *United States* v. *Amer. Trucking Assns., supra,* the Commission, in this latest and most informative decision, found that the classes of activities which it defined as those of mechanics, loaders and helpers affect the safety of operation of motor vehicles and that, therefore, employees engaging in such

[15] See Interpretative Bulletin No. 9, Wage and Hour Division, Office of the Administrator, par. 4 (b), November, 1943, 1944–1945 WH Man. 520, 523; discussed at note 24, *infra.*

classes of activities are subject to the Commission's power to prescribe their qualifications and maximum hours of service, pursuant to § 204 (a).[16] As related to loaders, the Commission announced the following findings of fact which are significant in the present case:

"*Findings of fact.*— . . .

"2. That loaders, as above defined,[17] employed by common and contract carriers and private carriers of property by motor vehicle subject to part II of the Interstate Commerce Act devote a large part of their time to activities which directly affect the safety of operation of motor vehicles in interstate or foreign commerce.

. . . . . .

"4. That no employees of common and contract carriers or private carriers of property by motor vehicle, subject to part II of the Interstate Commerce Act, other than drivers and those classes of employees covered by the three preceding findings of fact [mechanics, loaders and helpers], perform duties which directly affect safety of operation." *Ex parte No. MC–2,* 28 M. C. C. 125, 138–139.

These findings of fact are squarely within the jurisdiction of the Commission. They state affirmatively that, in the opinion of the Commission, the activities of loaders as described by the Commission do affect the safety of operation of motor vehicles in interstate or foreign commerce. They include also a finding that such loaders "devote a large part of their time to activities which directly affect the safety of operation of motor vehicles in interstate or foreign commerce." In the absence of any discussion or classification, on a time basis, of the several

[16] See note 2, *supra,* for the Commission's definition of the work of loaders.

[17] *Ibid.*

activities of loaders described by the Commission, this additional finding amounts to another way of saying that a large part of the loader's activities affect such safety of operation. There is nothing to indicate that it uses the element of time other than as representative of the continuing work period during all of which the loader is devoting himself to the activities of his job as a loader. It amounts, therefore, merely to a finding as to the character of a large part of the activities of loaders, in accordance with the main purpose of the Commission's proceeding which was to determine to what extent, if any, the activities of loaders affect safety of operation.

This additional finding, however, is material from another point of view. It recognizes tacitly that even a full-duty loader may engage in some activities which do not affect safety of operation. Such "non-safety" activities may make up another "large part" of the loader's total activities. They may constitute an even larger part of his activities than his safety-affecting activities. In the present case it was shown by the courts below that, in addition to his activities in clerical checking, etc., a "substantial part" of the petitioner's activities consisted of the very kind of activities of a loader which the Commission has described as directly affecting safety of operation. If it be suggested that significance should be attached to the Commission's use of the word "large" rather than the lower courts' use of the word "substantial" in this connection, such significance disappears completely when it is seen that the Commission itself substitutes the word "substantial" for the word "large" in its conclusion of law which is quoted below.

While the indefiniteness of the terms "large" or "substantial" is obvious, nevertheless, those are the words which the Commission has chosen to use in dealing with this subject. Arbitrary or sharp lines of distinction do

not lend themselves readily to supplying that extra margin of security which is natural in safety engineering. The fundamental test is simply that the employee's activities affect safety of operation. This is the test prescribed by this Court in *United States* v. *Amer. Trucking Assns., supra.* The verb "affect" is itself incapable of exact measurement. Furthermore, we are dealing here not with the final application of the power of the Commission, but rather with the limits of its discretionary power to establish the qualifications and maximum hours of service when and where deemed by it to be needed. In issuing its regulations, the Commission itself can supply whatever definiteness the occasion shall require. From the point of view of the safety program under the Motor Carrier Act, there is no need for a sharply drawn limit to the power of the Commission to make regulations with respect to employees whose activities affect the safety of operation of motor vehicles in interstate or foreign commerce.

Turning to the conclusions of law which were reached by the Commission in the same proceeding we find the following:

"*Conclusions of law.*— . . .

"2. That our jurisdiction to prescribe qualifications and maximum hours of service for employees of common and contract carriers and private carriers of property by motor vehicle is limited to those employees who devote a substantial part of their time to activities which directly affect the safety of operation of motor vehicles in the transportation of passengers or property in interstate or foreign commerce.

"3. That we have power, under section 204 (a) of said part II, to establish qualifications and maximum hours of service for the classes of employees covered by findings of fact numbered 1, 2, and 3 above

[mechanics, loaders and helpers], and that we have no such power over any other classes of employees, except drivers.

"A further hearing will be held to determine what regulations, if any, should be prescribed for those employees, other than drivers, whom we have found subject to our jurisdiction. No order is necessary at this time." *Ex parte No. MC–2,* 28 M. C. C. 125, 139.

As conclusions of law, these do not have the same claim to finality as do the findings of fact made by the Commission. However, in the light of the Commission's long record of practical experience with this subject and its responsibility for the administration and enforcement of this law, these conclusions are entitled to special consideration. Conclusion of law No. 2 must be read in close connection with finding of fact No. 2 and conclusion of law No. 3. It is apparent that, in conclusion of law No. 2, the phrase "employees who devote a substantial part of their time to activities which directly affect the safety of operation of motor vehicles" is intended to match the corresponding phrase in finding of fact No. 2 as to loaders who "devote a large part of their time to activities which directly affect the safety of operation of motor vehicles." This is made still more clear by conclusion of law No. 3 which finds that the Commission has jurisdiction to establish qualifications and maximum hours of service for the loaders included in both paragraphs. Here again there is no classification of the respective activities of loaders on the basis of the time devoted to each activity. The phrase closely follows a discussion of full-duty loaders and its reference to a "substantial part of their time" is but another way of saying a "substantial part of their activities as loaders."

Addressing ourselves to the questions of law presented by the case before us, we reaffirm our position in *United*

States v. *Amer. Trucking Assns.*, 310 U. S. 534, and *Southland Co.* v. *Bayley*, 319 U. S. 44. We recognize the Interstate Commerce Commission as the agency charged with the administration and enforcement of the Motor Carrier Act and especially charged with the establishment of qualifications and maximum hours of service of employees of common and contract carriers and private carriers of property by motor vehicle in interstate and foreign commerce. We see no reason to question its considered conclusion that the activities of full-duty drivers, mechanics, loaders and helpers, as defined by it, affect safety of operation of the carriers by whom they are employed. In harmony with our reasoning in *Southland Co.* v. *Bayley, supra,* and with that of the Interstate Commerce Commission in *Ex parte No. MC–3,* 23 M. C. C. 1, as to employees of private carriers, and in *Ex parte Nos. MC–2* and *MC–3,* 28 M. C. C. 125, as to mechanics, loaders and helpers in general, we hold that the Commission has the power to establish qualifications and maximum hours of service under § 204 (a) with respect to full-duty employees engaged in doing the work of loaders, although the Commission has not exercised that power affirmatively by establishing qualifications and maximum hours of service with respect to loaders.

In harmony with our decision in *United States* v. *Amer. Trucking Assns., supra,* and of the Interstate Commerce Commission in *Ex parte No. MC–28,* 13 M. C. C. 481, we recognize that the Commission has such power over all employees of such carriers whose activities affect safety of operation and that the Commission does not have such power over employees whose activities do not affect safety of operation. In the *American Trucking Associations* case it was not determined that it was necessary for any employee to devote all, or any precise share, of his working time or of his activities, to a particular class of work in

order for such class of work to be held to affect safety of operation. It was assumed, for the purposes of that case, that the employee devoted his entire working time and activities to the single class of work under consideration.

It has been noted, however, that the Commission, in defining the class of work, as a whole, of loaders, recognized, in its findings of fact, that that class of work in its nature included duties other than those directly affecting safety of operation. It said: "We conclude that loaders devote a large part of their time to activities which directly affect the safety of operation of motor vehicles operated in interstate or foreign commerce, and hence that we have power to establish qualifications and maximum hours of service for such employees under said section 204 (a)." *Ex parte No. MC–2*, 28 M. C. C. 125, 134, and see 139. This means that the nature of the duties of even a full-duty "loader" is such that it is not essential that more than a "large part" of his time or activities be consumed in activities directly affecting the safety of operation of motor vehicles—for example—loading, distributing and making secure heavy or light parcels of freight on board a truck so as to contribute as much as possible to the safety of the trip. On the other hand, it means also that more than half of the time or activities of a full-duty "loader" may be consumed in activities not directly affecting the safety of operation of motor vehicles—for example—in placing freight in convenient places in the terminal, checking bills of lading, etc. From the point of view of the Commission and its jurisdiction over safety of operation, this indicates that it is not a question of fundamental concern whether or not it is the larger or the smaller fraction of the employee's time or activities that is devoted to safety work. It is the character of the activities rather than the proportion of either the employee's time or of his activities that determines the actual need

for the Commission's power to establish reasonable requirements with respect to qualifications, maximum hours of service, safety of operation and equipment. This line of reasoning is consistent with that applied throughout this case. It results in keeping within the jurisdiction of the Commission's safety program partial-duty loaders, as well as full-duty loaders, provided only that the class of work done by them affects safety of operation, regardless of whether or not in any particular week they may have devoted more hours and days to activities not affecting safety of operation than they may have devoted to those affecting such safety of operation. The Commission uses similar language in asserting its jurisdiction over mechanics and helpers. This reasoning also resembles that by which the Commission imposes upon a "driver" a maximum total of 60 hours of service "on duty" of any kind, in a "week" of 168 consecutive hours, as well as a maximum of 10 hours, in the aggregate, of driving or operating of a motor vehicle in any period of 24 consecutive hours. *Ex parte No. MC–2,* 3 M. C. C. 665, 6 M. C. C. 557, 11 M. C. C. 203. For example, the Commission has recognized expressly that, in charter operations, the driver of a chartered bus may be on duty for long hours, but often may spend as little as one-half of that time actually driving. *Ex parte No. MC–2,* 3 M. C. C. 665, 679. All of these conclusions recognize that an employee who is engaged in a class of work that affects safety of operation is not necessarily engaged during every hour or every day in activities that directly affect safety of operation. While the work of a full-duty driver may affect safety of operation during only that part of the time while he is driving, yet, as a practical matter, it is essential to establish reasonable requirements with respect to his qualifications and activities at all times in order that the safety of operation of his truck may be protected during those

particular hours or days when, in the course of his duties as its driver, he does the particular acts that directly affect the safety of its operation.[18]

We have set forth the Commission's record of supervision over this field of safety of operation to demonstrate not only the extent to which the Commission serves Congress in safeguarding the public with respect to qualifications, maximum hours of service, safety of operation and equipment of interstate motor carriers, but to demonstrate the high degree of its competence in this specialized field which justifies reliance upon its findings, conclusions and recommendations.

Before examining further the new issue presented by the facts of this case, it is important to recognize that, by virtue of the unique provisions of § 13 (b) (1) of the Fair Labor Standards Act, we are *not* dealing with an exception to that Act which is to be measured by regulations which Congress has authorized to be made by the Administrator of the Wage and Hour Division, United States Department of Labor.[19] Instead, we are dealing here with the

[18] See *Richardson* v. *James Gibbons Co.*, 132 F. 2d 627, argued and affirmed with *Southland Co.* v. *Bayley*, 319 U. S. 44. In that case the Commission's power, under § 204 (a) (3), was upheld as to an employee who testified that he was employed "twenty-five per cent of the time as a truck driver and seventy-five per cent of the time as a distributor-operator" of liquid asphalt, and whose employer testified that the same employee "was employed approximately thirty per cent of the time in distributing the asphalt and seventy per cent in transporting same." *Id.* at 628. Apparently his work was accepted as affecting safety of operation although only 25 to 70% of his time was spent as a driver and the balance of his time was spent in work not affecting safety of operation.

[19] Section 13 (b) (1), in this particular, is in sharp contrast with § 13 (a) (1) which provides as follows for the definition and delimitation of that exemption by the Administrator:

"SEC. 13. (a) The provisions of sections 6 and 7 shall not apply with respect to (1) any employee employed in a bona fide executive,

interpretation of the scope of the safety program of the Interstate Commerce Commission, under § 204 of the Motor Carrier Act, which in turn is to be interpreted in the light of the regulations made by the Interstate Commerce Commission pursuant to that Act. Congress, in the Fair Labor Standards Act, does not attempt to impinge upon the scope of the Interstate Commerce Commission safety program. It accepts that program as expressive of a pre-existing congressionally approved project. Section 13 (b) (1) of the Fair Labor Standards Act thus requires that we interpret the scope of § 204 of the Motor Carrier Act in accordance with the purposes of the Motor Carrier Act and the regulations issued pursuant to it. It is only to the extent that the Interstate Commerce Commission does *not* have power to establish qualifications and maximum hours of service pursuant to said § 204, that the subsequent Fair Labor Standards Act has been made applicable or its Administrator has been given congressional authority to act. This interpretation puts safety first, as did Congress. It limits the Administrator's authority to those "employees of motor carriers whose activities do not affect the safety of operation." *No. MC–C–139,* 16 M. C. C. 497.

Accordingly, we should approach the issue of the partial-duty driver and the partial-duty loader squarely from the point of view of the safety program of the Interstate Commerce Commission, as developed under § 204 of the Motor Carrier Act, apart from the Fair Labor Standards Act. The principle to be applied is the same in the case of the loader as in that of the driver, although the issue is more

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administrative, professional, or local retailing capacity, or in the capacity of outside salesman (as such terms are defined and delimited by regulations of the Administrator); . . . ." 52 Stat. 1067, 29 U. S. C. § 213 (a) (1). See also, §§ 213 (a) (7), 213 (a) (10) and 214.

obvious when the test of jurisdiction is applied to the driver than when applied to any other class of employees of the motor carrier. This is because the driver's work more obviously and dramatically affects the safety of operation of the carrier during every moment that he is driving than does the work of the loader who loaded the freight which the driver is transporting. Furthermore, in the case of the driver, the Commission not only has found that it has the power to establish, but it actually has established, tested and revised, a set of qualifications for his service and a maximum limitation on the aggregate number of hours during which he safely may be permitted to drive during any period of 24 consecutive hours. It also has established a maximum limitation on the number of hours during any "week" of 168 consecutive hours during which such a driver safely may be permitted to be "on duty," even though many of his activities and much of his time while "on duty" may not affect safety of operation of the carrier.[20]

In the present case, the issue is whether the Commission has the power to establish qualifications and maximum hours of service with respect to partial-duty loaders comparable to the petitioner. It is not necessary, as a condition precedent, to find that the Commission has exercised, or should exercise, such power by actually establishing qualifications and maximum hours of service with respect to loaders in general, corresponding to those established for drivers in general. The existence of the power is enough. The fact that the Commission has found it necessary to establish qualifications and maximum hours of service which cover not only drivers, but also partial-

[20] Safety Regulations for Carriers by Motor Vehicle, 49 CFR, Cum. Supp., Part 190—General Definitions; Part 191—Hours of Service; Part 192—Qualifications of Drivers; Part 193—Driving of Motor Vehicles; Part 194—Necessary Parts and Accessories; Part 195—Accident Reports; Part 196—Inspection and Maintenance.

duty drivers, is an indication that, in the opinion of the Commission, its power, under the Motor Carrier Act, extends to partial-duty as well as to full-duty employees engaged in activities affecting the safety of operation of interstate motor carriers.

The principle can be tested by the use of a partial-duty driver as an example. His activities are such that the exclusion of them from the Commission's safety program would have serious consequences. In the case of the full-duty driver, there is no question as to the power of the Commission to establish reasonable requirements with respect to his qualifications and hours of service.[21] Regulations on these subjects were in effect throughout the period with which this case is concerned. In the class of work referred to by the Commission as that of driver-salesmen of industry trucks, the regulations which have been issued have been mentioned above.[22] These were adapted expressly to drivers who devoted less than 50% of their time to driving. The effect thus given by the Commission to the fact that such employees devote less than one-half of their time to driving is not to exclude such partial-duty drivers from any of its required qualifications. These qualifications include those relating to eyesight, physical condition, age, or ability to read or speak English, etc., which are deemed by it to be important for drivers in general. On the other hand, this fact that cer-

[21] See 49 CFR, Cum. Supp., Parts 191 and 192.

[22] Discussed at pages 667–668, *supra*. *Ex parte No. MC–3*, 23 M. C. C. 1, 31, 44.

". . . no driver salesman employed by a private carrier of property who devotes more than 50 percent of his time to selling and less than 50 percent to such work as driving, loading, unloading, and the like, shall be permitted or required to drive or operate a motor vehicle for more than an aggregate of 50 hours in any week as defined in said § 191.1 (e)." (Such a "week" is defined as "any period of 168 consecutive hours beginning at the time the driver reports for duty, ...") 49 CFR, Cum. Supp., § 191.3 (b).

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tain employees devote a part, rather than all, of their time to driving has brought forth from the Commission an appropriate modification of its safety regulations to fit that fact. The modification takes the form of eliminating the Commission's limitation on the total maximum hours that the employee can remain on duty in a week of 168 consecutive hours but limiting his hours of actual driving to an aggregate of not more than 50 in any such week. This requirement, established by the agency which is recognized by Congress as the one body authorized to establish qualifications and maximum hours of service applicable to drivers of motor carriers in interstate commerce, is a demonstration that such agency has found it necessary to make active use of its powers of regulation in this field of part-time driving. It follows, as a matter of principle, that, if such power exists with respect to full-duty drivers and partial-duty drivers because they affect the safety of operation of the interstate motor carriers, the power exists also with respect to full-duty loaders and partial-duty loaders because they too affect such safety of operation, although not in precisely the same manner.

From a safety standpoint, a partial-duty driver who drives 30 hours continuously and then drives no more during that week creates a greater hazard than the man who drives 10 hours daily for 6 days a week. The hazard of continuous driving is not measured adequately by the total hours during which the driver is employed during the week, nor is it eliminated by a law which entitles him merely to an increased rate of pay for whatever time, above 40 hours per week, he shall work in any one workweek. The loading of any truck load of mixed freight requires that the general qualifications of the loader be adequate, regardless of the proportion of his working time that may have been devoted to this activity or to other activities in that particular week. Similarly, his hours of continuous work

during a day of heavy loading may render him unfit for loading the last truck on that day even though, for the entire balance of that week, he may engage in no activities whatever or may engage in only such activities as are unrelated to safety of operation.

We have in this case an employee working full time throughout his employment as a "checker" or "terminal foreman." If he had worked full time as a "loader" as defined by the Commission, he would have been unquestionably within the jurisdiction of the Commission to the extent necessary to exclude him from § 7 of the Fair Labor Standards Act. Under the conclusions of law of the Commission in *Ex parte No. MC–2,* 28 M. C. C. 125, 139, a full-duty "loader" does not have to devote more than a "substantial part" of his time to activities directly affecting safety of operation in order to be subject to the power of the Commission to establish qualifications and maximum hours of service with respect to him. So here it is enough for the purposes of this case that a substantial part of the petitioner's activities consisted of the doing or immediate direction of the very kind of activities of a loader that are described by the Commission as directly affecting safety of operation. The petitioner's activities thus affected safety of operation, although it does not appear what fraction of his time was spent in activities affecting safety of operation. As a consequence, he comes within the power of the Commission to establish qualifications and maximum hours of service with respect to him and, by the express terms of § 13 (b) (1) of the Fair Labor Standards Act, he is excluded, automatically, from the benefits of § 7 of that Act.

Recognizing that it is the intent of the Fair Labor Standards Act to give full recognition to the safety program of the Motor Carrier Act, this conclusion does not conflict with the meaning or purpose of the Fair Labor Standards

Act, although it does reduce the scope of application of the compulsory overtime compensation provisions of § 7 of that Act.

The contrary position which has been taken as to partial-duty drivers, mechanics, loaders and helpers by the Administrator of the Wage and Hour Division, United States Department of Labor, requires mention. This position no doubt arose from a desire to give wide effect to the Fair Labor Standards Act in an effort to comply with its remedial character. Generally, an expansion of the jurisdiction of the Act does not conflict with jurisdictions established under other Acts of Congress, whereas here every expansion of the jurisdiction of the Act through interpretation of § 13 (b) (1) cuts down the jurisdiction of the Commission under § 204 of the Motor Carrier Act. Furthermore, in seeking a practical method of resolving other administrative difficulties such as that of determining the degree of interstate activity or administrative service which should be the measure of the jurisdiction of the Act or of exemption from it, the Administrator has found it practical to fix upon a specific proportion of time devoted to a particular kind of activity and to make that proportion decisive. In some instances, in regulations, he has used 20% as a test of substantiality.[23]

In an attempt to resolve the present difficulty in a similar manner, the Administrator at one time proposed that, if an employee in any given week devoted 20% or more of his time to activities not affecting safety of operation, he would be entitled to the benefits of the overtime provisions of § 7 of the Fair Labor Standards Act.[24] He soon abandoned this, but he has attempted to answer

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[23] 29 CFR, Cum. Supp., §§ 541.1 (f), 541.3 (a) (4), 541.4 (b), and 541.5 (b). See also, *Ralph Knight, Inc.* v. *Mantel*, 135 F. 2d 514.

[24] Interpretative Bulletin No. 9, Wage and Hour Division, Office of the Administrator, March, 1942, par. 5 (b), 1943 WH Man. 186, 189.

the question on a 50% basis in Interpretative Bulletin No. 9, Wage and Hour Division, Office of the Administrator, November, 1943, 1944–1945 WH Man. 520, 523, as follows:

"4. . . .

"(b) It should be noted that any truck driver, drivers' helper, mechanic, or loader employed by a common, contract, or private carrier who spends the greater part of his time during any workweek on nonexempt activities (such as producing, processing, or manufacturing goods, warehouse or clerical work, or other type of work which does not affect safety of operations) is not within the scope of the exemption contained in Section 13 (b) (1). It is the opinion of the Division that Congress did not intend that this exemption should be available as a vehicle to exempt employees who spend most of their time in work other than that which forms the basis of the exemption."

In paragraph 2 of this Bulletin he recognizes the limited legal effect to which this interpretation is entitled, especially insofar as it concerns the meaning of § 204 of the Motor Carrier Act.[25]

Such an interpretation conflicts, however, with the Commission's safety program. It conflicts directly, for example, with the regulation of the Commission as to

[25] "2. The scope of the exemption provided in Section 13 (b) (1) involves the interpretation not only of the Fair Labor Standards Act but also of Section 204 of the Motor Carrier Act, 1935. The Act confers no authority upon the Administrator to extend or restrict the scope of the exemption provided in Section 13 (b) (1) or even to impose legally binding interpretations as to its meaning. This bulletin is merely intended to indicate the course which the Administrator will follow in the performance of his administrative duties until otherwise required by the authoritative rulings of the courts. It is nevertheless to be noted that the Supreme Court has held that the interpretations expressed in bulletins of this Division are entitled to great weight."

partial-duty drivers of industry trucks of private carriers in interstate commerce.[26]

The fundamental and ever-recurring difficulty with the Administrator's interpretation of the scope of § 7 of the Fair Labor Standards Act is that to the extent that he expands the jurisdiction of the Fair Labor Standards Act he must reduce the jurisdiction of the Commission under the Motor Carrier Act, whereas he has no authority to do so.[27]

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[26] See note 22, *supra*.

[27] In 1945, upon the recommendation of the Administrator of the Wage and Hour Division, United States Department of Labor, S. 1349 was introduced proposing many amendments to the Fair Labor Standards Act. That Bill, as introduced and as recommended for passage by the Senate Committee on Education and Labor, proposed expressly to expand somewhat the scope of the Fair Labor Standards Act without reducing the jurisdiction of the Commission under the Motor Carrier Act, by amending § 13 (b) (1) to read:

"SEC. 13. . . .

"(b) The provisions of section 7 shall not apply with respect to (1) any employee who during the greater part of any workweek is engaged in work with respect to which the Interstate Commerce Commission has established qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act, 1935; . . . ."

Hearings on S. 1349 before the Subcommittee of the Senate on Education and Labor. September 25, 1945, pp. 4, 249, *et seq.*; Sen. Rep. No. 1012, 79th Cong., 2d Sess., pp. 3, 11, 17; Part 2, pp. 5, 135.

This Amendment, however, was eliminated on the floor of the Senate, 92 Cong. Rec. 2656, 2657, 3094, 3095, 3096, 3185, before passage of the Bill, April 5, 1946. Furthermore, it was not included in the companion Bill, H. R. No. 4130, as reported to the House of Representatives by the Committee on Labor June 19, 1946, H. R. Rep. No. 2300, 79th Cong., 2d Sess., although it was recommended in the minority report of that Committee. *Id.* at 7, 15, 19. See also, Hearings before the Committee on Labor of the House of Representatives, 79th Cong., 1st Sess., pp. 864, 905. Congress adjourned without taking final action on either Bill, but, when Congress adjourned, neither pending measure contained the proposal.

Our conclusion is that, under the Motor Carrier Act, the Interstate Commerce Commission has power to establish qualifications and maximum hours of service for those employees whose service affects the safety of transportation of common carriers, contract carriers or private carriers of property in interstate and foreign commerce; that such Commission has been charged with the administration and enforcement of that Act; and that in the course of performance of its duties and after extended hearings on the subject, it has found that the work of loaders, as defined by it, affects safety of motor carrier operation. Furthermore, we conclude, upon the findings of the lower courts in this case, that the petitioner was employed by a motor carrier of interstate freight within the meaning of the Motor Carrier Act and that, throughout the period at issue, a substantial part of his activities consisted of doing, or immediately directing, the work of one or more loaders as defined by the Interstate Commerce Commission and affecting the safety of operation of motor vehicles in interstate or foreign commerce; that, accordingly, the Commission, with respect to him, had power to establish qualifications and maximum hours of service; and that, by virtue of § 13 (b) (1) of the Fair Labor Standards Act, the provisions of § 7 of that Act as to overtime pay were rendered inapplicable to him. The judgment of the Supreme Court of Illinois therefore is

Affirmed.

MR. JUSTICE RUTLEDGE, dissenting.

As the Court's opinion says, there is no necessary inconsistency between enforcing Interstate Commerce Commission regulations concerning "qualifications and maximum hours of service of employees" affecting safety, 49 Stat. 543, 546, and at the same time, within those limitations, requiring compliance with the Fair Labor Standards Act's provisions for overtime pay. Indeed the latter would

reinforce the former. Ordinarily, when statutes are not inherently conflicting, the rule applied in construing them is to give each as much room for operation as is consistent with its terms and purposes, rather than to create conflict unnecessarily between them.

Nothing in the Motor Carrier Act forbids or inhibits the operation of § 7 of the Fair Labor Standards Act. The latter statute, it has been held repeatedly, is to be broadly and liberally applied, in order to achieve its prime objects of distributing and raising standards of employment and living.[1] The Act however contains certain exempting provisions, which are to be narrowly construed in the light of and in order to accomplish the same statutory purposes.[2]

Among these is § 13 (b) (1). It reads: "The provisions of section 7 shall not apply with respect to (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act, 1935 . . . ." 52 Stat. 1060, 1068. It is the meaning and effect of § 13 (b) (1) which we have now to determine in relation to employees who do some work affecting safety in operations and some not affecting it.[3]

Read literally, in the light of the *Southland* decision,[4] the section would exempt all employees who do any work affecting safety operations, as the Illinois Court of Ap-

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[1] *Tennessee Coal Co.* v. *Muscoda Local,* 321 U. S. 590, 597; *Phillips Co.* v. *Walling,* 324 U. S. 490, 493; *Calaf* v. *Gonzalez,* 127 F. 2d 934, 937.

[2] *Phillips Co.* v. *Walling, supra; Calaf* v. *Gonzalez, supra.*

[3] As to employees engaged full time in such work, *Southland Co.* v. *Bayley,* 319 U. S. 44, held that the existence of power in the Commission, whether or not exercised, to prescribe qualifications and hours of service, excludes them under § 13 (b) (1) from coverage under the Fair Labor Standards Act's terms. Cf. note 11.

[4] *Ibid.*

peals held in this case.[5] For, factually speaking, not the amount of time an employee spends in work affecting safety, but what he may do in the time thus spent whether it be large or small determines the effect on safety. Ten minutes of driving by an unqualified driver may do more harm on the highway than a month or a year of constant driving by a qualified one.

It would seem essential therefore to effective safety control by the Commission that it should have power to determine the qualifications and maximum hours of service of all employees whose work substantially affects safety, whether or not they spend what may be found to be less than a "substantial" amount of time in that sort of work. Anything less than this would open the door to the greatest danger to motor traffic from casual, unqualified drivers or other employees whose work affects safety.

There is or may be in some circumstances a relation between time spent in such work and substantial effects upon safety, but it is by no means an exclusive or controlling one. Time affects the duration and scope, not necessarily the existence, of the risk.

I accept the "safety first" view of the Commission's power. And this requires acceptance of the view that, in relation to some kinds of work, the Commission has power to prescribe the qualifications of all employees who engage in it to any extent, though the time thus spent is not five minutes daily or weekly. "Substantial effect" in these instances has little if any relation, negatively speak-

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[5] The court said: ". . . We believe that the true determinant is whether an employee performs *any* duties which substantially affect the safety of operation, rather than whether the duties affecting safety are substantial." 323 Ill. App. 505, 509. (Emphasis added.) This is also the Commission's position taken in the brief and at the argument in this cause. See note 16. The Illinois Supreme Court found the test in "a substantial part of plaintiff's work." 389 Ill. 466, 473.

ing, to "substantial time." Driving and the work of mechanical repair of trucks are obvious examples. Loading may be another, less obviously as the Court says, but depending upon the circumstances under which it is done.[6] So with the work of helpers in these three functions.

Notwithstanding the Commission's contrary finding,[7] this means that all employees who do any part of certain kinds of work, for however short a time, regularly or casually, fall within the Commission's power. It means, for instance, that a person who spends ten minutes a day or an hour a week in driving or in mechanically repairing trucks, and the remaining 39 hours of a 40-hour week in work having no effect upon safety falls within the Commission's authority. For, in such circumstances, it cannot be held that the comparatively minute amount of time spent in work affecting safety is trivial or inconsequential in its possible effects upon safety. And in the Court's view, as I understand it, the result is not only that the Commission has power to prescribe the qualifications of all such employees,[8] but also that they are thereby ex-

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[6] Thus, one who has the sole responsibility of loading or of directing loading, where weight of the articles carried is unequal and its distribution may affect safety, would seem clearly to be within the classification whether the time spent is large or small. On the other hand, if the worker is merely a helper, loading under direct and active supervision of another, with no responsibility other than to obey his superior's orders as to placement, it would seem clear that his work does not affect safety.

[7] See text *infra* at note 15; and note 16.

[8] The opinion puts the matter in various ways. *E. g.*, "The fundamental test is simply that the employee's activities affect safety of operation." "The term 'partial-duty loader' is used . . . so as to avoid the implication that time spent in certain activities, rather than the character of those activities, is to be the conclusive factor . . . ." Note 3. "It is essential to the Commission's safety program whenever and wherever hazardous activities are engaged in that affect

empted from the overtime pay provisions of the Fair Labor Standards Act.

It is from the latter conclusion that I dissent. I cannot believe that Congress, when it incorporated § 13 (b) (1) in the statute, intended to exclude from those provisions every employee who might spend ten minutes a day in work substantially affecting safety and seven hours and fifty minutes in work having no effect whatever upon it. An exactly literal application of § 13 (b) (1), it is true, would lead to this result. But we are frequently told that rigidly literal application of a statute may be ruinous to achieving its purposes.[9] It is especially so in this instance, in view of the nature and purposes of the Act we are construing, for a variety of reasons.

The legislative history shows, in my judgment, that Congress did not have in mind so expansive and destructive an exemption as literal application of § 13 (b) (1) and the Court's ruling [10] would produce. Congress clearly intended to exempt some employees who do not devote all their time to such work. But at the time it acted its pri-

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safety . . . that those who engage in them shall be qualified . . . ." "We recognize that the Commission has such power over all employees . . . whose activities affect safety . . . ." "It is the character of the activities rather than the proportion of either the employee's time or of his activities that determines the actual need for the Commission's power . . . ." "The loading of any truck load of mixed freight requires that the general qualifications of the loader be adequate, regardless of the proportion of his working time that may have been devoted to this activity . . . ." "The petitioner's activities thus affected safety of operation, although it does not appear what fraction of his time was spent in activities affecting safety of operation."

[9] Cf. note 12. "All construction is the ascertainment of meaning. And literalness may strangle meaning." *Utah Junk Co.* v. *Porter,* 328 U. S. 39, 44; *Markham* v. *Cabell,* 326 U. S. 404, 409; *Church of the Holy Trinity* v. *United States,* 143 U. S. 457.

[10] See note 8 and text *infra* at note 15.

mary concern and that of the Commission [11] were with full-time employees, principally drivers, so engaged. In view of that fact, it cannot be taken that Congress intended every employee assigned for a few minutes daily or weekly to work substantially affecting safety to be eliminated from the overtime pay provisions. Such a view in practical effect would nullify the Act's broad and inclusive purposes for large numbers of employees as to whom, at the time, the Commission had shown no concern in exercising its safety power or in its representations to Congress, and as to whom therefore there was no sound reason for or purpose of exemption.

Moreover, acceptance of such a construction would set up an easy mode for evasion of the Fair Labor Standards Act's requirements. An employer so minded readily could assign to nonsafety employees whom he desired to remove from the overtime pay requirements work affecting safety for minute portions of their total service. Committing the Act's coverage in all such possible situations to a determination of the employer's good faith could only invite continuous litigation upon his motive, a result in itself tending strongly to defeat the rights given by the Act. I do not think Congress intended such consequences for the statute's effective operation when it included § 13 (b) (1).

The difficulty lies of course not only in the rigidly literal interpretation given to that section, but in the corol-

[11] The exemption made by § 13 (b) (1) was suggested to Congress originally by the Interstate Commerce Commission. *United States* v. *American Trucking Assns.*, 310 U. S. 534, 549. The legislative history shows that the section "was adopted to free operators of motor vehicles from the regulation by two agencies of the hours of *drivers*," *Southland Gasoline Co.* v. *Bayley*, 319 U. S. 44, 48–49, upon the understanding that the Interstate Commerce Commission "had already acted upon maximum hours for drivers . . . ." *Id.*, at 49, n. 5. (Emphasis added.) See also note 16.

lary assumption of intended complete mutual exclusiveness of the Commission's power and the Fair Labor Standards Act's applicability drawn from it. As I do not think Congress intended the one, in relation to the problem now presented, so I do not believe it had the other in mind. And if this was true, then the problem for us becomes, as it most often does in such situations, one of making accommodation between the two statutes in a manner which will give to each its maximum effect without nullifying Congress' manifest intention.[12]

If the spirit and purposes of the statutes are taken into account, we are not inescapably compelled to choose between the equally untenable alternatives of a completely literal application of § 13 (b) (1) and a construction which would nullify the Commission's power concerning the great bulk of employees to which it rightfully extends. Although the exemption of § 13 (b) (1) is not among those which specifically empower the Administrator to determine their scope by regulations,[13] he is charged with the duty of administering it and his experience is entitled to weight when he formulates conclusions from it for the purpose of applying the Act's provisions, albeit they are not conclusive. The present problem has not been without difficulty for the Administrator,[14] but his final ruling,

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[12] "The problem of statutory construction . . . should not be solved simply by a literal reading of the exemption section of the Fair Labor Standards Act and the delegation of power section of the Motor Carrier Act. Both sections are parts of important general statutes and their particular language should be construed in the light of the purposes which led to the enactment of the entire legislation." *Southland Gasoline Co.* v. *Bayley*, 319 U. S. 44, 47.

[13] See §§ 13 (a) (1), 13 (a) (7), 13 (a) (10), 14.

[14] The Administrator originally interpreted the exemption to be inapplicable to any employee who spent a substantial amount of his time in nonexempt work. Subsequently "substantial" was explained to mean more than twenty per cent of the employee's time. Interpre-

resulting from his experience, presents in my opinion both the most workable solution and the one most consistent with Congress' purpose and intent relating to the operation of both Acts. It is that the exemption is inapplicable to any employee "who spends the greater part of his time during any workweek on non-exempt activities (such as producing, processing, or manufacturing goods, warehouse or clerical work, or other type of work which does not affect safety of operations)."

Such a standard is more consistent with the Act's purposes than the one applied by the Court, not only in the light of the legislative history, but also in that it is more definite, more easily applied, and not invitingly conducive to litigation. For these reasons, and because I do not believe a totally literal application of § 13 (b) (1) was comprehended for the situations now presented, I think a line so drawn most nearly consistent with what Congress had in mind to accomplish by the exemption.

However, since there is no essential inconsistency in the two statutes or their operation, I do not think it necessarily follows that part-time employees thus not excluded from the Fair Labor Standards Act's coverage are thereby excluded from the Commission's safety power. That power I would leave unqualified as to them, since nothing in either statute compels qualification, as to employees not exempted, of the authority given the Commission to regulate "qualifications and hours of service of employees" whose work affects safety. The two statutes clearly are mutually exclusive, though not essentially inconsistent, as to employees primarily engaged in operations affecting

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tative Bulletin, No. 9, March, 1942, Wage & Hour Manual (1943 ed.) 186, 189. Later the ruling was changed so that the exemption was given its present form as stated in the text, *infra*. Interpretative Bulletin No. 9, November, 1943, Wage & Hour Manual (1944–1945 ed.) 520, 523.

safety. They are not necessarily or, I think, by virtue of Congress' intent or command, thus exclusive as to others.

I therefore agree that "substantial effect" upon safety rather than "substantial time" spent in doing work affecting it determines the scope of the Interstate Commerce Commission's safety power. However, in accepting this conclusion, though not the further one that all employees so covered are within the exemption of § 13 (b) (1), I do so not upon the basis of the Commission's own determination, which expressly adopts the criterion of "substantial time" and is therefore both narrower than and inconsistent with the Court's ruling as to the extent of its power.[15] The Commission's determination tends strongly to support the Administrator's position as to the scope of the exemption intended to be created by § 13 (b) (1). But its voice is only persuasive, not conclusive, upon the question of the scope of its power. In adopting "substantial time" rather than "substantial effect," I agree that the Commission has

[15] The Court purports to adopt the Commission's basis for determining what employees are within the safety power, especially as made in *Ex parte Nos. MC–2* and *MC–3*, 28 M. C. C. 125. But since the test the Court now prescribes is apparently one of "substantial effect" rather than "substantial time," see note 8, it differs from the basis of the Commission's ruling. The Commission's findings of fact and conclusions of law are set forth in the text of the majority opinion. The quoted finding is that loaders "devote *a large part of their time* to activities which directly affect the safety of operation." 28 M. C. C. at 139. And the conclusion of law is stated in terms of time, namely, "that our jurisdiction . . . *is limited to* those employees who devote *a substantial part of their time* to activities which directly affect the safety of operation," and "that we have power . . . to establish qualifications . . . for the classes of employees" covered by the findings of fact, and "that *we have no such power over any other classes of employees*, except drivers." *Ibid.* (Emphasis added.) This necessarily excluded employees of the classes covered not devoting a substantial part of their time to work affecting safety, in view of the findings.

ruled too narrowly. Indeed, its brief in this case maintains as much.[16] Accordingly I conclude, independently of its formal determination, that the full and adequate performance by the Commission of the safety function conferred by the Motor Carrier Act requires the larger scope which the Court's ruling allows for its operation.

The views expressed in this opinion, of course, would apply also in *Pyramid Motor Freight Corp.* v. *Ispass,* 330 U. S. 695, decided this day, but in view of the decision in this case it is not necessary to file a separate dissent in the companion one.

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

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[16] The difference in the Commission's findings and conclusions, as made in *Ex parte Nos. MC–2* and *MC–3,* see note 15, and the position taken here by counsel in its behalf was the occasion for some difficulty, if not embarrassment, at the argument. The brief and argument, by contrast with the findings and conclusions, maintained: ". . . it seems clear that, regardless of the amount of time devoted to the work by an individual loader (or loader foreman), he is expected to be fitted, and in fit condition, to perform it when the occasion arises and therefore intended to be subject to the Commission's authority over qualifications and hours of service." Reliance was placed squarely upon the position taken in this case by the Illinois Court of Appeals. See note 5.

Able counsel for the Commission sought to avoid the effect of the findings and conclusions by restricting it to classes of employees without reference to individual employees. It was not satisfactorily explained, however, how an individual employee could be brought within the class without being brought within the outer boundary prescribed by the Commission for defining the class.

Syllabus.

PYRAMID MOTOR FREIGHT CORP. *v.* ISPASS ET AL.

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

No. 41. Argued October 22, 1946.—Decided March 31, 1947.

1. Where a notice of appeal has been duly filed in a district court but the appeal has not been docketed and the transcript of record has not been filed in the circuit court of appeals within the time specified in Rule 73 (g) of the Federal Rules of Civil Procedure, it is not an abuse of discretion for a circuit court of appeals to take into consideration the substantiality of the question to be at issue on the merits of the appeal, in connection with all the other circumstances before it, when refusing, under authority of Rule 73 (a), to dismiss the appeal. Pp. 702–705.
2. After the Interstate Commerce Commission had defined specifically the classes of employees of interstate motor carriers, including "loaders," as to whom it "has power" under § 204 (a) of the Motor Carrier Act to establish qualifications and maximum hours of service, certain employees of an interstate motor carrier sued under § 16 (b) of the Fair Labor Standards Act for overtime compensation under § 7. The employer defended on the ground that their labor "consisted primarily of that of driver's helper and of loader," and that they were excluded by § 13 (b) (1) of the Fair Labor Standards Act from the benefits of § 7. *Held:* The question whether or not an individual employee is within any class of employees as to which the Commission has power to establish qualifications and maximum hours of service is to be determined by the judicial process, and there is no occasion to suspend final judgment pending further findings by the Commission. Pp. 705–707.
3. This case is remanded to the district court for determination of the status of the plaintiffs in accordance with the principles stated in *Levinson* v. *Spector Motor Service, ante,* p. 649, and the following principles:

   (a) In applying § 204 of the Motor Carrier Act to plaintiffs, the district court will determine whether or not the activities of each plaintiff, either as a whole or in substantial part, come within the Commission's definition of the work of a "loader." P. 707.

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(b) In making this determination, the district court shall not be concluded by the name which may have been given to his position or to the work that he does nor be required to find that any specific part of his time in any given week must have been spent in those activities. P. 707.

(c) The district court shall give particular attention to whether or not the activities of the respective plaintiffs included that kind of "loading" which is held by the Commission to affect safety of operation. Pp. 707–708.

(d) The mere handling of freight at a terminal, before or after loading, or even the placing of certain articles of freight on a motor carrier truck may form so trivial, casual or occasional part of an employee's activities, or his activities may relate only to such articles or to such limited handling of them, that his activities will not come within the kind of "loading" which is described by the Commission and which is found by it to affect safety of operation. P. 708.

(e) If none of the alleged "loading" activities of the respective plaintiffs, during the periods at issue, come within the kind of activities which, according to the Commission, affect the safety of operation, then such plaintiffs are entitled to the benefits of § 7 of the Fair Labor Standards Act. P. 708.

(f) If the whole or a substantial part of such alleged "loading" activities of the respective plaintiffs, during the periods at issue, does come within the kind of activities which, according to the Commission, affect safety of operation, such plaintiffs are excluded from the benefits of § 7 of the Fair Labor Standards Act. P. 708.

(g) If some, but less than a substantial part, of such activities of the respective plaintiffs, during some or all of the periods at issue, come within the kind of activities which, according to the Commission, affect such safety of operation, then the question as to the right of such plaintiffs to the benefits of § 7 of the Fair Labor Standards Act is reserved, since it does not come within the precise issue determined in *Levinson* v. *Spector Motor Service, ante,* p. 649. Pp. 708–709.

152 F. 2d 619, judgment vacated in part and cause remanded.

In a suit brought by certain employees of an interstate motor carrier under § 16 (b) of the Fair Labor Standards Act for overtime compensation under § 7, a District Court declined to determine plaintiffs' status under § 13 (b) (1)

and the Motor Carrier Act, but held the case "open for further action," in order to give them an opportunity to present that question to the Interstate Commerce Commission. 54 F. Supp. 565. Upon plaintiffs' refusal to do so and their motion requesting a final disposition of the case, the District Court dismissed the complaint "without prejudice." 59 F. Supp. 341. The Circuit Court of Appeals affirmed the dismissal as to one plaintiff and remanded the case to the District Court for entry of judgment in favor of the other plaintiffs. 152 F. 2d 619. This Court granted certiorari. 327 U. S. 774. Except as to one plaintiff, as to whom the judgment of dismissal was not questioned here, the judgment of the Circuit Court of Appeals is *vacated in part* and the cause is *remanded* to the District Court for further proceedings. P. 709.

Charles E. Cotterill argued the cause and filed a brief for petitioner.

Deane Ramey argued the cause and filed a brief for respondents.

Mr. Justice Burton delivered the opinion of the Court.

This case presents two issues:

I. Was it reversible error for the Circuit Court of Appeals to deny petitioner's motion to dismiss the appeal, made on the ground that the appeal had not been docketed and the transcript of record had not been filed within the time specified in Rule 73 (g) of the Federal Rules of Civil Procedure? We hold that it was not.

II. Under the principles we have stated in the companion case of *Levinson* v. *Spector Motor Service,* 330 U. S. 649, was the Circuit Court of Appeals justified in remanding the present case to the District Court for entry of a judgment under the Fair Labor Standards Act, in

favor of all of the respondents except Shapiro? We hold that the case should be remanded, but with directions to proceed in accordance with the opinion of this Court in this case and the *Levinson* case. This will include a direction to the District Court to determine whether or not the activities of each respondent consisted, wholly or in substantial part, of the class of work which is defined by the Interstate Commerce Commission in *Ex parte No. MC–2*, 28 M. C. C. 125, 133–134, as that of a "loader" of freight for an interstate common carrier by motor vehicle, and as affecting the safety of operation of motor vehicles in interstate or foreign commerce.[1]

This action was begun in 1942 in the City Court of the City of New York, pursuant to § 16 (b) of the Fair Labor Standards Act.[2] It sought to recover unpaid overtime compensation for services rendered to the petitioner by each of six of the eight respondents as "a delivery clerk and 'push-boy'," during various periods between October 24, 1938, and September 20, 1941, computed in accordance with § 7 of the Fair Labor Standards Act,[3] together with interest, liquidated damages and an attorney's fee. The case was removed by the petitioner to the United States District Court for the Southern District of New York. The other two respondents there joined in the complaint on like grounds. The petitioner answered that it was an interstate common carrier of freight by motor vehicle; that the labor performed by each of the respondents "consisted primarily of that of [a] driver's helper and of [a] loader;" that, with respect to them, the Interstate Commerce Commission had power to establish qualifications and maximum hours of service pursuant to § 204 of the Motor Carrier Act, 1935, and that, by virtue of

[1] See *Levinson* v. *Spector Motor Service, ante,* p. 652, note 2.

[2] See *Levinson* v. *Spector Motor Service, ante,* p. 653, note 6.

[3] See *Levinson* v. *Spector Motor Service, ante,* p. 653, note 5.

§ 13 (b) (1) of the Fair Labor Standards Act,[4] § 7 of that Act did not apply to the services of the respondents. The case was submitted to the court upon an agreed statement of facts.[5]

On November 29, 1943, the District Court rendered an opinion in which it declined to determine the status of

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[4] See *Levinson* v. *Spector Motor Service, ante,* p. 653, note 4.

[5] This included the following description of the work of the respondents as employees of the petitioner:

"Item 3. As to northbound freight the loaded vehicles would come into New York in the very early morning hours to the West 11th Street Terminal where new drivers took charge of the vehicles, and what were called downtown helpers rode on the vehicles with the drivers to the 38th Street Terminal. At such terminal the doors of the trucks were opened in the mornings, both the driver and downtown helper remaining on the vehicles. *As the downtown helper pushed the freight packages over the tailboards they were received by the plaintiffs* [*respondents*], *who then placed the freight packages in the sub-terminal building. Still later in the mornings the plaintiffs* [*respondents*] *then delivered the packages to various consignees in the Garment Center, generally using for that purpose what are called hand-trucks or flat trucks, using their own manpower for propulsion.*

"During those same days other northbound trucks after first stopping at the West 11th Street main terminal to change a driver and receive a downtown helper, by-passed the West 38th Street subterminal and parked first at one place and then another alongside the curbs in the Garment Center. *At those places the unloading operation was performed in the same way as at the sub-terminal hereinabove described, and the plaintiffs* [*respondents*] *then made the deliveries by hand or by hand trucks into the insides of the Garment Center buildings.*

"Item 4. In the late afternoons and early evenings freight originating with various consignors at various locations in the Garment Center was 'picked up' for intended delivery the next morning in Philadelphia or elsewhere south of New York. As to these southbound operations the facts were these: *Some of the freight packages would be picked up by the plaintiffs* [*respondents*] *at the consignor's places of business in the Garment Center and hand-trucked by them to the West 38th Street sub-terminal. At that place the plaintiffs* [*respondents*] *themselves did, in due course, physically load the freight packages into a waiting truck which, when loaded, took up*

the respondents but held the case "open for further action" in order to give the respondents an opportunity to present that question to the Interstate Commerce Commission. 54 F. Supp. 565, 569. Pursuant to respondents' statement that they would not so apply to the Commission and pursuant to their motion requesting a final disposition of the case, the court, on February 14, 1945, dismissed the complaint "without prejudice." [6] 59 F. Supp. 341. After considerable delay in the filing of the record on

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this journey first to the West 11th Street main terminal, and then with a new driver went on to the destinations south of New York. A downtown employee other than the plaintiffs [respondents] would also at the same time so load the vehicles.

"Other trucks for southbound loadings took their stations on the public streets in the Garment Center where the plaintiffs [respondents] brought the packages by hand or by hand truck. The part which the plaintiffs [respondents] took in such loading consisted of the lifting of the packages on to the tailboards of the trucks, and very often when the weights or size of the packages so required they would stand inside the truck bodies and, together with the downtown employee, stack and pile the freight in the vehicle.

"Item 5. As to all the plaintiffs [respondents] other than Shapiro they generally walked between stopping points but occasionally rode upon the trucks when the trucks moved from one place to another in the Garment Center, thereby avoiding loss of time by walking. As to the plaintiff Shapiro, he regularly and as a matter of fixed duty, between August 1939 and September 1, 1941, rode on the truck between four and five hours daily. On the truck at the same time was the driver and a helper from the downtown terminal. In addition thereto the plaintiff Shapiro devoted three and a half hours each day to inside office work at the 38th Street sub-terminal." (Italics supplied.)

[6] The order of dismissal appearing in the record was as follows:

"Ordered that the complaint be and the same hereby is dismissed and that judgment be entered abating and dismissing said action, without prejudice to the rights of plaintiffs [respondents], or any one of them, to bring other actions or proceedings for the establishment of their respective claims, either administratively or at an appropriate time, by action in this court or other proper tribunal."

appeal, the Circuit Court of Appeals for the Second Circuit affirmed the judgment of dismissal as to the respondent Shapiro on the ground that "he is a 'helper' within the Commission's ruling in 28 M. C. C. at pages 135, 136." 152 F. 2d 619, 622. As to the other respondents, it reversed the judgment with costs and remanded the cause "for entry of judgment in their favor and for allowance of an attorney's fee." *Id.* at 622. The judgment as to Shapiro has not been questioned and is not before us.

Because of its importance in the interpretation of the Motor Carrier Act and the Fair Labor Standards Act, we granted certiorari, 327 U. S. 774, and the case was argued immediately following the *Levinson* case. A brief on behalf of the Administrator of the Wage and Hour Division, United States Department of Labor, as *amicus curiae,* was filed jointly in this case and in the *Levinson* case, supporting the position of the respondents.[7]

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[7] See also, *Walling* v. *Comet Carriers,* 57 F. Supp. 1018, 151 F. 2d 107, 109; cert. granted, 326 U. S. 716; writ of certiorari dismissed on motion of counsel for petitioner Comet Carriers, 328 U. S. 819. That case, also in the Second Circuit, related to "four motor truck drivers, four drivers' helpers and two hand truckers or pushers" employed by Comet Carriers in the transportation of goods between manufacturers and contractors mostly on intrastate trips within or near the New York City Garment Center. As to the hand truckers or pushers, the District Court said: "they are not employed on motor vehicles nor do their functions as employees affect or relate to the safety of operation of the motor vehicles in interstate commerce." 57 F. Supp. 1018, 1023. The Circuit Court of Appeals discussed only the drivers and drivers' helpers. As to them it said:

"Proof that two employees worked only three hours a week in interstate transportation and that two employees made 'some' and 'occasional' deliveries to the warehouses of chain stores and worked the remaining time in the production of goods for commerce does not satisfy the requirement that the amount of time during which they are engaged in interstate commerce be substantial." 151 F. 2d 107, 111.

I.

Notice of appeal, dated March 29, 1945, was filed by the respondents in the District Court April 2, 1945. In spite of the applicable provisions of Rule 73 (g) of the Federal Rules of Civil Procedure,[8] respondents sought from the District Court no extension of time within which to docket their appeal or file a transcript of the record. On July 20, 1945, more than 90 days from the date of the first notice of appeal, respondents, pursuant to motion supported by affidavit, secured from Circuit Judge Augustus N. Hand an order extending to September 1, 1945, the time within which to serve and file their record on appeal. On that date, the transcript of record was filed. The petitioner promptly moved to dismiss the appeal under Rule 73 (a) of the Federal Rules of Civil Procedure,[9] questioning especially the right of a single member

[8] "Rule 73. Appeal to a Circuit Court of Appeals.

. . . . . .

"(g) Docketing and Record on Appeal. The record on appeal as provided for in Rules 75 and 76 shall be filed with the appellate court and the action there docketed within 40 days from the date of the notice of appeal; except that, when more than one appeal is taken from the same judgment to the same appellate court, the district court may prescribe the time for filing and docketing, which in no event shall be less than 40 days from the date of the first notice of appeal. In all cases the district court in its discretion and with or without motion or notice may extend the time for filing the record on appeal and docketing the action, if its order for extension is made before the expiration of the period for filing and docketing as originally prescribed or as extended by a previous order; but the district court shall not extend the time to a day more than 90 days from the date of the first notice of appeal." 308 U. S. 752, 28 U. S. C. following § 723 (c).

[9] "Rule 73. Appeal to a Circuit Court of Appeals.

"(a) How Taken. When an appeal is permitted by law from a district court to a circuit court of appeals and within the time prescribed, a party may appeal from a judgment by filing with the district court a notice of appeal. Failure of the appellant to take any

of that court to make the order of July 20. This motion was denied October 10, 1945, Circuit Judges Learned Hand, Swan and Clark speaking for the court. The motion was renewed at the hearing on the merits of the appeal and, on December 28, 1945, was denied again, Circuit Judges Learned Hand, Swan and Frank speaking for the court. 152 F. 2d 619. The issue was raised properly and fully presented here.

The authority of a Judge of the Circuit Court of Appeals for the Second Circuit to extend the time for filing the record on appeal appears to be supported by Rule 15 of that court.[10] That Rule, however, was not discussed

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of the further steps to secure the review of the judgment appealed from does not affect the validity of the appeal, but is ground only for such remedies as are specified in this rule or, when no remedy is specified, for such action as the appellate court deems appropriate, which may include dismissal of the appeal." 308 U. S. 749, 28 U. S. C. following § 723 (c).

[10] Rule 15, U. S. C. C. A., Second Circuit.

"Docketing Cases.

"1. In an appeal in a civil action the appellant shall docket the action and file the record in this court within forty days after filing the notice of appeal with the District Court, or within any added time granted by the district judge within forty days after the filing of the notice of appeal, but in no case later than ninety days after such filing (Rule 73 [g]). . . . *If the record is not presented to the clerk for filing within the periods above provided, he shall refuse to accept it unless this court so orders, or a judge thereof if the court is not sitting.*

"2. This Court will not hear and grant motions for filing and docketing appeals, otherwise properly taken, at times other than as stated in subdivision 1 hereof, except upon a showing by affidavits, or otherwise as the Court may order, (a) that the delay has been due to cause beyond the control of the moving party or (b) that the delay has been due to circumstances which shall be deemed to be merely excusable neglect on the part of the moving party and there is a substantial question to be presented on appeal and (c) in all cases where the district court has power to act, that an extension of time has been denied

by counsel and we sustain the action taken by the Circuit Court of Appeals under authority of Rule 73 (a), even without reference to its own Rule 15.

The principal argument against the final action of the Circuit Court of Appeals on this motion is based upon the following statement in that court's opinion: "In the case at bar there was no abuse of discretion in extending the time, *despite the somewhat feeble excuses for delay, since the appeal presents a substantial question as to the correctness of the judgment.*" (Italics supplied.) 152 F. 2d 619, 621. It is urged that this shows that the court based its refusal to dismiss the appeal on the substantiality of the question to be presented on the merits of the appeal, rather than on the substantiality of the excuses for the delay in filing the record.

We interpret the statement as no more than a recognition by the court that the substantiality of the question to be at issue on the merits of the appeal was a matter appropriate for its consideration under Rule 73 (a), in connection with all the other circumstances before it. Rule 73 (a) is intended to place reliance upon the sound discretion of the Circuit Court of Appeals. We see no

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by that court, together with the grounds for such denial, if any are stated.

"3. If the appellant shall have failed to comply with this rule, any appellee may either docket the action and file the record in this Court, in which event it shall stand for argument, or may have the action docketed and dismissed by the Clerk of this Court upon producing a certificate from the Clerk of the Court wherein the judgment or decree was rendered, certifying that such appeal has been duly taken or allowed, and proof that four days' notice in writing has been served on the appellant or his attorney that application will be made to the Clerk of this Court for such dismissal. No action dismissed under this rule shall be reinstated except in the discretion of the Court and upon a showing similar to that required under subdivision 2 hereof." (Italics supplied.) 11 U. S. Sup. Ct. Rep. Digest, L. Ed., Supp. No. 4, p. 55.

reason to question the discretion exercised in this case as evidenced by the agreement of all of the five Circuit Judges to whom the issue was presented. *Ainsworth* v. *Gill Glass & Fixture Co.,* 104 F. 2d 83; *Mutual Benefit Health & Accident Assn.* v. *Snyder,* 109 F. 2d 469; *Burke* v. *Canfield,* 72 App. D. C. 127, 111 F. 2d 526; *United States* v. *Gallagher,* 151 F. 2d 556.

Accordingly, we sustain the denial of the motion to dismiss the appeal under Rule 73 (a).

II.

On the merits, the question is whether or not the Circuit Court of Appeals was justified in remanding this case with instructions to enter a judgment under the Fair Labor Standards Act in favor of all of the respondents except Shapiro. We hold that the cause should be remanded but that the order of remand should be modified. This case was tried, without a jury, entirely upon an agreed statement of facts and a pre-trial agreement between the parties, approved by the District Court, settling the issues to be determined. For the sake of clarity, we have proceeded on the same basis and have treated the case as though, upon remand of it to the District Court, that court will proceed upon the same record. This, however, should not be interpreted as necessarily restricting that court to that record if, for good cause, that court should find it advisable to retry the case *de novo.*[11]

[11] The District Court, in its order of February 14, 1945, described the basis on which the case had been tried as follows:

". . . on the 3rd day of May, 1943, and the parties hereto having duly appeared by their respective attorneys, and submitted to the Court, in lieu of the offering of proof, an agreed statement of facts setting forth the issues framed by the complaint, and the Court, upon the consent of the attorneys for the respective parties, having thereupon made and entered an order herein on the said 3rd day of May, 1943, wherein and whereby the said agreed statement of facts which

Under the agreed statement there was no question but that the Fair Labor Standards Act applied to each respondent provided only that he was not found to have been excluded from the overtime pay requirements of that Act by § 13 (b) (1) because of being an "employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act, 1935; . . ." 52 Stat. 1068, 29 U. S. C. § 213 (b) (1). There thus will remain to be determined by the District Court the question whether the activities of the respective respondents consisted, either wholly or in substantial part, of the class of work which is defined by the Interstate Commerce Commission in *Ex parte No. MC–2,* 28 M. C. C. 125, 133–134, as that of a "loader," and as affecting the safety of operation of motor vehicles in interstate or foreign commerce.[12]

It will remain for the District Court to apply the facts found by it as to the activities of the respective respondents to the classifications of work that have been made by the Interstate Commerce Commission, defining what comes within the jurisdiction of the Commission under § 204 of the Motor Carrier Act. The Commission has defined its jurisdiction, both affirmatively and negatively, as follows:

> ". . . we have power, under section 204 (a) of said part II, to establish qualifications and maximum hours of service for the classes of employees covered by findings of fact numbered 1, 2, and 3 above [me-

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were submitted by the attorneys for the respective parties, as aforesaid, was set forth as the issues framed by the complaint and answer, and the said action having been submitted to the Court for its determination upon the said agreed statement of facts and order hereinbefore mentioned and referred to, . . ."

[12] See *Levinson* v. *Spector Motor Service, ante,* p. 652, note 2.

chanics, loaders and helpers], and . . . we have no such power over any other classes of employees, except drivers." *Ex parte No. MC–2,* 28 M. C. C. 125, 139.[13]

Under these circumstances, there is no occasion for us to refer to the Commission any question presented in this case nor to suspend the long-delayed final judgment pending further findings by the Commission. The Commission has done its work. The District Court must determine simply whether or not the respective employees who seek to recover overtime compensation under § 7 are excluded from the benefits of that Section because they are within the above classification. The special knowledge and experience required to determine what classifications of work affect safety of operation of interstate motor carriers have been applied by the Commission. Whether or not an individual employee is within any such classification is to be determined by judicial process.

The District Court, in applying § 204 of the Motor Carrier Act to respondents, will determine whether or not the activities of each respondent, either as a whole or in substantial part, come within the Commission's definition of the work of a "loader." In determining whether the activities, or any substantial part of the activities, of an individual come within those of such a "loader," the District Court shall not be concluded by the name which may have been given to his position or to the work that he does, nor shall the District Court be required to find that any specific part of his time in any given week must have been spent in those activities. The District Court shall give particular attention to whether or not

[13] The findings of fact referred to by the Commission, insofar as they relate to loaders, are those quoted in the text of *Levinson* v. *Spector Motor Service, ante,* p. 669, at note 17.

the activities of the respective respondents included that kind of "loading" which is held by the Commission to affect safety of operation. In contrast to the loading activities in the *Levinson* case, the mere handling of freight at a terminal, before or after loading, or even the placing of certain articles of freight on a motor carrier truck may form so trivial, casual or occasional a part of an employee's activities, or his activities may relate only to such articles or to such limited handling of them, that his activities will not come within the kind of "loading" which is described by the Commission and which, in its opinion, affects safety of operation. See also, *McKeown* v. *Southern California Freight Forwarders,* 49 F. Supp. 543. Except insofar as the Commission has found that the activities of drivers, mechanics, loaders and helpers, as defined by it, affect safety of operation, it has disclaimed its power to establish qualifications or maximum hours of service under § 204 of the Motor Carrier Act.

If none of the alleged "loading" activities of the respective respondents, during the periods at issue, come within the kind of activities which, according to the Commission, affect the safety of operation of motor vehicles in interstate or foreign commerce within the meaning of the Motor Carrier Act, then those respondents of which that is true are entitled to the benefits of § 7 of the Fair Labor Standards Act. On the other hand, if the whole or a substantial part of such alleged "loading" activities of the respective respondents, during the periods at issue, does come within the kind of activities which, according to the Commission, affect such safety of operation, then those respondents who were engaged in such activities are excluded from the benefits of such § 7. If some, but less than a substantial part, of such activities of the respective respondents, during some or all of the periods at issue, come within the kind of activities which, according to the Commission, affect such safety of opera-

tion, then the right of those respondents who were engaged in such activities to receive the benefits of § 7 of the Fair Labor Standards Act does not come within the precise issue determined in the *Levinson* case and this Court reserves its decision as to the power of the Commission to establish qualifications and maximum hours of service with respect to them and, consequently, reserves its decision as to their right to receive the benefits of § 7 of the Fair Labor Standards Act.

For these reasons, the judgment of the Circuit Court of Appeals is vacated insofar as it relates to the respondents other than Shapiro, and the cause is remanded to the District Court for further proceedings consistent with this opinion.

It is so ordered.

UNITED STATES *v.* OGILVIE HARDWARE CO., INC.

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

No. 430. Argued March 5, 1947.—Decided April 7, 1947.

A corporation, organized with a paid-in capital of $100,000, increased its capitalization in 1924 to $200,000 by declaration of a $100,000 stock dividend out of past earnings. Thereafter, operating losses created a deficit in total capitalization, the deficit being about $71,000 in 1937 but being reduced to about $61,000 by 1938. With this deficit, the corporation was forbidden by state law to pay any dividends and it refrained from doing so. The Commissioner of Internal Revenue assessed, and the Company paid, undistributed profits taxes under § 14 of the Revenue Act of 1936 for its fiscal years ending in 1937 and 1938. The corporation sued for a refund of these taxes under § 26 (c) (3) of the Revenue Act of 1936, as added by § 501 (a) (3) of the Revenue Act of 1942, claiming to be a corporation having "a deficit in accumulated earnings and profits" within the meaning of that section. *Held:* The corporation is entitled to the refund. Pp. 713–719.

(a) The 1942 amendment was designed to grant corporations a refund on account of payments of undistributed profits taxes for tax years in which they had an accumulated deficit, and where, for that reason, state law, federal law, or public regulatory orders of either prohibited distribution of dividends. P. 713.

(b) It was an extraordinary relief measure, and its language, the circumstances which prompted its passage, and the very mechanics of the amendment itself require that determination of rights to refund under it be based on consideration of something other than the established meaning under federal tax law of the word "deficit" and the phrase "accumulated earnings and profits." Pp. 714–719.

(c) Congress at least intended to refund taxes imposed on corporations which had failed to distribute dividends when distribution, in violation of state law, would have impaired long-existing state-approved corporate capitalizations. P. 719.

155 F. 2d 577, affirmed.

A District Court awarded a judgment under § 501 (a) (3) of the Revenue Act of 1942, 56 Stat. 798, to a corporation for refund of undistributed profits taxes paid while the corporation's capital was impaired, although half the capital had resulted from a stock dividend paid out of past earnings. 62 F. Supp. 338. The Circuit Court of Appeals affirmed. 155 F. 2d 577. This Court granted certiorari. 329 U. S. 699. *Affirmed,* p. 719.

Lee A. Jackson argued the cause for the United States. With him on the brief were *Acting Solicitor General Washington, Sewall Key, Stanley M. Silverberg* and *Helen R. Carloss.*

Elias Goldstein argued the cause for respondent. With him on the brief was *H. C. Walker, Jr.*

Briefs were filed as *amici curiae* by *Milton R. Schlesinger* for the Vaughn Machinery Co.; *F. Eberhart Haynes, U. E. Wild* and *J. Marvin Haynes* for the Hawaiian Canneries Co., Ltd.; and *John E. Hughes,* urging affirmance.

MR. JUSTICE BLACK delivered the opinion of the Court.

This is a suit for tax refund which the District Court allowed. 62 F. Supp. 338. The Circuit Court of Appeals affirmed. 155 F. 2d 577. We granted certiorari because of an apparent conflict with *Century Electric Co.* v. *Commissioner*, 144 F. 2d 983.

The respondent, Ogilvie Hardware Co., Inc., was incorporated in Louisiana in 1907 with a paid-in capital of $100,000. In 1924 it increased its capitalization to $200,000 by declaration of a $100,000 stock dividend out of past earnings. Depressed business conditions during the 1930's brought heavy operating losses so that by 1937 the company's assets were about $71,000 less than the $200,000 capitalization. The company books accordingly showed a deficit in this amount. By 1938 this deficit was reduced to about $61,000. In this financial posture the corporation could not declare dividends without impairing its then capital structure (which included capitalization of the $100,000 stock dividend) and Louisiana law prohibited payment of a dividend under such circumstances.[1] Section 14 of the governing Rev-

[1] "I. No corporation shall pay dividends in cash or property, (a) except from the surplus of the aggregate of its assets over the aggregate of its liabilities, plus the amount of its capital stock; or (b) out of any surplus due or arising from (1) any profit on treasury shares before resale; or (2) any unrealized appreciation in value or revaluation of fixed assets; or (3) any unrealized appreciation in value or revaluation of inventories before sale; or (4) the unaccrued portion of unrealized profit on notes, bonds or obligations for the payment of money, purchased or otherwise acquired, unless such notes, bonds or obligations are readily marketable, in which case they may be taken at their actual market value; or (5) the unaccrued or unearned portion of any unrealized profit in any form whatever, whether in the form of notes, bonds, obligations for the payment of money, installment sales, credits or otherwise, except as provided in the preceding sub-paragraph (4).

. . . . . .

"III. No corporation shall pay dividends in shares of the corpora-

enue Act of 1936 imposed a surtax on certain corporate net income earned during the tax year but not distributed as dividends.[2] It provided no exemption from that surtax because a corporation had an accumulated deficit at the beginning of the tax year, or because state law prohibited payments of dividends.

Acting under this 1936 law, the Commissioner, on examination of respondent's 1937 and 1938 tax returns, determined that respondent was subject to the undistributed profits tax, despite the deficit and the state prohibition against payment of dividends. The Commissioner's interpretation and application of the 1936 Act was in accord with our holding in *Helvering* v. *Northwest Steel Rolling Mills,* 311 U. S. 46, and *Crane-Johnson Co.* v. *Helvering,* 311 U. S. 54. The taxpayers in those cases claimed exemption from the surtax on the ground that they could not distribute dividends "without violating a provision of a written contract executed by the corporation prior to May 1, 1936, which provision expressly deals with the payment of dividends." Section 26 (c) (1) of the 1936 Act relieved corporations from the tax if such contracts existed. 49 Stat. 1648, 1664. The question we had to decide in those cases was whether a state constitution, corporate charter, or state statute, which prohibited payment of dividends, was a "written contract" within the meaning of the § 26 (c) (1) exemption provision. We held that we could not so expand the provision's language, relying in part upon previous statements of this Court "that provisions granting special tax exemptions are to be strictly construed." *Helvering* v. *Northwest Steel Rolling Mills, supra,* 49. Since the respondent here had no "written con-

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tion, except from the surplus of the aggregate of its assets . . . over the aggregate of its liabilities, plus the amount of its capital stock." La. Acts 1928, No. 250, § 26, I, III, 1 La. Gen. Stat. § 1106.

[2] 49 Stat. 1648, 1655–1657.

tract" against payment of dividends, it had no exemption from the surtax imposed by the original 1936 Act.

But this suit is not brought to determine the company's tax liability under the 1936 Act as it stood in the taxable years 1937 and 1938. It is an action for a refund under a 1942 relief amendment to the 1936 Act specifically designed to authorize corporations to obtain repayments of taxes they had been forced to pay under the 1936 Act as we had interpreted it. That amendment, as enacted, provided for complete or partial retroactive immunity from the 1936 undistributed profits tax under the following circumstances:

> "DEFICIT CORPORATIONS.—In the case of a corporation having a deficit in accumulated earnings and profits as of the close of the preceding taxable year, the amount of such deficit, if the corporation is prohibited by a provision of a law or of an order of a public regulatory body from paying dividends during the existence of a deficit in accumulated earnings and profits, and if such provision was in effect prior to May 1, 1936." § 501 (a) (3), Revenue Act of 1942, 56 Stat. 798, 954.

This amendment was designed to grant corporations a refund on account of payments of undistributed profits taxes for tax years in which they had an accumulated deficit, and where, for that reason, state law, federal law, or public regulatory orders of either prohibited distribution of dividends. It therefore authorized refunds to the very taxpayers who had been lawfully required to pay taxes by the 1936 Act as we had interpreted it in the two cases cited above. Furthermore, in order to make sure that taxpayers who had paid under our interpretation might recover refunds, § 501 (c) of the same amendment specifically authorized claims for repayment to be filed within one year after its passage, without regard to

any statute of limitations or other designated statutory bars. 56 Stat. 798, 955.

The Government's contention is that we should construe the word "deficit" and the phrase "accumulated earnings and profits" according to their established meaning under federal tax law; that so construed the $100,000 allotted for stock dividends remained a part of earnings and profits for tax purposes; therefore, there was no deficit in the federal tax sense, and consequently the tax payments should not have been refunded here despite the state prohibition against distribution. We may assume that the Government is correct in contending that if Congress intended in the 1942 amendment to use the words "deficit" and "earnings and profits" in this federal tax sense, the stock dividend did not reduce "earnings," there was no "deficit," and the refund should be denied. See § 115, Revenue Act of 1936, 49 Stat. 1648, 1687–1689; *Commissioner* v. *Bedford,* 325 U. S. 283, 292. This construction would greatly limit the scope of the relief granted by the 1942 amendment. To determine whether Congress intended so to limit the relief it granted, we must look to the whole 1942 amendment in its relationship to the 1936 Act and the legislative and judicial history intervening between the two.

The 1936 undistributed profits tax law was a novelty in the field of federal taxation. Its chief novel feature was that it was designed to compel corporations to distribute current earnings to shareholders by imposing a surtax on corporations which failed to make such distributions. It had detailed provisions for defining the net income which would be reached by this tax. Its application, therefore, raised new and sometimes wholly unexpected problems. Widespread opposition developed to the tax. Since 1938, only a token of it has survived. See Revenue Act of 1938, 52 Stat. 447. But even after the 1936 undistributed profits tax was no longer in effect, complaints about its prior

application from corporations which had been required to pay an undistributed profits tax continued to reach and to concern Congress. Representatives of these corporations appeared before the House and Senate Committees in 1942, and Congress responded to their complaints by enacting the several provisions of § 501—the retroactive relief legislation now under consideration.

One subject of complaint was that under the income tax definitions only a fraction of capital losses was deductible from taxable net income. Corporations which had suffered large capital losses in a given year were required to pay undistributed profits taxes in that year as though they had made a profit. The 1942 amendment, as reported by the House Committee, met this complaint by recommending that refunds be authorized for corporations who had paid under this 1936 definition of net income.[3] This authorization, subsequently approved by the Senate Committee,[4] clearly shows that Congress intended to provide for this phase of the refund without regard to tax definitions, and did not intend its authorized refund to be restricted by the application of established tax terminology.

When the bill reached the Senate Committee, insistent complaints related to the fact that corporations with defi-

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[3] The House Ways and Means Committee reported that § 501 of the 1942 Act allowed corporations to deduct capital losses from their capital assets for purposes of the undistributed profits tax even though only $2,000 of such capital loss was deductible from gross income for other purposes.

Another amendment provided a stock redemption credit deductible from gross income taxable for undistributed profits tax purposes.

And the breadth of the refund provision is illustrated by the provisions making the amendment effective as of the date the 1936 Act was enacted, and extending the Statute of Limitations to permit refunds for all overpayments since that date. H. R. Rep. 2333, 77th Cong., 2d Sess., 170 (1942).

[4] Sen. Rep. No. 1631, 77th Cong., 2d Sess., 244, 245 (1942).

cits in accumulated earnings and profits had been compelled to pay taxes for non-distribution of dividends although state or federal law prohibited dividend payments. A deficit railroad corporation had been taxed over its objection that payment of dividends would have rendered its officers subject to punishment for a misdemeanor under federal law and a money penalty under state law. The Board of Tax Appeals had overruled objections on these grounds, relying on our decisions in the *Crane-Johnson* and *Northwest Steel* cases, *supra*. *Paris & Mt. Pleasant R. Co.* v. *Comm'r*, 47 B. T. A. 439.[5] The counsel who had represented Crane-Johnson before this Court also appeared on their behalf before the Senate Committee and made a plea for relief for deficit corporations which had been compelled to pay the undistributed profits tax.[6] He

[5] *Hearings before Senate Committee on Finance on Revenue Act of 1942*, 77th Cong., 2d Sess., 2343–2345 (1942). Counsel for another deficit railroad corporation pointed out that under governing state law that railroad's officers would have been liable for a penalty of double the damages to anyone harmed. *Id.* at 1422.

[6] Statement of Mr. John E. Hughes:

"Next I have a statement on behalf of Crane Johnson Co. that section 501 of the House bill should be simplified. That point is this: If a corporation was forbidden by State law to declare a dividend because its capital stock was impaired, it could not avoid the undistributed profits tax enacted in 1936 and was caught in a trap. A rich corporation could. It could declare a dividend and avoid it. Surely you would not discriminate against a poor one.

"Furthermore, if it had an impairment of capital stock and was organized under the laws of about one-third of the States where corporations in such condition are allowed to declare dividends, a dividend would be a return of capital to the shareholder and no credit for the undistributed profits tax would be given.

"There is no reason for granting relief retroactively in the limited cases which may be held to be covered by the vague and ambiguous language of section 501 of the House bill without granting relief in these cases also.

"The language of section 501 is vague and ambiguous and ought to be simplified. In 1938 relief was granted as soon as this situation was brought to the attention of Congress, but unfortunately was not made

urged that such corporations had been "caught in a trap," and that they were justly entitled to have a refund for that reason. It was apparently in response to the foregoing complaints that the relief provision before us, not part of the House bill as it came to the Senate,[7] was introduced by the Senate Committee.[8] We think Congress was moved to relieve those corporations which it considered to be "caught in a trap" whereby they were taxed by the Federal Government if they did not pay dividends and subject to prosecution and penalties by the Federal Government or the states if they did.

Some of the language Congress used, considered taxwise only, provides plausible support for the interpretation urged by the Government which would give the relief amendment more limited scope. But the provision before us is not a general tax exemption to be interpreted in the framework of a currently operating general revenue law. It is a special retroactive relief measure to authorize repayment of taxes collected in previous years under a revenue law which had already been substantially abandoned. The language of this extraordinary relief measure and the circumstances which prompted its passage convince us that Congress intended to provide refunds to corporate taxpayers, with possible minor exceptions, who had paid undistributed profits taxes as a choice between conflicting state and federal compulsions.

Furthermore, the very mechanics of the 1942 amendment require that determination of rights to refund under it be based on consideration of something other than the tax meaning of the 1936 Act or other tax terminology. The right to recovery in every case depends ultimately upon whether federal law or federal regulatory bodies, or

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retroactive to 1936. The House bill in section 501 properly makes it retroactive to 1936, but is not phrased in simple enough language." *Hearings, supra* 1022. See also *id.* at 1306–1308.

[7] See H. R. Rep., note 3, *supra.*

[8] See Sen. Rep., note 4, *supra.*

state law or state regulatory bodies, prohibit payments of dividends. In this case the ultimate right to refund depends upon state law. *Cf. Lyeth* v. *Hoey,* 305 U. S. 188, 193. Before that right can be finally established, courts must examine state law at least to the extent of determining (1) what is a "deficit"; (2) what are "accumulated earnings and profits"; (3) what was the state law on these questions prior to May 1, 1936; (4) whether payments of dividends under these circumstances were prohibited by state law. Acceptance of the Government's contention would mean that courts administering the 1942 Act must first determine whether a deficit exists under federal law; if such a federal deficit exists, they must then turn to state law to decide whether under it a deficit exists such as prohibits the payment of dividends. We do not think that Congress intended the courts so to administer the 1942 amendment. The Government's argument that it does relies heavily upon the Senate Committee Report.

We think the Senate Committee Report, as a whole, leans toward the view we have taken of the purpose of the law.[9] But in one of the six illustrative examples of application of the new tax relief provisions of the amendment,

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[9] Sen. Rep. 1631, note 4, *supra,* outlining § 501 of the proposed Revenue Act of 1942 stated:

". . . [A] new paragraph . . . has been added, providing for an additional credit in cases of corporations having a deficit in accumulated earnings and profits and prohibited by law from paying dividends, and . . . a new subsection has been added providing for a stock redemption credit.

"Section 501 . . . grants relief from the undistributed-profits tax for taxable years beginning after December 31, 1935, and prior to January 1, 1938, by allowing as an additional credit in computing undistributed net income the portion of the adjusted net income which, in certain instances, could not be distributed as a taxable dividend. . . .

"Under section 14 of the Revenue Act of 1936 corporations in general were subject to surtax at various rates from 7 to 27 percent of their undistributed net income. In some instances State law or an order of a public regulatory body prohibited payment of dividends

and in the subsequent Treasury Regulations, it was indicated that no tax credit should be allowed where a tax deficit resulted from "prior capitalization of surplus in the course of a nontaxable reorganization." [10] Aside from the fact that corporate reorganizations and simple stock dividends are quite different things, we find this one illustrative example insufficient to outweigh the considerations which have governed our interpretation of the 1942 amendment.

We are persuaded that Congress at least intended by the amendment to refund taxes imposed on corporations which had failed to distribute dividends when distribution, in violation of state law, would have impaired long-existing state-approved corporate capitalizations. See *United States* v. *Byron Sash & Door Co.*, 150 F. 2d 44, 46. In order that this purpose may be effected, the judgment of the Circuit Court of Appeals is

Affirmed.

MR. JUSTICE FRANKFURTER, with whom MR. JUSTICE REED joins, dissenting.

The Revenue Act of 1936 imposed a surtax on undistributed corporate profits. Section 26 (c) (1) gave relief

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during the existence of a deficit even though the corporation had current earnings and profits which would constitute undistributed net income under the definition thereof in section 14 (a) (2). Such corporations were, therefore, subject to undistributed profits surtax even though they were prohibited by law from paying dividends. The addition of the new paragraph 3 to subsection (c) of section 26 to provide an additional credit in the amount of the deficit in accumulated earnings and profits as of the close of the preceding taxable year is intended to give relief in certain of these cases.

"Also under section 14 of the Revenue Act of 1936, it was possible that the undistributed net income of a corporation might exceed accumulated and current earnings and profits. In such case the tax could not be avoided even if distributions were made to shareholders." The amendment was to provide relief in this situation also.

[10] *Id.* at 246.

from this surtax under defined circumstances.[1] In *Helvering* v. *Northwest Steel Mills,* 311 U. S. 46, it was held that although a restriction on the distribution of corporate profits was imposed by State law, a credit for such withheld profits was not authorized by § 26 (c) (1). In reaching this conclusion, the Court took into account that it "has been said many times that provisions granting special tax exemptions are to be strictly construed." *Helvering* v. *Northwest Steel Mills, supra,* at 49. By way of relaxing the restricted scope which this Court gave to exemption from the undistributed profits tax, Congress, by the Revenue Act of 1942, substituted a new subdivision (3) to § 26 (c) of the Revenue Act of 1936. This section did not undo the *Northwest Steel Mills* doctrine. It did not allow a deduction for profits forbidden to be distributed by State law, as it had, in § 26 (c) (1), allowed credit for profits undistributed because of a "written contract." Congress gave relief for earnings forbidden to be distributed by State law only "In the case of a corporation having a deficit in accumulated earnings and profits as of the close of the preceding taxable year . . . ."[2]

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[1] 49 Stat. 1648, 1664.

"In the case of a corporation the following credits shall be allowed to the extent provided in the various sections imposing tax—

. . . . . .

"(1) PROHIBITION ON PAYMENT OF DIVIDENDS. An amount equal to the excess of the adjusted net income over the aggregate of the amounts which can be distributed within the taxable year as dividends without violating a provision of a written contract executed by the corporation prior to May 1, 1936, which provision expressly deals with the payment of dividends. If a corporation would be entitled to a credit under this paragraph because of a contract provision and also to one or more credits because of other contract provisions, only the largest of such credits shall be allowed, and for such purpose if two or more credits are equal in amount only one shall be taken into account."

[2] Section 501 (a), Revenue Act of 1942, 56 Stat. 798, 954. "(3) DEFICIT CORPORATIONS.—In the case of a corporation having a deficit

This is tax language and should be read in its tax sense. We must not disregard the illumination of an authoritative tax lexicon in reading tax legislation. The language of the 1942 amendment carries with it tax usage, tax practice, and the gloss of authoritative legislative history. All combine to make the condition under which State law prohibiting distribution of profits comes into play, that which Congress in words of art said was the condition, namely, the existence of "a deficit in accumulated earnings and profits." Here there was no deficit in the controlling sense of the term. And nothing warrants the attribution of a non-technical meaning to so settled a technical term. Nothing, that is, except the suggestion that to give the 1942 amendment this established meaning might not afford the relief that, as a matter of abstract justice, should be afforded. But this is merely an attempt to invoke what has been called the "equity" of a statute. I am no friend of artificial canons of construction, and I would not strain language in order to construe tax exemptions strictly. On the other hand, Revenue Acts are not the kind of legislation which should be loosely construed in order to grant exemptions.

The legislative history of this enactment and the administrative practice only reenforce what seems to me to be the compelling requirement, to render technical terms used by Congress with their technical meaning. If it be suggested that counsel for taxpayers at a Congressional hearing urged the fairness of the construction which the Court now places upon what Congress has expressed, it would not be the first time that the final legislation of Congress did not satisfy the desire of some of its proponents. In

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in accumulated earnings and profits as of the close of the preceding taxable year, the amount of such deficit, if the corporation is prohibited by a provision of a law or of an order of a public regulatory body from paying dividends during the existence of a deficit in accumulated earnings and profits, and if such provision was in effect prior to May 1, 1936."

any event, I do not think the argument of counsel for a taxpayer urging relief should carry more weight than the use by Congress of settled tax language, carrying a meaning which excludes that result, a meaning which is reenforced by the legislative, judicial and administrative history that led up to and followed the enactment. See *Century Electric Co.* v. *Commissioner,* 144 F. 2d 983, affirming the Tax Court, 3 T. C. 297; S. Rep. No. 1631, 77th Cong., 2d Sess., pp. 244–46; Treasury Regulations 94 and 101, Art. 115–11; Treasury Regulations 103, § 19.115–11; Treasury Regulations 111, § 29.115–11. The short of the matter is, that even though corporate profits here were withheld because Louisiana forbade their distribution, there can be no credit allowed for a deficit because in a federal tax sense there was no deficit.

No doubt Congress, to some extent, desired to relieve from the undistributed profits tax corporations forbidden by State law from declaring dividends. But neither what Congress enacted nor its legislative history indicates a purpose to disregard the limiting provisions of § 115 (h) of the Revenue Act of 1936.[3] This section, which embodies the analysis of *Commissioner* v. *Sansome,* 60 F. 2d 931,

[3] 49 Stat. 1648, 1688–89. § 115 (h): "EFFECT ON EARNINGS AND PROFITS OF DISTRIBUTIONS OF STOCK.—The distribution (whether before January 1, 1936, or on or after such date) to a distributee by or on behalf of a corporation of its stock or securities or stock or securities in another corporation shall not be considered a distribution of earnings or profits of any corporation—

"(1) if no gain to such distributee from the receipt of such stock or securities was recognized by law, or

"(2) if the distribution was not subject to tax in the hands of such distributee because it did not constitute income to him within the meaning of the Sixteenth Amendment to the Constitution or because exempt to him under section 115 (f) of the Revenue Act of 1934 or a corresponding provision of a prior Revenue Act. As used in this subsection the term 'stock or securities' includes rights to acquire stock or securities."

see S. Rep. 2156, 74th Cong., 2d Sess., p. 19, requires that in respect to federal taxes, assets be treated as available for distribution as earnings regardless of stock dividends which capitalize earnings and profits. H. Rep. No. 2894, 76th Cong., 3d Sess., p. 41, cited in *Commissioner* v. *Wheeler,* 324 U. S. 542, 546. The specific example cited by the Senate Committee Report on § 501 of the Revenue Act of 1942 shows that Congress intended to limit the relief afforded by the amendment to cases where the deficit in question had not resulted from the capitalization of accumulated earnings and profits.[4] The majority finds a difference between capitalization of earnings in a nontaxable reorganization and capitalization of earnings by a simple stock dividend. The circumstances are different but the difference is not significant for the legal effect of the stock dividend on earnings and profits. The example given is concerned with the effect of capitalizing earnings and profits, not with the method. If Congress meant to relieve undistributed earnings and profits even though those earnings and profits were considered available under § 115 (h), it should have said so.

We think the judgment of the Circuit Court of Appeals should be reversed.

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[4] S. Rep. No. 1631, 77th Cong., 2d Sess., pp. 245–46:

"(1) The X corporation for the calendar year 1936 had an adjusted net income of $200,000 . . . .

"(2) Assume in the above example that the deficit in accumulated earnings and profits is $20,000 for income tax purposes, but the deficit in accumulated earnings and profits on the corporation's books by reason of a prior capitalization of surplus in the course of a nontaxable reorganization amounts to $250,000. In this case, although the State law would probably prohibit payment of any dividends, the credit allowed under the amendment to section 26 (c) is limited to $20,000, which is the deficit in accumulated earnings and profits for income tax purposes. X corporation, therefore, will be liable for undistributed profits surtax on $180,000 of its adjusted net income."

UNITED STATES *v.* LEM HOY.

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

No. 585. Argued March 14, 1947.—Decided April 7, 1947.

1. Section 5 (g) of the Farm Labor Supply Appropriation Act of 1944 does not except agricultural laborers from the provision of § 5 of the Immigration Act of 1917 making it a criminal offense to induce to migrate to the United States as contract laborers aliens who are not entitled to enter the United States under the 1917 Act or any other law of the United States. Pp. 730–731.
2. Since dismissal of the information in this case was based on the construction of the 1917 Act as the Government sought to apply it in the information, the case was properly brought to this Court on direct appeal from the district court. P. 725.

Reversed.

A United States District Court dismissed an information charging a violation of § 5 of the Immigration Act of 1917, 39 Stat. 874, by inducing aliens to migrate to the United States as contract laborers—on the ground that § 5 (g) of the Farm Labor Supply Appropriation Act of 1944, 58 Stat. 11, excepts agricultural laborers from the provisions of the 1917 Act. On direct appeal to this Court, *reversed,* p. 731.

Peyton Ford argued the cause for the United States. With him on the brief were *Acting Solicitor General Washington, Robert S. Erdahl* and *Sheldon E. Bernstein.*

Henry G. Bodkin submitted on brief for respondent.

Mr. Justice Black delivered the opinion of the Court.

A United States Attorney filed an information in a Federal District Court charging that the appellee, Lem Hoy, "did attempt to induce, assist, encourage, and solicit,

certain alien persons to migrate to the United States as contract laborers . . . who were not alien contract laborers duly entitled to migrate to the United States under the Act of February 5, 1917, or to enter or migrate to the United States under any other law of the United States, as the defendant then and there well knew." The conduct charged was made an offense by § 5 of the 1917 Immigration Act referred to in the information. 39 Stat. 874, 879, 8 U. S. C. § 139. Hoy appeared, waived indictment, asked for a bill of particulars, and moved to dismiss the information on the ground that § 5 of the 1917 Act had been repealed by § 5 (g) of the Farm Labor Supply Appropriation Act of 1944. 58 Stat. 11, 15–16, 50 U. S. C. App., Supp. V, § 1355 (g). The bill of particulars showed that Hoy had written a letter to certain persons living in Mexico to induce them to come to the United States to work for him. In the letter Hoy told them that "it makes no difference if you pass as contraband (smuggle in), as wherever the Immigration catches you I will get you out with a bond." The letter also directed the aliens to see a man near the border who would "bring" them to Hoy for $25, and stated that Hoy would "arrange everything." It was stipulated that Hoy wanted the men to work for him as agricultural laborers.

Holding that the 1944 Farm Labor Act had made the 1917 Act inapplicable to such farm laborers, and therefore to those who induced their entry, the District Court dismissed the information. Since this dismissal was based on the construction of the 1917 Act as the Government sought to apply it in the information, the case is properly here on direct appeal from the District Court. 18 U. S. C. Supp. V § 682, 28 U. S. C. § 345.

The 1944 Farm Labor Act, by its terms, was designed to facilitate the wartime employment, and therefore the immigration into the United States for a limited stay, of

agricultural laborers from North, South, and Central America, and islands adjacent thereto. In determining whether this information was properly dismissed, it is appropriate for us to consider whether Congress intended in the 1944 Act to remove all restrictions, enforceable by sanctions, against immigration into the United States of such agricultural laborers from the western hemisphere; and at the same time whether it intended to repeal, not only the provision which prohibited contract laborers from entering the country, but also the long-standing law which made it a criminal offense to induce such persons, barred by law, to enter.[1] If the 1944 Act has these effects, it marks a complete reversal of the congressional policy which has been followed for more than half a century.[2]

In line with this policy, the purpose of the 1917 Act, according to its title, was "To regulate the immigration of aliens to, and the residence of aliens in, the United States." It provided detailed qualifications for persons to be admitted to the country. Certain persons were to be completely barred, such as idiots, epileptics, chronic alcoholics, vagrants, criminals, polygamists, prostitutes, persons afflicted with loathsome or dangerous contagious diseases, persons who advise, advocate, or teach opposition to organized government or its overthrow by force, illit-

[1] Compare 39 Stat. 894, 8 U. S. C. § 163 (crime to aid or assist any person to enter who believes in violent overthrow of government); 39 Stat. 880, 43 Stat. 166, 8 U. S. C. § 145 (crime to bring to the United States an alien with certain diseases); 45 Stat. 1551, 8 U. S. C. § 180a (crime for alien to enter at any place other than at an immigration point, or to elude examination). See also 35 Stat. 1152, 18 U. S. C. § 550 which provides that "Whoever directly commits . . . an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal."

[2] See 23 Stat. 332; 32 Stat. 1213; 34 Stat. 898; 41 Stat. 1008; *Holy Trinity Church* v. *United States*, 143 U. S. 457, 463–465.

erates, and contract laborers, defined as persons induced or encouraged to come to this country by offers or promises of employment. The 1917 Act further provided for deportation of improperly admitted aliens, and authorized the promulgation of regulations to enforce the various provisions looking to exclusion of all persons except those qualified to enter the United States under the prescribed statutory standards. Pursuant to the broad terms of the 1917 and other supplementary Acts, a bureau of immigration and naturalization, now a part of the Department of Justice, has been established to examine the qualifications of those seeking admission and otherwise to enforce and administer the immigration laws in the interior and at the borders.[3]

The 1944 Farm Labor Act does not on its face purport to relax the standards of the 1917 and other Acts, except in a very limited way. It does not abolish the screening, administrative and enforcement function of the immigration authorities. Indeed the sponsor of the bill on the Senate floor explained that the measure proposed made certain, by provision for strict control of immigration and immigrants, that the stay of workers admitted pursuant to its provisions would be wholly temporary, and that "we" who sponsored the bill "are not in any way interfering with the firmly established national immigration policy." [4]

Section 5 (g) of the 1944 Act, relied on as wholly excepting agricultural laborers from the restrictions of the 1917 Act, is set out below.[5] It will be noted that this section

[3] 22 Stat. 214, 24 Stat. 415, 26 Stat. 1085, 28 Stat. 780, 32 Stat. 825, 828, 37 Stat. 736, 737, 54 Stat. 1238, 8 U. S. C. §§ 100–103.

[4] 90 Cong. Rec. 864 (1944).

[5] "In order to facilitate the employment by agricultural employers in the United States of native-born residents of North America, South America, and Central America, and the islands adjacent thereto, desir-

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does permit entrance of agricultural workers who, but for this Act, would not be admitted under the former law. The only exceptions from the long list of non-admissibles under the 1917 and other Acts are these: illiterates and those who have been induced to come into the country by

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ing to perform agricultural labor in the United States, during continuation of hostilities in the present war, any such resident desiring to enter the United States for that purpose shall be exempt from the payment of head tax required by section 2 of the Immigration Act of February 5, 1917, and from other admission charges, and shall be exempt from those excluding provisions of section 3 of such Act which relate to contract laborers, the requirements of literacy, and the payment of passage by corporations, foreign government, or others; and any such resident shall be admitted to perform agricultural labor in the United States for such time and under such conditions (but not including the exaction of bond to insure ultimate departure from the United States) as may be required by regulations prescribed by the Commissioner of Immigration and Naturalization with the approval of the Attorney General; and in the event such regulations require documentary evidence of the country of birth of any such resident which he is unable to furnish, such requirement may be waived by the admitting officer of the United States at the point where such resident seeks entry into the United States if such official has other proof satisfactory to him that such resident is a native of the country claimed as his birthplace. Each such resident shall be provided with an identification card (with his photograph and fingerprints) to be prescribed under such regulations which shall be in lieu of all other documentary requirements, including the registration at time of entry or after entry required by the Alien Registration Act of 1940. Any such resident admitted under the foregoing provisions who fails to maintain the status for which he was admitted or to depart from the United States in accordance with the terms of his admission shall be taken into custody under a warrant issued by the Attorney General at any time after entry and deported in accordance with section 20 of the Immigration Act of February 5, 1917. Sections 5 and 6 of such Act shall not apply to the importation of aliens under this title. No provision of this title shall authorize the admission into the United States of any enemy alien." § 5 (g) Farm Labor Supply Appropriation Act, 1944, 58 Stat. 11, 15–16, 50 U. S. C. App. Supp. V, 1355 (g).

promises of employment, or whose passage has been paid by corporations or other persons. By specifically lifting the immigration barriers in these respects, Congress left the barriers in effect which barred physical and mental defectives, those with certain diseases, etc. And even the exceptions granted were not unconditional, for under the 1944 Act agricultural laborers could still be admitted only "for such time and under such conditions . . . as may be required by regulations prescribed by the Commissioner of Immigration and Naturalization with the approval of the Attorney General . . . ."

In pursuance of their authority under this Act, the immigration authorities have promulgated regulations which provide in detail for the admission of agricultural laborers who are "in all respects admissible under the provisions of the immigration laws except" as to the particular limited provisions of the 1917 Act designated in the 1944 Act. 8 C. F. R. Cum. Supp. § 115.2 (c). And as shown by the Senate and House reports and hearings on the 1944 Act, a vast program was to be carried out to permit agricultural laborers to enter and to remain in the United States, but only for a limited time and under such conditions as conform with the immigration laws and regulations, and in accordance, so far as this case is concerned, with agreements made with the Government of Mexico.[6] Far from abolishing the responsibilities of the immigration authorities in examining and approving these persons at the border and supervising their stay, the 1944 Act, the treaty and the regulations, although changing those responsibilities in some respects, have actually increased them. Aliens must still make a lawful entry at the places designated for their examination, screening, and registration. Those

[6] See H. Rep. No. 246, 78th Cong., 1st Sess., 3, 4, 6 (1943); H. Rep. No. 358, 78th Cong., 1st Sess., 8 (1943); Sen. Rep. No. 157, 78th Cong., 1st Sess., 3, 4 (1943).

who do not meet the statutory standards of the 1917 Act, with the minor exceptions made in the 1944 Act, must be turned back. And those who are permitted to enter remain subject to supervision, control, and early deportation by immigration authorities.[7]

This brings us to the contention that Hoy cannot be prosecuted under § 5 of the 1917 Act because the 1944 Act provides that § 5 "shall not apply to the importation of aliens under this title." But Hoy was not charged with inducing or encouraging the Mexican aliens whom he wrote to come in "under this title." [8] He was allegedly inviting them to enter the country in disregard and defiance of "this title" and all other law. Thus he was specifically charged with inducing aliens to come into this country who were not entitled to enter under the 1917 Act or "under any other law of the United States, as . . . [he] then and there well knew." If this charge, as clarified by the bill of particulars, is true, he was urging aliens to come into this country without passing through the immigration stations, without regard to the length of their stay, or whether they were barred by reason of disease, physical weakness, or any of the other disqualifications set out in the 1917 and other laws or regulations.

The 1944 Act was intended to permit alien agricultural workers to enter the country for a limited time under Government rules and regulations after proper proofs to Government officials that the aliens were so qualified. It

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[7] For example, under the treaty with Mexico governing wartime immigration of these farm laborers our Government has the right to determine where in the United States workers are needed most and to send them there. Other provisions of the treaty require that 10% of each worker's wages be earmarked and returned for deposit in Mexico, and that their living and working conditions meet specified standards. These provisions require close supervision of the admitted aliens by immigration authorities. 56 Stat. 1759–1768; 57 Stat. 1152–1163.

[8] The phrase "this title" refers only to the "Farm Labor Supply Appropriation Act, 1944," § 5 (l), 58 Stat. 11, 17.

is true that the law was intended to fill the need for agricultural workers by removing the 1917 prohibition against would-be employers' inviting and inducing foreign workers to come to the United States. But we are not persuaded that the law, which provided specific limitations and requisites to entry under it, can properly be interpreted to authorize would-be employers to invite, induce and offer rewards to aliens to circumvent immigration processing and to enter the United States in disregard and defiance of law. The 1917 prohibition against employers inducing laborers to enter the country, enforceable by sanctions, removed obstacles which might hinder immigration authorities in the performance of their duties; we do not think the 1944 Act was intended to license employers to obstruct their performance. The information charged an offense and it should not have been dismissed.

Reversed.

LAND, CHAIRMAN, UNITED STATES MARITIME COMMISSION, ET AL. *v.* DOLLAR ET AL.

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

No. 207. Argued February 11, 12, 1947.—Decided April 7, 1947.

1. A steamship company being in financial straits, its stockholders (respondents here) entered into a contract with the Maritime Commission, pursuant to which they delivered their common stock, endorsed in blank, to the Commission, which released respondents from certain obligations, granted an operating subsidy and made a loan to the company, and obtained an additional loan for it from the Reconstruction Finance Corporation. After the company had fully paid all its indebtedness to the United States, respondents demanded the return of the stock, claiming that it had been pledged as collateral for a debt which had been paid. The Commission refused and offered the stock for sale. Respondents sued the individual members of the Commission (petitioners here) in a district court, praying that they be restrained from selling the stock and

directed to return it to respondents. The district court, on its own motion, dismissed the complaint with prejudice, holding that the suit was against the United States. *Held:* The district court had jurisdiction to determine its jurisdiction by proceeding to a decision on the merits. Pp. 734–739.

(a) The allegations of the complaint, if proved, would establish that petitioners are unlawfully withholding respondents' property under the claim that it belongs to the United States, since that conclusion would follow if either of respondents' contentions were established: (1) that the Commission had no authority to purchase the stock or acquire it outright; or (2) that, even though such authority existed, the contract resulted not in an outright transfer but in a pledge of the stock. Pp. 735–736.

(b) If the allegations of the complaint are true, the stock never was the property of the United States and is being wrongfully withheld by petitioners, who acted in excess of their authority as public officers and are answerable personally for their actions. *United States* v. *Lee*, 106 U. S. 196. Pp. 736–739.

(c) While a judgment on such a claim would not be *res judicata* against the United States because it cannot be made a party to the suit, the courts have jurisdiction to resolve the controversy between those who claim possession. *Id.* Pp. 736–737.

2. Pursuant to Rule 25 (d) of the Federal Rules of Civil Procedure, the Solicitor General moved to substitute as defendants the new members of the Commission for those who are no longer members. This Court added the new members as petitioners-defendants, and dismissed as to a deceased member, but reserved decision as to the other former members. *Held:* These questions not having been briefed or argued here and there being a possibility that the present record may not present all the facts necessary for disposition of the motions, the order of substitution is vacated, in order that the district court, on remand of the case, may pass on the motion unembarrassed by any action here. P. 739.

81 U. S. App. D. C. 28, 154 F. 2d 307, affirmed.

A District Court dismissed a suit against the individual members of the Maritime Commission on the ground that it was a suit against the United States. The United States Court of Appeals for the District of Columbia reversed. 81 U. S. App. D. C. 28, 154 F. 2d 307. This Court granted certiorari. 329 U. S. 700. *Affirmed*, p. 739.

Paul A. Sweeney argued the cause for petitioners. With him on the brief were *Acting Solicitor General Washington, Assistant Attorney General Sonnett, Melvin Richter, Ellis Lyons* and *Paul D. Page.*

Gregory A. Harrison argued the cause for respondents. With him on the brief were *Moses Lasky, Clinton M. Hester* and *M. M. Kearney.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Petitioners are present and former members of the United States Maritime Commission. Respondents are stockholders of Dollar Steamship Lines, Inc., Ltd. (Dollar of Delaware), whose corporate name was changed to American President Lines, Ltd., subsequent to the execution in 1938 of a contract out of which the present litigation arises. By 1937 Dollar of Delaware was in difficult financial straits. The problems confronting it and the various steps taken to remedy the situation need not be recapitulated here.[1] It is sufficient for purposes of the various questions presented by this case to say that the Commission and respondents entered into a contract in 1938 by which respondents delivered their common stock in Dollar of Delaware, endorsed in blank, to the Commission; and the Commission released some of respondents from certain obligations and agreed to grant Dollar of Delaware an operating subsidy and to make a loan to it and to obtain for it another loan from the Reconstruction Finance Corporation.

[1] The details of the difficulties, and the steps taken to remedy them are contained in two reports to Congress by the Commission: (1) Financial Readjustments in Dollar Steamship Lines, Inc., Ltd., dated February 17, 1938; (2) Reorganization of American President Lines, Ltd., dated April 10, 1939.

The subsidy was granted and the loans were made. By 1943 American President Lines, Ltd., had fully paid all indebtedness due the United States. Respondents thereupon demanded return of their shares of stock from the then members of the Commission, claiming that the shares had only been pledged as collateral for a debt which had been paid. The members of the Commission refused to surrender the shares, claiming that they had not been pledged under the 1938 contract but transferred outright. Acting on that theory the Commission had indeed offered the shares for sale and had under consideration substantial offers to purchase them.

Thereupon respondents instituted the present suit in the District Court for the District of Columbia, see 11 D. C. Code, §§ 301, 305, 306, claiming that petitioners were unlawfully in possession of respondents' stock and illegally withholding it. The prayer was that petitioners be restrained from selling the shares and be directed to return them to respondents. Respondents moved for a preliminary injunction. Petitioners submitted affidavits opposing the motion. After a hearing, the District Court on its own motion dismissed the complaint with prejudice, holding that the suit was against the United States. The Court of Appeals reversed. 81 U. S. App. D. C. 28, 154 F. 2d 307. The case is here on a petition for a writ of certiorari which we granted because of the importance of the question presented.[2]

First. The facts asserted in the affidavits support the view that the 1938 contract called for the outright transfer of the shares, not for their pledge. But we put the affidavits to one side for two reasons. In the first place, the function of the affidavits was to oppose the motion for a

[2] Although the judgment below was not a final one, we considered it appropriate for review because it involved an issue "fundamental to the further conduct of the case." *United States* v. *General Motors Corp.*, 323 U. S. 373, 377.

preliminary injunction. The case had not been submitted for decision on the merits. Issue, indeed, had not yet been joined. And the ruling of the District Court, as we read it, was based on the premise that since the Commission had the right to make the contract, the suit was against the United States.[3] Hence we do not think the District Court in fact relied on the affidavits in dismissing the complaint. In the second place, although as a general rule the District Court would have authority to consider questions of jurisdiction on the basis of affidavits as well as the pleadings,[4] this is the type of case where the question of jurisdiction is dependent on decision of the merits.

The allegations of the complaint, if proved, would establish that petitioners are unlawfully withholding respondents' property under the claim that it belongs to the United States. That conclusion would follow if either of respondents' contentions were established: (1) that the Commission had no authority to purchase the shares or acquire them outright; or (2) that, even though

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[3] The District Court said: ". . . I think . . . that the Commission had the legal right; and therefore I think it is inescapable that this is a suit against the United States and therefore that the complaint must be dismissed . . . ."

[4] In passing on a motion to dismiss because the complaint fails to state a cause of action, the facts set forth in the complaint are assumed to be true and affidavits and other evidence produced on application for a preliminary injunction may not be considered. *Polk Co.* v. *Glover,* 305 U. S. 5, 9; *Gibbs* v. *Buck,* 307 U. S. 66, 76. But when a question of the District Court's jurisdiction is raised, either by a party or by the court on its own motion, Judicial Code § 37, 28 U. S. C. § 80, Fed. R. Civ. P. 12 (b), the court may inquire, by affidavits or otherwise, into the facts as they exist. *Wetmore* v. *Rymer,* 169 U. S. 115, 120–121; *McNutt* v. *General Motors Corp.,* 298 U. S. 178, 184 *et seq.; KVOS, Inc.* v. *Associated Press,* 299 U. S. 269, 278. As stated in *Gibbs* v. *Buck, supra,* pp. 71–72, "As there is no statutory direction for procedure upon an issue of jurisdiction, the mode of its determination is left to the trial court."

such authority existed, the 1938 contract resulted not in an outright transfer but in a pledge of the shares.

If respondents are right in these contentions, their claim rests on their right under general law to recover possession of specific property wrongfully withheld. At common law their suit as pledgors to recover the pledged property on payment of the debt would sound in tort.[5]

If viewed in that posture, the case is very close to *United States* v. *Lee,* 106 U. S. 196. That was an action in ejectment to recover possession of a tract of land. The defendants were military officers who, acting under orders of the President, took possession of the land and converted one part into a fort and another into a cemetery. For the lawfulness of their possession they relied on a tax sale of the property to the United States. On the trial it was held that the claim of the plaintiffs to the land was valid and that the defendants were wrongfully in possession. The Court affirmed the judgment over the objection that the suit was one against the United States. It held that the assertion by officers of the Government of their authority to act did not foreclose judicial inquiry into the lawfulness of their action; that a determination of whether their "authority is rightfully assumed is the exercise of jurisdiction, and must lead to the decision of the merits of the question." P. 219. It further held that while such an adjudication is not *res judicata* against the United States because it cannot be made a party to the suit, the courts have jurisdiction to resolve the controversy between those who claim possession. And it concluded that an agent or officer of the United States who acts beyond his authority is answerable for his actions. And see *Philadelphia Co.* v. *Stimson,* 223 U. S. 605, 619–620; *Sloan Shipyards Corp.* v. *United States Fleet Corp.,* 258 U. S. 549, 567.

[5] Restatement of the Law of Torts, §§ 223, 237; 3 Street, Foundations of Legal Liability (1906), p. 160.

Where the right to possession or enjoyment of property under general law is in issue, and the defendants claim as officers or agents of the sovereign, the rule of *United States* v. *Lee, supra,* has been repeatedly approved. *Cunningham* v. *Macon & Brunswick R. Co.,* 109 U. S. 446, 452; *Tindal* v. *Wesley,* 167 U. S. 204; *Smith* v. *Reeves,* 178 U. S. 436, 439; *Scranton* v. *Wheeler,* 179 U. S. 141, 152–153; *Philadelphia Co.* v. *Stimson, supra,* pp. 619–620; *Goltra* v. *Weeks,* 271 U. S. 536, 545; *Ickes* v. *Fox,* 300 U. S. 82, 96; *Great Northern Life Ins. Co.* v. *Read,* 322 U. S. 47, 50–51. That rule is applicable here although we assume that record title to the shares is in the Commission. In *United States* v. *Lee, supra,* record title of the land was in the United States and its officers were in possession. The force of the decree in that case was to grant possession to the private claimant. Though the judgment was not *res judicata* against the United States, p. 222, it settled as between the parties the controversy over possession. Precisely the same will be true here, if we assume the allegations of the complaint are proved. For if we view the case in its posture before the District Court, petitioners, being members of the Commission, were in position to restore possession of the shares which they unlawfully held.

We do not trace the principle of *United States* v. *Lee, supra,* in its various ramifications. Cases on which petitioners rely are distinguishable. This is not an indirect attempt to collect a debt from the United States by preventing action of government officials which would alter or terminate the contractual obligation of the United States to pay money. See *Wells* v. *Roper,* 246 U. S. 335; *Mine Safety Co.* v. *Forrestal,* 326 U. S. 371. It is not an attempt to get specific performance of a contract to deliver property of the United States. *Goldberg* v. *Daniels,* 231 U. S. 218. It is not a case where the sovereign

admittedly has title to property and is sued by those who seek to compel a conveyance or to enjoin disposition of the property, the adverse claims being based on an allegedly superior equity or on rights arising under Acts of Congress. *Cunningham* v. *Macon & Brunswick R. Co., supra; Minnesota* v. *Hitchcock,* 185 U. S. 373; *Oregon* v. *Hitchcock,* 202 U. S. 60; *Naganab* v. *Hitchcock,* 202 U. S. 473; *Louisiana* v. *Garfield,* 211 U. S. 70; *Morrison* v. *Work,* 266 U. S. 481. And see *Stanley* v. *Schwalby,* 162 U. S. 255, 271–272.

We say the foregoing cases are distinguishable from the present one, though as a matter of logic it is not easy to reconcile all of them. But the rule is based on practical considerations reflected in the policy which forbids suits against the sovereign without its consent. The "essential nature and effect of the proceeding" may be such as to make plain that the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration. *Ex parte New York,* 256 U. S. 490, 500, 502. If so, the suit is one against the sovereign. *Mine Safety Co.* v. *Forrestal, supra,* p. 374. But public officials may become tort-feasors by exceeding the limits of their authority. And where they unlawfully seize or hold a citizen's realty or chattels, recoverable by appropriate action at law or in equity, he is not relegated to the Court of Claims to recover a money judgment. The dominant interest of the sovereign is then on the side of the victim who may bring his possessory action to reclaim that which is wrongfully withheld.

It is in the latter category that the pleadings have cast this case. That is to say, if the allegations of the petition are true, the shares of stock never were property of the United States and are being wrongfully withheld by petitioners who acted in excess of their authority as public officers. If ownership of the shares is in the United States, suit to recover them would of course be a suit against the

United States. But if it is decided on the merits either that the contract was illegal or that respondents are pledgors, they are entitled to possession of the shares as against petitioners, though, as we have said, the judgment would not be *res judicata* as against the United States. See *United States* v. *Lee, supra,* p. 222.

We intimate no opinion on the merits of the controversy. We only hold that the District Court has jurisdiction to determine its jurisdiction by proceeding to a decision on the merits.

Second. Motions were made by the Solicitor General to substitute as defendants the new members of the Commission for those who are no longer members.[6] We added the new members as petitioners-defendants, and dismissed as to a deceased member, but reserved decision as to the other former members. A majority of those joining in this opinion are of the view that it is more appropriate that both motions be considered by the District Court. The questions have not been briefed or argued here. Moreover, the present record may not present all the facts necessary for disposition of the motions. Accordingly, we vacate the order of substitution which we entered, so that the District Court may, on remand of the cause, pass on the motions unembarrassed by any action here.

The judgment of the Court of Appeals is

Affirmed.

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

MR. JUSTICE REED, concurring.

As I think this proceeding states a cause of action against the United States Maritime Commission, I do not

[6] See Fed. R. Civ. P. 25 (d); *Allen* v. *Regents,* 304 U. S. 439, 444–445.

agree with the manner of disposition. No damages are sought against the petitioners. Relief is sought that can only be obtained by an order directed against the Commission.

A contract between plaintiffs, Dollar et al., and the United States Maritime Commission, was attached to the complaint as an exhibit. The contract was not signed by any individual member of the Commission but by the Commission through its duly authorized special counsel. In the complaint, respondents alleged that they and their predecessors in interest "caused said shares of stock of the company to be transferred to the United States Maritime Commission." They further alleged that they made demand upon the "Maritime Commission for the return of said stock in July, 1945. This request was denied by the Maritime Commission in July, 1945." The ultimate result sought by the complaint was that the respondents "be directed and ordered by this court to return the plaintiffs' stock, now in the unlawful possession and custody of the defendants, to the plaintiffs, the lawful owners." Taken as a whole, I cannot read the complaint otherwise than as alleging that title and possession of this stock is now in the United States Maritime Commission. Although plaintiffs assert possession in the defendants, the other allegations and the attached contract show that defendants hold the stock by virtue of their official positions as members of the Commission. If the basic allegations were proven, the Commission would be shown to be in possession of the stock under a claim of right.

If that is the correct interpretation of the complaint, it follows of course that the Maritime Commission is an indispensable party to this proceeding. See *Commonwealth Trust Co.* v. *Smith*, 266 U. S. 152, 159. No matter how far beyond their statutory powers the members of the Commission may have acted in contracting with the

respondents or how illegal may be the retention of the certificates by the Commission under its claim of ownership through the contract, the transfer to the Commission, as alleged in the petition, put the title and possession of this property in the Maritime Commission and not in the petitioners as individuals. It may be that the Commission holds the stock wrongfully; but, if so, it can only be restored to the respondents by an act of the Commission. Under such circumstances, cases like *United States* v. *Lee,* 106 U. S. 196, are inapplicable. In the *Lee* case, an action in ejectment was brought to recover possession of land from officers of the United States who were wrongfully in possession of the land. That suit was not brought against the United States to compel the United States to retransfer title to the complainants or to quiet title in those who claimed against the United States. In *United States* v. *Lee,* the officer of the United States could be ejected from the real property involved without loss of title or right of possession to the United States. That is not the result in this case. A piece of paper, the stock certificate, will be taken from the hands of the Maritime Commission and placed in the hands of plaintiffs by a court decree, if plaintiffs are successful. If the decree is to be effective, it will require the individual defendants to transfer the certificates by endorsement of the name of the Maritime Commission or delivery, if the certificate is still in the name of the plaintiffs. The situation is as if the United States had been ordered by the decree in the *Lee* case to convey title to and possession of the property to Lee. Plaintiffs do not here seek damages for past acts of petitioners. Plaintiffs want property now in the possession of the Maritime Commission and to secure this relief, plaintiffs, I should think, must implead the Commission. Whether the Maritime Commission holds the property by title unchallenged by the plaintiffs or challenged by the plaintiffs

cannot, it seems to me, be determinative as to the necessity of making the Commission a party. See *Goldberg* v. *Daniels,* 231 U. S. 218.

Cases cited in the opinion of the Court as following the rule of *United States* v. *Lee* are not significant here. Two are similar cases of ejectment.[1] Other cases cited turn on liability of a sovereign to suits.[2] Still others are those which enjoin an officer from proceeding illegally.[3] In *Goltra* v. *Weeks,* 271 U. S. 536, 539, 549, there was a suit by a lessee to enjoin officers of the United States from taking possession of boats leased to the plaintiff by the Government and also to return the boats already taken. The prayer for a return of the property contained the possibility of the issue here raised but this Court treated the proceeding as one to enjoin a threatened trespass.

The present suit is for the return to the plaintiffs of property held by the Maritime Commission under a contract which the Dollar interests allege called for a return of the certificates to them on payment of a debt. Such a suit, it seems to me, is an effort to get possession of property actually in the possession of the Maritime Commission. This cannot be done without joining the Maritime Commission as a party defendant. See *Goldberg* v. *Daniels,* 231 U. S. 218; *Wells* v. *Roper,* 246 U. S. 335; *Morrison* v. *Work,* 266 U. S. 481, 487; *Mine Safety Co.* v. *Forrestal,* 326 U. S. 371.

As this appears to me as a suit against the Commission, I would affirm the judgment of the Court of Appeals, remanding this case to the District Court. There the ques-

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[1] *Tindal* v. *Wesley,* 167 U. S. 204; *Scranton* v. *Wheeler,* 179 U. S. 141.

[2] *Cunningham* v. *Macon & Brunswick R. Co.,* 109 U. S. 446; *Smith* v. *Reeves,* 178 U. S. 436; *Great Northern Ins. Co.* v. *Read,* 322 U. S. 47.

[3] *Ickes* v. *Fox,* 300 U. S. 82; *Philadelphia Co.* v. *Stimson,* 223 U. S. 605.

tions of the suability of the Commission [4] and the effect of the Administrative Procedure Act of June 11, 1946, could be considered. There the merits of the controversy could be decided.

BRUCE'S JUICES, INC. *v.* AMERICAN CAN CO.

CERTIORARI TO THE SUPREME COURT OF FLORIDA.

No. 27. Reargued November 14, 1946.—Decided April 7, 1947.

In a suit by a seller against a buyer on notes given for the accumulated balance remaining on a running account of sales and credits over a period of years, it is no defense that the seller had engaged in price discriminations against the buyer in violation of the Robinson-Patman Act, which prescribes criminal penalties and entitles injured persons to triple damages, but does not expressly make the contract of sale illegal or the purchase price uncollectible. Pp. 750–757.

155 Fla. 877, 22 So. 2d 461, affirmed.

The Supreme Court of Florida affirmed a judgment on certain notes for the unpaid balance of the purchase price of goods. 155 Fla. 877, 22 So. 2d 461. This Court granted certiorari, 326 U. S. 711, and affirmed the judgment below by an equally divided Court. 327 U. S. 758. It granted a rehearing and restored the cause to the docket for reargument before a full bench. 327 U. S. 812. *Affirmed,* p. 757.

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[4] Merchant Marine Act, 49 Stat. 1988, § 207, as amended, 52 Stat. 954, § 2:

"The Commission may enter into such contracts, upon behalf of the United States, and may make such disbursements as may, in its discretion, be necessary to carry on the activities authorized by this Act, or to protect, preserve, or improve the collateral held by the Commission to secure indebtedness, in the same manner that a private corporation may contract within the scope of the authority conferred by its charter." *Keifer & Keifer* v. *R. F. C.,* 306 U. S. 381.

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Cody Fowler and *Thurman Arnold* reargued the cause for petitioner. With them on the brief was *R. W. Shackleford.*

John Lord O'Brian reargued the cause for respondent. With him on the brief were *Leonard B. Smith, John M. Allison* and *Harry B. Terrell.*

Solicitor General McGrath, Assistant Attorney General Berge, Charles H. Weston, Philip Marcus and *Philip Elman* filed a brief for the United States, as *amicus curiae,* in support of petitioner.

MR. JUSTICE JACKSON delivered the opinion of the Court.

The federal question which survives proceedings in the Florida state courts is whether renewal notes representing the purchase price of goods sold and delivered are uncollectible if it is found that the vendor violated the Robinson-Patman Act, 49 Stat. 1526, 1528; 15 U. S. C. §§ 13, 13a.

Bruce is a canner and, over a period of years, bought its cans chiefly from The American Can Company. A debt accumulated which was put into promissory notes and on one or more occasions they were renewed, reduced by amounts which had been paid. Upon eventual default, two suits, later consolidated, were brought on renewal notes aggregating about $114,000. As to each note, Bruce pleaded in defense that "the consideration for said notes is illegal and said notes void and of no force and effect." This was said to be for the reason that the Can Company had sold to others at prices which discriminated against Bruce and thereby violated the Robinson-Patman Act.

The alleged discrimination chiefly relied upon consisted of quantity discounts. Annual purchases by Bruce

were about $350,000. Some other canners bought much larger quantities. The Can Company's contract with all its customers allowed a discount of 1% on annual purchases of $500,000, and nothing to those whose purchases were less than that. It was so graduated as to give a maximum discount of 5% to a customer whose purchases were $7,000,000 a year. The consequence is that relatively small packers pay 5% more for their cans than their largest competitors.

It is claimed that this advantage to quantity buyers renders the quantity discount *per se* a violation of the Robinson-Patman Act. To sustain the defense in this case it would be necessary to so hold. It is not denied that Bruce got the same discounts as other purchasers of like quantities when it qualified, and in one year Bruce was in the $500,000 bracket and received the 1% discount. It is not claimed that the Can Company failed to give discounts where earned under this uniform contract, or that discounts were given where not so earned. Bruce received the same discounts as others within its classification and it is not questioned that had it been a purchaser of larger quantities it would have been allowed the same discount as other purchasers of that class.

Before a court could sustain the defense in this particular case, it would also have to overcome other difficulties of law and fact. The Act does not prohibit all quantity discounts but expressly permits them under certain conditions. It indicates, too, that the Federal Trade Commission is the appropriate tribunal to hear in the first instance the complicated issues growing out of grievances against a quantity discount practice of a seller. 49 Stat. 1526; 15 U. S. C. § 13 (a). Quantity discounts are among the oldest, most widely employed and best known of discount practices. They are common in retail trade, wholesale trade, and manufacturer-jobber relations. They are common in regulated as well as unregulated

price structures. Congress refused to declare flatly that they are illegal. They become illegal only under certain conditions and when they are illegal it is as much a violation to accept or receive as to allow them. Bruce, in one of the years included in its balance of account, purchased more than a half million dollars of cans on which it received precisely the kind and amount of discount it now asserts to be illegal.

The argument is made that such a remedy as Bruce seeks here would support the anti-monopoly policy of Congress. But Bruce is not complaining of the high price of cans. Bruce complains of a lower price for cans to others—which would enable competitors to put their products on the market cheaper. This may well put Bruce to some disadvantage, but it does not follow that Congress would forbid the savings of large-scale mass production to be passed along to consumers. The economic effects on competition of such discounts are for the Trade Commission to judge. Until the Commission has determined the question, courts are not given guidance as to what the public interest does require concerning the harm or benefit of these quantity discounts on the ultimate public interests sought to be protected in the Act. It would be a far-reaching decision to outlaw all quantity discounts. Courts should not rush in where Congress feared to tread.

Because of a more fundamental defect in petitioner's case, however, the Court does not find it necessary to consider the effect of these features of the Act on this case, as would be necessary before a conclusion could be reached that petitioner should win on the merits. On the questions of fact, considerable evidence was taken at pre-trial hearings and the parties are in dispute as to whether the decision thereon was a final judgment and, if so, as to whether the defense was not also adjudicated to be insufficient on the facts. Although the record is unsatisfactory,

we take it that all of the sales evidenced by the notes were made after the passing of the Robinson-Patman Act. It appears, however, that the notes are not identified with any particular sale but represent a balance remaining on a running account of sales and credits in many of which a claim of discrimination might not be supportable. The indebtedness they supplant is conceded to have been incurred before February, 1940. The purchases covered at least a four-year period and involved two types of cans. The purchase price which Bruce asks us to excuse it from paying is not identified either as to type of can or date of transaction. But petitioner contends that it is not necessary in proving a discrimination to show that others received a different discount on the same type of can at approximately the same time "because the scheme of discount by aggregate dollar volume of annual sales comprehends all cans bought whatever their size or price." To sustain this position would mean that a sale to a competitor of large cans in 1940 at a higher discount invalidated a sale of small cans to petitioner in 1936 so that petitioner need not pay the contract price for cans delivered that year. The contention is simply that if some purchasers got larger discounts on any bill for cans than petitioner got, the bill against petitioner and notes in settlement and extension of it are uncollectible.

However, for the purposes of this decision, in view of the uncertain nature of the proceedings below, we assume, but do not decide, that the defense on the facts has been or could be established as pleaded. We do not decide whether the quantity discount plan, whatever the facts were, violated the Robinson-Patman Act. The sole question we decide is whether notes given for purchases are unenforceable if the quantity discount plan violates the Act. Petitioner suggests that the Court may take two paths to the answer, but that the answer will be yes. The

broad ground petitioner offers is "that a transaction unlawful under the Robinson-Patman Act constitutes criminal conduct upon which no money judgment can be based." Petitioner also offers a narrow ground on which we can yet decide in its favor. "But, if it be admitted that the buyer [sic] is entitled to the fair value of the goods," petitioner says, respondent probably already has been paid the fair value of all the cans bought in 1936–40. When that value has been determined by the trial court, it urges, it will be found that the amount in notes is substantially equivalent to the amount of discrimination in discount.[1]

In effect, petitioner is treating the $114,000 in notes as representing the discount it claims it should have gotten on its 1937–42 purchases of $2,000,000. This alternative argument is that petitioner is liable only for the fair value of all the cans it bought, and in this suit it asks the courts to determine what that fair value was. But the fact is that as to the transactions for which petitioner paid $2,000,000 it has already paid the agreed price. Those transactions cannot be identified with particularity, but they were paid for at respondent's prices. Petitioner did not allege and does not contend that the notes represent specific transactions or that the sales for which they were given could be identified. Mr. Bruce conceded in his testimony that the notes simply represent a balance of an account which mingled the prices of individual transac-

[1] On petitioner's first theory, clearly no recovery on *quantum meruit* could be had. The general rule is that a transaction wholly illegal will not support such a suit. See Williston, Contracts (Rev. ed., 1938) § 1786A; Restatement, Contracts, § 598, Comment *c*. And on Bruce's second theory, because of the leniency with which respondent extended credit, it would be impossible for respondent to show which cans the notes represent and it would of course be unable to establish their fair value. If we hold the notes uncollectible, therefore, respondent could not recover on *quantum meruit*, and Bruce would get a windfall.

tions.[2] In its brief here, petitioner's only response to respondent's statement that "None of the original notes . . . had been tied to a particular transaction" is that "The record shows that all of the notes are tied to the entire series of transactions." There may be substantial equivalence numerically in the amount of the notes and the amount of alleged discrimination, but it cannot be said that the notes represent the separate item of price discrimination.[3]

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[2] His testimony on this point follows:

"Q. Mr. Bruce, do the notes evidence the purchase price of any particular size of cans you purchased from the American Can Co.?

A. There is nothing on the face of the notes that shows what size they were.

Q. During that period you purchased a certain size can?

A. It was purchased during a certain period.

Q. Did you run a separate account on the grocery can and on the soft drink can, or small and large?

A. No sir.

Q. The notes themselves simply represent that account, irrespective of the size of the cans?

A. Yes sir, the blanket way.

Q. In a blanket way. In other words there was no distinction made in your account between the large and small cans, I mean in the indebtedness?

A. Not while the notes were accruing.

Q. In other words the notes in question are for the purchase price of both large and small cans?

A. That is right."

[3] If the notes are considered alternatively as representing respondent's price due on the latest purchases to that amount in late 1939 and early 1940, petitioner, on its theory, would be entitled to be excused payment of only about 5% of the $114,000, because it is defending on the ground that it ought not to pay the allegedly discriminatory part of the price. But even for this limited purpose, it cannot be established what cans the $114,000 represents, so the court could not determine their fair value.

In *Penn-Allen Cement Co.* v. *Phillips & Southerland,* 182 N. C. 437, 109 S. E. 257, the specific sales were identified and the price unpaid.

The Act prescribes sanctions, and it does not make uncollectibility of the purchase price one of them. Violation of the Act is made criminal and upon conviction a violator may be fined or imprisoned. 49 Stat. 1528, 15 U. S. C. § 13a. Any person who is injured in his business or property by reason of anything forbidden therein may sue and recover threefold the damages by him sustained and the costs of suit, including a reasonable attorney's fee. 38 Stat. 731, 15 U. S. C. § 15. This triple damage provision to redress private injury and the criminal proceedings to vindicate the public interest are the only sanctions provided by Congress.

It is contended that we should act judicially to add a sanction not provided by Congress by declaring the purchase price of goods uncollectible where the vendor has violated the Act. It may be admitted as argued that such a sanction would be an effective enforcement provision. Addressed to Congress, this argument might be persuasive, but the very fact that it would obviously be an effective sanction makes it even more significant that

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The court there held only that the buyer should be excused payment of the discriminatory part of the contract price. But the opinion was given after the court had decided that the appeal was prematurely taken.

The defendant had counterclaimed for treble damages, computed on the basis of the alleged overcharge. The plaintiff urged that treble damages could not be recovered in an action for the purchase price but that the defendant must pay first, and then sue on that claim. The court said simply, "This matter also has not been passed upon by the court below, and there is nothing for us to consider." 182 N. C. at 441, 109 S. E. at 259. But if the court was right in holding that plaintiff could not recover the overcharge, it would necessarily follow that the counterclaim should have been dismissed. For without paying the overcharge, the defendant would have had no basis on which to rest its claim that it had been damaged in that amount and therefore entitled to treble compensation.

the Act made no provision for it; that no committee dealing with the Robinson-Patman Act proposed it; that not one word suggesting its consideration appears in the debates of Congress; no proponent of the Act pointed out in its favor that it would be self-enforcing because of this sanction; and no opponent pointed with alarm to the consequences of such a drastic sanction on the commerce of the nation. On the contrary, a proposed provision of the Act, passed only by the Senate which later receded, shows that Congress gave consideration to no sanction more extreme than to compel the remission of the excess charged. See S. 3154, § 2 (d), 74th Cong., 1st Sess., S. Rep. No. 1502, 74th Cong., 2d Sess., p. 8: Conference Rep., H. Rep. No. 2951, 74th Cong., 2d Sess., p. 8. Congress declined to adopt this relatively moderate provision and at no time does it appear that either house of Congress wanted to go so far as to permit a buyer to get goods for nothing.

Where the interests of individuals or private groups or those who bear a special relation to the prohibition of a statute are identical with the public interest in having a statute enforced, it is not uncommon to permit them to invoke sanctions. This stimulates one set of private interest to combat transgressions by another without resort to governmental enforcement agencies. Such remedies have the advantage of putting back of such statutes a strong and reliable motive for enforcement, which relieves the Government of cost of enforcement. Such private remedies lose, of course, whatever advantage there may be in the presumed disinterested, public interest standards and expertness of a governmental agency which has the initiative control of retributory measures. It is clear Congress intended to use private self-interest as a means of enforcement and to arm injured persons with private means to retribution when it gave to any injured

party a private cause of action in which his damages are to be made good threefold, with costs of suit and reasonable attorney's fee.

Bruce, it appears, already has undertaken the triple damage suit remedy against the Can Company. *Bruce's Juices, Inc.* v. *American Can Co.*, No. 569, Civ. T., S. D. Fla., 1942. To indicate its need that the Court establish this additional remedy unauthorized by Congress, it seeks to discredit and belittle both of the remedies Congress has expressly authorized. It says, "The triple damage suit is likely to prove protracted and expensive; damages caused by a disadvantageous competitive position are so speculative as to be usually unprovable. Nor can the buyer rely for protection upon the action of the government. The Department of Justice or the Federal Trade Commission may never get around to the matter." It is a little dubious whether the sort of remedy which has been in litigation over four years in this case which Bruce asks us to reverse and send back again, is an antidote for "protracted and expensive" triple damage suits. Moreover, if Bruce can in this suit prove that the prices respondent charged were illegal, as it must in order to win, it can do the same in a triple damage suit. The damages sustained because of discrimination are no more "speculative" nor "unprovable" in one suit than in the other, and their establishment in the statutory form of action carries a bonus.

Annexation of the proposed defense to the statute by implication either as an inference of unexpressed intention of Congress or as the result of some doctrine of common law, would be justified only if it would be at least a rational, nondiscriminatory and appropriate means of making the policy of the statute effective. To allow a buyer to get his goods for nothing because the seller violated the Act by giving someone else a greater discount, does not meet this test.

It would seem that one test of the rationality and appropriateness of such a defense because of a violation of the Act would be that the reparation it permits should be measured at least roughly by the extent of the injury caused by the violation. This, of course, is the principle of the suit for triple damages. But that is not the principle of the defense here urged. The extent of its indemnity is not measured by injury, and not measured by the dealings affected with the alleged violation. It is measured solely by the amount of credit the buyer obtained from the seller. The seller would lose the amount carried in notes or in open account. Had Bruce's delinquency been greater, so would its gain; had there been no credit asked or given the buyer could have had no remedy by way of defense. The obvious consequence would be to discourage vendors from extending credit where the operation of this rather difficult statute is in doubt. Since the danger of loss under the proposed remedy is greatest in the case of small buyers who get small discounts, the consequence would be to deny the small buyers credit and trust only those who, having the largest discounts, would be least likely to defend on a claim of violation. This result would hardly comport with the argument, so much dwelt upon by petitioner, that its status is that of a small business concern trying to battle a business giant. But we cannot suppose that "little fellows" are always buyers and only giants sell goods. Bruce itself is a seller of canned goods and if its trade practices include quantity discounts, this "little" canner might be on the other side of the same issue trying to collect against a small wholesaler who had less discount than a larger one. To decide issues of law on the size of the person who gets advantage or claims disadvantage is treacherous.

This construction which would make a grant of credit a point of vulnerability could be avoided only by holding that the whole purchase price, not merely that involved

in the credit, is uncollectible and recoverable even if voluntarily paid. In that case, the volume of the transaction, rather than the volume of the credit extended, would measure the loss a seller might suffer from violating the Act.

But, of course, if the discount system of the Can Company makes all of the Bruce purchases illegal and the price thereof recoverable, all sales to others under the discount system must be similarly tainted. It is hard to see how any of the Can Company's sales are valid if these to Bruce are void on the theory advanced. If this view is taken, certainly the remedy would soon end illegal quantity business discounts—by ending the business. We do not believe Congress has contemplated so deadly a remedy or has left the way open to us by judicial edict to dislocate business as such a holding would do. It must not be forgotten that such a decision would have retroactive effect for several years and unsettle many accounts. We cannot justify a judicial declaration to this effect.

But if only a few cases are to be unsettled—those, say, in positions similar to Bruce's—what becomes of the policy of nondiscrimination? Other canners who have paid cash find themselves competing with Bruce who is absolved from paying for a very large part of its cans—something like one-third of its annual dollar volume being involved in this case. In other words, as penalty for establishing a uniform one to five percent discount, the Can Company would be obliged to give Bruce something over a 30% discount on one year, or about 5% on all purchases shown by the evidence ever to have been made.

It is urged that holdings under the Sherman Antitrust Act supply an analogy for allowing this defense under the Robinson-Patman Act. The former provides, among other things, that every contract in restraint of trade or commerce "is hereby declared to be illegal." 26 Stat. 209,

50 Stat. 693, 15 U. S. C. § 1. This Court has held that where a suit is based upon an agreement to which both defendant and plaintiff are parties, and which has as its object and effect accomplishment of illegal ends which would be consummated by the judgment sought, the Court will entertain the defense that the contract in suit is illegal under the express provision of that statute. *Continental Wall Paper Co.* v. *Louis Voight and Sons Co.*, 212 U. S. 227. *Cf. Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U. S. 173. But when the contract sued upon is not intrinsically illegal, the Court has refused to allow property to be obtained under a contract of sale without enforcing the duty to pay for it because of violations of the Sherman Act not inhering in the particular contract in suit and has reaffirmed the "doctrine that 'where a statute creates a new offense and denounces the penalty, or gives a new right and declares the remedy, the punishment or the remedy can be only that which the statute prescribes.' " *D. R. Wilder Mfg. Co.* v. *Corn Products Refining Co.*, 236 U. S. 165, 174–175; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540.

Moreover, no single sale can violate the Robinson-Patman Act. At least two transactions must take place in order to constitute a discrimination. Thus, a contract may be made today which has no legal defect under the Robinson-Patman Act. A week later, another sale may be made at a different price or at a different discount, and the latter taken into consideration with the former may establish a discrimination. Whether a sale would be rendered void only because of simultaneous discrimination or preexisting ones, or whether a contract valid when made becomes void by reason of later transactions, and, if so, how much later, are questions we need not decide now. It is plain that the violation, if there was one, is not inherent in the contract sued upon, whether it be the notes or the sale of the goods, but can only be found in different trans-

actions which a party to the litigation had with third persons who are not parties. No such defense has been approved under the Sherman Act, and, furthermore, these characteristics show that the entire basis for judging under the two Acts is different and that the case law as to the Sherman Act does not fit the Robinson-Patman Act.

None the less, we are urged to supply judicially the sanction of invalidating obligations to pay for goods sold and delivered because, it is said, otherwise the courts become parties to the enforcement of a discrimination. If, in order to prove his own case, a plaintiff proves his violation of law, then no court will aid the plaintiff to recover.[4] Here, however, what the plaintiff must show is the notes which import consideration. If consideration is denied, he can prove that cans were sold and delivered at a stated price. That is no violation of law. It is only when the Court goes outside of the dealings between plaintiff and defendant and it is proved that the same kind of cans were sold to others at different prices within a relevant period of time, amounting to a discrimination—a fact unnecessary to sustain the plaintiff's cause of action—that the basis of the defense asserted here appears. The Court does not give its approval to transactions between one of the litigants and a third party just because it holds them irrelevant in this litigation.

The defendant's claim to be freed of the obligation to pay his promissory note because the payee, as vendor of cans, made sales to others that when compared with sales

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[4] In *McMullen* v. *Hoffman,* 174 U. S. 639, for example, the Court refused to enforce a partnership contract which was based on an illegal and fraudulent agreement to submit collusive bids for public construction. The plaintiff argued that the partnership contract itself did not disclose any illegality, but even that was questionable. The Court, moreover, held that the agreement to be partners could not be separated from the general collusive agreement which gave rise to it Agreements with third persons, not parties to the suit, however, were not relied upon by Court or litigants.

to itself may be held unlawfully discriminatory, cannot be supported as resting on any congressional word or policy. Not only was this remedy not named by Congress, but it would be surprising if it had been, in view of the remedies Congress did give. We have assumed for the purposes of this case that petitioner could establish that the prices respondent charged were discriminatory so that they violated the Act. But if petitioner can show that, clearly it would be entitled to recover in a triple damage suit supported by the same evidence. For despite petitioner's plaint on the difficulty of proving damages, it would establish its right to recover three times the discriminatory difference without proving more than the illegality of the prices. If the prices are illegally discriminatory, petitioner has been damaged, in the absence of extraordinary circumstances, at least in the amount of that discrimination. No reason suggests itself why Congress should have intended a remedy by which the victim of discrimination could recover by defense only one-third of what he could recover, on the same proof, by offense. The inducement of thrice the damages suffered may bring the sufferer to aid in enforcement of the statute. To assure his help, however, it would hardly be thought appropriate to offer him the choice of taking only one-third that amount. Since the remedy embodied in petitioner's second theory would be but a weak one-third shadow of the one Congress expressly gave, we cannot see the need for judicial reduplication in miniature. We hold that federal law does not support the defense alleged and the judgment of the Florida Supreme Court is

Affirmed.

MR. JUSTICE MURPHY, dissenting.

The issue in this case is whether sellers of goods should be allowed to use the courts to collect price differentials which have been made illegal by Congress in the Robinson-

Patman Act. The Court approaches but never quite meets that issue. But the unmistakable effect of the Court's decision is to permit the recovery of discriminatory prices despite the plain language and policy of the Act and despite the lessening of competition that might thereby result. I remain unconvinced, however, that such a result is consistent with the high ideals of our judicial system or that it is made necessary by any rule of law or policy.

Section 3 of the Act makes it unlawful for any person to be a party to any sale which discriminates, to his knowledge, against competitors of a purchaser by granting to that purchaser "any discount, rebate, allowance, or advertising service charge" not available to the competitors in respect of a sale of goods of like grade, quality and quantity. 15 U. S. C. § 13a. Section 2 (a) of the Clayton Act, as amended by the Robinson-Patman Act, makes it unlawful for any person "to discriminate in price between different purchasers of commodities of like grade and quality" where the result is to lessen competition or to tend to create a monopoly. 15 U. S. C. § 13 (a). It is in light of these statutory provisions that we must examine the opinion of the Court.

1. The Court proceeds on the basic assumption, unsupported by the record or by petitioner's contentions, that the petitioner is seeking to avoid all liability for the cans sold to it by the respondent. No such assumption is justified. Petitioner's brief, it is true, suggests two alternative theories in support of its position: (1) a transaction unlawful under the Robinson-Patman Act constitutes criminal action upon which no money judgment can be based; (2) discriminatory prices over and above the fair value of the goods cannot be collected by the seller. But petitioner does not pursue the first alternative, pointing out that only the second and narrower alternative is presented by the record. Thus the only contention really

before us is that promissory notes cannot be collected by legal action to the extent that they represent a price differential outlawed by Congress. As petitioner notes, this contention "does not require the Court to decide that the entire transaction is so tainted with illegality that the seller cannot collect even the fair value of the goods, thus giving the buyer a windfall." If the petitioner were to prevail in this case and the promissory notes were to be declared unenforceable, respondent would still be free to recover on a *quantum meruit* basis if it has not already so recovered. See *Penn-Allen Cement Co.* v. *Phillips & Southerland,* 182 N. C. 437, 109 S. E. 257.

Moreover, there is a strong indication that petitioner already may have paid the respondent the fair value of the cans. Since the passage of the Robinson-Patman Act, petitioner has had a continuing account with the respondent; under that account, petitioner paid respondent more than $2,000,000 for cans during the period from 1937 to 1942. When this suit was instituted, petitioner owed a balance of $114,000 on this account, represented by the promissory notes in issue here. To deny enforceability to those notes might thus affect only the discriminatory price differential, which the Court assumes violated the Robinson-Patman Act.

It also appears that the quantity discounts in issue were based upon the aggregate dollar value of annual sales rather than upon individual transactions. The discriminatory differentials had a like basis. Hence it is enough if petitioner can prove that the $114,000 in notes represents an illegal differential from this over-all standpoint.

The Court states, however, that the transactions represented by the $114,000 cannot be identified and that this figure cannot be said to reflect the separate item of price discrimination. But such sentiments are necessarily premature in the present posture of the case; petitioner

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has not yet had a full opportunity to present all its evidence or to try to connect the notes with a discriminatory differential. Petitioner concededly has the burden of proving that the $114,000 in notes does represent the discriminatory part of the purchase price, whether in relation to specific transactions or to the aggregate dollar volume of annual sales. If it cannot so prove, its case collapses. The important and the only point now is that petitioner should be given the chance to prove this defense. We should not shut the court's door in petitioner's face before it has had that chance. Nor should we prejudice that defense by holding or intimating that proof is impossible. Certainly the right to offer and prove a defense is not to be denied because a court thinks that the purported defense has not yet been proved. It is one thing to raise a defense; it is quite another to prove it. Since we are concerned here only with the first proposition, it is beside the point whether the defense has been or can be proved.

We may thus dismiss as unwarranted the Court's fear that petitioner is going to get something for nothing if its contention is sustained. It is pleading only for the right to defend against the collection of that which Congress has declared illegal.

2. Equally irrelevant is the Court's inquiry into whether Congress "wanted to go so far as to permit a buyer to get goods for nothing" where the Robinson-Patman Act has been violated. In the case before us, the only relevant inquiry is whether the Robinson-Patman Act was designed to allow sellers to recover illegal price differentials through court action. A determination that the Act precludes such a recovery does not involve a finding that the framers of the Act desired these sellers to forfeit all the value of the products on which they placed an illegal price differential. It involves simply a finding

that the language and policy of the Act frown upon the use of the courts to effectuate what Congress clearly made illegal.

3. The Court thinks it significant that the Robinson-Patman Act makes no provision for a buyer interposing the vendor's violation of the Act as a defense to a suit by the vendor. It is said that the triple damage actions and the criminal proceedings are the exclusive sanctions provided by Congress for the enforcement of the Act.

This overlooks the fact, however, that a specific statutory provision is unnecessary to make an illegal contract unenforceable in the courts. Where a contract is outlawed by statute or is otherwise contrary to public policy, the illegality may be set up as a defense to a suit for enforcement despite the absence of a legislative recognition of that defense. Otherwise the courts would become parties to the illegality by sanctioning the enforcement of the unlawful agreements. *McMullen* v. *Hoffman,* 174 U. S. 639, 669–670. This principle has been applied many times by this Court. At an early date it was recognized that, despite the absence of a provision in the Sherman Act authorizing a defense of illegality in a private suit on a contract, such a defense might be used, that "any one sued upon a contract may set up as a defence that it is a violation of the act of Congress, and if found to be so, that fact will constitute a good defence to the action." *Bement* v. *National Harrow Co.,* 186 U. S. 70, 88. *Continental Wall Paper Co.* v. *Voight & Sons Co.,* 212 U. S. 227. Similarly, without specific statutory permission, private litigants have been allowed to invoke the policy of the antitrust laws so as to limit the scope of patent rights. *Mercoid Corp.* v. *Mid-Continent Co.,* 320 U. S. 661; *Sola Electric Co.* v. *Jefferson Electric Co.,* 317 U. S. 173; *B. B. Chemical Co.* v. *Ellis,* 314 U. S. 495; *Morton Salt Co.* v. *Suppiger Co.,* 314 U. S. 488; *Katzinger*

Co. v. *Chicago Mfg. Co.*, 329 U. S. 394; *MacGregor* v. *Westinghouse Co.*, 329 U. S. 402.

And so when a contract or promissory note is tainted with a violation of the Robinson-Patman Act, its enforcement should be refused by a court, at least to the extent of the illegality involved. The failure of Congress to mention such a sanction slips into insignificance in the light of precedents in analogous situations.

4. The Court holds, however, that the Robinson-Patman Act invalidates discrimination rather than contracts of sale at discount and that the analogy of denying the enforcement of contracts violative of other antitrust laws is imperfect.

But such a holding misconceives the very nature of the Robinson-Patman Act and the evils at which it was directed. No one contends that the Act makes illegal all contracts of sale at a discount. Nor does any one deny that an illegal discrimination becomes apparent only after there have been two or more sales. As the Court states, a contract may be made today which has no legal defect under the Robinson-Patman Act. But once there are two or more sales and once there has been illegal discrimination, the illegality may reach back to the first transaction, which was free of all defects when made. That is inherent in the very nature of discrimination and it should not surprise us to discover that fact. Discrimination may thus become evident in contracts, promissory notes, open accounts and other forms of indebtedness. And it may put in a tangible appearance when a subsequent suit is brought to recover, among other things, what has proved to be an illegal price differential. To deny effect to that discrimination in a suit by the vendor does not require that a court hold void the entire transaction and permit the buyer to retain the goods free of any charge. It requires only that the court refuse to permit the recovery of that part of the

purchase price which discriminates against the buyer who purchased the same kind and quality of goods as his competitors.

Thus that part of a contract of sale permitting a certain discount may be or become illegal if the purchaser's competitors are given larger discounts. Such is the whole tenor and policy of the Robinson-Patman Act. And collection of the discriminatory differential falls squarely within the area of illegality defined by the statute. Indeed, the Act is shorn of much of its meaning if the vendor is permitted to recover the fruits of his unlawful conduct. Courts should not be used for that purpose any more than they should be used to sanction recovery on contracts made wholly void by the Sherman Act. In the one case, courts are asked to give judgment for an unlawful price differential; in the other, they are asked to enforce a monopolistic agreement. In both cases, the answer should be a strong negative. The Acts are part and parcel of the same legislative policy, the Robinson-Patman Act merely elaborating some of the more subtle and refined monopolistic practices which Congress desired to eliminate. Courts should treat them accordingly.

It is no answer to say, as the Court does, that we must go outside the transaction in issue in order to give effect to a defense of unlawful discrimination. Of course that must be done, for discrimination is a relative matter depending upon the vendor's transactions with third parties. But such an inquiry must be made by a court in suits for triple damages under the Robinson-Patman Act. *American Can Co.* v. *Ladoga Canning Co.*, 44 F. 2d 763. And an inquiry of that type must frequently be made in private suits where defenses are made under the Sherman Act. Discriminations and monopolies rarely if ever appear on the face of documents which are introduced for purposes of securing a recovery in a court of law. Judges con-

stantly must look beyond the particular documents in issue. Surely, if it be assumed that a particular discount is unlawful, no factor of inconvenience or burden in looking at other transactions can justify ignoring the illegality and permitting an unwarranted recovery. And to insist that recovery must be allowed if the plaintiff shows no violation of law in proving the amount due on a promissory note is to hark back to medieval concepts of pleading and practice. The Robinson-Patman Act deals with complex economic realities. Litigants and judges must act accordingly when the Act is properly brought into issue by a defendant. If the policy of the Act is to be respected, the transaction before the court must be judged on the basis of other dealings by the vendor despite the superficial perfection of the vendor's pleadings and proof.

Nor is recovery to be denied because only part of the illegality may be in issue. Courts must strike down illegality wherever it appears. Statutory violations are not to be countenanced merely because the violator seeks to reap only part of his illegal harvest at a time.

5. The Court intimates, without actually deciding, that courts should not allow this type of defense to be raised until the Federal Trade Commission has determined the economic effects of quantity discounts on competition. The fear is expressed that without the Commission's guidance, courts might strike down all quantity discounts and create untold retroactive liabilities.

The short answer is that we should be reluctant to assume that judges are unable to comprehend the Robinson-Patman Act and the standards it sets up in regard to quantity discounts. It may be granted that the Federal Trade Commission has more technical knowledge and experience in dealing with the complexities of this problem than most courts; and the Commission's judgment would be of inestimable value to any judge called upon to deal

with quantity discounts. But in the absence of some action by the Commission, courts must act as best they can within the framework provided by Congress. The Act, 15 U. S. C. § 13 (a), specifically recognizes that quantity discounts are illegal only where they lessen or injure competition or tend to create a monopoly; and where price differentials are justified by differences in costs of manufacture, sale or delivery, the discounts are permissible. This matter is a complex one, but it is no more complex than many other problems which face the courts.

The only alternative to the Court's apparent position in this respect is for judges to sit idly by and allow sellers to collect illegal price differentials—a function that hardly qualifies as an ideal toward which we should strive. Indeed, if the Court's conception of the judicial function in suits of this nature is to be carried to its logical conclusion, judges would abdicate all their duties under the Robinson-Patman Act whenever the Federal Trade Commission has failed to express an opinion on the subject in issue. They would refuse to entertain treble damage suits and would dismiss all criminal indictments brought on the basis of an alleged violation of the Act. It seems to me, however, that the judicial process has more vigor and responsibility than the Court seems willing to imply in this case.

6. Finally, the Court indicates that the fact that petitioner is a small business concern is a treacherous basis for deciding issues of law. As a general proposition, there can be no dispute with that attitude. But we must not blind ourselves to the equally important fact that the antitrust laws, of which the Robinson-Patman Act is an integral part, are designed primarily to aid the small business concerns and to curb the growth of giant monopolies. Many years ago this Court had occasion to point out that trade and commerce may be "badly and unfortunately re-

strained by driving out of business the small dealers and worthy men whose lives have been spent therein, and who might be unable to readjust themselves to their altered surroundings. Mere reduction in the price of the commodity dealt in might be dearly paid for by the ruin of such a class, and the absorption of control over one commodity by an all-powerful combination of capital." *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290, 323. The same observation applies to this case. The Robinson-Patman Act was designed in large part to protect the small business concerns, Congress realizing the disastrous effects of their being the victims of discriminatory prices. A proper treatment of the Act demands appreciation of this purpose.

We should pause long before sanctioning the recovery of discriminatory prices which Congress has found inimical to the nation's welfare. We should be on guard against the use of the judicial process to augment the subtle destruction of small business contrary to the legislative will, and the erosion of the barriers which Congress has erected against the flood-tide of monopoly. To that end, therefore, we should reverse the judgment below and allow courts to give full effect to the Robinson-Patman Act.

MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS and MR. JUSTICE RUTLEDGE join in this dissent.

BETHLEHEM STEEL CO. ET AL. *v.* NEW YORK STATE LABOR RELATIONS BOARD.

NO. 55. APPEAL FROM THE COURT OF APPEALS OF NEW YORK.*

Argued December 16, 17, 1946.—Decided April 7, 1947.

Where the National Labor Relations Board had asserted general jurisdiction over unions of foremen employed by industries subject to the National Labor Relations Act but had refused to certify such unions as collective bargaining representatives on the ground that to do so at the time would obstruct rather than further effectuation of the purposes of the Act, certification of such unions by the New York State Labor Relations Board under a State Act similar to the National Act *held* invalid as in conflict with the National Labor Relations Act and the Commerce Clause of the Federal Constitution. Pp. 771–777.

295 N. Y. 601, 607, 64 N. E. 2d 350, 352, reversed.

No. 55. A New York state court issued an order to enforce a subpoena *duces tecum* issued by the New York State Labor Relations Board in a proceeding for the certification as a collective bargaining representative under the New York State Labor Relations Act of a union of foremen of an employer whose business was predominantly interstate. 9 C. C. H. Labor Cases (1945) ¶ 62, 611. The Appellate Division of the Supreme Court of New York affirmed. 269 App. Div. 805, 56 N. Y. S. 2d 195. The New York Court of Appeals affirmed. 295 N. Y. 601, 664, 64 N. E. 2d 350, 65 N. E. 2d 54. On appeal to this Court, *reversed*, p. 777.

No. 76. A New York state court dismissed a suit by an employer whose business was predominantly interstate for a declaratory judgment decreeing that the New York

*Together with No. 76, *Allegheny Ludlum Steel Corp.* v. *Kelley et al.*, appeal from the Supreme Court of New York for Chautauqua County.

State Labor Relations Board was without jurisdiction to determine representation of its foremen and enjoining the Board from ordering the employer to bargain collectively with their union. 184 Misc. 47, 49 N. Y. S. 2d 762. The Appellate Division of the Supreme Court of New York affirmed. 269 App. Div. 805, 56 N. Y. S. 2d 196. The Court of Appeals of New York affirmed. 295 N. Y. 607, 64 N. E. 2d 352. On appeal to this Court, *reversed and remanded*, p. 777.

Bruce Bromley argued the cause for appellants in No. 55. With him on the brief were *Daniel J. Kenefick, John H. Morse* and *Lyman M. Bass.*

John G. Buchanan argued the cause for appellant in No. 76. With him on the brief were *William J. Kyle, Jr., Stanley A. McCaskey, Jr.* and *John G. Buchanan, Jr.*

William E. Grady, Jr. argued the cause for appellees. With him on the brief was *Philip Feldblum.*

By special leave of Court, *Robert L. Stern* argued the cause for the United States, as *amicus curiae,* urging reversal. With him on the brief were *Acting Solicitor General Washington, Gerhard P. Van Arkel, Morris P. Glushien* and *Mozart G. Ratner.*

Mr. Justice Jackson delivered the opinion of the Court.

These appeals challenge the validity of the Labor Relations Act of the State of New York as applied to appellants to permit unionization of their foremen. Conflict is asserted between it and the National Labor Relations Act and hence with the Commerce Clause of the Constitution.

After enactment by Congress of the National Labor Relations Act, July 5, 1935, 49 Stat. 449, 29 U. S. C. § 151, *et seq.,* New York adopted a State Labor Relations Act

following the federal pattern. Laws of New York, 1937, Chap. 443, 30 McKinney's Consolidated Laws of New York, §§ 700–716. In the administrative boards they create, the procedures they establish, the unfair labor practices prohibited, the two statutes may be taken for present purposes to be the same. But in provision for determination of units of representation for bargaining purposes, the two Acts are not identical. Their differences may be made plain by setting forth § 9 (b) of the Federal Act, with that part which is omitted from the State Act in brackets and additions made by the State Act as amended, Laws of New York, 1942, Chap. 518, in italics:

> "The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization [and] to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, *multiple employer unit,* craft unit, plant unit, or [subdivision thereof] *any other unit; provided, however, that in any case where the majority of employees of a particular craft shall so decide the board shall designate such craft as a unit appropriate for the purpose of collective bargaining.*"

The procedures prescribed for the two boards for investigation, certification, and hearing on representation units and for their election are substantially the same except that the State law adds the following limitation not found in the Federal Act: ". . . provided, however, that the board shall not have authority to investigate any question or controversy between individuals or groups within the same labor organization or between labor organizations affiliated with the same parent labor organization." Laws of New York, 1937, Chap. 443, as amended, Laws 1942, Chap. 518, 30 McKinney's Consolidated Laws of New York, § 705.3.

The two boards have at times pursued inconsistent policies in applying their respective Acts to petitions of foremen as a class to organize bargaining units thereunder. The State Board has in these cases recognized that right; the National Board for a time recognized it. *Union Collieries Coal Co.*, 41 N. L. R. B. 961; *Godchaux Sugars, Inc.*, 44 N. L. R. B. 874. Later, there was a period when, for policy reasons but without renouncing jurisdiction, it refused to approve foremen organization units. *Maryland Drydock Co.*, 49 N. L. R. B. 733; *Boeing Aircraft Co.*, 51 N. L. R. B. 67; *General Motors Corp.*, 51 N. L. R. B. 457. Now, again, it supports their right to unionize. *Packard Motor Car Co.*, 61 N. L. R. B. 4, 64 N. L. R. B. 1212; *L. A. Young Spring & Wire Corp.*, 65 N. L. R. B. 298. The foremen of these appellants, at a time when their desire to organize was frustrated by the policy of the National Board, filed applications with the State Board. It entertained their petitions and its policy permitted them as a class to become a bargaining unit. Both employers, by different methods adequate under State law to raise the question, challenged the constitutionality of the State Act as so applied to them. Their contentions ultimately were considered and rejected by the New York Court of Appeals and its decisions sustaining state power over the matter were brought here by appeals.

Both of these labor controversies arose in manufacturing plants located in New York where the companies employ large staffs of foremen to supervise a much larger force of labor. But both concerns have such a relation to interstate commerce that, for the reasons stated in *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, federal power reaches their labor relations. On this basis the National Board has exercised power to certify bargaining agents for units of employees

other than foremen of both companies. *Matter of Allegheny Ludlum Steel Corporation,* Case No. III–R–411, N. L. R. B., June 29, 1942; *Matter of Bethlehem Steel Corp. and C. I. O.,* 30 N. L. R. B. 1006, 32 N. L. R. B. 264, 1941 (production and maintenance employees); *Matter of Bethlehem Steel Corp. and A. F. of L.,* 47 N. L. R. B. 1330, 1943 (plant protection employees); *Matter of Bethlehem Steel Corporation and C. I. O.,* 52 N. L. R. B. 1217, 1943 (employees in order department); *Matter of Bethlehem Steel Co. and A. F. of L.,* 55 N. L. R. B. 658, 1944 (fire department employees). The companies contend that the National Board's jurisdiction over their labor relations is exclusive of state power; the State contends on the contrary that while federal power over the subject is paramount, it is not exclusive and in such a case as we have here, until the federal power is actually exercised as to the particular employees, State power may be exercised.

At the time the courts of the State of New York were considering this issue, the question whether the Federal Act would authorize or permit unionization of foremen was in controversy and was unsettled until our decision in *Packard Motor Car Co.* v. *N. L. R. B.,* 330 U. S. 485. Whatever constitutional issue may have been presented by earlier phases of the evolution of the federal policy in relation to that of the State, the question now is whether, Congress having undertaken to deal with the relationship between these companies and their foremen, the State is prevented from doing so. Congress has not seen fit to lay down even the most general of guides to construction of the Act, as it sometimes does, by saying that its regulation either shall or shall not exclude state action. *Cf.* Securities Act of 1933, § 18, 48 Stat. 85, 15 U. S. C. § 77r; Securities Exchange Act of 1934, § 28, 48 Stat. 903, 15 U. S. C. § 78bb; United States Warehouse

Act, § 29, before and after 1931 amendment, 39 Stat. 490, 46 Stat. 1465, 7 U. S. C. § 269. Our question is primarily one of the construction to be put on the Federal Act. It long has been the rule that exclusion of state action may be implied from the nature of the legislation and the subject matter although express declaration of such result is wanting. *Napier* v. *Atlantic Coast Line R. Co.*, 272 U. S. 605.

In determining whether exclusion of state power will or will not be implied, we well may consider the respective relation of federal and state power to the general subject matter as illustrated by the case in hand. These companies are authorized to do business in New York State, they operate large manufacturing plants in that state, they draw their labor supply from its residents, and the impact of industrial strife in their plants is immediately felt by state police, welfare and other departments. Their labor relations are primarily of interest to the state, are within its competence legally and practically to regulate, and until recently were left entirely to state control. Thus, the subject matter is not so "intimately blended and intertwined with responsibilities of the national government" that its nature alone raises an inference of exclusion. *Cf. Hines* v. *Davidowitz,* 312 U. S. 52, 66.

Indeed, the subject matter is one reachable, and one which Congress has reached, under the federal commerce power, not because it is interstate commerce but because under the doctrine given classic expression in the *Shreveport* case, Congress can reach admittedly local and intrastate activities "having such a close and substantial relation to interstate traffic that the control is essential or appropriate to the security of that traffic, to the efficiency of the interstate service, and to the maintenance of conditions under which interstate commerce may be conducted upon fair terms and without molestation or hindrance."

Houston & Texas Ry. v. *United States,* 234 U. S. 342, 351. See also *National Labor Relations Board* v. *Fainblatt,* 306 U. S. 601.

In the National Labor Relations Act, Congress has sought to reach some aspects of the employer-employee relation out of which such interferences arise. It has dealt with the subject or relationship but partially, and has left outside of the scope of its delegation other closely related matters. Where it leaves the employer-employee relation free of regulation in some aspects, it implies that in such matters federal policy is indifferent, and since it is indifferent to what the individual of his own volition may do we can only assume it to be equally indifferent to what he may do under the compulsion of the state. Such was the situation in *Allen-Bradley Local* v. *Board,* 315 U. S. 740, where we held that employee and union conduct over which no direct or delegated federal power was exerted by the National Labor Relations Act is left open to regulation by the state. However, the power of the state may not so deal with matters left to its control as to stand "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hill* v. *Florida,* 325 U. S. 538, 542. *Cf. Maurer* v. *Hamilton,* 309 U. S. 598. When Congress has outlined its policy in rather general and inclusive terms and delegated determination of their specific application to an administrative tribunal, the mere fact of delegation of power to deal with the general matter, without agency action, might preclude any state action if it is clear that Congress has intended no regulation except its own. *Oregon-Washington Co.* v. *Washington,* 270 U. S. 87. In other cases, Congress has passed statutes which initiate regulation of certain activities, but where effective regulation must wait upon the issuance of rules by an administrative body. In the interval before those rules are established,

this Court has usually held that the police power of the state may be exercised. *Northwestern Bell Telephone Co.* v. *Nebraska State Commission,* 297 U. S. 471; *Welch Co.* v. *New Hampshire,* 306 U. S. 79. But when federal administration has made comprehensive regulations effectively governing the subject matter of the statute, the Court has said that a state regulation in the field of the statute is invalid even though that particular phase of the subject has not been taken up by the federal agency. *Napier* v. *Atlantic Coast Line R. Co.,* 272 U. S. 605. However, when federal administrative regulation has been slight under a statute which potentially allows minute and multitudinous regulation of its subject, *cf. Atlantic Coast Line R. Co.* v. *Georgia,* 234 U. S. 280, or even where extensive regulations have been made, if the measure in question relates to what may be considered a separable or distinct segment of the matter covered by the federal statute and the federal agency has not acted on that segment, the case will be treated in a manner similar to cases in which the effectiveness of federal supervision awaits federal administrative regulation, *Northwestern Bell Telephone Co.* v. *Nebraska State Commission, supra; Welch Co.* v. *New Hampshire, supra.* The states are in those cases permitted to use their police power in the interval. *Terminal Railroad Assn.* v. *Brotherhood of Railroad Trainmen,* 318 U. S. 1. However, the conclusion must be otherwise where failure of the federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute. *Napier* v. *Atlantic Coast Line,* 272 U. S. 605; compare *Oregon-Washington Co.* v. *Washington,* 270 U. S. 87, with *Parker* v. *Brown,* 317 U. S. 341; *cf. Mintz* v. *Baldwin,* 289 U. S. 346.

It is clear that the failure of the National Labor Relations Board to entertain foremen's petitions was of the

latter class. There was no administrative concession that the nature of these appellants' business put their employees beyond reach of federal authority. The Board several times entertained similar proceedings by other employees whose right rested on the same words of Congress. Neither did the National Board ever deny its own jurisdiction over petitions because they were by foremen. *Soss Manufacturing Co.*, 56 N. L. R. B. 348. It made clear that its refusal to designate foremen's bargaining units was a determination and an exercise of its discretion to determine that such units were not appropriate for bargaining purposes. *Maryland Drydock Co.*, 49 N. L. R. B. 733. We cannot, therefore, deal with this as a case where federal power has been delegated but lies dormant and unexercised.

Comparison of the State and Federal statutes will show that both governments have laid hold of the same relationship for regulation, and it involves the same employers and the same employees. Each has delegated to an administrative authority a wide discretion in applying this plan of regulation to specific cases, and they are governed by somewhat different standards. Thus, if both laws are upheld, two administrative bodies are asserting a discretionary control over the same subject matter, conducting hearings, supervising elections and determining appropriate units for bargaining in the same plant. They might come out with the same determination, or they might come out with conflicting ones as they have in the past. *Cf. Matter of Creamery Package Mfg. Co.*, 34 N. L. R. B. 108; Wisc. Emp. Rel. Bd. Case III, No. 348 E–117. But the power to decide a matter can hardly be made dependent on the way it is decided. As said by Mr. Justice Holmes for the Court, "When Congress has taken the particular subject-matter in hand coincidence is as ineffective as opposi-

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tion . . . ." *Charleston R. Co.* v. *Varnville Co.*, 237 U. S. 597, 604. See also *Southern Railway Co.* v. *Railroad Commission of Indiana*, 236 U. S. 439, 448; *Missouri Pacific R. R.* v. *Porter*, 273 U. S. 341, 345–6. If the two boards attempt to exercise a concurrent jurisdiction to decide the appropriate unit of representation, action by one necessarily denies the discretion of the other. The second to act either must follow the first, which would make its action useless and vain, or depart from it, which would produce a mischievous conflict. The State argues for a rule that would enable it to act until the federal board had acted in the same case. But we do not think that a case by case test of federal supremacy is permissible here. The federal board has jurisdiction of the industry in which these particular employers are engaged and has asserted control of their labor relations in general. It asserts, and rightfully so, under our decision in the *Packard* case, *supra*, its power to decide whether these foremen may constitute themselves a bargaining unit. We do not believe this leaves room for the operation of the state authority asserted.

The National and State Boards have made a commendable effort to avoid conflict in this overlapping state of the statutes. We find nothing in their negotiations, however, which affects either the construction of the federal statute or the question of constitutional power insofar as they are involved in this case, since the National Board made no concession or delegation of power to deal with this subject. The election of the National Board to decline jurisdiction in certain types of cases, for budgetary or other reasons presents a different problem which we do not now decide.

We therefore conclude that it is beyond the power of New York State to apply its policy to these appellants as

attempted herein. The judgments appealed from are reversed and the causes remanded for further proceedings not inconsistent herewith.

Reversed.

Separate opinion of MR. JUSTICE FRANKFURTER, in which MR. JUSTICE MURPHY and MR. JUSTICE RUTLEDGE join.

The legal issue in these cases derives from our decision in *Packard Motor Car Co.* v. *National Labor Relations Board,* 330 U. S. 485. The Court there held that foremen are "employees" within § 2 (3) of the National Labor Relations Act, 49 Stat. 449, 450, and as such are entitled to the rights of self-organization under the Act. As the *Packard* case points out, the exercise of this authority over foremen has had a chequered history before the National Labor Relations Board. There was a period when the Board in the exercise of its discretion denied resort to its authority by foremen seeking collective bargaining representation. During that period, foremen of the two petitioning steel companies invoked the jurisdiction of the New York State Labor Board to certify them as a bargaining unit under the New York law descriptively characterized as a "Little Wagner Act" because it enforces the same policies by the same means as does the Wagner Act. The State Board assumed jurisdiction and the New York Court of Appeals sustained that assumption. Our problem is whether the National Labor Relations Act in its entirety—the law as Congress gave it to the National Board for administration—precluded this exercise of State authority.

If the Court merely held that, having given the National Board jurisdiction over foremen Congress also gave it discretion to determine that it may be undesirable, as a matter of industrial relations, to compel recognition of foremen's unions; that the Board had so exercised its discretion

and, by refusing to sanction foremen's unions, had determined that foremen in enterprises like those before us could not exact union recognition; that therefore New York could not oppose such federal action by a contrary policy of its own, I should concur in the Court's decision, whatever the differences of interpretation to which the course of events before the National Board may lend itself. But the Court's opinion does not, as I read it, have that restricted scope, based on the individual circumstances before us. Apart from the suggestion that the National Board's declination of jurisdiction "in certain types of cases, for budgetary or other reasons" might leave room for the State in those situations, the Court's opinion carries at least overtones of meaning that, regardless of the consent of the National Board, New York is excluded from enforcing rights of collective bargaining in all industries within its borders as to which Congress has granted opportunity to invoke the authority of the National Board.

The inability of the National Board to exercise its dormant powers because of lack of funds ought not to furnish a more persuasive reason for finding that concurrent State power may function than a deliberate exercise of judgment by the National Board that industrial relations having both national and state concern can most effectively be promoted by an appropriate division of administrative resources between the National and the State Boards. This states abstractly a very practical situation. Based on the realization that as a practical matter the National Board could not effectuate the policies of the Act committed to it over the whole range of its authority, an arrangement was worked out whereby the National Board leaves to the State Board jurisdiction over so-called local industries covered by the federal Act, while the State Board does not entertain matters over which the National Board has consistently taken jurisdiction. This practical Federal-State working arrangement, arrived at by those

carrying the responsibility for breathing life into the bare bones of legislation, is so relevant to the solution of the legal issues arising out of State-Nation industrial interaction, that I have set forth the agreement in full in an Appendix. Particularly when dealing with legal aspects of industrial relations is it important for courts not to isolate legal issues from their workaday context. I cannot join the Court's opinion because I read it to mean that it is beyond the power of the National Board to agree with State agencies enforcing laws like the Wagner Act to divide, with due regard to local interests, the domain over which Congress had given the National Board abstract discretion but which, practically, cannot be covered by it alone. If such cooperative agreements between State and National Boards are barred because the power which Congress has granted to the National Board ousted or superseded State authority, I am unable to see how State authority can revive because Congress has seen fit to put the Board on short rations.

Since we are dealing with aspects of commerce between the States that are not legally outside State action by virtue of the Commerce Clause itself, New York has authority to act so long as Congress has not interdicted her action. While what the State does she does on sufferance, in ascertaining whether Congress has allowed State action we are not to consider the matter as though Congress were conferring a mere bounty, the extent of which must be viewed with a thrifty eye. When construing federal legislation that deals with matters that also lie within the authority, because within the proper interests, of the States, we must be mindful that we are part of the delicate process of adjusting the interacting areas of National and State authority over commerce. The inevitable extension of federal authority over economic enterprise has absorbed the authority that was previously left to the States. But in legislating, Congress is not indulging in doctrinaire,

hard-and-fast curtailment of the State powers reflecting special State interests. Federal legislation of this character must be construed with due regard to accommodation between the assertions of new federal authority and the functions of the individual States, as reflecting the historic and persistent concerns of our dual system of government. Since Congress can, if it chooses, entirely displace the States to the full extent of the far-reaching Commerce Clause, Congress needs no help from generous judicial implications to achieve the supersession of State authority. To construe federal legislation so as not needlessly to forbid preexisting State authority is to respect our federal system. Any indulgence in construction should be in favor of the States, because Congress can speak with drastic clarity whenever it chooses to assure full federal authority, completely displacing the States.

This is an old problem and the considerations involved in its solution are commonplace. But results not always harmonious have from time to time been drawn from the same precepts. In law also the emphasis makes the song. It may make a decisive difference what view judges have of the place of the States in our national life when they come to apply the governing principle that for an Act of Congress completely to displace a State law "the repugnance or conflict should be direct and positive, so that the two acts could not be reconciled or consistently stand together." *Sinnot* v. *Davenport*, 22 How. 227, 243. Congress can speak so unequivocally as to leave no doubt. But real controversies arise only when Congress has left the matter in doubt, and then the result depends on whether we require that actual conflict between State and federal action be shown, or whether argumentative conflict suffices.

Our general problem was only recently canvassed in the three opinions in *Hill* v. *Florida*, 325 U. S. 538. But the

frequent recurrence of the problem and the respective legislative and judicial share in its proper solution justify some repetition. It may be helpful to recall the circumspection with which federal absorption of authority previously belonging to the States was observed in the control of railroad rates.

In the *Minnesota Rate Cases,* 230 U. S. 352, this Court, after elaborate argument and extended consideration, held that State rates covering intrastate transportation could not be stricken down judicially even though it may be shown that such rates adversely affect carriers in their interstate aspects. This decision was based largely on the respect to be accorded to the respective functions of State and national authority, as evinced by Congressional and judicial history. But a year later, the Court held that when the Interstate Commerce Commission found that State regulation of local rates was designed to operate discriminatorily against related interstate commerce, the Interstate Commerce Act authorized removal of the discrimination against the interstate rates. *Houston, East and West R. Co.* v. *United States,* 234 U. S. 342. Nevertheless, so important did this Court deem respect for State power that it would not allow the *Shreveport* doctrine to be loosely used as a curtailment of State authority. Accordingly, it insisted on precision and definiteness in the orders of the Interstate Commerce Commission in this interacting area. *Illinois Central R. Co.* v. *State Public Utilities Commission,* 245 U. S. 493. Subsequently, by the Transportation Act of 1920, Congress formalized the *Shreveport* doctrine and extended its scope. The Commission was expressly authorized to correct State rates that were unreasonable with reference to related interstate rates, and was also given control over State rates which adversely affected interstate commerce as such. See § 13, par. 4 of the Interstate Commerce Act, as amended by

§§ 416 and 422 of the Transportation Act of 1920, 41 Stat. 456, 484, 488; *Wisconsin Railroad Commission* v. *C. B. & Q. R. R. Co.*, 257 U. S. 563; *New York* v. *United States*, 257 U. S. 591. It is not without significance that in exercising this new power Congress associated with the Interstate Commerce Commission the appropriate State agencies in an advisory capacity. Even where foreign commerce is involved, as to which State control is naturally viewed with less favor, this Court has not ruled out State authority derived from a State interest where State regulation was found to be complementary to federal regulation. *Union Brokerage Co.* v. *Jensen*, 322 U. S. 202, 208–09.

No doubt, as indicated, cases have not always dealt with such scrupulous regard for State action where Congress has not patently terminated it. Metaphor—"occupied the field"—has at times done service for close analysis. But the rules of accommodation that have been most consistently professed as well as the dominant current of decisions make for and not against the *modus vivendi* achieved by the two agencies in the labor relations field, which the Government, as *amicus curiae*, here sponsored. Such an arrangement assures the effectuation of the policies which underlie both the National Labor Relations Act and the "Little Wagner Act" of New York in a manner agreed upon by the two Boards for dealing with matters affecting interests of common concern. "Where the Government has provided for collaboration the courts should not find conflict." *Union Brokerage Co.* v. *Jensen*, 322 U. S. 202, 209.

What is before us is a very real and practical situation. The vast range of jurisdiction which the National Labor Relations Act has conferred upon the Board raises problems of administration wholly apart from available funds. As a result of this Court's decision in *National Labor Relations Board* v. *Fainblatt*, 306 U. S. 601, untold

small enterprises are subject to the power of the Board. While labor difficulties in these units in the aggregate may unquestionably have serious repercussions upon interstate commerce, in their individualized aspects they are equally the concern of their respective localities. Accordingly, the National Labor Relations Board, instead of viewing the attempt of State agencies to enforce the principles of collective bargaining as an encroachment upon national authority, regards the aid of the State agencies as an effective means of accomplishing a common end. Of course, as Mr. Justice Holmes said, "When Congress has taken the particular subject-matter in hand coincidence is as ineffective as opposition" to save the State law. But surely this is so only when the State seeks "to enforce a state policy differently conceived . . . ." *Charleston & Western Carolina R. R. Co.* v. *Varnville Furniture Company,* 237 U. S. 597, 604.

The National Board's business explains the reason and supports the reasonableness behind its desire to share burdens that may be the State's concern no less than the Nation's. The Board's Annual Reports show increasing arrears. At the end of the fiscal year 1944, 2602 cases were pending; at the end of 1945, 3244; at the end of 1946, there were 4605 unfinished cases. A shrewd critic has thus expressed the considerations that in the past have often lain below the surface of merely doctrinal applications: "Formally the enterprise is one of the interpretation of the Act of Congress to discover its scope. Actually it is often the enterprise of reaching a judgment whether the situation is so adequately handled by national prescription that the impediment of further state requirements is to be deemed a bane rather than a blessing." T. R. Powell, *Current Conflicts Between the Commerce Clause and State Police Power,* 12 Minn. L. Rev. 607. In the submission by the Board before us, we have the most authorita-

tive manifestation by national authority that State collaboration would be a blessing rather than a bane, and yet judicial construction would forbid the aid which the agency of Congress seeks in carrying out its duty. It is surely a responsible inference that the the result will be to leave uncontrolled large areas of industrial conflict. Neither what Congress has said in the National Labor Relations Act, nor the structure of the Act, nor its policy, nor its actual operation, should be found to prohibit the Board from exercising its discretion so as to enlist the aid of agencies charged with like duties within the States in enforcing a common policy by a distribution of cases appropriate to respective State and National interests.

APPENDIX.

Documents Indicating Understanding Between the New York and the National Labor Relations Boards

NEW YORK STATE LABOR RELATIONS BOARD
250 West 57th Street
NEW YORK 19

WILLIAM E. GRADY, Jr.
General Counsel

JULY 10, 1945.

ALVIN J. ROCKWELL, Esquire
General Counsel,
National Labor Relations Board,
Washington, D. C.

DEAR MR. ROCKWELL: The Board has examined your memorandum of our conference of April 20, 1945 and considers that it represents a fair statement of the proceedings.

As to insurance companies (page 6 of your memo), you will recall that we mentioned our prior experience with

such companies and the fact that units of less than statewide scope have been established and upheld by the courts. In such cases, therefore, we think it would be to the benefit of both Boards that you clear with us. A situation may very easily arise in which you would prefer to have us entertain a petition which had been filed with us.

Best regards.

Sincerely,

/s/ WILLIAM E. GRADY, Jr.

NATIONAL LABOR RELATIONS BOARD,
Washington 25, D. C., July 26, 1945.

WILLIAM E. GRADY, Jr.,
General Counsel,
New York State Labor Relations Board,
250 West 57th Street,
New York City 19, N. Y.

DEAR MR. GRADY: In Mr. Rockwell's absence on vacation this week, I am replying to your letter of July 10.

Mr. Rockwell's memorandum of our conference of April 20 and your letter were discussed with and approved by the Members of the Board.

We are, accordingly, circulating copies of this memorandum to the members of our staffs in the Buffalo and New York City offices. This memorandum and your letter will hereafter be followed as a guide in relations between the two Boards as regards cases arising in New York State.

Sincerely yours,

/s/ Oscar S. Smith
OSCAR S. SMITH,
Director of Field Division.

MEMORANDUM RE CONFERENCE BETWEEN REPRESENTATIVES OF NEW YORK STATE LABOR RELATIONS BOARD AND NATIONAL LABOR RELATIONS BOARD, HELD FRIDAY, APRIL 20, 1945

A conference was held at the offices of the New York State Labor Relations Board on Friday, April 20, 1945, attended by Father Kelley, Chairman, and Board Members Goldberg and Lorenz, Executive Secretary Goldberg, General Counsel Grady, and Associate General Counsel Feldblum, of the New York State Labor Relations Board, and by Field Director Smith, New York Regional Director Howard LeBaron, General Counsel Rockwell, and New York Regional Attorney Perl, of the National Labor Relations Board. The subject of the conference was the proper division of jurisdiction between the National and State Boards.

This conference followed an earlier conference held on January 9, 1945, in Washington, between Messrs. Smith and Rockwell and Buffalo Regional Director Ryder, representing the NLRB, and Messrs. Goldberg and Feldblum, representing the New York Board. At the conference in Washington, the principal subject discussed was the action of the State Board in entertaining election petitions involving the employees of large interstate manufacturing establishments over which the National Board has customarily asserted jurisdiction. The cases in question related to petitions filed by labor organizations which sought to be certified as representatives of units of supervisory employees or, in one case, a labor organization which sought to represent non-supervisory employees but whose membership was composed of a substantial number of supervisors. At the time of the January conference, the Board's decision in the *Packard* case, 61 N. L. R. B., No. 3, had not been issued; it appeared that in certifying a labor organization for supervisory employees the State

Board was taking action contrary to that which would have been taken by the National Board had the petition been filed with it. It was also believed that the action of the State Board in proceeding to a certification of a labor organization for non-supervisory employees whose membership included supervisors in substantial number might be contrary to the National Board's disposition of the case under its decision in *Matter of Rochester & Pittsburgh Coal Co.*, 56 N. L. R. B. 1760. No understanding was reached with regard to these types of cases at the January conference. In the meantime, on March 26, 1945, the Board issued its decision in the *Packard* case, holding that it would proceed to certify unaffiliated unions as representative of supervisory employees and leaving open the question of whether it would proceed to certify affiliated unions as such representatives. The New York conference was arranged in order to discuss the types of cases which were the subject of the January conference and also to canvass in general the question of the respective jurisdictions of the two Boards.

The New York conference began with consideration of Father Boland's letter to Mr. Madden dated July 12, 1937, which has constituted the principal basis of understanding between the two Boards during the ensuing years. The Boland letter states:

> Unless there are unusual circumstances, the New York State Labor Relations Board will assume jurisdiction over all cases arising in the following trades and industries, without clearing, except as a matter of record, with the National Board's officials:
>
> 1. Retail stores,
>
> 2. Small industries which receive all or practically all raw materials from within the State of New York, and do not ship any material proportion of their product outside the State,
>
> 3. Service trades (such as laundries),

4. Office and residential buildings,
5. Small and clearly local public utilities, (This includes local traction companies, as well as gas and electric light corporations.)
6. Storage warehouses,
7. Construction operations,
8. Other obviously local businesses.

A copy of the letter of July 12, 1937, is attached to this memorandum.

At the time of the preparation of the letter of July 12 and the conference which preceded it and upon which it is based, there was relatively little case law as to the jurisdiction under the commerce clause of the National Board under the National Act. Since that time there has been a large number of decisions in the federal circuit courts of appeals and several in the Supreme Court which have substantially extended the Board's jurisdiction beyond that which was understood to exist in July 1937. To take only one pertinent example: In July 1937 the Board had not asserted jurisdiction over retail establishments. Since 1937 the Board has accepted a considerable number of cases involving retail establishments such as department stores and the Board's power in this respect has been sustained by the courts. Notwithstanding this extension of jurisdiction under the National Act, the National and State Boards, respectively, have, in general, followed the understanding reflected by the letter of July 12, 1937. Thus, in New York State the National Board has not asserted jurisdiction over retail establishments. The representatives at the conference of April 20 expressed the view that, by and large, the understanding had worked out well as applied to the types of businesses there dealt with. The position was repeatedly expressed by the representatives of both National and State Boards that as a working matter the jurisdiction between the two Boards must be allotted on the basis of the type of indus-

try or business involved (rather, for example, than on the basis of which Board a petition or charge is initially filed with), and that when one Board, pursuant to common understanding, has asserted jurisdiction in the past over a particular employer, the other Board should thereafter refer any matters coming to it to the Board which had entertained the earlier case or cases.[1]

Following reference to the letter of July 12, there was detailed discussion of the eight categories there listed, which are quoted above. The gist of this discussion was as follows: *Retail stores.* Where the same company operates retail stores and also does a substantial interstate mail order business from within New York State, representatives of the National Board pointed out that probably the National Act should be applied to the company. The understanding was reached that before the State Board asserted jurisdiction in the future over any such companies, the case would be cleared with the National Board through the New York City or Buffalo offices, depending upon the region in which the case arose. *Service trades.* Where a New York concern is in the business of furnishing guards, window washers, laundry, or some other type of service within the State, it was felt that the business is essentially local in character and should be subject to the State Act even though the services are

[1] In *Consolidated Edison Co.* v. *N. L. R. B.*, 305 U. S. 197, 223, the Supreme Court indicated that in deciding whether or not to assert jurisdiction the National Board could properly take into account the existence of State protective legislation, such as the New York State Labor Relations Act.

The National Act contains no provision authorizing the National Board to enter into compacts or agreements with State Boards, but would seem to require the National Board in each case to exercise its discretion whether or not to proceed. It is believed, nevertheless, that understandings such as that embodied in the letter of July 12, 1937, although of no legal effect, assist both Boards in determining the proper disposition of particular cases as they arise.

furnished to a number of large interstate enterprises, which in themselves are subject to the jurisdiction of the National Act. (An exception is the case of detective agencies doing business on a national scale, concerning which, it is understood, the State Board will clear with the National Board before asserting jurisdiction.) On the other hand, where the interstate enterprise, over which the National Board would customarily assert jurisdiction, supplies its own guard, window washing, laundry, or other service for itself, it was believed that the employees involved would rightly come within the jurisdiction of the National Act. The test here is whether the service is performed by a separate business establishment which can properly be considered a local enterprise, even though services are rendered to interstate businesses, or whether the service is rendered by the interstate enterprise itself as an incident of its own business. *Office buildings.* The same test applicable to the service trades was also thought to be applicable to office buildings. Thus, if the employer involved is in the business of operating office buildings he is subject to the State Act even though tenants consist of interstate enterprises. On the other hand, where the office building is owned or operated, or both, by an interstate enterprise, over which the National Board would customarily assert jurisdiction, and is used by the interstate enterprise in conducting its interstate business, the National Board would expect to assert jurisdiction. *Public utilities.* It was agreed that the New York Board could properly assert jurisdiction over such utilities, including electric, gas, traction, bus companies, and the like which are not themselves engaged in supplying service across the State line. In short, where the National Board could only base its jurisdiction on the "affecting commerce" principle (plus the shipment into the State of fuel and capital equipment, not for resale), it was believed in general that the National Board

could properly leave jurisdiction to the State Board. An exception to this working rule is provided by a few very large utilities, such as the Consolidated Edison Company, over which the National Board originally asserted jurisdiction. *Warehouses.* The test applied in the case of service trades and office buildings seems applicable to warehouses, the question being whether they are operated as separate local enterprises or as incidents of the operation of interstate business over which the National Board would customarily take jurisdiction. *Construction business.* The New York Board is expected to assert jurisdiction over the construction industry except, for example, in the case of the construction of ships, which is thought of as falling within the field of manufacturing, over which, in general, the National Board asserts jurisdiction.

In addition to the foregoing lines of activity, referred to in the letter of July 12, 1937, two other businesses not dealt with in that letter were also discussed. *Insurance companies.* In the past both the State and the National Boards have intermittently asserted jurisdiction over insurance companies. So far as small insurance, bonding, casualty companies, etc., doing business primarily within the State are concerned, it was felt that the State Board should occupy this field. So far as the large national companies are concerned, however, the representatives of the National Board expressed the view that hereafter cases involving such companies should be handled by the latter Board. In this connection it was pointed out that as organization has matured among the large companies, State-wide and even larger units are being established and that this type of activity had therefore advanced to the stage where it was peculiarly the interest of the National Board. It was agreed that the State Board would not entertain any cases involving the large national companies without prior clearance with the National Board. *Newspapers.* The National Board has taken jurisdiction

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over large daily newspapers in New York and other States and, where challenged, has been uniformly sustained in this by the courts. At the same time, the circulation departments of such newspapers, to the extent that the distributing activity is confined within a single State, are in many aspects local in character. In New York State, and particularly in New York City, where news vendors are subject to local licensing requirements, the National Board feels that cases involving the distribution of newspapers should properly be handled by the State Board. Consistent with this approach, the New York Regional Office of the National Board has recently referred to the State Board news vendor cases involving four of the largest afternoon newspapers in New York City. The representatives of the State Board expressed agreement with this approach and indicated that the proper line of division might come at the level of the circulation managers. It was agreed that hereafter neither Board will accept cases at the circulation manager level without prior clearance with the other Board; that cases above this level will be handled by the National Board; and that cases below this level will be handled by the State Board. Of course, small newspapers of limited circulation will properly be handled by the State Board.

Concurrent jurisdiction.[2] The letter of July 12, 1937, left open the question of "concurrent jurisdiction"—by which, it is understood, was meant the procedure to be followed in the case of employers who might simultaneously be subject to the requirements of both the State and National Acts. The letter stated: "So far as concurrent jurisdiction is concerned, we assume that even a tentative understanding must await mutual study of the memorandum which Mr. Fahy is now preparing." It

[2] See *Davega-City Radio, Inc.* v. *New York Labor Relations Board,* 281 N. Y. 13; 22 N. E. 2nd 145; 4 L. R. R. Man. 899. (July 11, 1939.)

appears that the memorandum referred to was never prepared and that no subsequent understanding was reached as to such concurrent jurisdiction. In practice, this does not seem to have been a problem, except in the situation discussed below, since the State Board has by and large confined its activities to the businesses detailed in the letter of July 12 and the National Board in turn has left this field open to the State Board. The problem of so-called "concurrent jurisdiction" has arisen in recent months because, following the National Board's decision in *Matter of Maryland Drydock Company,* 49 N. L. R. B. 733, a number of labor organizations have filed election petitions with the State Board which they knew would not be entertained by the National Board. (See the second paragraph of this memorandum, above, concerning the conference of January 9, 1945, in Washington.) Prior to the *Maryland Drydock* case, the State Board, it is understood, had refrained from entertaining cases involving large interstate manufacturers and the National Board had asserted exclusive jurisdiction over such employers.

At the conference of April 20 the representatives of the National Board pointed to the recent decision in the *Packard* case and suggested that the State Board should adhere to its general policy of leaving all cases involving large manufacturing establishments doing interstate business to the National Board. The impracticability of both Boards intermittently asserting jurisdiction over the same employer was emphasized, and in addition the question was raised whether under the Federal Constitution the State Board could lawfully enforce any requirement against such employers which was inconsistent with or which imposed restraints in addition to those enforced by the National Board. The representatives of the New York Board agreed that cases of this type presented a legal problem but were of the view that it was advisable

for the State Board to entertain election petitions for units of supervisory employees where it was doubtful whether the National Board would proceed with the case were it filed with the latter Board. The representatives of the New York Board pointed to their obligation to contribute to the maintenance of industrial peace within the borders of New York State and recalled a provision of the New York Constitution which guarantees organizational rights to all employees. The representatives of the latter Board agreed, however, that their officials should not reach out for cases of this character, involving large interstate manufacturers, and that they would keep the National Board advised as to all such cases they decided to entertain. Thus, no broad understanding was reached on this score, both Boards reserving their respective positions with regard to petitions for units of supervisory employees and other petitions involving large interstate manufacturers.

It was believed that it would be helpful to the work of both Boards if lists of cases entertained within the State were periodically exchanged. The details of this were left to be worked out.

NEW YORK STATE LABOR RELATIONS BOARD,
July 12, 1937.

Honorable J. WARREN MADDEN,
National Labor Relations Board,
Washington, D. C.

DEAR MR. MADDEN: We wish, in the first place, to thank you and your colleagues for your warm reception of last Wednesday. It is gratifying to know that we can look forward to such wholehearted cooperation from your Board and its staff. We will gladly reciprocate.

As requested, we outline our recollection of the understandings reached. So far as concurrent jurisdiction is

concerned, we assume that even a tentative understanding must await mutual study of the memorandum which Mr. Fahy is now preparing.

Unless there are unusual circumstances, the New York State Labor Relations Board will assume jurisdiction over all cases arising in the following trades and industries, without clearing, except as a matter of record, with the National Board's officials:

1. Retail stores,
2. Small industries which receive all or practically all raw materials from within the State of New York, and do not ship any material proportion of their product outside the State,
3. Service trades (such as laundries),
4. Office and residential buildings,
5. Small and clearly local public utilities, (this includes local traction companies, as well as gas and electric light corporations),
6. Storage warehouses,
7. Construction operations,
8. Other obviously local businesses.

Clearance is certainly going to be required in the case of industries where the raw materials or most of them come from without the State, but the product is not shipped beyond the borders of New York. (The question here is as to the breadth of application of the "come to rest" doctrine of the *Schechter* case.)

You are familiar, of course, with Section 715 of our statute, part of which reads as follows: "Application of article. The provisions of this article shall not apply to the employees of any employer who concedes to and agrees with the board that such employees are subject to and protected by the provisions of the national labor relations act or the federal railway labor act . . .". The New York State Board will undoubtedly take the position that the

words "agrees with" contemplate the necessity of our Board's agreeing with the employer that his employees are subject to the national statute, and that no employer can by unilateral action select his jurisdiction.

This however, does not solve all of the problems created by the Section, since it is clear that even the agreement of this Board with the employer will not necessarily bestow federal jurisdiction under the Constitution. Presumably every time such a concession is proffered by an employer, our Board will have to clear with the National Board officials in the same way it would clear with them if no such concession were made.

It is our understanding that we should clear on all questions of jurisdiction with the Regional Directors in New York City and Buffalo in the first instance, and that you will instruct your Directors to reciprocate by clearing with us all doubtful cases which first come to their attention.

Whenever this Board and either of your Regional Directors find themselves unable to agree, the matter will be taken up with you at once.

We would appreciate knowing that your recollection and understanding of the above are in accord with our own.

Very sincerely yours,

s/ John P. Boland

(Dr.) JOHN P. BOLAND, *Chairman.*

NATIONAL LABOR RELATIONS BOARD

MINUTES OF AUGUST 16, 1946

An informal inquiry was made to the Board by United Financial Employees Association asking whether the Board would entertain a Section 9 representation petition on behalf of the employees of Harris Upham and Company, a New York brokerage house. The Board was also

advised that similar petitions were contemplated for the employees of a number of similar New York brokerage houses. The Board concluded that it would not, at this time, entertain a petition filed on behalf of the employees of Harris Upham and Company or other such brokerage houses because of budgetary and other administrative considerations. The Board further concluded that, in view of this disposition, it had no objection to having the State Labor Relations Board of the State of New York entertain such petitions filed under the State Act.

Dated at Washington, D. C.
August 16, 1946.

Donn N. Bent
DONN N. BENT,
Executive Secretary.

Approved:
s/ P. M. H.
s/ J. M. H.

Certified to be a true and correct copy.

s/ Donn N. Bent,
DONN N. BENT,
Executive Secretary.

DECISIONS PER CURIAM, ETC., FROM FEBRUARY 4, 1947, THROUGH APRIL 7, 1947.*

No. 9, original. ILLINOIS *v.* INDIANA ET AL. February 17, 1947. The Special Report of the Special Master as to Shell Oil Company, Incorporated, and The Texas Company is approved. The amended bill of complaint is dismissed as to Shell Oil Company, Incorporated, pursuant to the stipulation entered into by and between the State of Illinois and the State of Indiana, City of East Chicago, City of Hammond, and Shell Oil Company, Incorporated, and as to The Texas Company pursuant to the stipulation entered into by and among the State of Illinois and the State of Indiana, the City of East Chicago and The Texas Company. Costs against Shell Oil Company, Incorporated, and The Texas Company to be taxed hereafter in accordance with the recommendations of the Special Master.

No. 9, original. ILLINOIS *v.* INDIANA ET AL. February 17, 1947. The Interim Report of the Special Master, dated September 7, 1946, is approved. The Court finds that the course of procedure set forth in the Interim Report, which the Special Master has followed of entering orders staying further proceedings as to particular defendants upon stipulations received in evidence which in the opinion of the Special Master justify such course, is within the discretion of the Special Master. The Court further finds that the steps set forth in the recommendations of the Special Master in the Interim Report numbered one, two, three, four, five, six, and seven as to procedure for the future disposition of the case, are within the discretion of the Special Master and are ap-

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*For orders on petitions for certiorari, see *post,* pp. 813, 818; rehearing, *post,* pp. 852, 853.

proved as appropriate under the special circumstances of this case. The Court therefore orders and directs the Special Master to continue the proceedings in accordance with said recommendations. The Court further orders that the recommendation of the Special Master as to the apportionment of costs be adopted and costs to this date shall be taxed as recommended in the Interim Report. The objections of the Fruit Growers Express Company to the proposed apportionment of costs are overruled.

No. 102, Misc. Ex parte Poresky. February 17, 1947. The motion for leave to file petition for writ of mandamus is denied.

No. 103, Misc. Ex parte Huey. February 17, 1947. The application is denied.

No. 346. Silesian American Corp. et al. *v.* Markham, Alien Property Custodian. See *post,* p. 852.

No. 489, October Term, 1945. Zap *v.* United States. Certiorari, 326 U. S. 802, to the Circuit Court of Appeals for the Ninth Circuit. March 3, 1947. *Per Curiam:* The motion for leave to file a second petition for rehearing and to recall the mandate is granted. The second petition for rehearing is granted and the judgment entered June 10, 1946, 328 U. S. 624, and order denying rehearing entered October 21, 1946, 329 U. S. 824, are vacated. The judgment of the Circuit Court of Appeals is reversed and the case is remanded to the District Court with directions to dismiss the indictment. *Ballard* v. *United States,* 329

U. S. 187. THE CHIEF JUSTICE and MR. JUSTICE JACKSON took no part in the consideration or decision of this application. *Morris Lavine* for petitioner. *Acting Solicitor General Washington, W. Marvin Smith, Robert S. Erdahl* and *Beatrice Rosenberg* for the United States. Reported below: 151 F. 2d 100.

No. 457. ADAMS *v.* UNITED STATES. Certiorari, 329 U. S. 702, to the Circuit Court of Appeals for the Fifth Circuit. Argued February 14, 1947. Decided March 3, 1947. *Per Curiam:* The judgment is affirmed. *Thomas G. Gayle* argued the cause for petitioner. With him on the brief was *John W. Lapsley. Sheldon E. Bernstein* argued the cause for the United States. With him on the brief were *Acting Solicitor General Washington* and *Robert S. Erdahl.* Reported below: 156 F. 2d 271.

No. 105, Misc. EX PARTE JOHNSON;
No. 106, Misc. EX PARTE PEPLOWSKI;
No. 111, Misc. EX PARTE HOUGHTON;
No. 112, Misc. EX PARTE CLARK; and
No. 113, Misc. EX PARTE WALKER. March 3, 1947. The motions for leave to file petitions for writs of habeas corpus are denied.

No. 108, Misc. EX PARTE BOEHMAN; and
No. 114, Misc. EX PARTE KASPER. March 3, 1947. The applications are denied.

No. 109, Misc. BARNARD ET AL. *v.* JONES ET AL.; and
No. 115, Misc. EX PARTE CAMPBELL. March 3, 1947. The petitions for appeal are denied.

No. 819. BEN H. ROSENTHAL & CO., INC. ET AL. *v.* PORTER, PRICE ADMINISTRATOR;

No. 820. BORIN ET AL. *v.* PORTER, PRICE ADMINISTRATOR; and

No. 821. RUBIN ET AL. *v.* PORTER, PRICE ADMINISTRATOR. March 3, 1947. Petition for writs of certiorari to the United States Emergency Court of Appeals dismissed on motion of counsel for the petitioners. *W. B. Harrell* and *J. Manuel Hoppenstein* for petitioners. Reported below: 158 F. 2d 171.

No. 110, Misc. EX PARTE BARRON. March 3, 1947. Motion for leave to file petition for writ of habeas corpus denied.

No. 443. PAULY *v.* MCCARTHY ET AL., TRUSTEES. Certiorari, 329 U. S. 698, to the Supreme Court of Utah. Argued March 6, 1947. Decided March 10, 1947. *Per Curiam:* Judgment reversed. *Bailey* v. *Central Vermont R. Co.*, 319 U. S. 350; *Ellis* v. *Union Pacific R. Co.*, 329 U. S. 649. *Parnell Black* argued the cause for petitioner. With him on the brief were *Calvin W. Rawlings* and *Harold E. Wallace*. *W. Q. Van Cott* argued the cause for respondents. With him on the brief was *Dennis McCarthy*. Reported below: 109 Utah 398, 166 P. 2d 501.

No. 543. FEDERAL POWER COMMISSION ET AL. *v.* ARKANSAS POWER & LIGHT CO. Certiorari, 329 U. S. 703, to the United States Court of Appeals for the District of Columbia. Argued March 5, 1947. Decided March 10, 1947. *Per Curiam:* Judgment reversed on the ground that respondent has failed to exhaust its administrative remedies. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303

U. S. 41; *Macauley* v. *Waterman S. S. Corp.*, 327 U. S. 540. *Howard E. Wahrenbrock* argued the cause for petitioners. With him on the brief were *Acting Solicitor General Washington, Robert L. Stern, Lambert McAllister* and *Louis W. McKernan.* *A. J. G. Priest* argued the cause for respondent. With him on the brief were *P. A. Lasley, Sidman I. Barber* and *B. H. Dewey, Jr.* By special leave of Court, *Wyatt Cleveland Holland,* Assistant Attorney General, argued the cause for the State of Arkansas. With him on the brief were *Guy E. Williams,* Attorney General, *H. Cecil Kilpatrick,* and the Attorneys General of the States of Alabama, Connecticut, Georgia, Indiana, Kansas, Kentucky, Louisiana, Maine, Minnesota, Mississippi, Nebraska, New Hampshire, New Jersey, New Mexico, Nevada, North Carolina, North Dakota, Oregon, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, Wisconsin and Wyoming, as *amici curiae.* Reported below: 81 U. S. App. D. C. 178, 156 F. 2d 821.

Nos. 1027 and 1028. BOEING AIRCRAFT CO. *v.* KING COUNTY ET AL. Appeals from the Supreme Court of the State of Washington. March 10, 1947. *Per Curiam:* In No. 1027, the appeal is dismissed for want of jurisdiction. § 237 (a), Judicial Code, as amended, 28 U. S. C. § 344 (a). Treating the papers whereon the appeal was allowed as a petition for writ of certiorari as required by § 237 (c) of the Judicial Code, as amended, 28 U. S. C. § 344 (c), certiorari is denied. In No. 1028, the appeal is dismissed for the reason that application therefor was not made within the time provided by law. § 8 (a), Act of February 13, 1925 (43 Stat. 936, 940), 28 U. S. C. § 350. *Wendell W. Black* and *Frank E. Holman* for appellant. Reported below: 25 Wash. 2d 652, 171 P. 2d 838.

No. 1031. COLEGROVE ET AL. *v.* BARRETT, SECRETARY OF STATE OF ILLINOIS, ET AL. Appeal from the District Court of the United States for the Northern District of Illinois. March 10, 1947. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. In view of the Court's refusal to grant rehearing in *Colegrove* v. *Green,* 328 U. S. 549, rehearing denied, 329 U. S. 825, 828, and its dismissal of the appeals in *Cook* v. *Fortson* and *Turman* v. *Duckworth,* 329 U. S. 675, rehearing denied, 329 U. S. 829, MR. JUSTICE RUTLEDGE concurs in the dismissal of this appeal. MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, and MR. JUSTICE MURPHY are of the opinion that probable jurisdiction should be noted. *Urban A. Lavery* for appellants. *George F. Barrett,* Attorney General of Illinois, and *William C. Wines,* Assistant Attorney General, for appellees.

No. 117, Misc. SEIBOLD *v.* SNYDER, SECRETARY OF THE TREASURY. March 10, 1947. The application is denied.

No. 483. MURRAY *v.* FLEMING, TEMPORARY CONTROLS ADMINISTRATOR. March 10, 1947. Certiorari, 329 U. S. 705, to the Circuit Court of Appeals for the First Circuit dismissed on motion of counsel for the petitioner. *Richard F. Upton* and *Robert W. Upton* for petitioner. *Acting Solicitor General Washington, Philip Elman, William E. Remy, David London* and *Samuel Mermin* for respondent. Reported below: 156 F. 2d 781.

No. —, October Term, 1946. TIMES-MIRROR CO. ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. The Court met

in Special Term pursuant to a call by THE CHIEF JUSTICE having the approval of all the Associate Justices. March 15, 1947. Upon consideration of the application of counsel for the petitioners in the above-entitled cause, It is ordered that execution and enforcement of the order of the Circuit Court of Appeals for the Ninth Circuit, entered herein on March 10, 1947, be, and the same hereby is, stayed pending the filing, consideration, and disposition of a petition for writ of certiorari to review the said order providing such petition is filed on or before March 28, 1947. In the event the petition for writ of certiorari is granted, then this stay is to continue pending the final disposition of the case by this Court.

It is further ordered that the stay herein ordered shall be effective and operative only on the condition that petitioners shall file herein a bond in the sum of Five Thousand Dollars ($5,000) with good and sufficient surety to be approved by a judge of the United States Circuit Court of Appeals for the Ninth Circuit, conditioned that if petitioners herein fail to make application for such writ of certiorari within the time limited therefor, or fail to obtain an order granting their application, or fail to make good their plea in the Supreme Court of the United States, they shall answer for all damages and costs which the National Labor Relations Board or other persons who may be injured may sustain by reason of this stay.

It is further ordered that the printing of the record for the purpose of the consideration of the application for the writ of certiorari be dispensed with.

No. 119, Misc. EX PARTE COPELAND; and

No. 120, Misc. EX PARTE BERNARD. March 17, 1947. The motions for leave to file petitions for writs of habeas corpus are denied.

No. 901. EARLE *v.* COMMISSIONER OF INTERNAL REVENUE;

Nos. 902 and 904. EARLE *v.* COMMISSIONER OF INTERNAL REVENUE; and

No. 903. EARLE *v.* COMMISSIONER OF INTERNAL REVENUE. March 17, 1947. Petitions for writs of certiorari to the Circuit Court of Appeals for the Sixth Circuit dismissed per stipulation on motion of counsel for the petitioners. *Geo. E. H. Goodner* and *Scott P. Crampton* for petitioners. *Acting Solicitor General Washington* for respondent. Reported below: No. 901, 157 F. 2d 677; Nos. 902 and 904, 157 F. 2d 678; No. 903, 157 F. 2d 680.

No. 976. ROYAL PACKING CO. *v.* PORTER, PRICE ADMINISTRATOR. See *post*, p. 840.

No. 116, Misc. EX PARTE COOK; and

No. 118, Misc. EX PARTE ELLIOTT. March 17, 1947. The motions for leave to file petitions for writs of habeas corpus are denied.

No. 253. UNITED STATES *v.* PULLMAN COMPANY ET AL.;

No. 254. OTIS & CO. *v.* UNITED STATES ET AL.;

No. 255. CHESAPEAKE & OHIO RAILROAD CO. ET AL. *v.* UNITED STATES ET AL.; and

No. 256. GLORE, FORGAN & CO. *v.* UNITED STATES ET AL. Appeals from the District Court of the United States for the Eastern District of Pennsylvania. Argued March 11, 12, 13, 1947. Decided March 31, 1947. *Per Curiam:* The judgment is affirmed by an equally divided Court. MR. JUSTICE JACKSON took no part in the consideration or decision of these cases. *Holmes Baldridge* argued the cause for the United States. With him on the brief were

Acting Solicitor General Washington and *Assistant Attorney General Berge*. *Thurman Arnold* argued the cause for appellant in No. 254. With him on the brief was *Arne C. Wiprud*. *Robert J. Bulkley* argued the cause for appellants in No. 255. With him on the brief were *Frank J. Meistrell* and *Herbert G. Pillen*. *Leo F. Tierney* argued the cause for appellant in No. 256. With him on the brief was *Louis A. Kohn*. *George Wharton Pepper* argued the cause for the Pullman Company et al., appellees. With him on the brief were *Ralph M. Shaw, Seth W. Richardson, Lowell M. Greenlaw, Frederick H. Spotts* and *Guy A. Gladson*. *Jacob Aronson* argued the cause for the railroad appellees. With him on the brief were *Emmett E. McInnis, Sydney R. Prince, Harold H. McLean, Henry L. Walker* and *Albert Ward*. Appearances were entered by *Francis H. Scheetz* for appellant in No. 256; *John Dickinson* for the Atchison, Topeka & Santa Fe Railway Co. et al.; and *Leo J. Hassenauer, V. C. Shuttleworth* and *H. E. Wilmarth* for the Order of Railway Conductors of America, appellees. Reported below: 64 F. Supp. 108.

No. 880. SWEM *v.* MICHIGAN. On petition for writ of certiorari to the Supreme Court of Michigan. March 31, 1947. *Per Curiam:* The petition for writ of certiorari is granted. The judgment is vacated and the cause is remanded to the Supreme Court of Michigan in order to enable it to reexamine its decision in the light of *De Meerleer* v. *Michigan*, 329 U. S. 663. *William G. Comb* for petitioner. *Eugene F. Black*, Attorney General of Michigan, and *Edmund E. Shepherd*, Solicitor General, for respondent.

No. 1091. FALWELL ET AL. *v.* UNITED STATES ET AL. Appeal from the District Court of the United States for

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the Western District of Virginia. March 31, 1947. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. §§ 5 and 17, Interstate Commerce Act, 54 Stat. 905, 913, 49 U. S. C. §§ 5 and 17. *W. G. Burnette* for appellants. *Acting Solicitor General Washington* and *Daniel W. Knowlton* for the United States et al., appellees. *J. Ninian Beall* and *H. Lauren Lewis* filed a brief for the Regular Common Carrier Conference of American Trucking Assns. et al., as *amici curiae,* urging granting of the motion to affirm. *Nuel D. Belnap, E. B. Ussery* and *Rex H. Fowler* filed a brief for the Brady Transfer & Storage Co. et al., as *amici curiae,* replying to the motion to affirm. Reported below: 69 F. Supp. 71.

No. 1096. SMITH *v.* JEFFERSON COUNTY ET AL. Appeal from the Supreme Court of Georgia. March 31, 1947. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. § 237 (a), Judicial Code, as amended, 28 U. S. C. § 344 (a). Treating the papers whereon the appeal was allowed as a petition for writ of certiorari as required by § 237 (c) of the Judicial Code as amended, 28 U. S. C. § 344 (c), certiorari is denied. *Benj. E. Pierce* for appellant. *James M. Hull* for appellees. Reported below: 201 Ga. 674, 40 S. E. 2d 773.

No. 1110. GRAND LODGE HALL ASSOCIATION, I. O. O. F., ET AL. *v.* MOORE, AUDITOR OF MARION COUNTY, ET AL. Appeal from the Supreme Court of Indiana. March 31, 1947. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. *Wisconsin & Michigan R. Co.* v. *Powers,* 191 U. S. 379. *Frank C. Dailey, George E. Hershman, Othniel Hitch* and *Paul Y. Davis* for appellants. *Cleon H. Foust,* Attorney General of Indiana,

Winslow Van Horne, Karl J. Stipher, Deputy Attorneys General, and *Louis B. Ewbank* for appellees. Reported below: 224 Ind. 575, 70 N. E. 2d 19.

No. 121, Misc. Ex parte White; and

No. 123, Misc. Ex parte Wells. March 31, 1947. The motions for leave to file petitions for writs of habeas corpus are denied.

No. 122, Misc. Ex parte Poresky. March 31, 1947. The motion for leave to file petition for writ of mandamus is denied.

No. 124, Misc. Ex parte Standard Oil Company of Indiana. March 31, 1947. The motion for leave to file petition for writ of mandamus and/or prohibition and/or certiorari is denied. *Buell F. Jones, C. Henry Austin, Fred L. Williams, Robert F. Schlafly* and *Roland F. O'Bryen* for petitioner.

No. 141. Confederated Bands of Ute Indians *v.* United States. March 31, 1947. Order entered amending opinion.

Opinion reported as amended, 330 U. S. 169.

No. 288. Richardson et al. *v.* Kelly, Receiver. March 31, 1947. The motion of petitioner to retax costs is denied.

No. 385. Atlantic Coast Line Railroad Co. *v.* Thompson, State Revenue Commissioner. Appeal

from the Supreme Court of Georgia. March 31, 1947. Phillips substituted for Thompson as the party appellee.

No. 504. MARR, DOING BUSINESS AS MARR DUPLICATOR CO., *v.* A. B. DICK CO. March 31, 1947. The motion of petitioner for clarification or modification of the order and mandate of this Court is denied. Reported below: 155 F. 2d 923.

No. 1036. SMITH *v.* PORTER, PRICE ADMINISTRATOR. On petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit. March 31, 1947. Fleming, Temporary Controls Administrator, substituted as the party respondent.

No. 470. RICE ET AL. *v.* GREAT LAKES ELEVATOR CORP. ET AL.;

No. 471. RICE ET AL. *v.* BOARD OF TRADE OF CHICAGO;

No. 472. ILLINOIS COMMERCE COMMISSION ET AL. *v.* GREAT LAKES ELEVATOR CORP. ET AL.; and

No. 473. ILLINOIS COMMERCE COMMISSION ET AL. *v.* BOARD OF TRADE OF CHICAGO. Certiorari, 329 U. S. 701, to the Circuit Court of Appeals for the Seventh Circuit. March 31, 1947. Counsel for the petitioners in Nos. 470 and 471 having suggested that one of the copartners of the firm of Daniel F. Rice & Co., to wit: Walter T. Rice, died on June 8, 1946, and that said firm has been reconstituted with the addition of Joseph A. Fagan as a partner and member thereof, it is ordered that the writs of certiorari be dismissed as to Walter T. Rice and that Joseph A. Fagan be, and he hereby is, made a party petitioner in Nos. 470 and 471. Counsel for the petitioners in Nos. 470 and 471 having further suggested that respondent

Great Lakes Elevator Corporation has abandoned its service as a warehouse and public storer of grain for hire, it is ordered that the writs of certiorari in Nos. 470 and 472 be dismissed as to respondent Great Lakes Elevator Corporation. *Lee A. Freeman* for petitioners in Nos. 470 and 471. Reported below: 156 F. 2d 33.

No. 996. UNITED STATES *v.* ARKANSAS VALLEY RAILWAY, INC. March 31, 1947. The petition for writ of certiorari to the Court of Claims is dismissed on motion of counsel for the petitioner. *Acting Solicitor General Washington* for the United States. *Claude I. Depew* for respondent. Reported below: 107 Ct. Cl. 240, 68 F. Supp. 727.

No. 971. LOTTO ET AL. *v.* UNITED STATES. March 31, 1947. The petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit is denied as to petitioner Lotto. On consideration of the suggestion of the death of petitioner Cullotta on February 19, 1947, the petition for writ of certiorari as to said petitioner is dismissed. *Walter F. Maley* and *Frank J. Comfort* for petitioners. *Acting Solicitor General Washington, Robert S. Erdahl* and *Philip R. Monahan* for the United States. Reported below: 157 F. 2d 623.

No. 130, Misc. HARRINGTON *v.* JARECKI ET AL. March 31, 1947. Motion for injunction submitted by Joseph T. Harrington for the appellant below, and the motion is denied.

No. 207. LAND, CHAIRMAN OF THE UNITED STATES MARITIME COMMISSION, ET AL. *v.* DOLLAR ET AL. April

7, 1947. Certiorari, 329 U. S. 700, to the District Court of the United States for the District of Columbia. Order of this Court substituting new members of the Maritime Commission as petitioners vacated so that the District Court may consider motions for substitution on remand. See *ante*, p. 731.

No. 1100. UNITED STATES *v.* PALLETZ; and

No. 1101. UNITED STATES *v.* KROMER. Appeals from the District Court of the United States for the Eastern District of Pennsylvania. April 7, 1947. *Per Curiam:* The judgments are reversed. 56 Stat. 23, 24, § 1 (b) as amended, 50 U. S. C. App. (Supp. V, 1946) § 901 (b); R. S. § 13, as amended, 58 Stat. 118; *Great Northern R. Co.* v. *United States,* 208 U. S. 452; *United States* v. *Reisinger,* 128 U. S. 398. *Acting Solicitor General Washington* and *Gerald A. Gleeson* for the United States.

No. 125, Misc. EX PARTE BUTZ ET AL.; and

No. 126, Misc. EX PARTE STERBA. April 7, 1947. The motions for leave to file petitions for writs of mandamus are denied.

No. 127, Misc. EX PARTE LEWIS ET AL. April 7, 1947. The petition for appeal is denied.

No. 131, Misc. EX PARTE SNYDER. April 7, 1947. The petition for appeal presented to MR. JUSTICE DOUGLAS and by him referred to the Court is denied.

No. 184. CONE *v.* WEST VIRGINIA PULP & PAPER CO. April 7, 1947. The motion of respondent as to costs is denied. See *ante*, p. 212.

No. 993. BELL ET AL. *v.* PORTER ET AL. April 7, 1947. The order entered March 31, 1947, 330 U. S. 817, granting certiorari is vacated. On reconsideration the petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit is denied. *Harold Leventhal* for petitioners. *John T. Chadwell* and *Richard M. Keck* for respondents. Reported below: 159 F. 2d 117.

ORDERS GRANTING CERTIORARI, FROM FEBRUARY 4, 1947, THROUGH APRIL 7, 1947.

No. 850. WILLIAMS ET AL. *v.* AUSTRIAN ET AL., TRUSTEES. February 10, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Milton Pollack, Emery H. Sykes, Horace R. Lamb* and *Lewis L. Delafield* for petitioners. *Carl J. Austrian, Saul J. Lance* and *Isadore H. Cohen* for respondents. Reported below: 159 F. 2d 67.

No. 733. INTERSTATE NATURAL GAS CO., INC. *v.* FEDERAL POWER COMMISSION ET AL. See *post*, p. 852.

No. 934. CLARK, ATTORNEY GENERAL, SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, *v.* UEBERSEE FINANZ-KORPORATION, A. G. February 17, 1947. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia granted. *Acting Solicitor General Washington* for petitioner. Reported below: 81 U. S. App. D. C. 284, 158 F. 2d 313.

No. 346. SILESIAN AMERICAN CORP. ET AL. *v.* MARKHAM, ALIEN PROPERTY CUSTODIAN. See *post*, p. 852.

No. 862. UNITED STATES *v.* JOHN J. FELIN & Co., INC. March 3, 1947. Petition for writ of certiorari to the Court of Claims granted. *Acting Solicitor General Washington* for the United States. *Wilbur La Roe, Jr., Frederick E. Brown* and *Arthur L. Winn, Jr.* for respondent. Reported below: 107 Ct. Cl. 155, 67 F. Supp. 1017.

No. 847. UNITED STATES *v.* MUNSEY TRUST CO., RECEIVER. March 3, 1947. Petition for writ of certiorari to the Court of Claims granted. *Acting Solicitor General Washington* for the United States. *Alexander M. Heron* and *William L. Owen* for respondent. Reported below: 107 Ct. Cl. 131, 67 F. Supp. 976.

No. 937. SHERRER *v.* SHERRER. March 3, 1947. Petition for writ of certiorari to the Probate Court for the County of Berkshire, Massachusetts, granted. *Francis J. Quirico* for petitioner. Reported below: See 320 Mass. 351, 69 N. E. 2d 801.

No. 958. COE *v.* COE. March 3, 1947. Petition for writ of certiorari to the Probate Court for the County of Worcester, Massachusetts, granted. *Arthur V. Getchell* for petitioner. Reported below: See 320 Mass. 295, 69 N. E. 2d 793.

No. 945. MCWILLIAMS *v.* COMMISSIONER OF INTERNAL REVENUE;

No. 946. ESTATE OF MCWILLIAMS *v.* COMMISSIONER OF INTERNAL REVENUE; and

No. 947. MCWILLIAMS *v.* COMMISSIONER OF INTERNAL REVENUE. March 3, 1947. Petition for writs of certiorari to the Circuit Court of Appeals for the Sixth

Circuit granted. MR. JUSTICE BURTON took no part in the consideration or decision of this application. *John A. Hadden* and *John S. Beard, Jr.* for petitioners. *Acting Solicitor General Washington* for respondent. Reported below: 158 F. 2d 637.

No. 861. PRIEBE & SONS, INC. *v.* UNITED STATES. March 10, 1947. Petition for writ of certiorari to the Court of Claims granted. *Samuel Williston, J. Arthur Miller* and *Allen H. Gardner* for petitioner. *Acting Solicitor General Washington, Assistant Attorney General Sonnett, John Ford Baecher, Paul A. Sweeney* and *Melvin Richter* for the United States. Reported below: 106 Ct. Cl. 789, 65 F. Supp. 457.

No. 922. FEDERAL TRADE COMMISSION *v.* CEMENT INSTITUTE ET AL.;

No. 923. FEDERAL TRADE COMMISSION *v.* AETNA PORTLAND CEMENT CO. ET AL.;

No. 924. FEDERAL TRADE COMMISSION *v.* MARQUETTE CEMENT MANUFACTURING CO.;

No. 925. FEDERAL TRADE COMMISSION *v.* CALAVERAS CEMENT CO. ET AL.;

No. 926. FEDERAL TRADE COMMISSION *v.* HURON PORTLAND CEMENT CO.;

No. 927. FEDERAL TRADE COMMISSION *v.* SUPERIOR PORTLAND CEMENT, INC.;

No. 928. FEDERAL TRADE COMMISSION *v.* NORTHWESTERN PORTLAND CEMENT CO.;

No. 929. FEDERAL TRADE COMMISSION *v.* RIVERSIDE CEMENT CO.;

No. 930. FEDERAL TRADE COMMISSION *v.* UNIVERSAL ATLAS CEMENT CO.;

No. 931. FEDERAL TRADE COMMISSION *v.* CALIFORNIA PORTLAND CEMENT CO.;

No. 932. FEDERAL TRADE COMMISSION *v.* MONOLITH PORTLAND CEMENT CO. ET AL.; and

No. 933. FEDERAL TRADE COMMISSION *v.* SMITH ET AL. March 10, 1947. Petitions for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Acting Solicitor General Washington* for petitioner. *William J. Donovan, George S. Leisure, Breck P. McAllister, Nathan L. Miller, John H. Hershberger, Herbert W. Clark, Marshall P. Madison, Edward D. Lyman* and *Walter C. Fox, Jr.* for respondents in Nos. 922, 923, 925, 926, 930 and 933. *Edward A. Zimmerman, H. W. Norman* and *W. R. Engelhardt* for respondent in No. 924. *Herbert S. Little* and *F. A. LeSourd* for respondent in No. 927. *S. Harold Shefelman* for respondent in No. 928. *Louis W. Myers* and *Pierce Works* for respondent in No. 929. *Robert B. Murphey* and *Alex W. Davis* for respondent in No. 931. Reported below: 157 F. 2d 533.

No. 967. MAGGIO *v.* ZEITZ, TRUSTEE IN BANKRUPTCY. March 10, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Max Schwartz* for petitioner. *Joseph Glass* for respondent. Reported below: 157 F. 2d 951.

No. 880. SWEM *v.* MICHIGAN. See *ante*, p. 807.

No. 908. BROTHERHOOD OF LOCOMOTIVE FIREMEN & ENGINEMEN, LOCAL LODGE NO. 926, ET AL. *v.* TOLEDO, PEORIA & WESTERN RAILROAD ET AL.; and

No. 1047. FARMERS GRAIN CO. ET AL. *v.* BROTHERHOOD OF LOCOMOTIVE FIREMEN & ENGINEMEN, LOCAL LODGE NO.

926, ET AL. March 31, 1947. Petitions for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Louis F. Knoblock, Harold C. Heiss* and *Russell B. Day* for petitioners in No. 908. *John E. Cassidy* for the Farmers Grain Co. et al., petitioners in No. 1047 and the shippers, respondents in No. 908. *Donald A. Morgan* for the Toledo, P. & W. R. Co., respondent in Nos. 908 and 1047. Reported below: 158 F. 2d 109.

No. 993. BELL ET AL. *v.* PORTER ET AL. March 31, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Harold Leventhal* for petitioners. *John T. Chadwell* and *Richard M. Keck* for respondents. *Acting Solicitor General Washington* filed a memorandum for the United States, as *amicus curiae,* opposing the petition. Reported below: 159 F. 2d 117.

No. 893. HUNTER *v.* TEXAS ELECTRIC RAILWAY CO. March 31, 1947. Petition for writ of certiorari to the Court of Civil Appeals, 3d Supreme Judicial District, of Texas, granted. *F. Neilson Rogers* and *Spearman Webb* for petitioner. *Joe A. Keith* for respondent. Reported below: 194 S. W. 2d 281.

No. 425. MORRIS *v.* WALLING, WAGE & HOUR ADMINISTRATOR. April 7, 1947. The petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit is granted limited to the second question presented by the petition for the writ. *George S. Dixon* for petitioner. *Solicitor General McGrath, William S. Tyson* and *Morton Liftin* for respondent. Reported below: 155 F. 2d 832.

No. 1059. OYAMA ET AL. *v.* CALIFORNIA. April 7, 1947. Petition for writ of certiorari to the Supreme Court of California granted. *A. L. Wirin, Charles A. Horsky, James Purcell, Guy C. Calden* and *Saburo Kido* for petitioners. *Fred N. Howser,* Attorney General of California, and *Everett W. Mattoon,* Deputy Attorney General, for respondent. Briefs were filed, as *amici curiae,* by *Edward J. Ennis, Osmond K. Fraenkel, Walter Gellhorn, Arthur Garfield Hays* and *Harold Evans* for the American Civil Liberties Union; *Max Radin, George Altman, Louis M. Brown* and *Clore Warne* for the National Lawyers Guild; and *Henry Epstein, Will Maslow, Shad Polier* and *Joseph B. Robison* for the American Jewish Congress, in support of the petition. Reported below: 29 Cal. 2d 164, 173 P. 2d 794.

ORDERS DENYING CERTIORARI, FROM FEBRUARY 4, 1947, THROUGH APRIL 7, 1947.

No. 804. MERTIG *v.* NEW YORK; and

No. 805. ELMHURST *v.* NEW YORK. February 10, 1947. Petition for writs of certiorari to the Supreme Court, Appellate Division, of New York, denied. *P. Bateman Ennis* for petitioners. Reported below: 270 App. Div. 1044, 63 N. Y. S. 2d 838.

No. 809. BISIGNANO *v.* MUNICIPAL COURT OF THE CITY OF DES MOINES ET AL. February 10, 1947. Petition for writ of certiorari to the Supreme Court of Iowa denied. *Frank J. Comfort* and *Walter F. Maley* for petitioner. *Howard L. Bump* for respondents. Reported below: 237 Iowa 895, 23 N. W. 2d 523.

No. 812. UNITED STATES *v.* PHELPS DODGE MERCANTILE CO. February 10, 1947. Petition for writ of certio-

rari to the Circuit Court of Appeals for the Ninth Circuit denied. *Acting Solicitor General Washington* for the United States. *Ralph W. Bilby* for respondent. Reported below: 157 F. 2d 453.

No. 852. MATHER *v.* COMMISSIONER OF INTERNAL REVENUE. February 10, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Donald F. Melhorn* for petitioner. *Acting Solicitor General Washington, Sewall Key, J. Louis Monarch* and *Harry Marselli* for respondent. Reported below: 157 F. 2d 680.

No. 855. DETWEILER BROS., INC. *v.* WALLING, WAGE & HOUR ADMINISTRATOR. February 10, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Harry Benoit* for petitioner. *Acting Solicitor General Washington* and *William S. Tyson* for respondent. Reported below: 157 F. 2d 841.

No. 825. LADD ET AL. *v.* BRICKLEY, TRUSTEE, ET AL. February 10, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. MR. JUSTICE DOUGLAS and MR. JUSTICE MURPHY took no part in the consideration or decision of this application. *Howell Van Auken* for petitioners. *Acting Solicitor General Washington, Roger S. Foster, Robert S. Rubin* and *Alexander Cohen* for the Securities & Exchange Commission; *Bartholomew A. Brickley, Samuel Hoar* and *Frank B. Wallis* for Brickley, Trustee; *Archibald Palmer* for Howard; *John L. Hall* and *John W. Davis* for the International Paper Co., and *Joseph Nemerov* for Kresberg et al., respondents. Reported below: 158 F. 2d 212.

No. 832. TINKOFF ET AL. *v.* GOLD, TRUSTEE, ET AL. February 10, 1947. On consideration of the suggestion of a diminution of the record and a motion for a writ of certiorari in that relation, the motion for certiorari is denied. The petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit is also denied. Petitioners *pro se*. *Robert Mack David* for David Storage & Moving Co. et al., respondents. Reported below: 156 F. 2d 405.

No. 843. PIZZA *v.* FOSTER, WARDEN. February 10, 1947. 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: 296 N. Y. 630, 69 N. E. 2d 240.

No. 870. FAUBERT *v.* MICHIGAN. February 10, 1947. Petition for writ of certiorari to the Supreme Court of Michigan denied.

No. 857. KAVAL *v.* RAGEN, WARDEN. Petition for writ of certiorari to the Criminal Court of Cook County, Illinois; and

No. 883. KAVAL *v.* RAGEN, WARDEN. Petition for writ of certiorari to the Circuit Court of Will County, Illinois. February 10, 1947. Denied.

No. 789. VACUUM CAN CO. ET AL. *v.* SECURITIES & EXCHANGE COMMISSION. February 17, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Christopher B. Garnett, Thomas H. Riley* and *Everett Jennings* for petitioners. *Acting*

Solicitor General Washington, Roger S. Foster, Robert S. Rubin and *W. Victor Rodin* for respondent. Reported below: 157 F. 2d 530.

No. 849. SPEVAK, DOING BUSINESS AS J. SPEVAK & Co., ET AL. *v.* UNITED STATES. February 17, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Robert E. Coughlan, Jr.* for petitioners. *Acting Solicitor General Washington, Robert S. Erdahl* and *Irving S. Shapiro* for the United States. Reported below: 158 F. 2d 594.

No. 851. VARNEDOE *v.* ALLEN, COLLECTOR OF INTERNAL REVENUE. February 17, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Welborn B. Cody* for petitioner. *Acting Solicitor General Washington, Sewall Key, Helen R. Carloss* and *Muriel S. Paul* for respondent. Reported below: 158 F. 2d 467.

No. 881. ANDREWS *v.* UNITED STATES. February 17, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *James F. Kemp* for petitioner. *Acting Solicitor General Washington, Robert S. Erdahl* and *Philip R. Monahan* for the United States. Reported below: 157 F. 2d 723.

No. 889. VALCO MORTGAGE CO., INC. ET AL. *v.* 536 BROAD STREET CORP. February 17, 1947. Petition for writ of certiorari to the Court of Errors and Appeals of New Jersey denied. *John Warren* for petitioners. *Benjamin M. Weinberg* for respondent. Reported below: 138 N. J. Eq. 431, 48 A. 2d 191.

No. 900. EARLE ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. February 17, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Geo. E. H. Goodner* and *Scott P. Crampton* for petitioners. *Acting Solicitor General Washington, Sewall Key, J. Louis Monarch* and *Harry Marselli* for respondent. Reported below: 157 F. 2d 501.

No. 725. DE NORMAND *v.* UNITED STATES. February 17, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. Petitioner *pro se. Acting Solicitor General Washington, Robert S. Erdahl* and *Leon Ulman* for the United States. Reported below: 149 F. 2d 622.

No. 741. QUINN *v.* UNITED STATES. February 17, 1947. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *John J. Bonner* for petitioner. *Acting Solicitor General Washington, Robert S. Erdahl* and *Leon Ulman* for the United States. Reported below: 81 U. S. App. D. C. 274, 158 F. 2d 177.

No. 949. BAXTER *v.* RAGEN, WARDEN. Petition for writ of certiorari to the Criminal Court of Cook County, Illinois; and

No. 951. TURNER *v.* RAGEN, WARDEN. Petition for writ of certiorari to the Circuit Court of Will County, Illinois. February 17, 1947. Denied.

No. 952. ENTRICAN *v.* MICHIGAN. February 17, 1947. Petition for writ of certiorari to the Supreme Court of Michigan denied.

No. 957. BRYARLY *v.* INDIANA. February 17, 1947. Petition for writ of certiorari to the Supreme Court of Indiana denied.

No. 959. UNITED STATES EX REL. GOLLEHUR *v.* RAGEN, WARDEN. February 17, 1947. Petition for writ of certiorari to the Circuit Court of Knox County, Illinois, denied.

No. 962. MARCINKOWSKI *v.* NEW YORK. February 17, 1947. Petition for writ of certiorari to the Supreme Court, Erie County, New York, denied. Reported below: 62 N. Y. S. 2d 757.

No. 963. HAYES *v.* RAGEN, WARDEN. February 17, 1947. Petition for writ of certiorari to the Supreme Court of Illinois and the Criminal Court of Cook County, Illinois, denied.

No. 965. MAKOWSKI *v.* BENSON, WARDEN. February 17, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. Reported below: 158 F. 2d 158.

No. 977. GRECO *v.* MISSOURI. February 17, 1947. Petition for writ of certiorari to the Supreme Court of Missouri denied.

No. 978. EASTER *v.* RAGEN, WARDEN. February 17, 1947. Petition for writ of certiorari to the Circuit Court of Franklin County, Circuit Court of Will County, and Supreme Court of Illinois, denied.

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No. 979. VON SCHERER *v.* RAGEN, WARDEN;
No. 980. GAWRON *v.* RAGEN, WARDEN; and
No. 981. ROSS *v.* ILLINOIS. February 17, 1947. Petitions for writs of certiorari to the Supreme Court of Illinois denied. Reported below: No. 981, 396 Ill. 11, 71 N. E. 2d 65.

No. 763. WABASH RAILROAD CO. *v.* WILLIAMSON. March 3, 1947. Petition for writ of certiorari to the Supreme Court of Missouri denied. *Joseph A. McClain, Jr.* and *Sam B. Sebree* for petitioner. *Walter A. Raymond* for respondent. Reported below: 355 Mo. 248, 196 S. W. 2d 129.

No. 837. LICHT ET AL. *v.* UNITED STATES. March 3, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *James D. C. Murray* for petitioners. *Acting Solicitor General Washington, Robert S. Erdahl* and *Beatrice Rosenberg* for the United States. Reported below: 158 F. 2d 458.

No. 874. PESKOE *v.* UNITED STATES. March 3, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Ralph L. Fusco* for petitioner. *Acting Solicitor General Washington, Frederick Bernays Wiener, Robert S. Erdahl* and *Irving S. Shapiro* for the United States. Reported below: 157 F. 2d 935.

No. 876. KREPPER *v.* UNITED STATES. March 3, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *George R. Sommer* for petitioner. *Acting Solicitor General Washington, Robert S. Erdahl* and *Philip R. Monahan* for the United States. Reported below: 159 F. 2d 958.

No. 890. SMITH, RICHEY & CO., INC. ET AL. *v.* FLEMING, TEMPORARY CONTROLS ADMINISTRATOR. March 3, 1947. Petition for writ of certiorari to the United States Emergency Court of Appeals denied. *Joseph Cohn* for petitioners. *Acting Solicitor General Washington, John R. Benney, Carl A. Auerbach* and *William R. Ming, Jr.* for respondent.

No. 907. TEXAS & PACIFIC RAILWAY CO. *v.* ST. LOUIS SOUTHWESTERN RAILWAY CO. March 3, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Charles M. Spence* and *Thomas Bond* for petitioner. *A. H. Kiskaddon, Oliver J. Miller* and *Jacob M. Lashly* for respondent. Reported below: 158 F. 2d 251.

No. 910. BUCKNER ET AL. *v.* TWEED, TRADING AS F. A. TWEED CO. March 3, 1947. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Ben Lindas* for petitioners. Reported below: 81 U. S. App. D. C. 256, 157 F. 2d 211.

No. 935. EDWARDS ET AL. *v.* DINE. March 3, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Edward M. Burke* for petitioners. *Charles Rivers Aiken* and *Emmet J. Cleary* for respondent. Reported below: 158 F. 2d 17.

No. 938. VULCAN CORPORATION *v.* INTERNATIONAL SHOE MACHINE CORP. ET AL. March 3, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Walter F. Murray* and *L. G. Miller* for petitioner. *Herman T. Gammons* and *Robert L. Thompson* for respondents. Reported below: 158 F. 2d 520.

No. 846. SEABOARD SURETY CO. *v.* UNITED STATES. March 3, 1947. Petition for writ of certiorari to the Court of Claims denied. *Bernard J. Gallagher* and *M. Walton Hendry* for petitioner. *Acting Solicitor General Washington, Assistant Attorney General Sonnett* and *Samuel D. Slade* for the United States. Reported below: 107 Ct. Cl. 34, 67 F. Supp. 969.

No. 848. COMMISSIONER OF INTERNAL REVENUE *v.* MCALLISTER. March 3, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Acting Solicitor General Washington* for petitioner. *Charles B. Collins* and *James D. Carpenter* for respondent. Reported below: 157 F. 2d 235.

No. 854. CAMPA *v.* UNITED STATES. March 3, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Floyd Duke James* for petitioner. *Acting Solicitor General Washington, Robert S. Erdahl* and *Leon Ulman* for the United States. Reported below: 158 F. 2d 643.

No. 863. WHITMAN PUBLISHING CO. *v.* UNITED STATES. March 3, 1947. Petition for writ of certiorari to the Court of Claims denied. *Stanley Suydam* and *Russell Hardy* for petitioner. *Acting Solicitor General Washington, Sewall Key, Helen R. Carloss* and *Elizabeth B. Davis* for the United States. Reported below: 106 Ct. Cl. 689, 65 F. Supp. 487.

No. 868. ANTHONY *v.* OREGON. March 3, 1947. Petition for writ of certiorari to the Supreme Court of Oregon

denied. *William P. Lord* and *Ben Anderson* for petitioner. Reported below: 179 Ore. —, 169 P. 2d 587.

No. 911. GARLAND *v.* UNITED STATES; and

No. 916. WELLS *v.* UNITED STATES. March 3, 1947. Petitions for writs of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Hayden C. Covington* for petitioners. *Acting Solicitor General Washington, Robert S. Erdahl* and *Irving S. Shapiro* for the United States. Reported below: No. 911, 158 F. 2d 93; No. 916, 158 F. 2d 932.

No. 914. OGDEN DAIRY CO. *v.* WICKARD, SECRETARY OF AGRICULTURE, ET AL. March 3, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Hector A. Brouillet* for petitioner. *Acting Solicitor General Washington, Assistant Attorney General Berge, J. Stephen Doyle, Jr.* and *Katharine A. Markwell* for respondents. Reported below: 157 F. 2d 445.

No. 915. MOORE, DIRECTOR OF FISHERIES OF THE STATE OF WASHINGTON, ET AL. *v.* UNITED STATES. March 3, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Smith Troy,* Attorney General of the State of Washington, and *Harold A. Pebbles* for petitioners. *Acting Solicitor General Washington* and *Assistant Attorney General Bazelon* for the United States. *Kenneth R. L. Simmons* filed a brief for the Quillayute Tribe of Indians, as *amicus curiae,* opposing the petition. Reported below: 157 F. 2d 760.

No. 941. NEBRASKA NATIONAL HOTEL CO. *v.* O'MALLEY, COLLECTOR OF INTERNAL REVENUE. March 3, 1947.

Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *William J. Hotz* for petitioner. *Acting Solicitor General Washington* for respondent.

No. 942. ALLEN, COLLECTOR OF INTERNAL REVENUE, *v.* FIRST NATIONAL BANK & TRUST CO., EXECUTOR. March 3, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Acting Solicitor General Washington* for petitioner. *T. Baldwin Martin* for respondent. Reported below: 157 F. 2d 592.

No. 955. EASTMAN KODAK CO. *v.* FEDERAL TRADE COMMISSION. March 3, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *T. Carl Nixon, Arthur L. Stern* and *Thomas Kiernan* for petitioner. *Acting Solicitor General Washington, Assistant Attorney General Berge, Robert L. Stern* and *W. T. Kelley* for respondent. Reported below: 158 F. 2d 592.

No. 964. 7 FIFTHS OLD GRAND-DAD WHISKEY ET AL. *v.* UNITED STATES. March 3, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Hal M. Black* for petitioners. *Acting Solicitor General Washington, Robert S. Erdahl* and *Beatrice Rosenberg* for the United States. Reported below: 158 F. 2d 34.

No. 972. PUBLIC SERVICE INTERSTATE TRANSPORTATION CO. *v.* SUTTON. March 3, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Sec-

ond Circuit denied. *William C. Morris* for petitioner. *Asher Blum* for respondent. Reported below: 157 F. 2d 947.

No. 974. ROBERTS *v.* ROBERTS ET AL. March 3, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Jas. G. Martin* for petitioner. *Acting Solicitor General Washington* for the United States, and *Russell T. Bradford* for Margaret E. Roberts, respondents. Reported below: 157 F. 2d 906.

No. 770. CITY OF PORTLAND *v.* PUBLIC MARKET CO. ET AL. March 3, 1947. Petition for writ of certiorari to the Supreme Court of Oregon denied. *Jay Bowerman* and *Lyman E. Latourette* for petitioner. *Acting Solicitor General Washington, Robert C. Goodale* and *Jerry N. Griffin* for the Reconstruction Finance Corporation et al., and *Charles A. Hart* for the Public Market Co., respondents. Reported below: 179 Ore. —, 170 P. 2d 586.

No. 742. BULLOCK *v.* UNITED STATES. March 3, 1947. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Henry Lincoln Johnson, Jr.* for petitioner. *Acting Solicitor General Washington* and *Robert S. Erdahl* for the United States. Reported below: 81 U. S. App. D. C. 271, 157 F. 2d 702.

No. 806. PARKER *v.* UNITED STATES. March 3, 1947. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. Peti-

tioner *pro se*. *Acting Solicitor General Washington, Robert S. Erdahl* and *Leon Ulman* for the United States. Reported below: 81 U. S. App. D. C. 282, 158 F. 2d 185.

No. 810. LACEY *v.* SANFORD, WARDEN. March 3, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. Petitioner *pro se*. *Acting Solicitor General Washington, Robert S. Erdahl* and *Leon Ulman* for the United States. Reported below: 158 F. 2d 282.

No. 834. LEONARD *v.* UNITED STATES. March 3, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Robert Bobrick* and *David H. H. Felix* for petitioner. *Acting Solicitor General Washington* and *Robert S. Erdahl* for the United States. Reported below: 157 F. 2d 767.

No. 845. MIGNOGNA *v.* UNITED STATES. March 3, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. Petitioner *pro se*. *Acting Solicitor General Washington, Robert S. Erdahl* and *Leon Ulman* for the United States. Reported below: 157 F. 2d 839.

No. 869. MILLER *v.* SANFORD, WARDEN. March 3, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. Petitioner *pro se*. *Acting Solicitor General Washington, Robert S. Erdahl* and *Leon Ulman* for the United States.

No. 871. TURNER *v.* UNITED STATES. March 3, 1947. Petition for writ of certiorari to the Circuit Court of

Appeals for the Fifth Circuit denied. *Hayden C. Covington* and *Grover C. Powell* for petitioner. *Acting Solicitor General Washington, Robert S. Erdahl* and *Irving S. Shapiro* for the United States. Reported below: 157 F. 2d 520.

No. 877. MORRISON *v.* FOSTER, WARDEN. March 3, 1947. 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: 296 N. Y. 748, 70 N. E. 2d 553.

No. 894. WOODS *v.* ILLINOIS. March 3, 1947. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 939. STERN *v.* COX. March 3, 1947. Petition for writ of certiorari to the Court of Appeals of Tennessee denied. *John S. Ashworth* for petitioner. *Jas. H. Epps, Jr., Robert L. Taylor* and *Wm. E. Miller* for respondent.

No. 997. THOMPSON *v.* NIERSTHEIMER, WARDEN. March 3, 1947. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 1005. ROSS *v.* RAGEN, WARDEN. March 3, 1947. Petition for writ of certiorari to the Circuit Court of Will County, Illinois, denied.

No. 1006. SAMUELS *v.* RAGEN, WARDEN; and
No. 1007. HARRIS *v.* RAGEN, WARDEN. March 3, 1947.

Petitions for writs of certiorari to the Supreme Court of Illinois denied.

No. 1008. McCollum *v.* Ragen, Warden. March 3, 1947. Petition for writ of certiorari to the Criminal Court of Cook County and the Supreme Court of Illinois, denied.

No. 1009. Mills *v.* Ragen, Warden. March 3, 1947. Petition for writ of certiorari to the Circuit Court of Will County and the Supreme Court of Illinois, denied.

No. 1010. Barron *v.* Ragen, Warden. March 3, 1947. Petition for writ of certiorari to the Criminal Court of Cook County, Illinois, denied.

No. 1011. Kaval *v.* Ragen, Warden; and

No. 1012. Klein *v.* Nierstheimer, Warden. March 3, 1947. Petitions for writs of certiorari to the Supreme Court of Illinois denied.

No. 1023. Bellino et al. *v.* Massachusetts. March 3, 1947. Petition for writ of certiorari to the Superior Court of Essex County, Massachusetts, denied. *Arthur L. Brown* for petitioners. Reported below: 320 Mass. 635, 71 N. E. 2d 411.

No. 1032. Norwitt *v.* Illinois. March 3, 1947. Petition for writ of certiorari to the Supreme Court of Illinois denied. Reported below: 394 Ill. 553, 69 N. E. 2d 285.

No. 1037. CANNATA *v.* NEW YORK. March 3, 1947. Petition for writ of certiorari to the County Court of Kings County, New York, denied. Reported below: See 267 App. Div. 996, 49 N. Y. S. 2d 414.

No. 1042. BUTLER *v.* RAGEN, WARDEN. March 3, 1947. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 182. MACKEY *v.* NEW YORK. March 3, 1947. Petition for writ of certiorari to the County Court of Onondaga County, New York, denied. MR. JUSTICE DOUGLAS and MR. JUSTICE RUTLEDGE are of the opinion that the petition should be granted. Petitioner *pro se*. *William H. Bowers* for respondent.

No. 1033. BARRON *v.* RAGEN, WARDEN. March 3, 1947. Petition for writ of certiorari to the Circuit Court of Will County, Illinois, denied.

Nos. 1027 and 1028. BOEING AIRCRAFT CO. *v.* KING COUNTY ET AL. See *ante*, p. 803.

No. 827. SOUTHERN PACIFIC CO. *v.* UNITED STATES. March 10, 1947. Petition for writ of certiorari to the Court of Claims denied. *C. O. Amonette* and *Lawrence Cake* for petitioner. *Acting Solicitor General Washington, Assistant Attorney General Sonnett, John Ford Baecher* and *Samuel D. Slade* for the United States. Reported below: 107 Ct. Cl. 167, 67 F. Supp. 966.

No. 860. UNITED STATES *v.* ILLINOIS PURE ALUMINUM Co. March 10, 1947. Petition for writ of certiorari to the Court of Claims denied. *Acting Solicitor General Washington* for the United States. *Walter G. Moyle, Ralph P. Wanlass* and *Ernest H. Oliver* for respondent. Reported below: 107 Ct. Cl. 1, 67 F. Supp. 955.

No. 899. KINNISON *v.* UNITED STATES. March 10, 1947. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Myron G. Ehrlich* and *Richard L. Tedrow* for petitioner. *Acting Solicitor General Washington, Robert S. Erdahl* and *Leon Ulman* for the United States. Reported below: 81 U. S. App. D. C. 312, 158 F. 2d 403.

No. 950. MORTON *v.* THOMAS, COMMUNITY SURVIVOR. March 10, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Homer Jack Fisher* and *Lloyd E. Elliott* for petitioner. *Acting Solicitor General Washington, Sewall Key, Lee A. Jackson* and *Hilbert P. Zarky* for respondent. Reported below: 158 F. 2d 574.

No. 953. SANITARY DISTRICT OF CHICAGO *v.* ACTIVATED SLUDGE, INC. ET AL. March 10, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Ernest Buehler, Edmund D. Adcock* and *Ralph M. Snyder* for petitioner. *Charles L. Byron* and *Gordon F. Hook* for respondents. Reported below: 157 F. 2d 517.

No. 982. PURE OIL CO. *v.* PETROLITE CORPORATION, LTD. March 10, 1947. Petition for writ of certiorari to

the Circuit Court of Appeals for the Fifth Circuit denied. *David T. Searls* for petitioner. *Leonard S. Lyon* for respondent. Reported below: 158 F. 2d 503.

No. 986. Joseph E. Seagram & Sons, Inc. *v.* Levin. March 10, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Edward R. Adams* for petitioner. *Bernard Yedor* for respondent. Reported below: 158 F. 2d 55.

No. 988. Ambassador Management Corp. et al. *v.* Incorporated Village of Hempstead. March 10, 1947. Petition for writ of certiorari to the Supreme Court, Second Appellate Division, of New York, denied. *Henry Waldman* for petitioners. *C. H. Tunnicliffe Jones* for respondent. Reported below: See 270 App. Div. 898, 62 N. Y. S. 2d 165; 296 N. Y. 666, 69 N. E. 2d 819.

No. 1014. Garrett et al. *v.* District of Columbia. March 10, 1947. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Ewing Laporte* for petitioners. *Vernon E. West* and *Chester H. Gray* for respondent. Reported below: 81 U. S. App. D. C. 374, 159 F. 2d 457.

No. 1018. Fisch, Trustee in Bankruptcy, et al. *v.* Standard Factors Corp. March 10, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *George Furst* for petitioners. *Max L. Rosenstein* for respondent. Reported below: 157 F. 2d 997.

No. 960. KAUFMAN *v.* NEW YORK. March 10, 1947. Petition for writ of certiorari to the County Court of Kings County, New York, denied. *Maurice Edelbaum* for petitioner.

No. 879. SOUTHERN PACIFIC CO. *v.* HENWOOD, TRUSTEE, ET AL.;

No. 909. MEYER *v.* HENWOOD, TRUSTEE, ET AL.; and

No. 936. ST. LOUIS SOUTHWESTERN RAILWAY CO. *v.* HENWOOD, TRUSTEE, ET AL. March 10, 1947. Petitions for writs of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. MR. JUSTICE FRANKFURTER took no part in the consideration or decision of these applications. MR. JUSTICE DOUGLAS is of the opinion that the petition for certiorari in No. 909 should be granted. *Ben C. Dey, George L. Buland, Robert L. Pierce, Claude O. Pearcy* and *G. H. Muckley* for the Southern Pacific Co., petitioner in No. 879 and respondent in No. 909. *Walter E. Meyer* and *R. Walston Chubb* for petitioner in No. 909. *Jacob M. Lashly* for petitioner in No. 936. *Edwin S. S. Sunderland* and *Thomas O'G. FitzGibbon* for the Guaranty Trust Co.; *James Piper* for the Protective Committee for bondholders of St. Louis S. W. R. Co.; *S. Mayner Wallace* and *Paul Duryea Miller* for the Chase National Bank et al.; and *Alfred H. Phillips* for the Chemical Bank & Trust Co., respondents. Reported below: 157 F. 2d 337.

No. 824. LOVVORN *v.* UNITED STATES. March 10, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. Reported below: 157 F. 2d 910.

No. 865. MONSKY ET AL. *v.* NEW YORK. March 10, 1947. Petition for writ of certiorari to the County Court of Nassau County, New York, denied.

No. 882. KIRK *v.* HEINZE, WARDEN. March 10, 1947. Petition for writ of certiorari to the Supreme Court of California denied. Reported below: 76 Cal. App. 2d 496, 173 P. 2d 367.

No. 891. WATKINS *v.* SMYTH, SUPERINTENDENT. March 10, 1947. Petition for writ of certiorari to the Supreme Court of Appeals of Virginia denied. *W. A. Hall, Jr.* for petitioner. Reported below: 185 Va. lxix.

No. 895. HABERMANN *v.* NEW YORK. March 10, 1947. Petition for writ of certiorari to the Court of General Sessions of New York County, New York, denied.

No. 897. KYNETTE *v.* DUFFY, WARDEN; and

No. 984. MANDELL *v.* DUFFY, WARDEN. March 10, 1947. Petitions for writs of certiorari to the Supreme Court of California denied.

No. 1039. RHODES *v.* NIERSTHEIMER, WARDEN. Petition for writ of certiorari to the Supreme Court of Illinois;

No. 1053. BURNER *v.* NIERSTHEIMER, WARDEN. Petition for writ of certiorari to the Circuit Court of Adams County, Illinois;

No. 1054. BRANCATO *v.* ILLINOIS; and

No. 1056. THOMPSON *v.* RAGEN, WARDEN. Petitions for writs of certiorari to the Supreme Court of Illinois. March 10, 1947. Denied.

No. 944. BLOCH *v.* UNITED STATES. March 17, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *William H. Fryer* for

petitioner. *Acting Solicitor General Washington, Robert S. Erdahl, Sheldon E. Bernstein, William E. Remy, David London, Samuel Mermin* and *Albert J. Rosenthal* for the United States. Reported below: 158 F. 2d 519.

No. 973. PIONEER MILL CO., LTD. *v.* VICTORIA WARD, LTD. ET AL. March 17, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Urban E. Wild* for petitioner. *Robert M. Searls* for Victoria Ward, Ltd. et al., respondents. Reported below: 158 F. 2d 122.

No. 983. ALLEN *v.* UNITED STATES. March 17, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Lawrence Kovalsky* and *David Goldstein* for petitioner. *Acting Solicitor General Washington, W. Marvin Smith, Robert S. Erdahl* and *Leon Ulman* for the United States. Reported below: 159 F. 2d 594.

No. 989. PETERSON ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. March 17, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Philip J. Schneider* and *Morison R. Waite* for petitioners. *Acting Solicitor General Washington, Gerhard P. Van Arkel, Morris P. Glushien* and *Ruth Weyand* for respondent. Reported below: 157 F. 2d 514.

No. 990. FRIEDMAN *v.* SCHWELLENBACH, SECRETARY OF LABOR, ET AL. March 17, 1947. Petition for writ of certiorari to the United States Court of Appeals for the

District of Columbia denied. *Morton Stavis* and *Sidney V. Smith* for petitioner. *Acting Solicitor General Washington, Assistant Attorney General Sonnett, John F. Baecher* and *Paul A. Sweeney* for respondents. *Thurman Arnold, Abe Fortas* and *Milton V. Freeman* filed a brief for the United Public Workers of America, as *amicus curiae,* in support of the petition. Reported below: 81 U. S. App. D. C. 365, 159 F. 2d 22.

No. 991. CANNON ET AL. *v.* UNITED STATES. March 17, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *M. A. Grace* for petitioners. *Acting Solicitor General Washington, Robert S. Erdahl* and *Beatrice Rosenberg* for the United States. Reported below: 158 F. 2d 952.

No. 992. ATLANTIC COAST LINE RAILROAD CO. *v.* MOSS. March 17, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Thomas W. Davis* and *James J. Mennis* for petitioner. *Richard Steel* for respondent. Reported below: 157 F. 2d 1005.

No. 1001. RANDOLPH *v.* UNITED STATES. March 17, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *B. F. Louis* for petitioner. *Acting Solicitor General Washington, Assistant Attorney General Sonnett, Frederick Bernays Wiener* and *Samuel D. Slade* for the United States. Reported below: 158 F. 2d 787.

No. 1002. D. M. W. CONTRACTING CO., INC. ET AL. *v.* STOLZ. March 17, 1947. Petition for writ of certiorari

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to the United States Court of Appeals for the District of Columbia denied. *Emanuel Harris* for petitioners. *Maurice Friedman* for respondent. Reported below: 81 U. S. App. D. C. 334, 158 F. 2d 405.

No. 794. BLUE *v.* INDIANA. March 17, 1947. Petition for writ of certiorari to the Supreme Court of Indiana denied. MR. JUSTICE MURPHY and MR. JUSTICE RUTLEDGE are of the opinion that the petition for certiorari should be granted. *John D. Shoaff* for petitioner. Reported below: 224 Ind. 394, 67 N. E. 2d 377.

No. 976. ROYAL PACKING CO. *v.* PORTER, PRICE ADMINISTRATOR. March 17, 1947. Fleming, Temporary Controls Administrator, substituted as the party respondent. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Douglas H. Jones* for petitioner. *Acting Solicitor General Washington, William E. Remy, David London, Samuel Mermin* and *Norma G. Zarky* for respondent. Reported below: 157 F. 2d 524.

No. 815. POVICH *v.* SANFORD, WARDEN. March 17, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. Petitioner *pro se*. *Acting Solicitor General Washington, Robert S. Erdahl* and *Sheldon E. Bernstein* for respondent. Reported below: 157 F. 2d 873.

No. 878. ROGERS *v.* SQUIER, WARDEN. March 17, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. Petitioner *pro*

se. *Acting Solicitor General Washington, Robert S. Erdahl* and *Leon Ulman* for respondent. Reported below: 157 F. 2d 948.

No. 888. LUCAS *v.* UNITED STATES. March 17, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. Petitioner *pro se.* *Acting Solicitor General Washington, Robert S. Erdahl* and *Beatrice Rosenberg* for the United States. Reported below: 158 F. 2d 865.

No. 1055. ERNEST *v.* ILLINOIS; and

No. 1066. FORSYTHE *v.* NIERSTHEIMER, WARDEN. March 17, 1947. Petitions for writs of certiorari to the Supreme Court of Illinois denied. Reported below: No. 1066, 396 Ill. 193, 71 N. E. 2d 62.

No. 1089. VON SCHERER *v.* RAGEN, WARDEN. March 17, 1947. Petition for writ of certiorari to the Circuit Court of Will County, Illinois, denied.

No. 1045. COOK *v.* INDIANA. March 17, 1947. Petition for writ of certiorari to the Supreme Court of Indiana denied.

No. 1073. ELLIOTT *v.* MICHIGAN. March 17, 1947. Petition for writ of certiorari to the Supreme Court of Michigan denied.

No. 1096. SMITH *v.* JEFFERSON COUNTY ET AL. See *ante,* p. 808.

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No. 735. DELGADO ET AL. *v.* CENTRAL CAMBALACHE, INC. ET AL. March 31, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Ulpiano Crespo, Jr.* for petitioners. *E. T. Fiddler* for respondents. Reported below: 157 F. 2d 43.

No. 859. HARTMANN, EXECUTOR, *v.* UNITED STATES. March 31, 1947. Petition for writ of certiorari to the Court of Claims denied. *Zeamore A. Ader* for petitioner. *Acting Solicitor General Washington, Assistant Attorney General Sonnett, John Ford Baecher, Paul A. Sweeney* and *Oscar H. Davis* for the United States. Reported below: 106 Ct. Cl. 686, 65 F. Supp. 397.

Nos. 968 and 969. WHITE *v.* ILLINOIS EX REL. MARTIN ET AL. March 31, 1947. Petition for writs of certiorari to the Appellate Court, First District, of Illinois, denied. *Joseph I. Bulger* and *Ode L. Rankin* for petitioner. Reported below: 329 Ill. App. 81, 67 N. E. 2d 498, 504.

No. 975. UNITED STATES EX REL. REICHEL *v.* CARUSI, COMMISSIONER OF IMMIGRATION & NATURALIZATION SERVICE. March 31, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Francis Fisher Kane* for petitioner. *Acting Solicitor General Washington, Assistant Attorney General Sonnett, Frederick Bernays Wiener* and *Thomas M. Cooley, II,* for respondent. Reported below: 157 F. 2d 732.

No. 994. ROKEY ET AL. *v.* DAY & ZIMMERMANN, INC. March 31, 1947. Petition for writ of certiorari to the

Circuit Court of Appeals for the Eighth Circuit denied. *J. C. Pryor* for petitioners. *Acting Solicitor General Washington, Assistant Attorney General Sonnett* and *Samuel D. Slade* for respondent. Reported below: 157 F. 2d 734.

No. 995. BOWERS ET AL. *v.* REMINGTON RAND, INC. March 31, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Harold Leventhal* for petitioners. *Acting Solicitor General Washington, Assistant Attorney General Sonnett* and *Samuel D. Slade* for respondent. Reported below: 159 F. 2d 114.

No. 998. ST. REGIS PAPER CO. *v.* HIGGINS, COLLECTOR OF INTERNAL REVENUE. March 31, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Horace R. Lamb* for petitioner. *Acting Solicitor General Washington, Sewall Key, Lee A. Jackson* and *Irving I. Axelrad* for respondent. Reported below: 157 F. 2d 884.

No. 1000. JEFFRIES *v.* COMMISSIONER OF INTERNAL REVENUE. March 31, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Garland M. McNutt* for petitioner. *Acting Solicitor General Washington, Sewall Key, Helen R. Carloss* and *Helen Goodner* for respondent. Reported below: 158 F. 2d 225.

No. 1019. ILLINOIS EX REL. EL *v.* NIERSTHEIMER, WARDEN. March 31, 1947. Petition for writ of certiorari to the Supreme Court of Illinois denied. *Robert E. Bryant* and *Harold M. Tyler* for petitioner.

No. 1025. SMITH, ADMINISTRATOR, *v.* HYDRO GAS CO. OF WEST FLORIDA, INC. ET AL. March 31, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *J. Kirkman Jackson* and *Erle Pettus* for petitioner. *Harry H. Smith* for the Hydro Gas Company of West Florida, Inc., respondent. Reported below: 157 F. 2d 809.

No. 1029. UTAH JUNK CO. *v.* FLEMING, TEMPORARY CONTROLS ADMINISTRATOR. March 31, 1947. Petition for writ of certiorari to the United States Emergency Court of Appeals denied. *Keith L. Seegmiller* and *Ray R. Murdock* for petitioner. *Acting Solicitor General Washington, Carl A. Auerbach* and *William R. Ming, Jr.* for respondent. Reported below: 159 F. 2d 440.

No. 1041. PRICHARD *v.* UNITED STATES. March 31, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *J. F. Kemp* for petitioner. *Acting Solicitor General Washington, Robert S. Erdahl* and *Sheldon E. Bernstein* for the United States. Reported below: 158 F. 2d 952.

No. 1043. UNION TRUST CO., TRUSTEE, *v.* GENAU ET AL. March 31, 1947. Petition for writ of certiorari to the Supreme Court of Florida denied. *Frank M. Harris* and *Harold A. Kooman* for petitioner. *O. K. Reaves* for respondents. Reported below: 158 Fla. 294, 28 So. 2d 890.

No. 1046. NORFOLK SOUTHERN BUS CORP. *v.* NATIONAL LABOR RELATIONS BOARD. March 31, 1947. Pe-

tition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *S. Burnell Bragg* and *Jas. G. Martin* for petitioner. *Acting Solicitor General Washington, Gerhard P. Van Arkel, Morris P. Glushien* and *Ruth Weyand* for respondent. Reported below: 159 F. 2d 516.

No. 1050. CONNORS, TRUSTEE IN BANKRUPTCY, *v.* TOWN OF AGAWAM. March 31, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *David J. Cohen* and *Edward J. Flavin* for petitioner. *Donald M. Macaulay* for respondent. Reported below: 159 F. 2d 360.

No. 1052. ALEXANDER *v.* ALEXANDER. March 31, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Arthur Miller* for petitioner. *Paul S. Kelly* for respondent. Reported below: 158 F. 2d 429.

No. 1072. SWALLEY *v.* ADDRESSOGRAPH-MULTIGRAPH CORP. March 31, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *A. Berkowitz* for petitioner. *Philip M. Aitken* for respondent. Reported below: 158 F. 2d 51.

No. 971. LOTTO ET AL. *v.* UNITED STATES. See *ante*, p. 811.

No. 1090. GAVALIS *v.* ILLINOIS. March 31, 1947. Petition for writ of certiorari to the Supreme Court of Illinois denied. Reported below: 395 Ill. 409, 70 N. E. 2d 589.

No. 866. WAGNER *v.* UNITED STATES. March 31, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. Petitioner *pro se.* *Acting Solicitor General Washington, Robert S. Erdahl* and *Philip R. Monahan* for the United States. Reported below: 157 F. 2d 516.

No. 892. ACKLEY *v.* NEW YORK. March 31, 1947. Petition for writ of certiorari to the Court of Appeals of New York denied. Reported below: 296 N. Y. 825, 72 N. E. 2d 16.

No. 1016. PEYTON *v.* RAILWAY EXPRESS AGENCY, INC. March 31, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. Reported below: 158 F. 2d 671.

No. 1017. NOORLANDER *v.* CALIFORNIA. March 31, 1947. Petition for writ of certiorari to the District Court of Appeal, 2d Appellate District, of California, denied. Reported below: 76 Cal. App. 2d 274, 172 P. 2d 766.

No. 1021. VELAZQUEZ *v.* HUNTER, WARDEN. March 31, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. Petitioner *pro se.* *Acting Solicitor General Washington, Robert S. Erdahl* and *Beatrice Rosenberg* for respondent. Reported below: 159 F. 2d 606.

No. 1044. DUNSCOMB *v.* NEW YORK. March 31, 1947. Petition for writ of certiorari to the County Court of Onondaga County, New York, denied.

No. 1074. SEILECI *v.* NEW YORK. March 31, 1947. Petition for writ of certiorari to the Supreme Court, Appellate Division, of New York, denied.

No. 1099. HAYES *v.* NEW YORK. March 31, 1947. Petition for writ of certiorari to the County Court of Kings County, New York, denied.

No. 1102. TERWILLIGER *v.* NEW YORK. March 31, 1947. Petition for writ of certiorari to the County Court of Tioga County, New York, denied.

No. 1114. MCGREGOR *v.* ILLINOIS. March 31, 1947. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 1115. WILLIAMS *v.* RAGEN, WARDEN. March 31, 1947. Petition for writ of certiorari to the Circuit Court of Will County, Illinois, denied.

No. 1129. HAUPRIS *v.* ILLINOIS. March 31, 1947. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 1130. CROWLEY *v.* RAGEN, WARDEN; and

No. 1131. GAWRON *v.* RAGEN, WARDEN. March 31, 1947. Petitions for writs of certiorari to the Criminal Court of Cook County, Illinois, denied.

No. 1136. WOODS *v.* ILLINOIS. March 31, 1947. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 993. BELL ET AL. *v.* PORTER ET AL. See *ante*, p. 813.

Nos. 677 and 678. SENDEROWITZ ET AL., TRADING AS ROYAL MANUFACTURING CO., *v.* FLEMING, TEMPORARY CONTROLS ADMINISTRATOR. April 7, 1947. Petition for writs of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Julius M. Rapoport* for petitioners. *Acting Solicitor General Washington, John R. Benney, William E. Remy, David London, Samuel Mermin* and *Albert J. Rosenthal* for respondent. Reported below: 158 F. 2d 435.

No. 813. MARTINI ET AL., DOING BUSINESS AS LAKESIDE CUT-RATE LIQUOR STORE, *v.* FLEMING, TEMPORARY CONTROLS ADMINISTRATOR. April 7, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Wayne M. Collins* for petitioners. *Acting Solicitor General Washington, William E. Remy, David London, Samuel Mermin* and *Albert J. Rosenthal* for respondent. Reported below: 157 F. 2d 35.

No. 985. CULLIGAN *v.* UNITED STATES. April 7, 1947. Petition for writ of certiorari to the Court of Claims denied. *Robert C. Handwerk* for petitioner. *Acting Solicitor General Washington, Assistant Attorney General Sonnett* and *Paul A. Sweeney* for the United States. Reported below: 107 Ct. Cl. 222.

No. 1048. THOMAS *v.* FLORIDA. April 7, 1947. Petition for writ of certiorari to the Supreme Court of Florida denied. *Zach H. Douglas* for petitioner. *J. Tom Watson,* Attorney General of Florida, for respondent. Reported below: 158 Fla. 191, 28 So. 2d 264.

No. 1065. CHANEY *v.* STOVER. April 7, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Joseph I. Nachman* for petitioner. *J. M. Perry* for respondent. Reported below: 158 F. 2d 604.

No. 1067. CLEAVER *v.* COMMISSIONER OF INTERNAL REVENUE. April 7, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Malcolm K. Whyte* and *Herbert C. Hirschboeck* for petitioner. *Acting Solicitor General Washington, Sewall Key, Lee A. Jackson* and *Louise Foster* for respondent. Reported below: 158 F. 2d 342.

No. 1070. MOSS, ADMINISTRATRIX, *v.* PENNSYLVANIA RAILROAD CO. April 7, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Owen W. Crumpacker* and *Jay E. Darlington* for petitioner. *Hugh B. Cox* and *John R. Wall* for respondent. Reported below: 158 F. 2d 86.

No. 1071. HOOK, ADMINISTRATRIX, *v.* NATIONAL BRICK CO. April 7, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Owen W. Crumpacker* and *Jay E. Darlington* for petitioner. *Bernard J. Gallagher* for respondent. Reported below: 158 F. 2d 86.

No. 1077. PACIFIC ELECTRIC RAILWAY CO. *v.* UNITED STATES. April 7, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *C. W. Cornell* for petitioner. *Acting Solicitor General Washington, Sewall Key, Lee A. Jackson* and *Melva M.*

Graney for the United States. Reported below: 157 F. 2d 902.

No. 1080. FLEMING, TEMPORARY CONTROLS ADMINISTRATOR, *v.* COLLINS ET AL.;

No. 1081. FLEMING, TEMPORARY CONTROLS ADMINISTRATOR, *v.* HIRSCH; and

No. 1082. FLEMING, TEMPORARY CONTROLS ADMINISTRATOR, *v.* MORRISON ET AL. April 7, 1947. Petition for writs of certiorari to the United States Emergency Court of Appeals denied. *Acting Solicitor General Washington* and *Carl A. Auerbach* for petitioner. *Allen P. Dodd, Sr.* and *Mac Asbill* for respondents in Nos. 1080 and 1082. *Frederic P. Lee* and *J. Verser Conner* for respondent in No. 1081. Reported below: 159 F. 2d 431.

No. 1084. WILSON *v.* UNITED STATES. April 7, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *G. Ernest Jones* for petitioner. Reported below: 158 F. 2d 659.

No. 1087. KIRKMYER ET AL. *v.* ARKANSAS FUEL OIL CO. April 7, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Guy B. Hazelgrove* for petitioners. *H. C. Walker, Jr.* and *Robert Roberts, Jr.* for respondent. Reported below: 158 F. 2d 821.

No. 1093. CHANADY *v.* DETROIT SHEET STEEL WORKS. April 7, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Warren E. Miller* for petitioner. *Ernest W. Hotchkiss* for respondent. Reported below: 158 F. 2d 799.

No. 1119. CERTIFIED OIL CO., INC. ET AL. *v.* RUDNICK ET AL. April 7, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *William W. Frankel* for petitioners. Respondents *pro se*. Reported below: 158 F. 2d 940.

No. 1106. ARNSTEIN *v.* PORTER. April 7, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. Petitioner *pro se*. *Samuel J. Silverman* for respondent. Reported below: 158 F. 2d 795.

No. 1061. JOHNSON *v.* FOSTER, WARDEN. April 7, 1947. Petition for writ of certiorari to the Supreme Court of New York, Appellate Division, Fourth Department, denied. Petitioner *pro se*. *Nathaniel L. Goldstein,* Attorney General of New York, and *Wendell P. Brown,* Solicitor General, for respondent. Reported below: 271 App. Div. 862, 66 N. Y. S. 2d 924.

No. 1124. WHITED *v.* ILLINOIS; and

No. 1146. RIOS *v.* ILLINOIS. April 7, 1947. Petitions for writs of certiorari to the Supreme Court of Illinois denied.

No. 1148. BARTELL *v.* NIERSTHEIMER, WARDEN. April 7, 1947. Petition for writ of certiorari to the Criminal Court of Cook County, Illinois, denied.

No. 1151. STENGEL *v.* BURKE, WARDEN. April 7, 1947. Petition for writ of certiorari to the Supreme Court of Pennsylvania denied.

No. 1153. JONES *v.* RAGEN, WARDEN. April 7, 1947. Petition for writ of certiorari to the Criminal Court of Cook County, Illinois, denied.

ORDERS GRANTING REHEARING, FROM FEBRUARY 4, 1947, THROUGH APRII 7, 1947.

No. 733. INTERSTATE NATURAL GAS CO., INC. *v.* FEDERAL POWER COMMISSION ET AL. February 10, 1947. The petition for rehearing is granted. The order entered January 6, 1947, denying certiorari, 329 U. S. 802, is vacated and the petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit is granted limited to Questions (1), (2), and (3) presented by the petition for the writ. *William A. Dougherty, Henry P. Dart, Jr.* and *James Lawrence White* for petitioner. *Mac Q. Williamson,* Attorney General of Oklahoma, filed a brief for that State, as *amicus curiae,* and *Donald C. McCreery, Wesley E. Disney, Charles I. Francis, Russell B. Brown, L. Dan Jones, Forrest M. Darrough, Hiram M. Dow, Walace Hawkins, L. G. Owen* and *William Henry Rector* filed a brief for the Independent Natural Gas Assn. et al., as *amici curiae,* in support of the petition. Reported below: 156 F. 2d 949.

No. 346. SILESIAN AMERICAN CORP. ET AL. *v.* MARKHAM, ALIEN PROPERTY CUSTODIAN. February 17, 1947. The petition for rehearing is granted. The order entered October 14, 1946, denying certiorari, 329 U. S. 730, is vacated and the petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit is granted. Clark, Attorney General, Successor to the Alien Property Custodian, substituted as the party respondent. *George W. Whiteside, Leonard P. Moore* and *William Gilligan* for petitioners. Reported below: 156 F. 2d 793.

No. 489, October Term, 1945. ZAP *v.* UNITED STATES. See *ante*, p. 800.

ORDERS DENYING REHEARING, FROM FEBRUARY 4, 1947, THROUGH APRIL 7, 1947.*

No. 142. LOUISIANA EX REL. FRANCIS *v.* RESWEBER, SHERIFF, ET AL. February 10, 1947. The order entered June 10, 1946, staying execution is also vacated. 329 U. S. 459.

No. 183. CAHOON *v.* UNITED STATES. February 10, 1947. Second petition for rehearing denied. 329 U. S. 833.

No. 706. SMALL *v.* MARTIN, WARDEN. February 10, 1947. 329 U. S. 797.

No. 717. TOWER *v.* WATER HAMMER ARRESTER CORP. February 10, 1947. 329 U. S. 806.

No. 28. MACGREGOR *v.* WESTINGHOUSE ELECTRIC & MANUFACTURING CO. February 17, 1947. 329 U. S. 402.

Nos. 70 and 71. EDWARD KATZINGER CO. *v.* CHICAGO METALLIC MFG. CO. February 17, 1947. 329 U. S. 394.

No. 92. GARDNER, TRUSTEE, *v.* NEW JERSEY. February 17, 1947. 329 U. S. 565.

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*See Table of Cases Reported in this volume for earlier decisions in these cases, unless otherwise indicated.

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No. 765. PEONY PARK, INC. *v.* M. WITMARK & SONS;

No. 766. FOX *v.* CHAPPELL & CO., INC.; and

No. 767. INTERSTATE HOTEL CO. *v.* KERN ET AL. February 17, 1947. 329 U. S. 809.

No. 62. MORRIS *v.* JONES, DIRECTOR OF INSURANCE. March 3, 1947. 329 U. S. 545.

No. 208. TRANSPARENT-WRAP MACHINE CORP. *v.* STOKES & SMITH CO. March 3, 1947. 329 U. S. 637.

No. 690. INSURANCE GROUP COMMITTEE ET AL. *v.* DENVER & RIO GRANDE WESTERN RAILROAD CO. ET AL. March 3, 1947. 329 U. S. 607.

No. 725. DE NORMAND *v.* UNITED STATES. March 3, 1947.

No. 792. GENERAL METALS POWDER CO. *v.* S. K. WELLMAN CO. ET AL. March 3, 1947. 329 U. S. 812.

No. 816. PATTERSON *v.* VIRGINIA ELECTRIC & POWER CO. March 3, 1947. 329 U. S. 813.

No. 826. BRUMMEL *v.* L. F. DIETZ & ASSOCIATES, INC. ET AL. March 3, 1947. 329 U. S. 813.

No. 831. FLEMING ET AL., TRUSTEES, *v.* OKLAHOMA TAX COMMISSION. March 3, 1947. 329 U. S. 812.

No. 52. EVERSON *v.* BOARD OF EDUCATION OF THE TOWNSHIP OF EWING ET AL. March 10, 1947.

No. 832. TINKOFF ET AL. *v.* GOLD, TRUSTEE, ET AL. March 10, 1947.

No. 706. SMALL *v.* MARTIN, WARDEN. March 10, 1947. Leave to file a second petition for rehearing is denied.

No. 825. LADD ET AL. *v.* BRICKLEY, TRUSTEE, ET AL. March 10, 1947. MR. JUSTICE DOUGLAS and MR. JUSTICE MURPHY took no part in the consideration or decision of this application.

No. 854. CAMPA *v.* UNITED STATES. March 10, 1947. The application for a stay is also denied.

No. 553. CARTNER *v.* NEW YORK. March 17, 1947. 329 U. S. 776.

No. 804. MERTIG *v.* NEW YORK. March 17, 1947.

No. 805. ELMHURST *v.* NEW YORK. March 17, 1947.

No. 269, October Term, 1945. SABIN ET AL. *v.* HOME OWNERS' LOAN CORP. ET AL.; and

No. 952, October Term, 1945. SABIN ET AL. *v.* HOME OWNERS' LOAN CORP. ET AL. March 31, 1947. The motions for leave to file second petitions for rehearing are denied. THE CHIEF JUSTICE and MR. JUSTICE JACKSON took no part in the consideration or decision of these applications. 329 U. S. 823.

No. 182. MACKEY *v.* NEW YORK. March 31, 1947.

No. 874. PESKOE *v.* UNITED STATES. March 31, 1947.

No. 543. FEDERAL POWER COMMISSION ET AL. *v.* ARKANSAS POWER & LIGHT CO. April 7, 1947.

No. 910. BUCKNER ET AL. *v.* TWEED, TRADING AS F. A. TWEED CO. April 7, 1947.

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