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# UNITED STATES REPORTS

VOLUME 337

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## CASES ADJUDGED

IN

# THE SUPREME COURT

AT

## OCTOBER TERM, 1948

FROM MAY 16 THROUGH (IN PART) JUNE 27, 1949

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WALTER WYATT
REPORTER

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ERRATUM.

299 U. S. 148, n. 17, last line, "Sen. Rep. No. 1347" should be "Sen. Rep. No. 1297."

34557

# 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.

---

TOM C. CLARK, Attorney General.
PHILIP B. PERLMAN, Solicitor General.
CHARLES ELMORE CROPLEY, Clerk.
WALTER WYATT, Reporter.
THOMAS ENNALLS WAGGAMAN, Marshal.
HELEN NEWMAN, Librarian.

## SUPREME COURT OF THE UNITED STATES.

### Allotment of Justices.

*It is ordered* that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, 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.

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

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# CASES ADJUDGED

IN THE

# SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1948.

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## TERMINIELLO *v.* CHICAGO.

CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

No. 272. Argued February 1, 1949.—Decided May 16, 1949.

In a meeting which attracted considerable public attention, petitioner addressed a large audience in an auditorium outside of which was an angry and turbulent crowd protesting against the meeting. He condemned the conduct of the crowd outside and vigorously criticized various political and racial groups. Notwithstanding efforts of a cordon of police to maintain order, there were several disturbances in the crowd. Petitioner was charged with violation of an ordinance forbidding any "breach of the peace," and the trial court instructed the jury that any misbehavior which "stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance" violates the ordinance. Petitioner did not except to that instruction, but he did maintain at all times that, as applied to his conduct, the ordinance violated his right of free speech under the Federal Constitution. He was convicted on a general verdict and his conviction was affirmed by an intermediate appellate court and by the Supreme Court of the State. *Held:*

1. As construed by the trial court and applied to petitioner, the ordinance violates the right of free speech guaranteed by the First Amendment, made applicable to the States by the Fourteenth Amendment. Pp. 4–5.

2. It is immaterial that petitioner took no exception to the instruction and that, throughout the appellate proceedings, the state courts assumed that the only conduct punishable and punished under the ordinance was conduct constituting "fighting words,"

since the verdict was a general one and it cannot be said that petitioner's conviction was not based upon the instruction quoted above. *Stromberg* v. *California,* 283 U. S. 359. Pp. 5–6.
400 Ill. 23, 79 N. E. 2d 39, reversed.

Petitioner was convicted in a state court of violating a city ordinance forbidding any breach of the peace. The Illinois Appellate Court affirmed. 332 Ill. App. 17, 74 N. E. 2d 45. The Supreme Court of Illinois affirmed. 400 Ill. 23, 79 N. E. 2d 39. This Court granted certiorari. 335 U. S. 890. *Reversed,* p. 6.

*Albert W. Dilling* argued the cause and filed a brief for petitioner.

*L. Louis Karton* argued the cause for respondent. With him on the brief were *Benjamin S. Adamowski, Joseph F. Grossman, A. A. Pantelis* and *Harry A. Iseberg.*

*William E. Rodriguez* and *Osmond K. Fraenkel* filed a brief for the American Civil Liberties Union, as *amicus curiae,* urging reversal.

*William Maslow, Shad Polier* and *Byron S. Miller* filed a brief for the American Jewish Congress, as *amicus curiae,* urging affirmance.

Mr. Justice Douglas delivered the opinion of the Court.

Petitioner after jury trial was found guilty of disorderly conduct in violation of a city ordinance of Chicago [1] and fined. The case grew out of an address he delivered in an auditorium in Chicago under the auspices of the

[1] "All persons who shall make, aid, countenance, or assist in making any improper noise, riot, disturbance, breach of the peace, or diversion tending to a breach of the peace, within the limits of the city . . . shall be deemed guilty of disorderly conduct, and upon conviction thereof, shall be severally fined not less than one dollar nor more than two hundred dollars for each offense." Municipal Code of Chicago, 1939, § 193–1.

Christian Veterans of America. The meeting commanded considerable public attention. The auditorium was filled to capacity with over eight hundred persons present. Others were turned away. Outside of the auditorium a crowd of about one thousand persons gathered to protest against the meeting. A cordon of policemen was assigned to the meeting to maintain order; but they were not able to prevent several disturbances. The crowd outside was angry and turbulent.

Petitioner in his speech condemned the conduct of the crowd outside and vigorously, if not viciously, criticized various political and racial groups whose activities he denounced as inimical to the nation's welfare.

The trial court charged that "breach of the peace" consists of any "misbehavior which violates the public peace and decorum"; and that the "misbehavior may constitute a breach of the peace if it stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance, or if it molests the inhabitants in the enjoyment of peace and quiet by arousing alarm." Petitioner did not take exception to that instruction. But he maintained at all times that the ordinance as applied to his conduct violated his right of free speech under the Federal Constitution. The judgment of conviction was affirmed by the Illinois Appellate Court (332 Ill. App. 17, 74 N. E. 2d 45) and by the Illinois Supreme Court. 396 Ill. 41, 71 N. E. 2d 2; 400 Ill. 23, 79 N. E. 2d 39. The case is here on a petition for certiorari which we granted because of the importance of the question presented.

The argument here has been focused on the issue of whether the content of petitioner's speech was composed of derisive, fighting words, which carried it outside the scope of the constitutional guarantees. See *Chaplinsky* v. *New Hampshire,* 315 U. S. 568; *Cantwell* v. *Connecticut,* 310 U. S. 296, 310. We do not reach that question, for there is a preliminary question that is dispositive of the case.

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As we have noted, the statutory words "breach of the peace" were defined in instructions to the jury to include speech which "stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance . . . ." That construction of the ordinance is a ruling on a question of state law that is as binding on us as though the precise words had been written into the ordinance. See *Hebert* v. *Louisiana,* 272 U. S. 312, 317; *Winters* v. *New York,* 333 U. S. 507, 514.

The vitality of civil and political institutions in our society depends on free discussion. As Chief Justice Hughes wrote in *De Jonge* v. *Oregon,* 299 U. S. 353, 365, it is only through free debate and free exchange of ideas that government remains responsive to the will of the people and peaceful change is effected. The right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes.

Accordingly a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, *Chaplinsky* v. *New Hampshire, supra,* pp. 571–572, is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. See *Bridges* v. *California,* 314 U. S. 252, 262; *Craig* v. *Harney,* 331 U. S. 367, 373. There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas

either by legislatures, courts, or dominant political or community groups.

The ordinance as construed by the trial court seriously invaded this province. It permitted conviction of petitioner if his speech stirred people to anger, invited public dispute, or brought about a condition of unrest. A conviction resting on any of those grounds may not stand.

The fact that petitioner took no exception to the instruction is immaterial. No exception to the instructions was taken in *Stromberg* v. *California,* 283 U. S. 359. But a judgment of conviction based on a general verdict under a state statute was set aside in that case, because one part of the statute was unconstitutional. The statute had been challenged as unconstitutional and the instruction was framed in its language. The Court held that the attack on the statute as a whole was equally an attack on each of its individual parts. Since the verdict was a general one and did not specify the ground upon which it rested, it could not be sustained. For one part of the statute was unconstitutional and it could not be determined that the defendant was not convicted under that part.

The principle of that case controls this one. As we have said, the gloss which Illinois placed on the ordinance gives it a meaning and application which are conclusive on us. We need not consider whether as construed it is defective in its entirety. As construed and applied it at least contains parts that are unconstitutional. The verdict was a general one; and we do not know on this record but what it may rest on the invalid clauses.

The statute as construed in the charge to the jury was passed on by the Illinois courts and sustained by them over the objection that as so read it violated the Fourteenth Amendment. The fact that the parties did not dispute its construction makes the adjudication no less

ripe for our review, as the *Stromberg* decision indicates. We can only take the statute as the state courts read it. From our point of view it is immaterial whether the state law question as to its meaning was controverted or accepted. The pinch of the statute is in its application. It is that question which the petitioner has brought here. To say therefore that the question on this phase of the case is whether the trial judge gave a wrong charge is wholly to misconceive the issue.

But it is said that throughout the appellate proceedings the Illinois courts assumed that the only conduct punishable and punished under the ordinance was conduct constituting "fighting words." That emphasizes, however, the importance of the rule of the *Stromberg* case. Petitioner was not convicted under a statute so narrowly construed. For all anyone knows he was convicted under the parts of the ordinance (as construed) which, for example, make it an offense merely to invite dispute or to bring about a condition of unrest. We cannot avoid that issue by saying that all Illinois did was to measure petitioner's conduct, not the ordinance, against the Constitution. Petitioner raised both points—that his speech was protected by the Constitution; that the inclusion of his speech within the ordinance was a violation of the Constitution. We would, therefore, strain at technicalities to conclude that the constitutionality of the ordinance as construed and applied to petitioner was not before the Illinois courts. The record makes clear that petitioner at all times challenged the constitutionality of the ordinance as construed and applied to him.

*Reversed.*

MR. CHIEF JUSTICE VINSON, dissenting.

I dissent. The Court today reverses the Supreme Court of Illinois because it discovers in the record one sentence in the trial court's instructions which permitted

the jury to convict on an unconstitutional basis. The offending sentence had heretofore gone completely undetected. It apparently was not even noticed, much less excepted to, by the petitioner's counsel at the trial. No objection was made to it in the two Illinois appellate tribunals which reviewed the case. Nor was it mentioned in the petition for certiorari or the briefs in this Court. In short, the offending sentence in the charge to the jury was no part of the case until this Court's independent research ferreted it out of a lengthy and somewhat confused record. I think it too plain for argument that a reversal on such a basis does not accord with any principle governing review of state court decisions heretofore announced by this Court. Certainly, *Stromberg* v. *California,* 283 U. S. 359 (1931), as MR. JUSTICE FRANKFURTER demonstrates, offers no precedent for today's action.

It will not do to say that, because the Illinois appellate courts affirmed the petitioner's conviction in the face of a constitutional attack, they necessarily must have approved the interpretation of the Chicago ordinance contained in the unnoticed instruction. The fact is that the Illinois courts construed the ordinance as punishing only the use of "fighting words." Their opinions plainly show that they affirmed because they thought that the petitioner's speech had been found by the jury to come within that category.[1] Their action was not, and cannot here be taken to be, an approval of the ordinance "as construed" by the instruction because the record clearly shows that the case was treated on appeal, both by counsel and by the courts, as if no such instruction existed. This Court can reverse the conviction because of the instruction only if we are to say that every time a state

[1] The opinions are reported at 332 Ill. App. 17, 74 N. E. 2d 45, and at 400 Ill. 23, 79 N. E. 2d 39. See, particularly, 332 Ill. App. at pp. 23 and 38; 400 Ill. at p. 33.

court affirms a conviction it necessarily must approve of every unnoticed and unobjected to error which we may discover in the record. If such is the doctrine of this case, I feel compelled to register my emphatic dissent.

The instruction informed the jury that they could return a verdict of guilty if they found that the petitioner's speech was one which "stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance." If the petitioner's counsel, who carefully made other constitutional objections throughout the proceedings below, had brought any issue here as to the constitutional validity of that instruction I would agree with the Court's decision. But the record gives me no basis on which to believe that the Illinois courts would not also have so decided if that issue had been presented to them.

The Court, as I understand it, does not reach the issue which the parties argued here—whether a properly instructed jury could constitutionally have found from the conflicting evidence in the record that, under the circumstances, the words in the petitioner's speech were "fighting words" to those inside the hall who heard them. Certainly, the Court does not decide whether the violent opposition of those outside the hall, who did not hear the speech, could constitutionally warrant the conviction of the petitioner in order to keep the streets from becoming ideological battlegrounds. Since neither of these constitutional issues is decided by the Court, I think that it is not within my province to indicate any opinion concerning them. See *Rescue Army* v. *Municipal Court,* 331 U. S. 549, 568 (1947).

MR. JUSTICE FRANKFURTER, dissenting.

For the first time in the course of the 130 years in which State prosecutions have come here for review, this Court is today reversing a sentence imposed by a State court

on a ground that was urged neither here nor below and that was explicitly disclaimed on behalf of the petitioner at the bar of this Court.

The impropriety of that part of the charge which is now made the basis of reversal was not raised at the trial nor before the Appellate Court of Illinois. The fact that counsel for Terminiello wholly ignored it is emphasized by the objections that he did make in relation to other instructions given and not given. On appeal to the Supreme Court of Illinois, counsel still failed to claim as error that which this Court on its own motion now finds violative of the Constitution. It was not mentioned by the Illinois Supreme Court in its careful opinion disposing of other claims and it was not included in the elaborate petition for rehearing in that court. Thus an objection, not raised by counsel in the Illinois courts, not made the basis of the petition for certiorari here—not included in the "Questions Presented," nor in the "Reasons Relied On for the Allowance of the Writ"—and explicitly disavowed at the bar of this Court, is used to upset a conviction which has been sustained by three courts of Illinois.

Reliance on *Stromberg* v. *California,* 283 U. S. 359, for what is done today is wholly misplaced. Neither expressly nor by implication has that decision any bearing upon the issue which the Court's opinion in this case raises, namely, whether it is open for this Court to reverse the highest court of a State on a point which was not brought before that court, did not enter into the judgment rendered by that court, and at no stage of the proceedings in this Court was invoked as error by the State court whose reversal is here sought. The *Stromberg* case presented precisely the opposite situation. In that case the claim which here prevailed was a ground of unconstitutionality urged before the California court; upon its rejection by that court it was made the basis of appeal

to this Court; it was here urged as the decisive ground for the reversal of the California judgment.

The *Stromberg* case dealt with a statute which proscribed conduct in a threefold way. The information upon which a verdict of guilty was secured was couched in the threefold terms of the statute, and in that form submitted to the jury. A general verdict followed. It was urged throughout the proceedings, and finally at the bar of this Court, that one of the proscriptions of the statute was invalid under the Fourteenth Amendment. That view was sustained. All that the case holds is that where the validity of a statute is successfully assailed as to one of three clauses of a statute and all three clauses were submitted to the jury, the general verdict has an infirmity because it cannot be assumed that the jury convicted on the valid portions of the statute and not on the invalid. There was no question in that case of searching the record for an alleged error that at no time was urged against the State judgment brought here for review.

In the *Stromberg* case an error that was properly urged was sustained. In this case a claim that was not urged but was disavowed is transmuted into a claim denied.

Only the uninformed will deride as a merely technical point objection to what the Court is doing in this case. The matter touches the very basis of this Court's authority in reviewing the judgments of State courts. We have no authority to meddle with such a judgment unless some claim under the Constitution or the laws of the United States has been made before the State court whose judgment we are reviewing and unless the claim has been denied by that court.[1] How could there have been a

[1] "Our power of review in this case is limited not only to the question whether a right guaranteed by the Federal Constitution was denied, *Murdock* v. *City of Memphis,* 20 Wall. 590; *Haire* v. *Rice,*

denial of a federal claim by the Illinois courts, *i. e.*, that the trial judge offended the Constitution of the United States in what he told the jury, when no such claim was made? The relation of the United States and the courts of the United States to the States and the courts of the States is a very delicate matter. It is too delicate to permit silence when a judgment of a State court is reversed in disregard of the duty of this Court to leave untouched an adjudication of a State unless that adjudication is based upon a claim of a federal right which the State has had an opportunity to meet and to recognize. If such a federal claim was neither before the State court nor presented to this Court, this Court unwarrantably strays from its province in looking through the record to find some federal claim that might have been brought to the attention of the State court and, if so brought, fronted, and that might have been, but was not, urged here. This is a court of review, not a tribunal unbounded by rules. We do not sit like a kadi under a tree dispensing justice according to considerations of individual expediency.

Freedom of speech undoubtedly means freedom to express views that challenge deep-seated, sacred beliefs and to utter sentiments that may provoke resentment. But those indulging in such stuff as that to which this proceeding gave rise are hardly so deserving as to lead this Court to single them out as beneficiaries of the first

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204 U. S. 291, 301; but to the particular claims duly made below, and denied. *Seaboard Air Line Ry.* v. *Duvall,* 225 U. S. 477, 485–488. We lack here the power occasionally exercised on review of judgments of lower federal courts to correct in criminal cases vital errors, although the objection was not taken in the trial court. *Wiborg* v. *United States,* 163 U. S. 632, 658–660; *Clyatt* v. *United States,* 197 U. S. 207, 221–222. This is a writ of error to a state court. Because we may not enquire into the errors now alleged, I concur in affirming the judgment of the state court." Concurring opinion of Mr. Justice Brandeis joined by Mr. Justice Holmes in *Whitney* v. *California,* 274 U. S. 357, 380.

departure from the restrictions that bind this Court in reviewing judgments of State courts. Especially odd is it to bestow such favor not for the sake of life or liberty, but to save a small amount of property—$100, the amount of the fine imposed upon the petitioner in a proceeding which is civil, not criminal, under the laws of Illinois, and thus subject only to limited review. *City of Chicago* v. *Terminiello,* 400 Ill. 23, 29, 79 N. E. 2d 39, 43. This Court has recognized that fines of this nature are not within provisions of the Constitution governing federal criminal prosecutions. See *Hepner* v. *United States,* 213 U. S. 103.

The importance of freedom of speech of course cannot be measured by dollars and cents. A great principle may be at stake, as in the *Case of the Ship Money,* though the issue arise over the payment of a few shillings' tax. Were the Court to sustain the claim urged throughout these proceedings, in Illinois and here, namely, that a law is unconstitutional when it forbids Terminiello's harangue in the circumstances of its utterance, it would be immaterial that only $100 is involved. But to inject an error into the record in order to avoid the issue on which the case was brought here—for certainly relief from the payment of a fine of $100 could not alone have induced this Court to excogitate a defect in the judgment which counsel thoughtfully rejected and which three State courts did not consider—hardly raises the objection to the dignity of such a principle. If the Court refrained from taking phrases out of their environment and finding in them a self-generated objection, it could not be deemed to have approved of them even as abstract propositions.

On the merits of the issue reached by the Court, I share MR. JUSTICE JACKSON'S views. For I assume that the Court does not mean to reject, except merely for purposes of this case, the basic principle that guides scrutiny of

a charge on appeal. I assume, that is, that a charge is not to be deemed a bit of abstraction in a non-existing world; the function which a charge serves is to give practical guidance to a jury in passing on the case that was unfolded before it—the particular circumstances in their particular setting.

MR. JUSTICE JACKSON and MR. JUSTICE BURTON join this dissent.

MR. JUSTICE JACKSON, dissenting.

The Court reverses this conviction by reiterating generalized approbations of freedom of speech with which, in the abstract, no one will disagree. Doubts as to their applicability are lulled by avoidance of more than passing reference to the circumstances of Terminiello's speech and judging it as if he had spoken to persons as dispassionate as empty benches, or like a modern Demosthenes practicing his Philippics on a lonely seashore.

But the local court that tried Terminiello was not indulging in theory. It was dealing with a riot and with a speech that provoked a hostile mob and incited a friendly one, and threatened violence between the two. When the trial judge instructed the jury that it might find Terminiello guilty of inducing a breach of the peace if his behavior stirred the public to anger, invited dispute, brought about unrest, created a disturbance or molested peace and quiet by arousing alarm, he was not speaking of these as harmless or abstract conditions. He was addressing his words to the concrete behavior and specific consequences disclosed by the evidence. He was saying to the jury, in effect, that if this particular speech added fuel to the situation already so inflamed as to threaten to get beyond police control, it could be punished as inducing a breach of peace. When the light of the evidence not recited by the Court is thrown upon the Court's opinion, it discloses that underneath a little issue of

Terminiello and his hundred-dollar fine lurk some of the most far-reaching constitutional questions that can confront a people who value both liberty and order. This Court seems to regard these as enemies of each other and to be of the view that we must forego order to achieve liberty. So it fixes its eyes on a conception of freedom of speech so rigid as to tolerate no concession to society's need for public order.

An old proverb warns us to take heed lest we "walk into a well from looking at the stars." To show why I think the Court is in some danger of doing just that, I must bring these deliberations down to earth by a long recital of facts.

Terminiello, advertised as a Catholic Priest, but revealed at the trial to be under suspension by his Bishop, was brought to Chicago from Birmingham, Alabama, to address a gathering that assembled in response to a call signed by Gerald L. K. Smith, which, among other things, said:

> ". . . The same people who hate Father Coughlin hate Father Terminiello. They have persecuted him, hounded him, threatened him, but he has remained unaffected by their anti-Christian campaign against him. You will hear all sorts of reports concerning Father Terminiello. But remember that he is a Priest in good standing and a fearless lover of Christ and America."

The jury may have considered that this call attempted to capitalize the hatreds this man had stirred and foreshadowed, if it did not intend to invite, the kind of demonstration that followed.

Terminiello's own testimony shows the conditions under which he spoke. So far as material it follows:

> ". . . We got there [the meeting place] approximately fifteen or twenty minutes past eight. The car stopped at the front entrance. There was a

crowd of three or four hundred congregated there shouting and cursing and picketing. . . .

"When we got there the pickets were not marching; they were body to body and covered the sidewalk completely, some on the steps so that we had to form a flying wedge to get through. Police escorted us to the building, and I noticed four or five others there.

"They called us 'God damned Fascists, Nazis, ought to hang the so and sos.' When I entered the building I heard the howls of the people outside. . . . There were four or five plain clothes officers standing at the entrance to the stage and three or four at the entrance to the back door.

"The officers threatened that if they broke the door again they would arrest them and every time they opened the door a little to look out something was thrown at the officers, including ice-picks and rocks.

"A number of times the door was broken, was partly broken through. There were doors open this way and they partly opened and the officers looked out two or three times and each time ice-picks, stones and bottles were thrown at the police at the door. I took my place on the stage, before this I was about ten or fifteen minutes in the body of the hall.

"I saw a number of windows broken by stones or missiles. I saw the back door being forced open, pushed open.

"The front door was broken partly open after the doors were closed. There were about seven people seated on the stage. Smith opened the meeting with prayer, the Pledge of Allegiance to the Flag and singing of America. There were other speakers who spoke before me and before I spoke I heard things happening in the hall and coming from the outside.

"I saw rocks being thrown through windows and that continued throughout at least the first half of the meeting, probably longer, and again attempts were made to force the front door, rather the front door was forced partly. The howling continued on the outside, cursing could be heard audibly in the hall at times. Police were rushing in and out of the front door protecting the front door, and there was a general commotion, all kinds of noises and violence—all from the outside.

"Between the time the first speaker spoke and I spoke, stones and bricks were thrown in all the time. I started to speak about 35 or 40 minutes after the meeting started, a little later than nine o'clock. . . ."

The court below, in addition to this recital, heard other evidence, that the crowd reached an estimated number of 1,500. Picket lines obstructed and interfered with access to the building. The crowd constituted "a surging, howling mob hurling epithets" at those who would enter and "tried to tear their clothes off." One young woman's coat was torn off and she had to be assisted into the meeting by policemen. Those inside the hall could hear the loud noises and hear those on the outside yell, "Fascists," "Hitlers" and curse words like "damn Fascists." Bricks were thrown through the windowpanes before and during the speaking. About 28 windows were broken. The street was black with people on both sides for at least a block either way; bottles, stink bombs and brickbats were thrown. Police were unable to control the mob, which kept breaking the windows at the meeting hall, drowning out the speaker's voice at times and breaking in through the back door of the auditorium. About 17 of the group outside were arrested by the police.

Knowing of this environment, Terminiello made a long speech, from the stenographic record of which I omit

relatively innocuous passages and add emphasis to what seems especially provocative:

> "Father Terminiello: Now, I am going to whisper my greetings to you, Fellow Christians. I will interpret it. I said, 'Fellow *Christians,*' and I suppose there are *some of the scum got in by mistake,* so I want to tell a story about *the scum:*
>
> ". . . And nothing I could say tonight could begin to express the contempt I have for the *slimy scum* that got in by mistake.
>
> ". . . The subject I want to talk to you tonight about is the attempt *that is going on right outside this hall tonight,* the attempt that is going on to *destroy America by revolution.* . . .
>
> "My friends, it is no longer true that it can't happen here. It is happening here, and it only depends upon you, good people, who are here tonight, depends upon all of us together, as Mr. Smith said. The tide is changing, and if you and I turn and run from that tide, we will all be drowned in this tidal wave of Communism which is going over the world.
>
> ". . . I am not going to talk to you about the menace of Communism, which is already accomplished, in Russia, where from eight to fifteen million people were murdered in cold blood by their own countrymen, and millions more through Eastern Europe at the close of the war are being murdered by these murderous Russians, hurt, being raped and sent into slavery. *That is what they want for you, that howling mob outside.*
>
> "I know I was told one time that my winter quarters were ready for me in Siberia. I was told that. Now, I am talking about the fifty-seven varieties that we have in America, and we have fifty-seven varieties of pinks and reds and pastel shades in this country; and all of it can be traced back to the

twelve years we spent under the New Deal, because that was the build-up for what is going on in the world today.

. . . . . .

"Now, Russia promised us we would ga [*sic*] back to the official newspaper of Russia. Primarily, it was back about 1929. They quoted the words of George E. Dimitroff, who at that time was the Executive Secretary of the Communist International. I only quote you this one passage. I could quote thousands of paragraphs for you. Let me quote you: 'The worldwide nature of our program is not mere talk, but an all embracing *blood-soaked reality.' That is what they want for us, a blood-soaked reality but it was promised to us by the crystal gazers in Washington;* and you know what I mean by the 'crystal gazers', I presume.

"First of all, we had Queen Eleanor. Mr. Smith said, 'Queen Eleanor is now one of the world's communists. She is one who said this—imagine, coming from the spouse of the former President of the United States for twelve long years—this is what she said: 'The war is but a step in the revolution. The war is but one step in the revolution, and we know who started the war.'

"Then we have Henry Adolph Wallace, the sixty million job magician. You know we only need fifty-four million jobs in America and everybody would be working. He wants sixty million jobs, because some of the bureaucrats want two jobs apiece. Here he is, what he says about revolution: 'We are in for a profound revolution. Those of us who realize the inevitableness of the revolution, and are anxious that it be *gradual and bloodless* instead of *somewhat bloody. Of course, if necessary, we will have it more bloody.'*

"And then Chief Justice Stone had this to say: 'A way has been found for the effective suppression of speeches and press and religion, despite constitutional guarantee,'—from the Chief Justice, from the Chief Justice of the United States.

"Now, my friends, they are planning another ruse; and if it ever happens to this cou-try [*sic*], God help America. They are going to try to put into Mr. Edgar Hoover's position a man by the name of *George Swarzwald.* I think even those who were uneducated on so-called sedition charges, that the majority of the individuals in this department, that Christ-like men and women who realize today what is going on in this country, men who are in this audience today, who want *to know the names of those people, before they are outside, they want to know the names if any. Did you hear any tonight that you recognize? Most of them probably are imported. They are imported from Russia, certainly. If you know the names, please send them to me immediately.* . . .

". . . Didn't you ever read the Morgenthau plan for the starvation of little babies and pregnant women in Germany? Whatever could a child that is born have to do with Hitler or anyone else at the beginning of the war? Why should every child in Germany today not live to be more than two or three months of age? Because Morgenthau wants it that way, and so did F. D. R. . . . *You will know who is behind it when I tell you the story* of a doctor in Akron, Ohio. He boasted to a friend of mine within the last few days, while he was in the service of this country as a doctor, he and others of his kind made it a practice—now, this was not only one man—made it a practice to amputate the limbs of every German they came in contact with when-

ever they could get away with it; so, that they could never carry a gun. Imagine men of that caliber, sworn to serve this beautiful country of ours, *why should we tolerate them?*

"My friends, this moment someone reminded me of the plan to sterilize them. The nurses, they tell me are going to inject diseases in them, syphilis and other diseases in *every one that came there all of one race, all non-Christians.* . . .

"Now, we are going to get the threats of the people of Argentine, the people of Spain. We have now declared, according to our officials, to have declared Franco to have taken the place of Hitler. *Franco was the savior of what was left of Europe.*

"Now, let me say, I am going to talk about—I almost said, about the Jews. Of course, I would not want to say that. However, I am going to talk about some Jews. I hope that—I am a Christian minister. We must take a Christian attitude. I don't want you to go from this hall with hatred in your heart for any person, for no person. . . .

"Now, this danger which we face—let us call them Zionist Jews if you will, let's call them atheistic, communistic Jewish or Zionist Jews, then let us not fear to condemn them. You remember the Apostles when they went into the upper room after the death of the Master, they went in there, after locking the doors; they closed the windows. (At this time there was a very loud noise as if something was being thrown into the building.)

"Don't be disturbed. That happened, by the way, while Mr. Gerald Smith was saying 'Our Father who art in heaven;' (just then a rock went through the window.) *Do you wonder they were persecuted in other countries in the world?* . . .

1 JACKSON, J., dissenting.

"*You know I have always made a study of the psychology, sociology of mob reaction. It is exemplified out there.* Remember there has to be a leader to that mob. He is not out there. He is probably across the street, looking out the window. There must be certain things, money, other things, in order to have successful mob action; there must be rhythm. There must be some to beat a cadence. Those mobs are chanting; that is the caveman's chant. They were trained to do it. They were trained this afternoon. They are being led; *there will be violence.*

"That is why I say to you, men, don't you do it. Walk out of here dignified. The police will protect you. Put the women on the inside, where there will be no hurt to them. Just walk; don't stop and argue. . . . They want to picket our meetings. They don't want us to picket their meetings. It is the same kind of tolerance, if we said there was a bedbug in bed, 'We don't care for you,' or if we looked under the bed and found a snake and said, 'I am going to be tolerant and leave the snake there.' We will not be tolerant of that mob out there. We are not going to be tolerant any longer.

"We are strong enough. We are not going to be tolerant of their smears any longer. We are going to *stand up and dare them to smear us.* . . .

"So, my friends, since we spent much time tonight trying to quiet the howling mob, I am going to bring my thoughts to a conclusion, and the conclusion is this. We must all be like the Apostles before the coming of the Holy Ghost. We must not lock ourselves in an upper room for fear of the Jews. I speak of the Communistic Zionistic Jew, and those are not American Jews. We don't want them here; we want them to go back where they came from.

. . . . . .

"Mr. Smith: I would like to ask that Miss Purcell would please go back to the front of the building and contact the police officer in charge of the detail. We are going to adjourn this meeting if and when Miss Purcell comes back and reports to me that the one in charge of the detail believes it is safe for us to go out on the street. I am sure it is. Sit still. We are not going to have anybody move. If there are any chiselers that want to go, we are going to take up an offering for Father Terminiello.

"(There was further discussion to stimulate this offering which was not reported.)"

Such was the speech. Evidence showed that it stirred the audience not only to cheer and applaud but to expressions of immediate anger, unrest and alarm. One called the speaker a "God damned liar" and was taken out by the police. Another said that "Jews, niggers and Catholics would have to be gotten rid of." One response was, "Yes, the Jews are all killers, murderers. If we don't kill them first, they will kill us." The anti-Jewish stories elicited exclamations of "Oh!" and "Isn't that terrible!" and shouts of "Yes, send the Jews back to Russia," "Kill the Jews," "Dirty kikes," and much more of ugly tenor. This is the specific and concrete kind of anger, unrest and alarm, coupled with that of the mob outside, that the trial court charged the jury might find to be a breach of peace induced by Terminiello. It is difficult to believe that this Court is speaking of the same occasion, but it is the only one involved in this litigation.

Terminiello, of course, disclaims being a fascist. Doubtless many of the indoor audience were not consciously such. His speech, however, followed, with fidelity that is more than coincidental, the pattern of European fascist leaders.

The street mob, on the other hand, included some who deny being communists, but Terminiello testified and offered to prove that the demonstration was communist-organized and communist-led. He offered literature of left-wing organizations calling members to meet and "mobilize" for instruction as pickets and exhorting followers: "All out to fight Fascist Smith."

As this case declares a nation-wide rule that disables local and state authorities from punishing conduct which produces conflicts of this kind, it is unrealistic not to take account of the nature, methods and objectives of the forces involved. This was not an isolated, spontaneous and unintended collision of political, racial or ideological adversaries. It was a local manifestation of a world-wide and standing conflict between two organized groups of revolutionary fanatics, each of which has imported to this country the strong-arm technique developed in the struggle by which their kind has devastated Europe. Increasingly, American cities have to cope with it. One faction organizes a mass meeting, the other organizes pickets to harass it; each organizes squads to counteract the other's pickets; parade is met with counterparade. Each of these mass demonstrations has the potentiality, and more than a few the purpose, of disorder and violence. This technique appeals not to reason but to fears and mob spirit; each is a show of force designed to bully adversaries and to overawe the indifferent. We need not resort to speculation as to the purposes for which these tactics are calculated nor as to their consequences. Recent European history demonstrates both.

Hitler summed up the strategy of the mass demonstration as used by both fascism and communism: "We should not work in secret conventicles, but in mighty mass demonstrations, and it is not by dagger and poison or pistol that the road can be cleared for the movement but *by the conquest of the streets.* We must teach the Marxists

that the future *master of the streets* is National Socialism, just as it will some day be the master of the state." (Emphasis supplied.) 1 *Nazi Conspiracy and Aggression* (GPO, 1946) 204, 2 *id.* 140, Docs. 2760–PS, 404–PS, from *"Mein Kampf."* First laughed at as an extravagant figure of speech, the battle for the streets became a tragic reality when an organized *Sturmabteilung* began to give practical effect to its slogan that "possession of the streets is the key to power in the state." *Ibid.*, also Doc. 2168–PS.

The present obstacle to mastery of the streets by either radical or reactionary mob movements is not the opposing minority. It is the authority of local governments which represent the free choice of democratic and law-abiding elements of all shades of opinion, but who, whatever their differences, submit them to free elections which register the results of their free discussion. The fascist and communist groups, on the contrary, resort to these terror tactics to confuse, bully and discredit those freely chosen governments. Violent and noisy shows of strength discourage participation of moderates in discussions so fraught with violence, and real discussion dries up and disappears. And people lose faith in the democratic process when they see public authority flouted and impotent and begin to think the time has come when they must choose sides in a false and terrible dilemma such as was posed as being at hand by the call for the Terminiello meeting: "Christian Nationalism or World Communism—Which?"

This drive by totalitarian groups to undermine the prestige and effectiveness of local democratic governments is advanced whenever either of them can win from this Court a ruling which paralyzes the power of these officials. This is such a case. The group of which Terminiello is a part claims that his behavior, because it involved a speech, is above the reach of local authorities.

If the mild action those authorities have taken is forbidden, it is plain that hereafter there is nothing effective left that they can do. If they can do nothing as to him, they are equally powerless as to rival totalitarian groups. Terminiello's victory today certainly fulfills the most extravagant hopes of both right and left totalitarian groups, who want nothing so much as to paralyze and discredit the only democratic authority that can curb them in their battle for the streets.

I am unable to see that the local authorities have transgressed the Federal Constitution. Illinois imposed no prior censorship or suppression upon Terminiello. On the contrary, its sufferance and protection was all that enabled him to speak. It does not appear that the motive in punishing him is to silence the ideology he expressed as offensive to the State's policy or as untrue, or has any purpose of controlling his thought or its peaceful communication to others. There is no claim that the proceedings against Terminiello are designed to discriminate against him or the faction he represents or the ideas that he bespeaks. There is no indication that the charge against him is a mere pretext to give the semblance of legality to a covert effort to silence him or to prevent his followers or the public from hearing any truth that is in him.

A trial court and jury has found only that in the context of violence and disorder in which it was made, this speech was a provocation to immediate breach of the peace and therefore cannot claim constitutional immunity from punishment. Under the Constitution as it has been understood and applied, at least until most recently, the State was within its powers in taking this action.

Rioting is a substantive evil, which I take it no one will deny that the State and the City have the right and the duty to prevent and punish. Where an offense is

induced by speech, the Court has laid down and often reiterated a test of the power of the authorities to deal with the speaking as also an offense. "The question in every case is whether the words *used are used in such circumstances* and are of *such a nature* as to create a *clear and present danger* that they will bring about the substantive evils that Congress [or the State or City] has a right to prevent." (Emphasis supplied.) Mr. Justice Holmes in *Schenck* v. *United States,* 249 U. S. 47, 52. No one ventures to contend that the State on the basis of this test, for whatever it may be worth, was not justified in punishing Terminiello. In this case the evidence proves beyond dispute that danger of rioting and violence in response to the speech was clear, present and immediate. If this Court has not silently abandoned this long-standing test and substituted for the purposes of this case an unexpressed but more stringent test, the action of the State would have to be sustained.

Only recently this Court held that a state could punish as a breach of the peace use of epithets such as "damned racketeer" and "damned fascist," addressed to only one person, an official, because likely to provoke the average person to retaliation. But these are mild in comparison to the epithets "slimy scum," "snakes," "bedbugs," and the like, which Terminiello hurled at an already inflamed mob of his adversaries. MR. JUSTICE MURPHY, writing for a unanimous Court in *Chaplinsky* v. *New Hampshire,* 315 U. S. 568, 571–572, said:

> "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed

> that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. 'Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.' *Cantwell* v. *Connecticut,* 310 U. S. 296, 309–310."

In the latter case Mr. Justice Roberts for a unanimous Court also said:

> "The offense known as breach of the peace embraces a great variety of conduct destroying or menacing public order and tranquility. It includes not only violent acts but acts and words likely to produce violence in others. No one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement to riot or that religious liberty connotes the privilege to exhort others to physical attack upon those belonging to another sect. When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the State to prevent or punish is obvious." 310 U. S. 296, 308.

How this present decision, denying state power to punish civilly one who precipitated a public riot involving hundreds of fanatic fighters in a most violent melee, can be squared with those unanimous statements of law, is incomprehensible to me. And the Court recently cited these two statements as indicating that "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 mock-

ery." *United Public Workers* v. *Mitchell,* 330 U. S. 75, 95.

However, these wholesome principles are abandoned today and in their place is substituted a dogma of absolute freedom for irresponsible and provocative utterance which almost completely sterilizes the power of local authorities to keep the peace as against this kind of tactics.

Before giving the First and Fourteenth Amendments to the Constitution this effect, we should recall that our application of the First Amendment to Illinois rests entirely on authority which this Court has voted to itself. The relevant parts of the First Amendment, with emphasis supplied, reads: "*Congress* shall make *no* law . . . abridging the freedom of speech." This restrains no authority except Congress. Read as literally as some would do, it restrains Congress in terms so absolute that no legislation would be valid if it touched free speech, no matter how obscene, treasonable, defamatory, inciting or provoking. If it seems strange that no express qualifications were inserted in the Amendment, the answer may be that limitations were thought to be implicit in the definition of "freedom of speech" as then understood. Or it may have been thought unnecessary to delegate to *Congress* any power over abuses of free speech. The Federal Government was then a new and experimental authority, remote from the people, and it was supposed to deal with a limited class of national problems. Inasmuch as any breaches of peace from abuse of free speech traditionally were punishable by state governments, it was needless to reserve that power in a provision drafted to exclude only Congress from such a field of law-making.

The Fourteenth Amendment forbade states to deny the citizen "due process of law." But its terms gave no notice to the people that its adoption would strip their local governments of power to deal with such problems of local

peace and order as we have here. Nor was it hinted by this Court for over half a century that the Amendment might have any such effect. In 1922, with concurrence of the most liberty-alert Justices of all times—Holmes and Brandeis—this Court declared flatly that the Constitution does not limit the power of the state over free speech. *Prudential Insurance Co.* v. *Cheek,* 259 U. S. 530, 543. In later years the Court shifted its dogma and decreed that the Constitution does this very thing and that state power is bound by the same limitation as Congress. *Gitlow* v. *New York,* 268 U. S. 652. I have no quarrel with this history. See *Board of Education* v. *Barnette,* 319 U. S. 624. I recite the method by which the right to limit the state has been derived only from this Court's own assumption of the power, with never a submission of legislation or amendment into which the people could write any qualification to prevent abuse of this liberty, as bearing upon the restraint I consider as becoming in exercise of self-given and unappealable power.

It is significant that provisions adopted by the people with awareness that they applied to their own states have universally contained qualifying terms. The Constitution of Illinois is representative of the provisions put in nearly all state constitutions and reads (Art. II, § 4): "Every person may freely speak, write and publish on all subjects, *being responsible for the abuse of that liberty.*" (Emphasis added.) That is what I think is meant by the cryptic phrase "freedom of speech," as used in the Federal Compact, and that is the rule I think we should apply to the states.

This absence from the Constitution of any expressed power to deal with abuse of freedom of speech has enabled the Court to soar aloof from any consideration of the abuses which create problems for the states and to indulge in denials of local authority, some of which seem to me improvident in the light of functions which local gov-

ernments must be relied on to perform for our free society. Quite apart from any other merits or defects, recent decisions have almost completely immunized this battle for the streets from any form of control.

Streets and parks maintained by the public cannot legally be denied to groups "for communication of ideas." *Hague* v. *C. I. O.,* 307 U. S. 496; *Jamison* v. *Texas,* 318 U. S. 413. Cities may not protect their streets from activities which the law has always regarded subject to control, as nuisances. *Lovell* v. *Griffin,* 303 U. S. 444; *Schneider* v. *State,* 308 U. S. 147. Cities may not protect the streets or even homes of their inhabitants from the aggressions of organized bands operating in large numbers. *Douglas* v. *Jeannette,* 319 U. S. 157. As in this case, the facts are set forth fully only in the dissent, p. 166. See also *Martin* v. *Struthers,* 319 U. S. 141. Neither a private party nor a public authority can invoke otherwise valid state laws against trespass to exclude from their property groups bent on disseminating propaganda. *Marsh* v. *Alabama,* 326 U. S. 501; *Tucker* v. *Texas,* 326 U. S. 517. Picketing is largely immunized from control on the ground that it is free speech, *Thornhill* v. *Alabama,* 310 U. S. 88, and police may not regulate sound trucks and loud-speakers, *Saia* v. *New York,* 334 U. S. 558, though the Court finds them an evil that may be prohibited altogether. *Kovacs* v. *Cooper,* 336 U. S. 77. And one-third of the Court has gone further and declared that a position "that the state may prevent any conduct which induces people to violate the law, or any advocacy of unlawful activity, cannot be squared with the First Amendment . . ." and it is only we who can decide when the limit is passed. *Musser* v. *Utah,* 333 U. S. 95, 102. Whatever the merits of any one of these decisions in isolation, and there were sound reasons for some of them, it cannot be denied that their cumulative effect has been a sharp handicap on municipal control

of the streets and a dramatic encouragement of those who would use them in a battle of ideologies.

I do not think we should carry this handicap further, as we do today, but should adhere to the principles heretofore announced to safeguard our liberties against abuse as well as against invasion. It should not be necessary to recall these elementary principles, but it has been a long time since some of them were even mentioned in this Court's writing on the subject and results indicate they may have been overlooked.

I begin with the oft-forgotten principle which this case demonstrates, that freedom of speech exists only under law and not independently of it. What would Terminiello's theoretical freedom of speech have amounted to had he not been given active aid by the officers of the law? He could reach the hall only with their help, could talk only because they restrained the mob, and could make his getaway only under their protection. We would do well to recall the words of Chief Justice Hughes in *Cox* v. *New Hampshire,* 312 U. S. 569, 574: "Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses. . . ."

This case demonstrates also that this Court's service to free speech is essentially negative and can consist only of reviewing actions by local magistrates. But if free speech is to be a practical reality, affirmative and immediate protection is required; and it can come only from nonjudicial sources. It depends on local police, maintained by law-abiding taxpayers, and who, regardless of their own feelings, risk themselves to maintain supremacy of law. Terminiello's theoretical right to speak free from interference would have no reality if Chicago should withdraw its officers to some other section of the city, or if the men assigned to the task should look the other

way when the crowd threatens Terminiello. Can society be expected to keep these men at Terminiello's service if it has nothing to say of his behavior which may force them into dangerous action?

No one will disagree that the fundamental, permanent and overriding policy of police and courts should be to permit and encourage utmost freedom of utterance. It is the legal right of any American citizen to advocate peaceful adoption of fascism or communism, socialism or capitalism. He may go far in expressing sentiments whether pro-Semitic or anti-Semitic, pro-Negro or anti-Negro, pro-Catholic or anti-Catholic. He is legally free to argue for some anti-American system of government to supersede by constitutional methods the one we have. It is our philosophy that the course of government should be controlled by a consensus of the governed. This process of reaching intelligent popular decisions requires free discussion. Hence we should tolerate no law or custom of censorship or suppression.

But we must bear in mind also that no serious outbreak of mob violence, race rioting, lynching or public disorder is likely to get going without help of some speech-making to some mass of people. A street may be filled with men and women and the crowd still not be a mob. Unity of purpose, passion and hatred, which merges the many minds of a crowd into the mindlessness of a mob, almost invariably is supplied by speeches. It is naive, or worse, to teach that oratory with this object or effect is a service to liberty. No mob has ever protected any liberty, even its own, but if not put down it always winds up in an orgy of lawlessness which respects no liberties.

In considering abuse of freedom by provocative utterances it is necessary to observe that the law is more tolerant of discussion than are most individuals or communities. Law is so indifferent to subjects of talk that I think of none that it should close to discussion. Reli-

gious, social and political topics that in other times or countries have not been open to lawful debate may be freely discussed here.

Because a subject is legally arguable, however, does not mean that public sentiment will be patient of its advocacy at all times and in all manners. So it happens that, while peaceful advocacy of communism or fascism is tolerated by the law, both of these doctrines arouse passionate reactions. A great number of people do not agree that introduction to America of communism or fascism is even debatable. Hence many speeches, such as that of Terminiello, may be legally permissible but may nevertheless in some surroundings be a menace to peace and order. When conditions show the speaker that this is the case, as it did here, there certainly comes a point beyond which he cannot indulge in provocations to violence without being answerable to society.

Determination of such an issue involves a heavy responsibility. Courts must beware lest they become mere organs of popular intolerance. Not every show of opposition can justify treating a speech as a breach of peace. Neither speakers nor courts are obliged always and in all circumstances to yield to prevailing opinion and feeling. As a people grow in capacity for civilization and liberty their tolerance will grow, and they will endure, if not welcome, discussion even on topics as to which they are committed. They regard convictions as tentative and know that time and events will make their own terms with theories, by whomever and by whatever majorities they are held, and many will be proved wrong. But on our way to this idealistic state of tolerance the police have to deal with men as they are. The crowd mind is never tolerant of any idea which does not conform to its herd opinion. It does not want a tolerant effort at meeting of minds. It does not know the futility of trying to mob an idea. Released from the sense of

personal responsibility that would restrain even the worst individuals in it if alone and brave with the courage of numbers, both radical and reactionary mobs endanger liberty as well as order. The authorities must control them and they are entitled to place some checks upon those whose behavior or speech calls such mobs into being. When the right of society to freedom from probable violence should prevail over the right of an individual to defy opposing opinion, presents a problem that always tests wisdom and often calls for immediate and vigorous action to preserve public order and safety.

I do not think that the Constitution of the United States denies to the states and the municipalities power to solve that problem in the light of local conditions, at least so long as danger to public order is not invoked in bad faith, as a cover for censorship or suppression. The preamble declares domestic tranquility as well as liberty to be an object in founding a Federal Government and I do not think the Forefathers were naive in believing both can be fostered by the law.

Certain practical reasons reinforce the legal view that cities and states should be sustained in the power to keep their streets from becoming the battleground for these hostile ideologies to the destruction and detriment of public order. There is no other power that can do it. Theirs are the only police that are on the spot. The Federal Government has no police force. The Federal Bureau of Investigation is, and should remain, not a police but an investigative service. To date the only federal agency for preserving and restoring order when local authority fails has been the Army. And when the military steps in, the court takes a less liberal view of the rights of the individual and sustains most arbitrary exercises of military power. See *Korematsu* v. *United States,* 323 U. S. 214. Every failure of local authority to deal with riot problems results in a demand for the

establishment of a federal police or intervention by federal authority. In my opinion, locally established and controlled police can never develop into the menace to general civil liberties that is inherent in a federal police.

The ways in which mob violence may be worked up are subtle and various. Rarely will a speaker directly urge a crowd to lay hands on a victim or class of victims. An effective and safer way is to incite mob action while pretending to deplore it, after the classic example of Antony, and this was not lost on Terminiello. And whether one may be the cause of mob violence by his own personification or advocacy of ideas which a crowd already fears and hates, is not solved merely by going through a transcript of the speech to pick out "fighting words." The most insulting words can be neutralized if the speaker will smile when he says them, but a belligerent personality and an aggressive manner may kindle a fight without use of words that in cold type shock us. True judgment will be aided by observation of the individual defendant, as was possible for this jury and trial court but impossible for us.

There are many appeals these days to liberty, often by those who are working for an opportunity to taunt democracy with its stupidity in furnishing them the weapons to destroy it as did Goebbels when he said: "When democracy granted democratic methods for us in the times of opposition, this [Nazi seizure of power] was bound to happen in a democratic system. However, we National Socialists never asserted that we represented a democratic point of view, but we have declared openly that we used democratic methods only in order to gain the power and that, after assuming the power, we would deny to our adversaries without any consideration the means which were granted to us in the times of [our] opposition." 1 *Nazi Conspiracy and Aggression* (GPO, 1946) 202, Doc. 2412–PS.

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Invocation of constitutional liberties as part of the strategy for overthrowing them presents a dilemma to a free people which may not be soluble by constitutional logic alone.

But I would not be understood as suggesting that the United States can or should meet this dilemma by suppression of free, open and public speaking on the part of any group or ideology. Suppression has never been a successful permanent policy; any surface serenity that it creates is a false security, while conspiratorial forces go underground. My confidence in American institutions and in the sound sense of the American people is such that if with a stroke of the pen I could silence every fascist and communist speaker, I would not do it. For I agree with Woodrow Wilson, who said:

> "I have always been among those who believed that the greatest freedom of speech was the greatest safety, because if a man is a fool, the best thing to do is to encourage him to advertise the fact by speaking. It cannot be so easily discovered if you allow him to remain silent and look wise, but if you let him speak, the secret is out and the world knows that he is a fool. So it is by the exposure of folly that it is defeated; not by the seclusion of folly, and in this free air of free speech men get into that sort of communication with one another which constitutes the basis of all common achievement." Address at the Institute of France, Paris, May 10, 1919. 2 *Selected Literary and Political Papers and Addresses of Woodrow Wilson* (1926) 333.

But if we maintain a general policy of free speaking, we must recognize that its inevitable consequence will be sporadic local outbreaks of violence, for it is the nature of men to be intolerant of attacks upon institutions, personalities and ideas for which they really care. In

the long run, maintenance of free speech will be more endangered if the population can have no protection from the abuses which lead to violence. No liberty is made more secure by holding that its abuses are inseparable from its enjoyment. We must not forget that it is the free democratic communities that ask us to trust them to maintain peace with liberty and that the factions engaged in this battle are not interested permanently in either. What would it matter to Terminiello if the police batter up some communists or, on the other hand, if the communists batter up some policemen? Either result makes grist for his mill; either would help promote hysteria and the demand for strong-arm methods in dealing with his adversaries. And what, on the other hand, have the communist agitators to lose from a battle with the police?

This Court has gone far toward accepting the doctrine that civil liberty means the removal of all restraints from these crowds and that all local attempts to maintain order are impairments of the liberty of the citizen. The choice is not between order and liberty. It is between liberty with order and anarchy without either. There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.

I would affirm the conviction.

MR. JUSTICE BURTON joins in this opinion.

## UNION NATIONAL BANK *v.* LAMB.

APPEAL FROM THE SUPREME COURT OF MISSOURI.

No. 500. Argued March 31, 1949.—Decided May 16, 1949.

1. A judgment of the highest court of a State determining a claim of right under the Full Faith and Credit Clause of the Federal Constitution is reviewable here not by appeal but by certiorari; and the papers whereon an appeal has been improvidently taken in such a case may be treated as a petition for a writ of certiorari. 28 U. S. C. §§ 1257 (3), 2103. Pp. 39–40.
2. Where the last day of the period within which a review by this Court on appeal or certiorari may be applied for falls on a Sunday or legal holiday, an application made on the next day which is not a Sunday or legal holiday is timely under 28 U. S. C. § 2101 (c) and Rule 6 (a) of the Rules of Civil Procedure. Pp. 40–41.
3. In 1927 petitioner obtained a Colorado judgment against respondent, which was revived in Colorado in 1945 on personal service upon respondent in Missouri. Suit was then brought in Missouri on the revived Colorado judgment. The Supreme Court of Missouri, though assuming that the judgment was valid in Colorado, refused to enforce it because, under Missouri law, the original judgment could not have been revived in 1945. *Held:* The decision of the Missouri Court that, whatever the effect of revivor under Colorado law, the Colorado judgment was not entitled to full faith and credit in Missouri, is erroneous. *Roche* v. *McDonald,* 275 U. S. 449. Pp. 41–45.
4. The question of the status of the 1945 judgment under Colorado law, and the question whether the service on which the Colorado judgment was revived satisfied due process, which were not passed upon by the Missouri Court, will be open on remand of the cause. P. 44.

358 Mo. 65, 213 S. W. 2d 416, reversed.

The Supreme Court of Missouri refused enforcement of a Colorado judgment. 358 Mo. 65, 213 S. W. 2d 416. Treating the appeal papers as a petition for certiorari, this Court grants certiorari and *reverses* the judgment. Pp. 40–41, 45.

*Maurice J. O'Sullivan* argued the cause and filed a brief for appellant.

*Daniel L. Brenner* submitted on brief for appellee.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Missouri has a statute which limits the life of a judgment to ten years after its original rendition or ten years after its revival.[1] Missouri also provides that no judgment can be revived after ten years from its rendition.[2] These provisions are applicable to all judgments whether rendered by a Missouri court or by any other court.

Petitioner has a Colorado judgment against respondent. It was obtained in 1927 and revived in Colorado [3] in 1945 on personal service upon respondent in Missouri. Suit was then brought in Missouri on the revived Colorado judgment. The Supreme Court of Missouri, though assuming that the judgment was valid in Colorado, refused to enforce it because the original judgment under Missouri's law could not have been revived in 1945. It held that the *lex fori* governs the limitations of actions and that the Full Faith and Credit Clause of the Constitution, Art. IV, § 1, did not require Missouri to recognize Colorado's more lenient policy as respects revival of judgments. 358 Mo. 65, 213 S. W. 2d 416.

1. Petitioner sought to bring the case here by appeal. But we postponed the question of jurisdiction to the merits. Certiorari, not appeal, is the route by which the question whether or not full faith and credit has been given a foreign judgment is brought here. *Roche* v. *McDonald,* 275 U. S. 449; *Morris* v. *Jones,* 329 U. S. 545.

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[1] 1 Rev. Stat. Mo. 1939, § 1038.

[2] 1 Rev. Stat. Mo. 1939, § 1271.

[3] 1 Colo. Stat. Ann. 1935, c. 6, Rule 54 (h); 3 *id.,* c. 93, § 2.

Hence we treat the papers as a petition for certiorari, 28 U. S. C. § 2103, and grant it.

2. The opinion of the Supreme Court of Missouri was handed down July 12, 1948, and the motion for rehearing or for transfer to the court *en banc* [4] was denied September 13, 1948. The appeal was allowed by the Missouri court on December 13, 1948. That was within three months and therefore timely prior to the revision of the Judicial Code. But 28 U. S. C. § 2101 (c), effective September 1, 1948, reduced that period to ninety days. The ninetieth day was December 12, 1948, which was a Sunday. There is a contrariety of views whether an act which by statute is required to be done within a stated period may be done a day later when the last day of the period falls on Sunday.[5] Thus *Street* v. *United States,* 133 U. S. 299, treating Sunday as a *dies non* under a statute which authorized the President to transfer army officers from active duty and to fill vacancies in the active list on or before January 1, 1871, allowed the action to be taken on the following day. We think the policy of that decision is applicable to 28 U. S. C. § 2101 (c). Rule 6 (a) of the Rules of Civil Procedure provides that where the last day for performance of an act falls on a Sunday or a legal holiday, performance on the next day which is not a Sunday or legal holiday is timely.[6] That

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[4] See *Gorman* v. *Washington University,* 316 U. S. 98.

[5] Pro: *Street* v. *United States,* 133 U. S. 299; *Sherwood Bros.* v. *District of Columbia,* 72 App. D. C. 155, 113 F. 2d 162; *Wilson* v. *Southern R. Co.,* 147 F. 2d 165. Contra: *Johnson* v. *Meyers,* 54 F. 417; *Meyer* v. *Hot Springs Imp. Co.,* 169 F. 628; *Siegelschiffer* v. *Penn. Mut. Life Ins. Co.,* 248 F. 226; *Larkin Packer Co.* v. *Hinderliter Tool Co.,* 60 F. 2d 491; *Walters* v. *Baltimore & O. R. Co.,* 76 F. 2d 599.

[6] Rule 6 (a) provides: "In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the

rule provides the method for computation of time prescribed or allowed not only by the rules or by order of court but by "any applicable statute." Since the rule had the concurrence of Congress,[7] and since no contrary policy is expressed in the statute governing this review, we think that the considerations of liberality and leniency which find expression in Rule 6 (a) are equally applicable to 28 U. S. C. § 2101 (c). The appeal therefore did not fail for lack of timeliness.

3. *Roche* v. *McDonald* is dispositive of the merits. Roche had a Washington judgment against McDonald. He brought suit on that judgment in Oregon. He obtained a judgment in Oregon at a time when the original judgment had by Washington law expired and could not be revived. Roche then sued in Washington on the Oregon judgment. The Court reversed the Supreme Court of Washington which had held that full faith and credit need not be given the Oregon judgment since it would have been void and of no effect if rendered in Washington. The Court held that once the court of the sister State had jurisdiction over the parties and of the subject matter its judgment was valid and could not be impeached in the State of the forum, even though it could not have been obtained there. That decision was in line with *Fauntleroy* v. *Lum,* 210 U. S. 230 and *Christmas* v. *Russell,* 5 Wall. 290. For in those cases the Court

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designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Sunday or a legal holiday, in which event the period runs until the end of the next day which is neither a Sunday nor a holiday. When the period of time prescribed or allowed is less than 7 days, intermediate Sundays and holidays shall be excluded in the computation. A half holiday shall be considered as other days and not as a holiday."

[7] See Act of June 19, 1934, 48 Stat. 1064, 28 U. S. C. § 723c, now § 2072; Rule 86, Rules of Civil Procedure; *Sibbach* v. *Wilson & Co.,* 312 U. S. 1.

had held that the State of the forum could not defeat the foreign judgment because it was obtained by a procedure hostile to or inconsistent with that of the forum or because it was based on a cause of action which the forum itself would not have recognized.

Any other result would defeat the aim of the Full Faith and Credit Clause and the statute enacted pursuant to it.[8] It is when a clash of policies between two states emerges that the need of the Clause is the greatest. It and the statute which implements it are indeed designed to resolve such controversies. *Morris* v. *Jones, supra.* There is no room for an exception, as *Roche* v. *McDonald* makes plain, where the clash of policies relates to revived judgments rather than to the nature of the underlying claim as in *Fauntleroy* v. *Lum, supra.* It is the judgment that must be given full faith and credit. In neither case can its integrity be impaired, save for attacks on the jurisdiction of the court that rendered it.

Cases of statute of limitations against a cause of action on a judgment (*M'Elmoyle* v. *Cohen,* 13 Pet. 312) in-

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[8] Article IV, § 1 of the Constitution provides: "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."

The Act of Congress enacted pursuant to the Clause (28 U. S. C. § 1738), in part reads as follows:

"The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

"Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

volve different considerations as *Christmas* v. *Russell, supra,* p. 300, long ago pointed out. They do not undermine the integrity of the judgment on which suit is brought. In this case it is the 1945 Colorado judgment that claims full faith and credit in Missouri. No Missouri statute of limitations is tendered to cut off a cause of action based on judgments of that vintage.

It is argued, however, that under Colorado law the 1945 Colorado judgment is not a new judgment and that the revivor did no more than extend the statutory period in which to enforce the old judgment.[9] It is said that those were the assumptions on which the Missouri court proceeded. But we would have to add to and subtract from its opinion to give it that meaning. For when it placed revived judgments on the same basis as original judgments, it did so because of Missouri not Colorado law.[10]

This is not a situation where Colorado law also makes that conclusion plain. The Colorado authorities which

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[9] There is no concession that under Colorado law revival does not make a new judgment. Petitioner merely argues that the requirements of due process are less exacting in case of a revived, as distinguished from an original, judgment.

[10] The Missouri court stated, 358 Mo. p. 70, 213 S. W. 2d p. 419:

"Definitely, it is the law of this state that a foreign judgment, absent revival, or a payment thereon as provided in Sec. 1038, is barred in 10 years from the date of its original rendition regardless of what the limitation period may be under the law of the state where the judgment was rendered. *Northwestern Brewers Supply Co.* v. *Vorhees* [356 Mo. 699, 203 S. W. 2d 422]. And the only reasonable conclusion to draw is that a revived judgment, domestic or foreign, absent a payment as provided in Sec. 1038, is barred under said section unless the revival was within 10 years from the date of original rendition or, if such is the case, within 10 years from the last revival. In other words, a foreign judgment, original or revived, has the same standing in Missouri, no better, no worse, than a domestic judgment. This does not run counter to the full faith and credit

have been cited to us indeed seem to hold just the opposite. Thus *La Fitte* v. *Salisbury,* 43 Colo. 248, 95 P. 1065, holds that a revived judgment has the effect of a new one.[11] We are referred to no Colorado authorities to the contrary.

But since the status of the 1945 judgment under Colorado law was not passed upon by the Missouri court, we do not determine the question. For the same reason we do not consider whether the service on which the Colorado judgment was revived satisfied due process. See *Owens* v. *Henry,* 161 U. S. 642. Both of those questions will be open on remand of the cause.

The suggestion that we follow the course taken in *Minnesota* v. *National Tea Co.,* 309 U. S. 551, and vacate the judgment and remand the cause to the Missouri court so that it may first pass on these questions would be appropriate only if it were uncertain whether that court adjudicated a federal question. That course is singularly inappropriate here since it is plain that the Missouri court held that, whatever the effect of revivor under Colorado law, the Colorado judgment was not entitled to full faith

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provision of the federal Constitution, because, as we have seen, the enforcement of a foreign judgment goes to the *remedy* only and that is a matter for the law of the forum."

*Northwestern Brewers Supply Co.* v. *Vorhees,* which the court cites, did not involve a revived judgment. It merely held that a Wisconsin judgment sued on in Missouri was subject to Missouri's statute of limitations. The fact that the Missouri court in the present case held that the revived Colorado judgment was governed by that rule throws no light on the status of the revived judgment under Colorado law.

[11] 1 Colo. Stat. Ann. 1935, c. 6, Rule 54 (h) provides in part:

"A revived judgment must be entered within 20 years after the entry of the judgment which it revives, and may be enforced and made a lien in the same manner and for like period as an original judgment."

and credit in Missouri. That holding is a ruling on a federal question and it cannot stand if, as assumed, the Colorado judgment had the force and effect of a new one.

*Reversed.*

MR. JUSTICE BLACK and MR. JUSTICE RUTLEDGE dissent.

MR. JUSTICE FRANKFURTER, dissenting.

The Court finds that *Roche* v. *McDonald,* 275 U. S. 449, is "dispositive of the merits" of this case. I agree that that case demands the remand of this one; more than that can be found only by misconceiving what this case is about or what *Roche* v. *McDonald* decided.

1. Article IV, § 1 of the Constitution commands the courts of each State to give "Full Faith and Credit . . . to the . . . judicial Proceedings of every other State," and we have interpreted this command so straitly as to mean that the State of the forum cannot go behind the judgment of a sister State to establish such an allegation as that the judgment was procured by fraud, *Christmas* v. *Russell,* 5 Wall. 290, or that the judgment creditor was not the real party in interest, *Titus* v. *Wallick,* 306 U. S. 282. We have even required a State which prohibited the enforcement of gambling contracts to give full faith and credit to another State's judgment upon such a contract when the contract itself was entered in the State which regarded it as illegal. *Fauntleroy* v. *Lum,* 210 U. S. 230. See also *Kenney* v. *Supreme Lodge,* 252 U. S. 411; *Morris* v. *Jones,* 329 U. S. 545.

2. Considerations of policy lying behind the Full Faith and Credit Clause, however, are by no means so forcibly presented where the issue is simply whether the forum must respect the limitation period attached to a foreign judgment or whether it may apply its own. This Court has accordingly held that a State may refuse to enforce

the judgment of another State brought later than its own statute of limitations permits even though the judgment would still have been enforceable in the State which rendered it. *M'Elmoyle* v. *Cohen,* 13 Pet. 312; *Bacon* v. *Howard,* 20 How. 22.

3. Conversely, where the enforcement of a judgment by State A is sought in State B, which has a longer limitation period than State A, State B is plainly free to enter its own judgment upon the basis of State A's original judgment, even though that judgment would no longer be enforceable in State A. If enforcement of State B's new judgment is then sought in State A, State A cannot refuse to enforce it without violating the principle that the State where enforcement of a judgment is sought cannot look behind the judgment. That was the situation in *Roche* v. *McDonald,* 275 U. S. 449, and so we there held.

4. The present situation is this: Colorado entered a judgment in 1927 which in 1945 was there revived in accordance with Colorado's procedure. In 1945 the 1927 judgment could not have been enforced in Missouri because barred by that State's statute of limitations. The question whether the 1945 proceedings gave rise to a judgment enforceable in Missouri thus depends, obviously, on whether those proceedings created a new Colorado judgment, or whether they merely had the effect of extending the Colorado statute of limitations on the old judgment. Only in the former case would *Roche* v. *McDonald* be "dispositive of the merits"; in the latter, it is equally clear that *M'Elmoyle* v. *Cohen, supra,* 13 Pet. 312, and *Bacon* v. *Howard, supra,* 20 How. 22, would be controlling. Fundamental, therefore, to the issue of full faith and credit is an initial determination as to the effect in Colorado of its reviver proceedings.

5. The opinion of the Supreme Court of Missouri is not unequivocal. It could hardly, however, have assumed

the law of Colorado to be that reviver proceedings create a new judgment, for it chiefly relied upon a decision of its own according full recognition to *Roche* v. *McDonald* and other cases invoking the principle that the forum cannot look behind a judgment brought there for enforcement. See *Northwestern Brewers Supply Co.* v. *Vorhees,* 356 Mo. 699, 703, 203 S. W. 2d 422, 424. Surely we ought not to attribute to a State court a flagrant disregard of the decisions of this Court, particularly when it shows awareness of these decisions.[1] The more obvious interpretation of the Missouri court's opinion is that it assumed the effect of the Colorado proceedings to be what the face of the Colorado statute implies, namely, to extend the statute of limitations on the original judgment.[2] We should affirm, therefore, but for language which suggests a third view: that because the original judgment would have been unenforceable in Missouri at the time of the reviver proceedings, those proceedings were not entitled to full faith and credit no matter what their effect under Colorado law. If in fact the Colorado proceedings had resulted in a new judgment, this view would have disregarded *Roche* v. *McDonald.* But a State court may reach the right result despite an awkward formulation of the issue before it. Petitioner, to be entitled to redress, must establish that Colorado gave it a judgment which Missouri flouted, and it fails

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[1] The improbability that this was the view of the Missouri courts is emphasized by the fact that such a view would inevitably inject into the case an issue which in fact they put aside as irrelevant: the effectiveness of personal service upon defendant in Missouri to obtain jurisdiction in Colorado to supplant the old judgment by a new one. See *Owens* v. *Henry,* 161 U. S. 642.

[2] ". . . from and after twenty years from the entry of final judgment in any court of this state, the same shall be considered as satisfied in full, unless revived as provided by law." 3 Colo. Stat. Ann. 1935, c. 93, § 2.

to do so unless it shows that under Colorado law a judgment of reviver is a new judgment.

6. The Court does not find that petitioner has sustained this burden, and we should neither initiate an independent examination of Colorado law nor rest upon phrases in a single decision that does not explicitly adjudicate the question. Yet the Court concludes, "In this case it is the 1945 Colorado judgment that claims full faith and credit in Missouri. No Missouri statute of limitations is tendered to cut off a cause of action based on judgments of that vintage." But the very question of Colorado law in issue is whether the 1945 proceedings did in fact create a new judgment entitled to claim full faith and credit. Since in the view most favorable to petitioner it is not clear whether the courts of Missouri have resolved this issue against petitioner or left it undecided, we should not by affirming foreclose all opportunity for petitioner to establish that the true effect of the reviver proceedings was to grant it a new judgment. But neither should we foreclose the issue in petitioner's favor.

In view of the unresolved elements of the situation, the procedure outlined in *Minnesota* v. *National Tea Co.*, 309 U. S. 551, 557, should be followed in disposing of this case. Accordingly, I would vacate the judgment of the Supreme Court of Missouri and remand the case for further proceedings.

# BROOKS *v.* UNITED STATES.

NO. 388. CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.*

Argued March 2, 1949.—Decided May 16, 1949.

1. That a person was a member of the armed forces at the time of the accident does not prevent recovery of a judgment against the United States under the Federal Tort Claims Act for his death or injury (not incident to his services in the armed forces) resulting from the negligence of an employee of the Government. Pp. 50–53.
2. This does not necessarily mean that the amount payable under servicemen's benefit laws should not be deducted, or taken into consideration, when a serviceman obtains a judgment against the Government under the Federal Tort Claims Act. Pp. 53–54.

169 F. 2d 840, reversed.

A District Court gave judgment against the Government under the Federal Tort Claims Act, 60 Stat. 842, 28 U. S. C. (1946 ed.) § 931 (now § 2674), for the death of one member of the armed forces and the injury of another (not incident to their service) resulting from the negligence of an employee of the Government. The Court of Appeals reversed. 169 F. 2d 840. This Court granted certiorari. 335 U. S. 901. *Reversed and remanded,* p. 54.

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

*Paul A. Sweeney* argued the cause for the United States. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Morison* and *Morton Hollander.*

*Together with No. 389, *Brooks, Administrator,* v. *United States,* also on certiorari to the same Court.

MR. JUSTICE MURPHY delivered the opinion of the Court.

This is a suit against the United States under the Federal Tort Claims Act, 60 Stat. 842, 28 U. S. C. (1946 ed.) § 931, now 28 U. S. C. § 2674. The question is whether members of the United States armed forces can recover under that Act for injuries not incident to their service. The District Court for the Western District of North Carolina entered judgment against the Government, rendering an unreported opinion, but the Court of Appeals for the Fourth Circuit reversed, in a divided decision. 169 F. 2d 840. We brought the case here on certiorari because of its importance as an interpretation of the Act. 335 U. S. 901.

The facts are these. Welker Brooks, Arthur Brooks, and their father, James Brooks, were riding in their automobile along a public highway in North Carolina on a dark, rainy night in February, 1945. Arthur was driving. He came to a full stop before entering an intersection, and proceeded across the nearer lane of the intersecting road. Seconds later the car was struck from the left by a United States Army truck, driven by a civilian employee of the Army. Arthur Brooks was killed; Welker and his father were badly injured.

Welker and the administrator of Arthur's estate brought actions against the United States in the District Court. The District Judge tried the causes without a jury and found negligence on the part of the truck driver. The Government moved to dismiss on the ground that Welker and his deceased brother were in the armed forces of the United States at the time of the accident, and were therefore barred from recovery. The Court denied the motion, entered a $25,425 judgment for the decedent's estate, and a $4,000 judgment for Welker.[1] On appeal,

[1] James Brooks, the father, also recovered judgment in his own right. The Government does not contest his recovery.

however, the Government's argument persuaded the Court of Appeals to reverse the judgment, Judge Parker dissenting.

We agree with Judge Parker. The statute's terms are clear. They provide for District Court jurisdiction over *any* claim founded on negligence brought against the United States. We are not persuaded that "any claim" means "any claim but that of servicemen." The statute does contain twelve exceptions. § 421. None exclude petitioners' claims. One is for claims arising in a foreign country. A second excludes claims arising out of combatant activities of the military or naval forces, or the Coast Guard, during time of war. These and other exceptions are too lengthy, specific, and close to the present problem to take away petitioners' judgments. Without resorting to an automatic maxim of construction, such exceptions make it clear to us that Congress knew what it was about when it used the term "any claim." It would be absurd to believe that Congress did not have the servicemen in mind in 1946, when this statute was passed. The overseas and combatant activities exceptions make this plain.

More than the language and framework of the act support this view. There were eighteen tort claims bills introduced in Congress between 1925 and 1935.[2] All but two [3] contained exceptions denying recovery to members of the armed forces. When the present Tort Claims Act

[2] H. R. 12178, 68th Cong., 2d Sess.; H. R. 12179, 68th Cong., 2d Sess.; S. 1912, 69th Cong., 1st Sess.; H. R. 6716, 69th Cong., 1st Sess.; H. R. 8914, 69th Cong., 1st Sess.; H. R. 9285, 70th Cong., 1st Sess.; S. 4377, 71st Cong., 2d Sess.; H. R. 15428, 71st Cong., 3d Sess.; H. R. 16429, 71st Cong., 3d Sess.; H. R. 17168, 71st Cong., 3d Sess.; H. R. 5065, 72d Cong., 1st Sess.; S. 211, 72d Cong., 1st Sess.; S. 4567, 72d Cong., 1st Sess.; S. 1833, 73d Cong., 1st Sess.; H. R. 129, 73d Cong., 1st Sess.; H. R. 8561, 73d Cong., 2d Sess.; H. R. 2028, 74th Cong., 1st Sess.; S. 1043, 74th Cong., 1st Sess.

[3] H. R. 8561, 73d Cong., 2d Sess.; H. R. 12178, 68th Cong., 2d Sess.

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was first introduced, the exception concerning servicemen had been dropped.[4] What remained from previous bills was an exclusion of all claims for which compensation was provided by the World War Veterans' Act of 1924—43 Stat. 607, 38 U. S. C. § 421, compensation for injury or death occurring in the first World War. H. R. 181, 79th Cong., 1st Sess. When H. R. 181 was incorporated into the Legislative Reorganization Act, the last vestige of the exclusion for members of the armed forces disappeared. See also Note, 1 Syracuse L. Rev. 87, 93–94.

The Government envisages dire consequences should we reverse the judgment.[5] A battle commander's poor judgment, an army surgeon's slip of hand, a defective jeep which causes injury, all would ground tort actions against the United States. But we are dealing with an accident which had nothing to do with the Brooks' army careers, injuries not caused by their service except in the sense that all human events depend upon what has already transpired. Were the accident incident to the Brooks' service, a wholly different case would be presented. We express no opinion as to it, but we may note that only in its context do *Dobson* v. *United States,* 27 F. 2d 807, *Bradey* v. *United States,* 151 F. 2d 742, and *Jefferson* v. *United States,* 77 F. Supp. 706, have any relevance. See the similar distinction in 31 U. S. C. § 223b. Interpretation of the same words may vary, of course, with the consequences, for those consequences may provide insight for determination of congressional purpose. *Lawson* v. *Suwannee Fruit & Steamship Co.,*

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[4] Other bills after those mentioned in note 2, above, also omitted this exception. See, *e. g.,* H. R. 5373, 77th Cong., 1st Sess.; H. R. 1356, 78th Cong., 1st Sess. This has nothing to do with "congressional awareness" of the *Dobson* and *Bradey* decisions, *infra.* The present Tort Claims Act contains exceptions which would have been specifically covered by those cases. § 421 (d).

[5] The Government's other arguments on this phase of the case are sleeveless. They will not be discussed.

336 U. S. 198. The Government's fears may have point in reflecting congressional purpose to leave injuries incident to service where they were, despite literal language and other considerations to the contrary. The result may be so outlandish that even the factors we have mentioned would not permit recovery. But that is not the case before us.

Provisions in other statutes for disability payments to servicemen, and gratuity payments to their survivors, 38 U. S. C. § 701, indicate no purpose to forbid tort actions under the Tort Claims Act. Unlike the usual workman's compensation statute, *e. g.*, 33 U. S. C. § 905, there is nothing in the Tort Claims Act or the veterans' laws which provides for exclusiveness of remedy. *United States* v. *Standard Oil Co.,* 332 U. S. 301, indicates that, so far as third party liability is concerned. Nor did Congress provide for an election of remedies, as in the Federal Employees' Compensation Act, 5 U. S. C. § 757. Thus *Dahn* v. *Davis,* 258 U. S. 421, and cases following that decision, are not in point. Compare *Parr* v. *United States,* 172 F. 2d 462. We will not call either remedy in the present case exclusive, nor pronounce a doctrine of election of remedies, when Congress has not done so. Compare 31 U. S. C. § 224b, specifically repealed by the Tort Claims Act, § 424 (a). In the very Act we are construing, Congress provided for exclusiveness of the remedy in three instances, §§ 403 (d), 410 (b), and 423, and omitted any provision which would govern this case.

But this does not mean that the amount payable under servicemen's benefit laws should not be deducted, or taken into consideration, when the serviceman obtains judgment under the Tort Claims Act. Without the benefit of argument in this Court, or discussion of the matter in the Court of Appeals, we now see no indication that Congress meant the United States to pay twice for the same injury. Certain elements of tort damages may be the equivalent of elements taken into account in providing disability

payments. It would seem incongruous, at first glance, if the United States should have to pay in tort for hospital expenses it had already paid, for example. And whatever the legal theory behind a wrongful death action, the same considerations might apply to the Government's gratuity death payment to Arthur Brooks' survivors, although national service life insurance might be considered a separate transaction, unrelated to an action in tort or other benefits.

But the statutory scheme and the Veterans' Administration regulations may dictate a contrary result. The point was not argued in the case as it came to us from the Court of Appeals. The court below does not appear to have passed upon it; it was unnecessary, in the view they took of the case. We do not know from this record whether the Government objected to this portion of the District Court judgment—nor can we tell from this record whether the Court of Appeals should consider a general objection to the judgment sufficient to allow it to consider this problem. Finally, we are not sure how much deducting the District Judge did. It is obvious that we are in no position to pass upon the question of deducting other benefits in the case's present posture.

We conclude that the language, framework and legislative history of the Tort Claims Act require a holding that petitioners' actions were well founded. But we remand to the Court of Appeals for its consideration of the problem of reducing damages *pro tanto,* should it decide that such consideration is proper in view of the District Court judgment and the parties' allegations of error.

*Reversed and remanded.*

MR. JUSTICE FRANKFURTER and MR. JUSTICE DOUGLAS dissent, substantially for the reasons set forth by Judge Dobie, below, 169 F. 2d 840.

# EX PARTE COLLETT.

MOTION FOR LEAVE TO FILE PETITION FOR WRITS OF MANDAMUS AND PROHIBITION.

No. 206, Misc. Argued February 7, 1949.—Decided May 31, 1949.

Under 28 U. S. C. § 1404 (a), incorporated in the revision of the Judicial Code effective September 1, 1948, the doctrine of *forum non conveniens* is made applicable to actions under the Federal Employers' Liability Act. Pp. 56–72.

1. This conclusion is required by the clear and unambiguous language of § 1404 (a), which applies generally to "any civil action." Pp. 58–59.

2. It involves no implied repeal of § 6 of the Federal Employers' Liability Act, since that deals with the places where actions may be brought originally, whereas 28 U. S. C. § 1404 (a) deals with the right to transfer an action properly brought. Pp. 59–61.

3. The legislative history of the revision of the Judicial Code requires the same conclusion. Pp. 61–71.

4. As thus construed, § 1404 (a) is applicable to actions instituted before its effective date but not brought to trial prior to its effective date. P. 71.

Motion denied.

Under 28 U. S. C. § 1404 (a), a Federal District Court in which an action under the Federal Employers' Liability Act had been brought transferred it to a District Court in another District, on the ground that this would serve the convenience of parties and witnesses and be in the interest of justice. Petitioner moved in this Court for leave to file a petition for writs of mandamus and prohibition. The case was assigned for hearing on the motion. 335 U. S. 897. *Motion denied,* p. 72.

*Lloyd T. Bailey* argued the cause for petitioner. With him on the brief was *Theodore Granik.*

*Robert P. Hobson* argued the cause for the Honorable Fred L. Wham, United States Judge for the Eastern District of Illinois, respondent. With him on the brief was *Ernest Woodward.*

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

In this case we must decide whether the venue provisions of the Judicial Code [1] render applicable the doctrine of *forum non conveniens* to actions under the Federal Employers' Liability Act.[2] Petitioner instituted such an action against the Louisville and Nashville Railroad in October, 1947, in the court below, the United States District Court for the Eastern District of Illinois. No trial was had before September 1, 1948, the effective date of the present Judicial Code.[3] Thereafter the Railroad filed a motion to transfer the case to the District Court for the Eastern District of Kentucky.

The court below found that all 35 witnesses and the petitioner himself live in Irvine, Kentucky, which also was the scene of the accident; that Irvine is 420 miles, "approximately twenty-four hours . . . by public transportation," from East St. Louis, where the court below sits, but only 26 miles from Richmond and 48 from Lexington, in which two cities the District Court for the Eastern District of Kentucky sits. Furthermore, the court below determined that jury schedules at both Richmond and Lexington made early trial possible. Thus concluding that the transfer would serve the convenience of parties and witnesses, and would be in the interest of

[1] Act of June 25, 1948, 62 Stat. 869: "An Act To revise, codify, and enact into law title 28 of the United States Code entitled 'Judicial Code and Judiciary.' "

[2] 35 Stat. 65, as amended by 36 Stat. 291, and 53 Stat. 1404, 45 U. S. C. §§ 51–59.

[3] Act of June 25, 1948, 62 Stat. 869, 992, § 38.

justice, the District Court granted the Railroad's motion. Petitioner then filed directly in this Court a "Motion for leave to file petition for order to show cause why writs of mandamus [against the court below] and prohibition [against the Kentucky District Court] should not issue, and petition for same." Petitioner makes no allegation that the court below abused its discretion; his sole contention is that the order of transfer exceeded the District Court's authority. Since that issue seemed of importance in the administration of justice,[4] we assigned the case for hearing on the motion. 335 U. S. 897 (1948).

Prior to the current revision of Title 28 of the United States Code, *forum non conveniens* was not available in Federal Employers' Liability Act suits. *Baltimore & Ohio R. Co.* v. *Kepner,* 314 U. S. 44 (1941); *Miles* v. *Illinois Central R. Co.,* 315 U. S. 698 (1942); see *Gulf Oil Corp.* v. *Gilbert,* 330 U. S. 501, 505 (1947). The new Code, however, provides that "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." This is § 1404 (a). The reviser's notes, which accom-

[4] At least five district court decisions dealing with the relationship of § 1404 (a) to FELA suits have been reported. Four have held that the section is applicable. *Hayes* v. *Chicago, R. I. & P. R. Co.* (and seven other cases), 79 F. Supp. 821 (1948); *White* v. *Thompson,* 80 F. Supp. 411 (1948); *Nunn* v. *Chicago, M., St. P. & P. R. Co.,* 80 F. Supp. 745 (1948); *Scott* v. *New York Central R. Co.,* 81 F. Supp. 815 (1948); cf. *Brainard* v. *Atchison, T. & S. F. R. Co.,* 81 F. Supp. 211 (1948); *Perry* v. *Atchison, T. & S. F. R. Co.,* 82 F. Supp. 912 (1948) (in both, motion to transfer denied, in exercise of "discretionary powers"); *Chaffin* v. *Chesapeake & O. R. Co.,* 80 F. Supp. 957 (1948); *Richer* v. *Chicago, R. I. & P. R. Co.,* 80 F. Supp. 971 (1948). One reported decision has held that the Code section is inapplicable to such suits. *Pascarella* v. *New York Central R. Co.,* 81 F. Supp. 95 (1948).

pany each section of the Code, here read as follows: "Subsection (a) was drafted in accordance with the doctrine of forum non conveniens, permitting transfer to a more convenient forum, even though the venue is proper. As an example of the need of such a provision, see *Baltimore & Ohio R. Co.* v. *Kepner,* 1941, 62 S. Ct. 6, 314 U. S. 44, 86 L. Ed. 28, which was prosecuted under the Federal Employer's [*sic*] Liability Act in New York, although the accident occurred and the employee resided in Ohio. The new subsection requires the court to determine that the transfer is necessary for convenience of the parties and witnesses, and further, that it is in the interest of justice to do so." [5] The precise issue before us is whether, despite these expressions, the law remains unchanged. Petitioner so contends.

*First.* The court below relied on the language of § 1404 (a), *supra,* which it regarded as "unambiguous, direct, clear." We agree. The reach of "any civil action" [6] is unmistakable. The phrase is used without qualification, without hint that some should be excluded. From the statutory text alone, it is impossible to read the section as excising this case from "any civil action."

The only suggestion petitioner offers in this regard is that "any civil action" embraces only those actions for which special venue requirements are prescribed in §§ 1394–1403 of Revised Title 28,[7] since these sections

[5] H. R. Rep. No. 308, 80th Cong., 1st Sess. A 132 (1947); H. R. Rep. No. 2646, 79th Cong., 2d Sess. A127 (1946).

[6] The reviser's notes make clear that the phrase was substituted for "suit," formerly used in various venue statutes, in the light of Rule 2 of the Fed. Rules Civ. Proc.: "There shall be one form of action to be known as 'civil action'."

[7] Section 1394 deals with any civil action "by a national banking association to enjoin the Comptroller of the Currency"; § 1395, proceedings "for the recovery of a pecuniary fine" and "for the forfeiture of property" under varying circumstances; § 1396, "Any civil

immediately precede § 1404 (a), and all are within the Venue Chapter (§§ 1391–1406, inclusive) of the Code. To accept this contention, we would be required completely to disregard the Congressional admonition that "No inference of a legislative construction is to be drawn by reason of the chapter in Title 28 . . . in which any any [*sic*] section is placed . . . ." [8] Furthermore, petitioner's argument proves too much: §§ 1391–1393, which also are in the Venue Chapter and also refer to "any civil action," would be read as applying only to actions for which special venue requirements are established in neighboring sections of the Code, although they were obviously intended by Congress to be the general venue sections applicable to ordinary actions. It seems more reasonable to hold that § 1404 (a) in terms applies generally, *i. e.*, to "any civil action."

*Second.* Although petitioner wishes to restrict the literal meaning of "any civil action," he would expand the sense of "may transfer . . . to any other district or division where it might have been brought" beyond the exact scope of those words. Obviously, the express language gives no clue as to where the action "might have been brought." Yet the essence of petitioner's position is that the order below, transferring his suit, effects a repeal of § 6 of the Federal Employers' Liability Act, which granted him the right to sue in any district "in which the defend-

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action for the collection of internal revenue taxes"; § 1397, "of interpleader"; § 1398, "any civil action to enforce, suspend or set aside in whole or in part an order of the Interstate Commerce Commission"; § 1399, "for the partition of lands, where the United States is one of the tenants in common or joint tenants"; § 1400, actions "relating to copyrights" or "for patent infringement"; § 1401, "by a stockholder on behalf of his corporation"; § 1402, "against the United States"; and § 1403, "to condemn real estate for the use of the United States."

[8] Act of June 25, 1948, 62 Stat. 869, 991, § 33.

ant shall be doing business at the time of commencing such action." [9]

Section 6 of the Liability Act defines the proper forum; § 1404 (a) of the Code deals with the right to transfer an action properly brought. The two sections deal with two separate and distinct problems.[10] Section 1404 (a) does not limit or otherwise modify any right granted in § 6 of the Liability Act or elsewhere to bring suit in a particular district. An action may still be brought in any court, state or federal, in which it might have been brought previously.

The Code, therefore, does not repeal § 6 of the Federal Employers' Liability Act. We agree with petitioner that Congress had no such intention, as demonstrated by its failure to list the section in the meticulously prepared schedule of statutes repealed.[11] We cannot agree that the order before us effectuates an implied repeal. The inapplicability of *forum non conveniens* to Liability Act

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[9] "Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. . . ." 45 U. S. C. § 56. For a brief historical sketch, see *Baltimore & O. R. Co.* v. *Kepner,* 314 U. S. 44, 49–50 (1941).

[10] In almost every state, the requirements for venue and for transfer are treated in different statutory sections. Brief for New York, C. & St. L. R. Co. as *amicus curiae,* pp. 11–12, *Kilpatrick* v. *Texas & Pac. R. Co., post,* p. 75. See, *e. g.,* N. Y. Civil Practice Act, §§ 182, 187.

[11] Act of June 25, 1948, 62 Stat. 869, 992, § 39. Congress did list the pertinent statutes, when Code provisions in fact changed the basic venue requirements. For example, §§ 1394, 1395, 1396 and 1400, respectively, prescribe a new definition of appropriate forums for actions against the Comptroller of the Currency, involving fines and forfeitures, internal revenue taxes and patent and copyright suits; and the following statutes are therefore listed as repealed: 28 U. S. C. § 110; 28 U. S. C. §§ 104, 107, 108; 28 U. S. C. § 105; 28 U. S. C. § 109 and 17 U. S. C. § 35.

suits derives from the *Kepner* decision. And there this Court expressly stated that "If it is deemed unjust, the remedy is legislative . . . ." 314 U. S. at 54. That opinion discusses § 6 of the Liability Act, to be sure, but this Court did not and could not suggest that the legislative answer had necessarily to be addressed to that section. Since the words selected by Congress for § 6 denote nothing, one way or the other, respecting *forum non conveniens,* there was no occasion to repeal that section, expressly or impliedly; Congress chose to remove its judicial gloss via another statute. Discussion of the law of implied repeals is, therefore, irrelevant.

*Third.* Petitioner's chief argument proceeds not from one side or the other of the literal boundaries of § 1404 (a), but from its legislative history. The short answer is that there is no need to refer to the legislative history where the statutory language is clear. "The plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction." *Gemsco* v. *Walling,* 324 U. S. 244, 260 (1945). This canon of construction has received consistent adherence in our decisions.[12]

Nevertheless, we need not rest our decision on it solely. For the legislative history does not support petitioner's position. Petitioner's argument is based on these twin premises: Congress intended no "controversial change" to be incorporated in the Code; and § 1404 (a) is such a change.

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[12] E. g., *Packard Motor Car Co.* v. *Labor Board,* 330 U. S. 485, 492 (1947); *United States* v. *American Trucking Associations,* 310 U. S. 534, 543 (1940) and cases there cited.

The rule as to statutory revisions is the same. *Continental Casualty Co.* v. *United States,* 314 U. S. 527, 530 (1942); *Bate Refrigerating Co.* v. *Sulzberger,* 157 U. S. 1, 45 (1895); *United States* v. *Bowen,* 100 U. S. 508, 513 (1880).

To establish the former premise, petitioner cites a number of statements by legislative leaders in charge of the Code revision. For example, Representative Keogh, Chairman of the House Committee on the Revision of the Laws which initiated the work, said at the hearing before the House Judiciary Subcommittee, "The policy that we adopted . . . was to avoid wherever possible and whenever possible the adoption in our revision of what might be described as controversial substantive changes of law." [13] And Senator Donnell, Chairman of the Senate Judiciary Subcommittee considering the Code, said on the floor that ". . . the purpose of this bill is primarily to revise and codify and to enact into positive law, with such corrections as were deemed by the committee to be of substantial and noncontroversial nature." [14] But these statements clearly are not unequivocal promises that no changes would be made. The legislation was announced to be a revision as well as a codification. It is obvious that the changes in law retained in the Code were not considered as "controversial" by these Congressional spokesmen.

Petitioner does not offer any definition of "controversial," but he does point to one concrete example of what he regards as a "controversial" measure. This is the

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[13] Hearings before House Committee on the Judiciary on H. R. 1600 and H. R. 2055, 80th Cong., 1st Sess. 6 (1947). He also testified as follows: ". . . we proceeded upon the hypothesis that since that was primarily a restatement of existing law, we should not endanger its accomplishment by the inclusion in the work of any highly controversial changes in law." And, in response to the Chairman's question, "And this bill does not include controversial matters?" Rep. Keogh replied that "We have sought to avoid as far as possible . . . any substantive changes that did not meet with unanimity of opinion." *Ibid.*, 11.

[14] 94 Cong. Rec. 7928 (1948). The Senator had just given an illustration of "various changes that have been made."

Jennings Bill,[15] which was under consideration in the House in the spring of 1947, as was the Code revision.[16] The Jennings Bill and § 1404 (a) of the Code meet the same problem, the alleged abuses in the selection of

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[15] H. R. 1639, 80th Cong., 1st Sess.: "A Bill To amend the Employers' Liability Act so as to limit venue . . . ." As ultimately reported to the House, it repealed all of § 6 of the Federal Employers' Liability Act, except the last sentence prohibiting removal of actions brought in state courts to federal courts; and added the following paragraph to the then general venue statute, § 51 of the Judicial Code, 28 U. S. C. § 112: "A civil suit for damages for wrongful death or personal injuries against any interstate common carrier by railroad may be brought only in a district court of the United States or in a State court of competent jurisdiction, in the district or county (parish), respectively, in which the cause of action arose, or where the person suffering death or injury resided at the time it arose: Provided, That if the defendant cannot be served with process issuing out of any of the courts aforementioned, then and only then, the action may be brought in a district court of the United States, or in a State court of competent jurisdiction, at any place where the defendant shall be doing business at the time of the institution of said action." H. R. Rep. No. 613, 80th Cong., 1st Sess., Pt. 1, 9–10 (1947).

[16] The House Committee on the Judiciary held hearings on the Code, before Subcommittee No. 1, on Mar. 7, 1947, and four hearings on the Jennings Bill, before Subcommittee No. 4, from Mar. 28 to April 18, 1947. Congressman Jennings himself was a member of Subcommittee No. 1, considering the Code. Congressman Devitt, a member of Subcommittee No. 4, considering the Jennings Bill, testified in favor of the Code; Hearings before House Committee on the Judiciary on H. R. 1600 and H. R. 2055 (Code), 80th Cong. 1st Sess. 3 (1947); Hearings before Senate Committee on the Judiciary on H. R. 3214 (Code), 80th Cong., 2d Sess. 16 (1948).

The unanimous Judiciary Committee Report favoring the Code was published in April, 1947. H. R. Rep. No. 308, 80th Cong., 1st Sess. The divided Report on the Jennings Bill was submitted in June. H. R. Rep. No. 613, 80th Cong., 1st Sess. (in three parts).

On July 7, 1947, the House passed the proposed revision by a vote of 342 to 23. 93 Cong. Rec. 8392. Ten days later, the Jennings Bill was passed by 203 to 188. 93 Cong. Rec. 9193–4.

forums for Liability Act suits.[17] But the Jennings Bill was far more drastic than § 1404 (a). The Jennings Bill would in large part have repealed § 6 of the Liability Act. It would have delimited the available forum for actions brought in state as well as federal courts.[18] It would have eliminated the right to sue in any district in which the railroad did business. Initially, this applied only to Federal Employers' Liability Act plaintiffs, but in final draft the Jennings Bill generally restricted all, including passengers, who might sue railroads for personal injuries. Inasmuch as none of these changes in the law was contained in the Code, it is evident that § 1404 (a) might well be considered "noncontroversial" by the same Congress which would regard the Jennings Bill as "controversial." [19]

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[17] See, *e. g.*, Hearings before House Committee on the Judiciary on H. R. 1639, 80th Cong., 1st Sess. 6–12, 17–22, 31–8 (1947); H. R. Rep. No. 613, 80th Cong., 1st Sess., Pt. 1, 3–6; Pt. 2, 1–2, 4 (1947).

[18] As one of its three grounds of opposition to the Jennings Bill, the minority Report stated, "The bill restricts State courts in the administration of justice, deprives them of their prerogatives to require change of venue of lawsuits where necessary, and transcends the provisions of State laws governing the jurisdiction of State courts." H. R. Rep. No. 613, 80th Cong., 1st Sess., Pt. 2, 1 (1947).

Doubt was expressed that Congress had constitutional power so to affect state courts. See, *e. g.*, letter of Acting The Assistant to the Attorney General, Hearings before Senate Committee on the Judiciary on S. 1567 and H. R. 1639 (Jennings Bill), 80th Cong., 2d Sess. 215 (1948).

[19] Furthermore, petitioner's argument suggests at most that § 1404 (a) was as "controversial" as the Jennings Bill, as of July, 1947. Thereafter, however, both the Code and the Jennings Bill were referred to the Senate Judiciary Committee, which held hearings on both. The same three Senators composed the Subcommittee holding these hearings: Sen. E. H. Moore, Chairman at the hearings on the Jennings Bill in January, 1948; Sen. Donnell, Chairman at the hearings on the Code in April and June, 1948; and Sen. McGrath. The relationship between the two proposals was ex-

Moreover, even if we could distill from the legislative history of the Jennings Bill a usable concept of "controversial change," its application would destroy petitioner's case. For petitioner concedes that in fact § 1404 (a) did not arouse controversy; he submits the Jennings Bill as contrast. His argument is obviously based not on the actual legislative history of § 1404 (a), but on necessarily vague speculation as to what Congress might have done had it fully realized that *forum non conveniens* was henceforth to be applicable in Federal Employers' Liability Act suits. The requisite assumption, that Congress did not appreciate the significance of its action when it ratified the Code and § 1404 (a) therein, is contrary to the facts shown by the legislative history which is of record. The lack of controversy reflected aware agreement and not the inertia of ignorance.

This was scarcely hasty, ill-considered legislation. To the contrary, it received close and prolonged study. Five years of Congressional attention supports the Code.[20] And from the start, Congress obtained the most eminent expert assistance available. The spadework was entrusted to two lawbook-publishing firms, the staffs of which had unique experience in statutory codification and revision.[21]

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pressly called to their attention. See Hearings before Senate Committee on the Judiciary on S. 1567 and H. R. 1639 (Jennings Bill), 80th Cong., 2d Sess. 111–112 (1948). The Committee reported the Code favorably, albeit with amendments; but the Jennings Bill was not reported.

It is clear that only the Tax Court provisions were regarded by the Senate Committee as sufficiently "controversial" to be deleted. See S. Rep. No. 1559, 80th Cong., 2d Sess. 2 (1948); 94 Cong. Rec. 7927 (1948).

[20] June 28, 1943, Congress appropriated $100,000 "For preliminary work in connection with the preparation of a new edition of the United States Code, including the correction of errors . . . ." 57 Stat. 230.

[21] See H. R. Rep. No. 308, 80th Cong., 1st Sess. 2–3 (1947).

They formed an advisory committee, including distinguished judges and members of the bar, and obtained the services of special consultants.[22] Furthermore, an advisory committee was appointed by the Judicial Conference.[23] And to assist with matters relating to the jurisdiction of this Court, Chief Justice Stone appointed an advisory committee, consisting of himself and JUSTICES FRANKFURTER and DOUGLAS.[24]

That these experts assisted in drafting the Code does not mean that Congress blindly approved what outsiders did. This is demonstrated, for example, by the statement of Representative Robsion, Chairman of the House Judiciary Subcommittee, at the hearing conducted by his

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[22] "This public-spirited group [the advisory committee] consisted of Judge Floyd E. Thompson, former chief justice of the Illinois Supreme Court and former president of the Chicago Bar Association; Hon. Justin Miller, former associate justice of the United States Court of Appeals for the District of Columbia; Judge John B. Sanborn, judge of the United States Circuit Court of Appeals for the Eighth Circuit; Hon. Walter P. Armstrong, of the Memphis bar and former president of the American Bar Association; and Hon. John Dickinson, of the Philadelphia bar, former assistant Attorney General of the United States.

"This advisory committee was ably assisted by Judge John J. Parker, senior circuit judge of the United States Circuit Court of Appeals for the fourth circuit, who rendered valuable service as a judicial consultant. The committee was also assisted by two special consultants each an expert in the field of Federal procedure: Judge Alexander Holtzoff, United States district judge, District Court for the District of Columbia; and Prof. James W. Moore, of Yale University." H. R. Rep. No. 308, 80th Cong., 1st Sess. 3 (1947). See also Hearings before House Committee on the Judiciary on H. R. 1600 and H. R. 2055, 80th Cong., 1st Sess. 7–8, 12–14, 17–18, 24–26 (1947).

[23] Circuit Judge Maris was Chairman, and District Judges Galston and W. F. Smith also served on the committee. *Loc. cit. supra,* note 22. See 1944 Report of the Judicial Conference 24; 1945 *id.* 17–18; 1948 *id.* 41.

[24] H. R. Rep. No. 308, 80th Cong., 1st Sess. 4 (1947).

Subcommittee in 1947. "We shall do the same as we did last year . . . just read them line by line and have you and other expert codifiers and other persons go over the bill with us." [25]

Petitioner almost seems to imply that this very careful Committee consideration vitiates the legislation. But the Committee system is integral in typical legislative procedure; Congress could not function without it.[26] A canon of construction which would discount statutory words *pro tanto,* the greater the expertise or the more meticulous the Committee consideration devoted thereto, or the longer and more complex the legislation, would be absurd, not least because it would make mockery of the techniques of statutory interpretation which have heretofore been used by the courts.

The experts and the Committees did not attempt to conceal the proposed revisions. "The committee on revision of the laws in the preparation of those preliminary

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[25] Hearings before House Committee on the Judiciary on H. R. 1600 and H. R. 2055, 80th Cong., 1st Sess. 23 (1947).

[26] "Congressional government is Committee government . . . . The House sits, not for serious discussion, but to sanction the conclusions of its Committees as rapidly as possible. It legislates in its committee-rooms; not by the determinations of majorities, but by the resolutions of specially-commissioned minorities; so that it is not far from the truth to say that Congress in session is Congress on public exhibition, whilst Congress in its committee-rooms is Congress at work." Woodrow Wilson, Congressional Government, pp. xvi, 79 (15th ed. 1900). Nor has this changed. "The committees are the workshops of Congress. Committee work is the core of the legislative process. . . . It is the center of legislative activity where the law-making and supervisory functions of Congress are largely performed." Galloway, Congress at the Crossroads 53 (1946). And see Bryce, The American Commonwealth c. XV (New Ed. 1931); Chamberlain, Legislative Processes, cc. V–VI (1936); Kefauver and Levin, A Twentieth-Century Congress 114–153 (1947); Luce, Legislative Procedure, cc. IV–VIII (1922); Walker, The Legislative Process, c. 11 (1948).

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drafts sought to give them the widest possible circulation. We made certain that every member of the legislature got one; we made certain that they were sent to every United States attorney; that they were sent to every member of the Federal judiciary; that they were sent to the appropriate committees of the leading State and local bar associations; that they were sent to everyone who ever evidenced any interest in the work at all." [27] Indicative of the success in publicizing the provisions of the Code is the fact that there was specific treatment of § 1404 (a) and its applicability to Federal Employers' Liability Act suits in a number of legal periodicals.[28]

The initial appearance of § 1404 (a) was in the Second Draft of the Code, adopted by the meeting of May, 1945. Its text has remained unchanged. It was accompanied by a reviser's note, which recited that "Subsection (a) is new. It was drafted in accordance with a memorandum of Mar. 7, 1945, from the author of Moore's Federal Practice, stating that recognition should be given the doc-

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[27] Hearings before House Committee on the Judiciary on H. R. 1600 and H. R. 2055, 80th Cong., 1st Sess. 8 (1947).

[28] Expressly reciting the reference to the *Kepner* case in the reviser's notes: Braucher, *The Inconvenient Federal Forum,* 60 Harv. L. Rev. 908, 933 (July, 1947); Note, *New Limitations on Choice of Federal Forum,* 15 U. of Chi. L. Rev. 332, 341, n. 54 (Winter [March], 1948); Comment, *Forum Non Conveniens, A New Federal Doctrine,* 56 Yale L. J. 1234, 1249, n. 115 (Aug., 1947). And see Barrett, *The Doctrine of Forum Non Conveniens,* 35 Calif. L. Rev. 380, 421 (Sept., 1947); Note, 32 Minn. L. Rev. 633, 636, n. 29 (May, 1948). Cf. Note, 23 Ind. L. J. 82, 87, n. 26 (Oct., 1947) (quoting § 1404 (a) but not referring to the reviser's notes).

Of course the fact that the Judicial Code was being revised was publicized in discussions not directly bearing on the instant issue; *e. g.,* Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code,* 13 Law & Contemp. Prob. 216 (1948); Zinn, *Revision of Federal Judicial Code,* 48 Law Notes, Nos. 3–4, 11 (1944) (earliest reference); Note, *The Proposed Revision of the Federal Judicial Code,* 60 Harv. L. Rev. 424 (1947).

trine of *forum non conveniens* . . . ." [29] The balance of that note was substantially the same as the present reviser's note; it expressly cited the *Kepner* case, an action under the Federal Employers' Liability Act, as demonstrating the need for § 1404 (a). *And the reviser's notes were before the Congress at every subsequent legislative step.*

A preliminary draft of the Code was printed late in 1945 for the use of the House Committee on Revision of the Laws. In this draft, the reviser's notes appear directly below each related section or subsection. Section 1404 (a) and its note were in this draft, which, as noted above, was given very wide circulation.

July 24, 1946, the House ordered to be printed the Report submitted by Representative Keogh of New York, Chairman of the House Committee on Revision of the Laws, on the codification of Title 28.[30] This Report consisted of a preliminary statement *and a full printing of the reviser's notes.* Section 1404 (a) appears in that Report, together with its note. There was no further action on the Code in the Seventy-Ninth Congress.

In the Eightieth Congress, under the Legislative Reorganization Act of 1946,[31] the Code revision passed to

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[29] There is no doubt as to the meaning of § 1404 (a) in the mind of the author of the memorandum. See 3 Moore's Federal Practice 2141 (2d ed. 1948), stating that the Code "provides for a transfer . . . of *any* action to a proper and more convenient forum" (italics in original), with a footnote (107) citing § 1404 (a) and declaring that "ANY action in § 1404 (a) includes suits subject to special venue statutes, as suits for patent infringement and suits under the Federal Employers' Liability Act, as well as actions subject to the general venue statute." And see articles by a member of the advisory committee appointed by the Judicial Conference, and by the Chief Reviser: Galston, *An Introduction to the New Federal Judicial Code,* 8 F. R. D. 201, 206 (1948); Barron, *The Judicial Code 1948 Revision,* 8 F. R. D. 439, 442 (1949).

[30] H. R. Rep. No. 2646, 79th Cong., 2d Sess. (1946).

[31] 60 Stat. 812, 826–27 (1946).

the jurisdiction of the House Judiciary Committee and was assigned to a Subcommittee of which Representative Robsion of Kentucky was Chairman. At the hearing before this Subcommittee, Professor James William Moore of Yale University, special consultant to the revisers, in summarizing the Code proposals, testified that there were "changes of importance" in the law of venue and specifically mentioned § 1404.[32] In April, 1947, the House Judiciary Committee reported the bill with a unanimous recommendation that it be passed.[33] This Report *again fully reprinted the reviser's notes.* In this Report, the section entitled "Examples of Changes in Law," which had appeared in the Report on the revision in the preceding Session of Congress, expressly referred to the reviser's notes for §§ 1391–1406.[34]

After this painstaking consideration, with its references to § 1404 (a), the House initially passed the bill on July 7, 1947.[35] At that time and in the subsequent consideration in the Senate, the Tax Court provisions occasioned the most discussion; but other specific sections did not pass unnoticed. Attention was directly called to § 1404 (a) by one witness at the hearings before the Senate Judiciary Subcommittee, although his interest was not in the Federal Employers' Liability Act issue.[36] No change in § 1404 (a) was included in the Senate amendments; and the revision of Title 28 was enacted by the Congress in June, 1948.[37]

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[32] Hearings before House Committee on the Judiciary on H. R. 1600 and H. R. 2055, 80th Cong., 1st Sess. 29 (1947).

[33] H. R. Rep. No. 308, 80th Cong., 1st Sess. (1947).

[34] *Ibid.*, 6.

[35] 93 Cong. Rec. 8392 (1947).

[36] Hearings before Senate Committee on the Judiciary on H. R. 3214, 80th Cong., 2d Sess. 73–74 (1948).

[37] 94 Cong. Rec. 7927–30, 8297, 8438, 8498–8501 (1948).

While it lacks relevance to our holding as to Congressional intention and expression in June, 1948, the presentation of an up-to-date

Thus, at almost every stage of the legislative procedure, attention was directed to the fact of change, and in most instances specific mention was made of § 1404 (a). At no stage subsequent to the first formal printing did § 1404 (a) and its accompanying reviser's note fail to appear. From the start, § 1404 (a) remained the same, and the reference in the note to a Federal Employers' Liability Act case as showing the need for permitting the application of *forum non conveniens* remained unchanged. Now to hold that Congress did not appreciate what it was enacting in that section would defy the legislative history. We must flatly reject petitioner's thesis that this section was so obscured that its enactment is meaningless. We cannot blind ourselves to the hearings, to the experts, to the Committee reports, to the reviser's notes and their incorporation in the Committee reports—to a history of the most meticulous Congressional consideration.

*Fourth.* Petitioner suggests that his action may not be transferred because it was instituted prior to the effective date of the Code. Clearly, § 1404 (a) is a remedial provision applicable to pending actions. And "No one has a vested right in any given mode of procedure . . . ." *Crane* v. *Hahlo,* 258 U. S. 142, 147 (1922).[38]

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report of Congressional consideration of the Code revision requires noting that over 60 additional amendments to Title 28 have already become law. Act of May 24, 1949, 63 Stat. 89, 99–107, §§ 64a–127. See 95 Cong. Rec. 3814–20, 5826–27, 6283–84; H. R. Rep. No. 352, 81st Cong., 1st Sess. 11–20, 38–51 (1949); S. Rep. No. 303, 81st Cong., 1st Sess. (1949). While § 1406 is amended by adding "shall dismiss, or if it be in the interest of justice" before "shall transfer" (63 Stat. 101, § 81), no change whatever was suggested or made in § 1404 (a).

[38] *Gwin* v. *United States,* 184 U. S. 669 (1902); *National Exchange Bank of Baltimore* v. *Peters,* 144 U. S. 570 (1892); *Sherman* v. *Grinnell,* 123 U. S. 679 (1887); *McBurney* v. *Carson,* 99 U. S. 567, 569 (1878).

*Fifth.* Since the petition for mandamus and prohibition must be denied because of the view we must take as to the meaning of § 1404 (a) and its applicability to this case, we need not decide whether denial might be placed on other grounds also. "Mandamus, prohibition and injunction against judges are drastic and extraordinary remedies. . . . As extraordinary remedies, they are reserved for really extraordinary causes." *Ex parte Fahey,* 332 U. S. 258, 259, 260 (1947).[39]

What we hold is that the plain meaning of the statutory words and the consistent course of the legislative history are opposed to petitioner's contention that we must disregard § 1404 (a) because Congress knew not what it did. If petitioner's showing could sustain a decision that this section was not really enacted after all, little law would remain.

The motion is

*Denied.*

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS dissent for the reasons stated in the dissenting opinion of MR. JUSTICE DOUGLAS in *United States* v. *National City Lines, post,* p. 84.

MR. JUSTICE RUTLEDGE.*

I concur in the result. But in doing so I feel impelled to say two things.

One is that in my view § 1404 (a), taken broadly to include "any civil action," does effect a partial repeal of

[39] *Ex parte Mars, Inc.,* 320 U. S. 710 (1943); *Roche* v. *Evaporated Milk Assn.,* 319 U. S. 21 (1943), and cases there cited. Cf. *United States Alkali Export Assn.* v. *United States,* 325 U. S. 196 (1945), and cases there cited.

*[This is also a concurrence in the result in No. 233, Misc., *Kilpatrick* v. *Texas & P. R. Co., post,* p. 75, and No. 269, Misc., *United States* v. *National City Lines, post,* p. 78.]

§ 6 of the Federal Employers' Liability Act and of the other statutes mentioned by MR. JUSTICE DOUGLAS, including the venue provisions (§ 12) of the Clayton Act involved in our decision in *United States* v. *National City Lines*, 334 U. S. 573.

The legislative history, for example, of the Clayton Act venue provisions demonstrates that the change § 1404 (a) is said to have made was more than the mere removal of a judicial gloss. I think we should not now impugn the validity of our decisions in *National City Lines, supra,* and in *Kepner* and *Miles* [1] by characterizing each as a mere "judicial gloss" upon the pertinent statute. Those decisions in my opinion were true reflections of congressional intent as stated in the respective statutes and, accordingly, the changes made in them by § 1404 (a) were in the nature of repeals, to the extent that the plaintiffs were deprived of their rights under the pre-existing statutes to have their causes of action tried in the forums where they were properly brought.

In the second place, those changes, although entirely within Congress' power to make, were neither insubstantial nor noncontroversial, in view of the legislative history of the original provisions, for example, the venue provisions of the Clayton Act. Nor do I think the legislative history of § 1404 (a) demonstrates either the insubstantial or the noncontroversial nature of the changes in § 1404 (a), although they seem to have been so treated by those in charge of the bill.[2] It is to be noted, moreover, that

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[1] *Baltimore & Ohio R. Co.* v. *Kepner*, 314 U. S. 44; *Miles* v. *Illinois Central R. Co.*, 315 U. S. 698.

[2] "At the same time great care has been exercised to make no changes in the existing law which would not meet with substantially unanimous approval." S. Rep. No. 1559, 80th Cong., 2d Sess. 2. ". . . I may say that the purpose of this bill is primarily to revise and codify and to enact into positive law, with such corrections as

specific attention was drawn to the effect of § 1404 (a) upon § 6 of the Employers' Liability Act through reference to the *Kepner* and *Miles* decisions, but no like specific reference was made to the venue provisions of the Clayton Act and the *National City Lines* decision.

These matters make it impossible for me to concur in the view that Congress was in fact "fully informed as to the significance of § 1404 (a)." This, however, is a matter affecting congressional procedure and the manner of conducting legislative business. Accordingly, notwithstanding my doubts that Congress intended to go so far, I acquiesce in the Court's decisions.

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were deemed by the [Senate Judiciary] committee to be of substantial and noncontroversial nature." 94 Cong. Rec. 7928. For similar expressions by members of the House of Representatives, see Hearings before House Committee on the Judiciary on H. R. 1600 and H. R. 2055, 80th Cong., 1st Sess. 6, 11. A member of the House Judiciary Committee told the House that the only "controversial aspects" of the 1947 draft of the code were certain subsequently deleted provisions concerning the Tax Court. 93 Cong. Rec. 8390. But cf. the legislative history of the contemporaneously pending Jennings Bill, citations to which are made in the Court's opinion.

## KILPATRICK *v.* TEXAS & PACIFIC RAILWAY CO.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS OR CERTIORARI.

No. 233, Misc. Argued February 8, 1949.—Decided May 31, 1949.

Under 28 U. S. C. § 1404 (a), incorporated in the revision of the Judicial Code effective September 1, 1948, the doctrine of *forum non conveniens* is made applicable to actions under the Federal Employers' Liability Act. *Ex parte Collett, ante,* p. 55. Pp. 75–78.

Motion denied.

Under 28 U. S. C. § 1404 (a), a Federal District Court in which an action under the Federal Employers' Liability Act had been brought transferred it to a District Court in another District. Petitioner moved in this Court for leave to file a petition for a writ of certiorari or a writ of mandamus or any appropriate relief. The case was assigned for hearing on the motion. 335 U. S. 897. *Motion denied,* p. 78.

*William H. DeParcq* argued the cause for petitioner. With him on the brief were *Gerald F. Finley* and *Arnold B. Elkind.*

*Porter R. Chandler* argued the cause for respondent. With him on the brief were *Theodore Kiendl, Cleveland C. Cory* and *William H. Timbers.*

*Frank Y. Gladney, James C. Jones, Jr.* and *Lon Hocker, Jr.* filed a brief for the New York, Chicago & St. Louis Railroad Co., as *amicus curiae,* in support of respondent.

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

This litigation has a rather involved history. In 1946, while in the employ of respondent railroad, petitioner

was seriously injured in an accident at Big Spring, Texas. Petitioner promptly brought suit under the Federal Employers' Liability Act [1] in the United States District Court for the Southern District of New York. That court dismissed the action on the ground that the railroad could not properly be served in that district. 72 F. Supp. 635 (1947). Petitioner appealed from this dismissal; and, some days after taking the appeal, instituted an action in the District Court for the Northern District of Texas. An answer was filed in the latter action and a number of depositions were taken.

In March, 1948, the Court of Appeals for the Second Circuit held that the railroad was subject to service in New York. 166 F. 2d 788. Thereupon petitioner moved to dismiss his Texas action. When the district court refused to dismiss, petitioner appealed and also applied for a writ of prohibition to the Court of Appeals for the Fifth Circuit. That court declined to issue the writ. 167 F. 2d 471 (1948). In No. 275, petitioner requests this Court to issue a writ of certiorari to review the Court of Appeals action. And in No. 119 Misc., we are asked to issue a writ of prohibition directing the District Court for the Northern District of Texas not to proceed with the trial. We are advised that counsel have arranged that further progress of the Texas trial shall be held in abeyance pending our decision. We are this day denying those petitions. See *post*, p. 912.

When the New York cause was returned to the district court, after we had denied the railroad's petition for certiorari to review the Court of Appeals' determination that it might be sued there, 335 U. S. 814 (1948), petitioner moved for a preference in the order of trial. The court below, the United States District Court for the Southern

[1] 35 Stat. 65, as amended by 36 Stat. 291, and 53 Stat. 1404, 45 U. S. C. §§ 51–59.

District of New York, denied this motion. Respondent filed a cross-motion for an order transferring the action to the United States District Court for the Northern District of Texas. This motion was granted. The order of transfer relies on the authority of 28 U. S. C. § 1404 (a),[2] and cites *Hayes* v. *Chicago, R. I. & P. R. Co.*, 79 F. Supp. 821 (1948), and *Nunn* v. *Chicago, M., St. P. & P. R. Co.*, 80 F. Supp. 745 (1948). To nullify this order, petitioner moved this Court for leave to file a petition for a writ of certiorari or a writ of mandamus or any appropriate relief. We assigned the case for hearing on the motion for leave to file. 335 U. S. 897 (1948).

In support of his motion, petitioner urges that the general purposes of the 1948 revision of Title 28 by the Congress indicate no intention to "emasculate" the right to choose venue afforded under the Federal Employers' Liability Act; that "any civil action," as used in § 1404 (a) of the Code, refers only to civil actions specified in the Venue Chapter of Title 28 (§§ 1391–1406, inclusive); and that the court below "ignored the known temper of legislative opinion" as revealed chiefly by Congressional action on the Jennings Bill.

We fail to see anything in these contentions which can distinguish this case from *Ex parte Collett*, decided this day, *ante*, p. 55. In that opinion we have demonstrated that the venue provisions of § 6 of the Federal Employers' Liability Act are one thing and the transfer provisions of § 1404 (a) of the present Judicial Code another; that "any civil action" means what it says; and that Congress was fully informed as to the significance

[2] "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." This provision became effective Sept. 1, 1948. Act of June 25, 1948, 62 Stat. 869, 992, § 38.

of § 1404 (a). For these reasons, we conclude that the District Court for the Southern District of New York acted within its statutory authority. The motion must be

*Denied.*

[For opinion of Mr. Justice Rutledge concurring in the result, see *ante,* p. 72.]

Mr. Justice Black and Mr. Justice Douglas dissent for the reasons stated in the dissenting opinion of Mr. Justice Douglas in *United States* v. *National City Lines, post,* p. 84.

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## UNITED STATES *v.* NATIONAL CITY LINES, INC. ET AL.

MOTION FOR LEAVE TO FILE PETITION FOR CERTIORARI.

No. 269, Misc. Argued February 8, 1949.—Decided May 31, 1949.

Under 28 U. S. C. § 1404 (a), incorporated in the revision of the Judicial Code effective September 1, 1948, the doctrine of *forum non conveniens* is made applicable to civil suits by the Government against corporations under the antitrust laws. *Ex parte Collett, ante,* p. 55; *Kilpatrick* v. *Texas & Pacific R. Co., ante,* p. 75. Pp. 79–84.

Motion denied.

Under 28 U. S. C. § 1404 (a), a Federal District Court in which the Government had instituted a civil suit against certain corporations under the Sherman Act transferred it to a District Court in another District. 80 F. Supp. 734. The Government moved in this Court for leave to file a petition for writ of certiorari. The case was assigned for hearing on the motion. 335 U. S. 897. *Motion denied,* p. 84.

*Charles H. Weston* argued the cause for the United States. With him on the brief were *George T. Washing-*

*ton,* Acting Solicitor General, *Assistant Attorney General Bergson* and *Philip Elman.*

*C. Frank Reavis* argued the cause for respondents. With him on the brief were *Martin D. Jacobs, Oscar A. Trippet, Henry M. Hogan, H. D. Emery, Rayburn L. Foster, R. B. F. Hummer, Hubert T. Morrow, Marshall P. Madison, Eugene M. Prince, Francis R. Kirkham* and *Everett A. Mathews.*

*Marland Gale* was also on a brief with *Mr. Reavis* and *Mr. Jacobs* for the National City Lines, Inc., and Pacific City Lines, Inc., respondents. *Horace G. Hitchcock* was also of counsel for the Mack Manufacturing Corp., respondent.

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

The issue here is whether the 1948 revision of the Judicial Code (Title 28, United States Code) extends the doctrine of *forum non conveniens* to antitrust suits. The Government's complaint in this civil suit alleged that respondent corporations have conspired to obtain control of local transportation companies in at least 44 cities in 16 states in different sections of the country, in order to restrain and monopolize interstate commerce in busses and the petroleum and other supplies incident thereto, in violation of §§ 1 and 2 of the Sherman Act, 26 Stat. 209, 15 U. S. C. §§ 1, 2.

This is the second time that an order of the court below, the United States District Court for the Southern District of California, attempting to effectuate a transfer of the case from Los Angeles to Chicago, has been before this Court. When respondents' motion was first granted, the District Court dismissed the action, 7 F. R. D. 456 (1947), inasmuch as the federal courts then lacked statutory power to transfer cases. We reversed, holding that

*forum non conveniens* was not applicable in antitrust suits. *United States* v. *National City Lines*, 334 U. S. 573 (June 7, 1948). After September 1, 1948, the effective date of the present Judicial Code,[1] respondents filed a new motion under the doctrine of *forum non conveniens*, citing § 1404 (a), which reads as follows: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." Again the District Court below granted the motion. It ordered the case transferred. 80 F. Supp. 734 (1948). The Government thereupon submitted in this Court a motion for leave to file petition for writ of certiorari. We assigned the case for hearing on this motion. 335 U. S. 897 (1948).

In taking the position that the District Court lacked authority to enter its order of transfer, the Government has advanced many of the arguments which we have already considered today—and rejected—in *Ex parte Collett, ante*, p. 55, and *Kilpatrick* v. *Texas & Pacific R. Co., ante*, p. 75, in which we held that actions under the Federal Employers' Liability Act were now subject to the doctrine of *forum non conveniens*. The Government contends, for example, that Congress intended § 1404 (a) to apply only to actions the venue provisions of which were formerly contained in Title 28, rather than to "any civil action" (the venue requirements in antitrust cases are defined in 15 U. S. C. § 22; in Liability Act cases, 45 U. S. C. § 56); and that the legislative history establishes very clearly that Congress had no desire substantially to

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[1] Act of June 25, 1948, 62 Stat. 869, 992, § 38.

There has been apparently but one other reported case dealing with the instant issue. It is in accord with the holding below. *United States* v. *E. I. Du Pont de Nemours & Co.*, 83 F. Supp. 233 (1949).

See, generally, Note, *Venue in Antitrust Cases: Applicability of the New Discretionary Transfer Provision*, 58 Yale L. J. 482 (1949).

change the law—indeed, the Government urges us to disregard the reviser's notes which were printed in the House Reports.[2] We cannot accept this position for the reasons discussed in our previous decisions today. The reviser's notes are so obviously authoritative in perceiving the meaning of the Code that the Government itself, in discussing a section other than § 1404 (a), refers to them in its brief in this case. And we have already had occasion to look to the reviser's notes. *Stainback* v. *Mo Hock Ke Lok Po,* 336 U. S. 368, 376, n. 12 (1949).

It is true that the reviser's notes to § 1404 (a), although citing a Federal Employers' Liability Act decision, make no reference to the antitrust laws or to our previous decision in this litigation. The Government therefore urges that our disposition of the Liability Act cases is not conclusive. We disagree. The notes cite the Liability Act decision "As an example of the need of such a provision." Obviously, an example is not a complete catalogue. The use of an example implies no purpose to restrict the meaning of the statutory phrase "any civil action" precisely to the illustration selected. Quite the contrary, the particular example noted demonstrates that Congress intended to effectuate changes in the law, in order to expand the transferability of cases. And the

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[2] The note to § 1404 (a) appears at H. R. Rep. No. 308, 80th Cong., 1st Sess. A132 (1947) and H. R. Rep. No. 2646, 79th Cong., 2d Sess. A127 (1946). It reads as follows: "Subsection (a) was drafted in accordance with the doctrine of forum non conveniens, permitting transfer to a more convenient forum, even though the venue is proper. As an example of the need of such a provision, see *Baltimore & Ohio R. Co.* v. *Kepner,* 1941, 62 S. Ct. 6, 314 U. S. 44, 86 L. Ed. 28, which was prosecuted under the Federal Employer's [*sic*] Liability Act in New York, although the accident occurred and the employee resided in Ohio. The new subsection requires the court to determine that the transfer is necessary for convenience of the parties and witnesses, and further, that it is in the interest of justice to do so."

change in antitrust practice seems no more radical than the change in Federal Employers' Liability Act practice: *Baltimore & O. R. Co.* v. *Kepner,* 314 U. S. 44 (1941), cited in the reviser's note, was decided over six years before our initial decision in this case, 334 U. S. 573 (1948), which was the first ruling by this Court that *forum non conveniens* was inapplicable in antitrust suits.

Although no explanation is needed for the lack of Congressional reference to our former decision, simple chronology may be consulted. The reviser's notes appeared in House Report No. 308, 80th Congress, 1st Sess., which was published in April, 1947. The Code revision was initially passed by the House in July, 1947.[3] With amendments, the revision was passed by the Senate on June 12, 1948,[4] and by the House on June 16, 1948.[5] Our decision in the first *National City Lines* case, 334 U. S. 573, was handed down on June 7, 1948. Clearly, the failure of Congress expressly to consider this decision proves nothing.

Nor was there anything in our decision which required unique Congressional discussion, in the face of the unmistakable statutory language and reviser's notes. We expressly held that "Congress' mandate regarding venue and the exercise of jurisdiction is binding upon the federal courts," 334 U. S. at 588–89, and that decision in this field must rest on "the legislative purpose and the effect of the language used . . .," *supra,* at 597. Nothing in our previous opinion intimates that we could fail to respect whatever modification of the law Congress might enact.

Moreover, this change in the law must have been known to the Government in time for it to have addressed

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[3] 93 Cong. Rec. 8392 (1947).

[4] 94 Cong. Rec. 7930 (1948).

[5] 94 Cong. Rec. 8501 (1948).

the protests which we have heard to the Congress. This was admitted on the oral argument; it could not possibly have been denied. When this litigation was previously before us, National City's brief, at pp. 25–26 and 45, expressly called attention to the imminent probability that § 1404 (a) would be enacted and would be held applicable to antitrust suits. This brief was filed here on April 26, 1948. Not until June 7, 1948, was the final hearing on the Judicial Code revision held before the Senate Judiciary Subcommittee. Furthermore, the Code proposals were extensively publicized. See *Ex parte Collett, ante,* at pp. 67–68. The Department of Justice in particular was informed: each United States Attorney received a copy of the drafts; [6] a Department spokesman testified at the House hearing; [7] the Attorney General was asked for an opinion by the Congressional Committee.[8] The plain inference is either that the Government

[6] Hearings before House Committee on the Judiciary on H. R. 1600 and H. R. 2055, 80th Cong., 1st Sess. 8 (1947).

[7] Statement of Special Assistant to the Attorney General Baynton, *Ibid.*, 33–34. "With respect to the bill to codify title 28, the Department has been gathering memoranda from *all its various divisions* and from United States attorneys with the hope of making a comprehensible report on that bill. We have that material." (Emphasis added.) *Id.*, 34.

[8] Letter from Attorney General Tom C. Clark to Congressman Michener, Chairman of the Committee on the Judiciary, April 17, 1947, H. R. Rep. No. 308, 80th Cong., 1st Sess. 8 (1947). The letter declares that the objectives of the revision are "commendable and desirable," and continues as follows: "You will remember the discussions between members of the staff of the committee and of the Department last month at which the Department made some suggestions with reference to minor corrections of errors and omissions then in the draft of the bill being considered by your committee.

"I am advised that this conference agreed upon a number of corrections and changes and that these corrections and changes have now been incorporated in the bill with the one exception of the [Tax Court] portion . . . ." See 93 Cong. Rec. 8385 (1947).

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took no action with respect to the forthcoming alteration of the rule that *forum non conveniens* was inapplicable to antitrust suits, or that a protest was made which Congress disregarded. Neither alternative would offer the slightest justification for overriding the unequivocal words of § 1404 (a) and the legislative history which establishes that Congress indeed meant what it said.

For these reasons, we can find no distinction between this case and the others decided today. We hold that § 1404 (a) is applicable here. The motion is

*Denied.*

[For opinion of MR. JUSTICE RUTLEDGE concurring in the result, see *ante*, p. 72.]

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

There are difficulties for me however the case is decided. But I have concluded that the fairer result is reached if the ambiguities and doubts, fully canvassed and disclosed in the Court's opinions in this case and in *Ex parte Collett, ante*, p. 55, decided this day, are resolved by reading § 1404 (a) as making the doctrine of *forum non conveniens* applicable to any civil action as to which the venue provisions are codified in revised Title 28. That gives full effect to the words "any civil action" in the field in which Congress was legislating. And it authorizes, as respects that group of cases, a transfer to another district in lieu of outright dismissal as had previously obtained. That construction saves § 1404 (a), the venue provisions of the Clayton Act and our decision in *United States* v. *National City Lines, Inc.*, 334 U. S. 573, from mutilation. I am reluctant to conclude that Congress took the more drastic course in a mere revision of the code. So to hold would make a basic change not only in

the two statutes involved in these cases but in the Sherman Act, 15 U. S. C. §§ 4, 5; the Jones Act, 46 U. S. C. § 688; the Suits in Admiralty Act, 46 U. S. C. § 782; Merchant Marine Act of 1936, 46 U. S. C. § 1128d; the Securities Act, 15 U. S. C. §§ 77a, 77v; the Securities Exchange Act, 15 U. S. C. §§ 78a, 78aa; the Public Utility Holding Company Act, 15 U. S. C. §§ 79, 79y; the Investment Company Act, 15 U. S. C. §§ 80a–1, 80a–43; and perhaps in other statutes too.

# HYNES, REGIONAL DIRECTOR, FISH AND WILDLIFE SERVICE, DEPARTMENT OF THE INTERIOR, *v.* GRIMES PACKING CO. ET AL.

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

No. 24. Argued October 21, 1948.—Decided May 31, 1949.

Under § 2 of the Act of May 1, 1936, the Secretary of the Interior issued Public Land Order No. 128, designating as an Indian reservation, for the use and benefit of the native inhabitants of Karluk, Alaska, certain described lands and the waters adjacent thereto extending "3,000 feet from the shore line at mean low tide." Claiming authority under the White Act, 43 Stat. 464, which prescribed drastic penalties for violations, the Secretary promulgated a regulation prohibiting commercial fishing in the waters of the reservation except by natives or their licensees. Companies which for years had engaged in canning fish taken from these waters, which depended on that source of supply for profitable operations, and which had a substantial investment in their business, sued in the District Court to enjoin permanently the exclusion of their fishermen from the reservation, on the ground of the invalidity of the Land Order and the regulation. Named as sole defendant was the Regional Director for the Territory of Alaska of the Fish and Wildlife Service of the Department of the Interior. *Held:*

1. The Secretary of the Interior is not an indispensable party defendant to the suit, since a decree requiring the defendant and his subordinates to cease their interference will afford all the relief sought without the necessity of requiring the Secretary or any of his subordinates to take any affirmative action. Pp. 96–97.

2. The District Court had equity jurisdiction of the suit. Pp. 97–100.

(a) The facts sufficiently show that the complainants are without an adequate remedy at law and will suffer irreparable injury unless the enforcement of the regulation is restrained. Pp. 97–100.

(b) Although criminal prosecutions, even under an invalid statute, will ordinarily not be restrained, a civil action will lie in exceptional circumstances that make an injunction necessary effectually to protect property rights. Pp. 98–99.

3. The Secretary's inclusion in the Karluk Reservation of the waters described in the Land Order was authorized by § 2 of the Act of May 1, 1936. Pp. 100–116.

(a) The provision of § 2 of the Act of May 1, 1936, authorizing the Secretary of the Interior to designate as a reservation any "public lands which are actually occupied" by Indians in Alaska, did not preclude the inclusion of coastal waters in the Karluk Reservation. Pp. 110–116.

(b) The fact that tidelands are embraced within the area designated as the Karluk Reservation is without significance. Pp. 114–115.

(c) A statute which authorized permanent disposition of federal property would be strictly construed to avoid inclusion of fisheries by implication. P. 104.

(d) The Secretary of the Interior was without statutory authority to convey to the Indians any permanent title or right in the lands or waters of the Karluk Reservation. Pp. 101–106.

(e) Indian reservations in Alaska, established or enlarged under § 2 of the Act of May 1, 1936, are subject to the unfettered will of Congress. P. 106.

(f) Non-revocability in the case of the Karluk Reservation can not be predicated on the language of the Act of June 18, 1934, which must be construed as effective only where there has been specific recognition by the United States of Indian rights to control absolutely tribal lands. Pp. 106–107.

(g) References to general legislation on public lands in Alaska, appearing in a letter of the Secretary of the Interior printed in the House and Senate Reports on the bill which became the Act of May 1, 1936, can not be regarded as an adequate basis for adjudging power in the Secretary to dispose finally of such lands. Pp. 108–110.

4. The regulation prohibiting commercial fishing in the waters of the Karluk Reservation except by natives or their licensees was void as a whole, because in violation of the proviso of the White Act that "no exclusive or several right of fishery shall be granted." Pp. 116–123.

(a) The general prohibition and the exception in the regulation are not separable, and the regulation may not be upheld as imposing a prohibition applicable to everyone. P. 118.

(b) The White Act, the purpose of which was to protect and conserve the fisheries of Alaska on a non-monopolistic basis,

authorizes the establishment of preserves or closed areas in reservations created under § 2 of the Act of May 1, 1936. Pp. 118–119.

(c) Section 8 of the White Act does not make exclusive the power of the Territorial Legislature to license fishing. P. 121.

(d) Licenses for fishing may be required by the Secretary of the Interior in areas regulated under the White Act; but such licenses may be only regulatory in character and, within the discretion of the Secretary, must have their cost fixed so as not to exceed the estimated cost of reasonable policing of the area. Pp. 121–122.

(e) The White Act does not empower the Secretary of the Interior to raise general funds for native welfare or general conservation purposes from White Act preserves. P. 122.

(f) The proviso of § 1 of the White Act "that no exclusive or several right of fishery shall be granted" applies to commercial fishing by natives as well as by fishing companies, nonresidents of Alaska or other American citizens, and so applies whether those natives are or are not residents on a reservation. Pp. 122–123.

(g) The adoption of a corporate charter and a constitution by the Native Village of Karluk under §§ 16 and 17 of the Wheeler-Howard Act can not expand the power of the Secretary of the Interior under the White Act. P. 122.

(h) The sanctions of the White Act may not be employed to protect the Karluk Reservation against trespass. Pp. 122–123.

5. In view of the fact that the foregoing holdings establish a new basis for administrative and judicial conclusions, the decrees of the District Court and the Court of Appeals, granting a permanent injunction on the ground of the invalidity of both the regulation and the Land Order, are vacated and the case is remanded to the District Court with directions as to further proceedings. Pp. 123–127.

165 F. 2d 323, decree vacated and case remanded.

Several companies which were engaged in the canning of fish in Alaska brought an action against the Regional Director to enjoin the enforcement of a federal regulation prohibiting commercial fishing in the waters of the Karluk Reservation. The District Court granted a permanent injunction. 67 F. Supp. 43. The Court of Appeals affirmed. 165 F. 2d 323. This Court granted certiorari.

333 U. S. 866. *Decrees vacated and case remanded for further proceedings,* p. 127.

*Roger P. Marquis* argued the cause for petitioner. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Vanech, Stanley M. Silverberg* and *S. Billingsley Hill.*

*Frank L. Mechem* and *W. C. Arnold* argued the cause for respondents. With them on the brief was *Edward F. Medley. Charles A. Horsky* was also of counsel for respondents.

*Felix S. Cohen, James E. Curry* and *Henry Cohen* filed a brief on behalf of the Native Village of Karluk et al., as *amici curiae,* urging reversal.

Mr. Justice Reed delivered the opinion of the Court.

The Secretary of the Interior on May 22, 1943, issued Public Land Order 128. It is set out in full below.[1] In this case the significant part of No. 128 is that the Secretary included in the reservation, by paragraph 2, adjacent tidelands and coastal waters along the entire shore line of the uplands that touched Shelikof Strait between Kodiak Island and the Alaska Peninsula. The authority of the Secretary to utilize presidential power in the designation of this reservation out of public lands in Alaska flows from a delegation to the Secretary of presidential power to withdraw or reserve public lands and revoke or

[1] 8 Fed. Reg. 8557:

"Alaska

"Modification of executive order designating lands as Indian reservation

"By virtue of the authority contained in the act of June 25, 1910, c. 421, 36 Stat. 847, as amended by the act of August 24, 1912, c. 369, 37 Stat. 497 (U. S. C., title 43, secs. 141–143), and the act of May 1, 1936, c. 254, 49 Stat. 1250 (U. S. C., title 48, sec. 358a),

modify prior reservations. Executive Order No. 9146, of April 24, 1942, 1 C. F. R., Cum. Supp. 1149. The presidential power over reservations is made specific by the Act of June 25, 1910.[2] Another statutory provision, however, is the principal basis for Order 128. This is

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and pursuant to Executive Order No. 9146 of April 24, 1942: *It is ordered,* As follows:

"1. Executive Order No. 8344 of February 10, 1940, withdrawing Kodiak and other islands, Alaska, for classification and in aid of legislation, is hereby modified to the extent necessary to permit the designation as an Indian reservation of the following-described area:

"Beginning at the end of a point of land on the shore of Shelikof Strait on Kodiak Island, said point being about one and one-quarter miles east of Rocky Point and in approximate latitude 57°39′40″ N., longitude 154°12′20″ W.;

"Thence south approximately eight miles to latitude 57°32′30″ N.;

"Thence west approximately twelve and one-half miles to the confluence of the north shore of Sturgeon River with the east shore of Shelikof Strait;

"Thence northeasterly following the easterly shore of Shelikof Strait to the place of beginning, containing approximately 35,200 acres.

"2. The area described above and the waters adjacent thereto extending 3,000 feet from the shore line at mean low tide, are hereby designated as an Indian reservation for the use and benefit of the native inhabitants of the native village of Karluk, Alaska, and vicinity: *Provided,* That such designation shall be effective only upon its approval by the vote of the Indian and Eskimo residents of the area involved in accordance with section 2 of the act of May 1, 1936, *supra: And provided further,* That nothing herein contained shall affect any valid existing claim or right under the laws of the United States within the purview of that section."

[2] The first section reads as follows, 36 Stat. 847:

"That the President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States including the District of Alaska and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress."

There is a second section designed to keep the reservations free for mineral exploration and utilization.

§ 2 of the Act of May 1, 1936, 49 Stat. 1250. This act was passed to extend to Alaska the benefits of the Wheeler-Howard Act of June 18, 1934, 48 Stat. 984, and to provide for the designation of Indian reservations in Alaska. As § 2 is important in our discussion, the pertinent provisions are set out in full:

> "SEC. 2. That the Secretary of the Interior is hereby authorized to designate as an Indian reservation any area of land which has been reserved for the use and occupancy of Indians or Eskimos by section 8 of the Act of May 17, 1884 (23 Stat. 26), or by section 14 or section 15 of the Act of March 3, 1891 (26 Stat. 1101), or which has been heretofore reserved under any executive order and placed under the jurisdiction of the Department of the Interior or any bureau thereof, together with additional public lands adjacent thereto, within the Territory of Alaska, or any other public lands which are actually occupied by Indians or Eskimos within said Territory: *Provided,* That the designation by the Secretary of the Interior of any such area of land as a reservation shall be effective only upon its approval by the vote, by secret ballot, of a majority of the Indian or Eskimo residents thereof who vote at a special election duly called by the Secretary of the Interior upon thirty days' notice: . . . ."

The Native Village of Karluk held a meeting on May 23, 1944, and accepted "the proposed Indian Reservation for this village. The adoption of said Reservation passed by a vote of 46 for and 0 against. 11 of the eligible voters were absent." See note 26, *infra.* Under § 19 of the Wheeler-Howard Act the Alaskan aborigines are classified as Indians.

On March 22 and August 27, 1946, the Secretary of the Interior amended the Alaska Fisheries General Regu-

lations, 50 C. F. R., 1946 Supp., § 208.23, that related to the commercial fishing for salmon in the Kodiak Area Fisheries by the addition of a subsection (r), reading as follows:

> "(r) All waters within 3,000 feet of the shores of Karluk Reservation (Public Land Order No. 128, May 22, 1943), beginning at a point on the east shore of Shelikof Strait, on Kodiak Island, latitude 57°32′30″ N., thence northeasterly along said shore to a point 57°39′40″.
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> "The foregoing prohibition shall not apply to fishing by natives in possession of said reservation, nor to fishing by other persons under authority granted by said natives (49 Stat. 1250; 48 U. S. C. 358a). Such authority shall be granted only by or pursuant to ordinance of the Native Village of Karluk, approved by the Secretary of the Interior or his duly authorized representative." 11 Fed. Reg. 3105, 9528.

The authority for the regulation is given as 34 Stat. 263 and 478, as amended by the Act of June 6, 1924, 43 Stat. 464, an Act for the protection of the fisheries of Alaska, known as the White Act.[3] As the controlling section of this statute also is important, it is set out here,[4] 44 Stat. 752:

> "SECTION 1. That for the purpose of protecting and conserving the fisheries of the United States in all waters of Alaska the Secretary of Commerce from time to time may set apart and reserve fishing areas in any of the waters of Alaska over which the United

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[3] There is an amendment, immaterial here, see 44 Stat. 752.

[4] Under Reorganization Plan No. II the authority of the Department of Commerce over the administration of the White Act was transferred to the Department of the Interior, effective July 1, 1939. 53 Stat. 1431, § 4 (e).

States has jurisdiction, and within such areas may establish closed seasons during which fishing may be limited or prohibited as he may prescribe. Under this authority to limit fishing in any area so set apart and reserved the Secretary may (a) fix the size and character of nets, boats, traps, or other gear and appliances to be used therein; (b) limit the catch of fish to be taken from any area; (c) make such regulations as to time, means, methods, and extent of fishing as he may deem advisable. From and after the creation of any such fishing area and during the time fishing is prohibited therein it shall be unlawful to fish therein or to operate therein any boat, seine, trap, or other gear or apparatus for the purpose of taking fish; and from and after the creation of any such fishing area in which limited fishing is permitted such fishing shall be carried on only during the time, in the manner, to the extent, and in conformity with such rules and regulations as the Secretary prescribes under the authority herein given: *Provided,* That every such regulation made by the Secretary of Commerce shall be of general application within the particular area to which it applies, and that no exclusive or several right of fishery shall be granted therein, nor shall any citizen of the United States be denied the right to take, prepare, cure, or preserve fish or shellfish in any area of the waters of Alaska where fishing is permitted by the Secretary of Commerce. . . ." (See for definition of "several," 2 Bl. Com. 39–40.)

These are the statutes and orders that created the situation that led to this litigation.

The issuance of the White Act regulation of March 22, 1946, brought concern to the commercial fishing interests of Alaska. This was because of its drastic penalties. See note 49, *infra.* The native village of Karluk

spoken of in Order No. 128 establishing the reservation is situated on the Karluk River, long recognized as one of the most important salmon spawning streams of Alaska. The natives live at its mouth on Shelikof Strait. There the salmon must congregate from the Strait to enter the channel of the river leading to their spawning grounds in the interior of Kodiak Island. The waters included in the reservation are those stretching eight miles along the coast north and south of the mouth, 3,000 feet into the Strait. Thus the best of the Karluk salmon fishery is put into the reservation by Order No. 128.[5] For an understanding of the locality, a sketch map is appended.

The importance of the Karluk fishery will be appreciated by reference to a few of the facts in connection with it. When Russia ceded Alaska to the United States in 1867, 15 Stat. 539, Karluk was already well known as an abundant salmon fishery.[6] By 1885 the salmon canneries were flourishing and Bancroft reports the Karluk pack at 36,000 cases out of a total of 65,000.[7] The production continued large.[8] The red salmon was most prolific. There were variations in the catch but it was

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[5] The river itself and all waters within 100 yards of its mouth are closed to all commercial salmon fishing. 50 C. F. R., 1946 Supp., § 208.23 (d).

[6] Bancroft, History of Alaska, 1730–1885, p. 228, n. 12.

[7] *Id.*, p. 743.

[8] H. R. Misc. Doc. No. 211, 51st Cong., 1st Sess., Report on the Salmon and Salmon Rivers of Alaska, p. 20:

"The number of salmon actually caught in Karluk Bay, near the river mouth and in the lower portion of the river, is so large as to make a true statement concerning them seem incredible. In 1888 the canneries put up over 200,000 cases, averaging about 13 red salmon to the case, or more than 2,500,000 fish. In 1889 the number of fish put up was still larger, reaching probably 250,000 cases, containing more than 3,000,000 salmon. As the number of fish arriving at Karluk Bay for a long period of years has been known to be far greater than in any of the other bays of southern

U. S. Commission of Fish and Fisheries.
M. McDonald, Commissioner.

CHART OF THE

# KADIAK GROUP OF ISLANDS ALASKA

TO ACCOMPANY REPORT ON THE

## SALMON FISHERIES.

Shaw I.
C. Douglas
Ushugat I.
Amatuli I.
BARREN ISLDS.
Sea Otter Ids.
Kiukhpalik I.
Point Banks
Chuyak I.
Sea Otter I.
Chuyak Strait
C. Current
C. Chimak
Halip Bay
C. Nukhshak
Black Cape
Tonki Cape
Sea Lion Rocks
Kukak Bay
Paramanoff Bay
C. Paramanoff
Steep Cape
KODIAK I.
C. St. Hermogenes
Marmot I.
Pillar Cape
C. Kuliak
Takuli I.
Raspberry Str.
Northern Str.
MARMOT BAY
C. Uganuk
Spruce I.
Katmai Bay
C. Kubugakhli
C. Ugat
Kuliuyonuit
Uganuk I.
Narrow Str.
Williams Reef
St. Paul Hbr.
Kodiak Reef
St. Paul
C. Kaiurnoi
C. Uyak
UYAK BAY
CHINIAK BAY
Humpback Rock
C. Greville
C. Kartuk
Kartuk R.
Ugak Bay
St. Orlovsk
Low Cape
Ugak I.
Seal Rocks
C. Ikalik
Kiliuda Bay
Dangerous Cape
Ayakulik L.
Ayakulik R.
Sitkalidak Strait
3 Saints Bay
C. Barnabas
Olga Bay
Sitkalidak
Black Pt.
Low Cape
C. Alitak
ALITAK BAY
Alsentia
Two Headed Cape
Alsentia Bay
C. Trinity
Russian Hbr.
Geese Ids.
Sitkinak I.
Tugidak I.
TRINITY ISLANDS
SHELIKOF STRAIT
ALBATROS BANK

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always valuable.[9] In later years, the fluctuations continued and other varieties increased relatively.[10]

None of the respondent companies have packing plants at Karluk. All are, however, on Kodiak Island, which is around 100 miles long and 50 broad, and within fishing distance of the reservation waters. There is a fish refrigeration plant on the river. These canners have canned fish from these waters for from seven to twenty-four years. The percentage of each canner's pack that comes from the reserved waters is so large that the trial court found irreparable injury to the packers if they could not obtain the catch of the reservation. ". . . no other replacement source of such salmon for their canneries

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Alaska, it is probable that most of these salmon were present at Karluk for the purpose of ascending the river to spawn. Now the number of spawning fish seen in the river, the lakes, and their connecting rivers was comparatively very small, indeed out of all proportion to the number taken on the beach."

[9] The highest reported by the Statistical Review of the Alaska Salmon Fisheries, June 13, 1930, Bureau of Fisheries Bulletin, vol. XLVI, p. 666, was nearly 4,000,000 fish in 1901 and the lowest about 400,000 in 1927. The report said:

"Many investigations of the Karluk red-salmon fishery have been made, much has been written about it, commercial interests have battled for exclusive control and domination of it, and dire prophecies have been heard concerning its ultimate destruction. Because of these things, Karluk has undoubtedly been given more close attention than any other fishery in Alaska. . . ."

[10] Unchallenged figures by plaintiffs show large catches. A table from the largest operator is printed for illustration.

"The total catch of fish taken within the area now included in the Karluk Indian Reservation during the years specified . . . :

| | *Coho* | *Chum* | *Pink* | *King* | *Red* | *Total* |
|---|---|---|---|---|---|---|
| 1941..... | 1058 | 632 | 9893 | 134 | 59958 | 71675 |
| 1942..... | 397 | 14556 | 225323 | 57 | 58042 | 298375 |
| 1943..... | 83 | 825 | 2380 | 161 | 60273 | 63722 |
| 1944..... | 33 | 5803 | 219300 | 69 | 63535 | 288740 |
| 1945..... | 4 | 150 | 554 | 84 | 50907 | 51699 |
| 1946..... | 137 | 8660 | 1024596 | 44 | 25381 | 1058818" |

on Kodiak Island is available to them." The canners' investment is substantial, running from two to five hundred thousand dollars respectively. The fishing is done by men who own their own three- to four-man boats, use similar company boats or operate under boat-buying contracts. Prices for the catch vary for these classifications. These packers employ over four hundred fishermen, chiefly residents of Alaska, and over six hundred cannery employees, chiefly nonresidents.

The fishing season at Karluk begins around June 1 and continues intermittently, depending upon the run of fish, until Sept. 30. After the issuance of § 208.23 (r) restricting the fishery at Karluk Reservation to Karluk natives and licensees, respondents brought this action against the Regional Director for the Territory of Alaska of the Fish and Wildlife Service to permanently enjoin the exclusion of their fishermen from the reservation on the ground that neither regulation § 208.23 (r) nor Public Land Order No. 128 legally closed the fishery of the coastal waters to respondents. The District Court granted the permanent injunction and held invalid both the regulation and the land order. 67 F. Supp. 43. On the same grounds the Court of Appeals for the Ninth Circuit affirmed the order for permanent injunction. 165 F. 2d 323.

I.

(a) At the outset the United States contends that the Secretary of the Interior is an indispensable party who must be joined as a party defendant in order to give the District Court jurisdiction of this suit. In *Williams* v. *Fanning,* 332 U. S. 490, the test as to whether a superior official can be dispensed with as a party was stated to be whether "the decree which is entered will effectively grant the relief desired by expending itself on the subordinate official who is before the court." P. 494. Such

is the precise situation here. Nothing is required of the Secretary; he does not have to perform any act, either directly or indirectly. Respondents merely seek an injunction restraining petitioner from interfering with their fishing. No affirmative action is required of petitioner, and if he and his subordinates cease their interference, respondents have been accorded all the relief which they seek. The issues of the instant suit can be settled by a decree between these parties without having the Secretary of the Interior as a party to the litigation.

(b) Petitioner, Regional Director for the Territory of Alaska of the Fish and Wildlife Service of the Interior Department, is charged with the duty of enforcing the acts of Congress relating to the fisheries of Alaska and regulations issued thereunder. The District Court found that since March 22, 1946, the effective date of § 208.23 (r) of the Alaska Fisheries General Regulations, petitioner has continually threatened the seizure of all boats and equipment used to fish in the waters covered by this regulation to respondents' substantial and irreparable loss, and that the seasonal run of salmon in the reservation waters was essential for respondents' profitable operation. From the following facts it will be seen that there is sufficient evidence to support these findings.

After the promulgation of the fishery regulation, § 208.23 (r), the Warden for the Fish and Wildlife Service on Kodiak Island, one of petitioner's subordinate agents, repeatedly informed officials of the canneries that the regulation would be enforced and that the necessary steps would be taken to prosecute any violations. He communicated to the representatives of the canneries the contents of a telegram in which petitioner directed that a case to test the regulation be arranged for the opening day of the fishing season. The contents of this telegram were relayed to the headquarters in Seattle of the Alaska Salmon Industry, Inc., a trade association of the canned

salmon packers of which all but one of respondents are members. Thence the information was distributed to all interested parties. The Kodiak warden then reiterated to the cannery operators on that island his intention to enforce the regulation even though his force and equipment were inadequate for the purpose.

Thereafter two officers of the Indian Service were appointed special agents for the Fish and Wildlife Service to assist in the enforcement of the fishing regulations issued by the Interior Department. They arrived at Karluk June 24, 1946. These two deputies were armed and maintained a boat patrol in the waters of the reservation. They checked the names of boats fishing in the waters of the reservation against the permits issued by the village of Karluk. No boats were allowed inside the area which had been restricted for beach seining by vote of the Indian meeting of May 23, 1944,[11] and which was marked off by buoys.

If respondents show that they are without an adequate remedy at law and will suffer irreparable injury unless the enforcement of the alleged invalid regulation is restrained, a civil court will enjoin.[12] While ordinarily

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[11] "Minutes of Meeting

. . . .

"A meeting was called by the president and the same evening with Mr. Peters Mr. Watrous of Juneau and Mr. Leraas present. Following discussion and action:

"1. The problems of setting aside an area for beach seining were discussed. It was agreed that 1000 yd. from the mouth of the river up the spit and from the mouth of the river to Julia Fort point approximately 500 yd. on the Improvement side, placing markers or buoys 500 yd. out from mean low water mark be the restricted area for Karluk beach seining only. Purse seining could be done outside this restricted area this year or until further action by the council."

[12] See *Terrace* v. *Thompson*, 263 U. S. 197, 214; *Petroleum Exploration, Inc.* v. *Public Service Commission*, 304 U. S. 209, 217–19.

criminal prosecutions will not be restrained even under an invalid statute,[13] a civil action will lie in exceptional circumstances that make an injunction necessary to effectually protect property rights.[14]

The facts heretofore detailed as to the investments of respondents in canneries and fishing equipment and their established activities in the waters of the reservation make clear the serious effect on them of exclusion from the reservation. It is not a threat of a single prosecution, as in the *Spielman* case, but an ousting of respondents and their employees from the fishing grounds unless each individual person takes a fishing license. Under the findings the respondents could not operate profitably if prohibited from fishing in the reservation area. Many fishermen may stay away from the grounds for fear of punishment. In the pursuit of their otherwise lawful business respondents are threatened with criminal prosecution should they fish in the waters of the Karluk Reservation without a permit from the native village. For the violation of the applicable regulation under the White Act, severe penalties are imposed, including fine, imprisonment, the summary seizure of boats, haul, gear, equipment, and their forfeiture to the United States.[15] These sanctions deny to respondents an adequate remedy at law, for to challenge the regulation in an ordinary criminal proceeding is to hazard a loss against the payment of a license fee and compliance with the fishing rules of the natives. Yet to stay out of the reservation prevents the profitable operation of the canneries. In such a situa-

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[13] *Watson* v. *Buck,* 313 U. S. 387; *Ex parte Sawyer,* 124 U. S. 200.

[14] *Parker* v. *Brown,* 317 U. S. 341; *Packard* v. *Banton,* 264 U. S. 140; *Truax* v. *Raich,* 239 U. S. 33; *Philadelphia Co.* v. *Stimson,* 223 U. S. 605, 620, Second. Cf. *Watson* v. *Buck,* 313 U. S. 387, 400; *Spielman Motor Sales Co.* v. *Dodge,* 295 U. S. 89; *Stainback* v. *Mo Hock Ke Lok Po,* 336 U. S. 368.

[15] 43 Stat. 466, 48 U. S. C. § 226.

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tion a majority of the Court thinks that the "danger of irreparable loss is both great and immediate" and properly calls forth the jurisdiction of the court of equity.[16]

## II.

Respondents sought this injunction forbidding criminal proceedings aimed at excluding them from fishing in the coastal waters of Karluk Reservation on the ground that Public Land Order No. 128, note 1, *supra,* was invalid as a whole and particularly because of the inclusion of tidelands and coastal waters by § 2 of the order.

Respondents attack in their complaint the validity of the entire order because "no part of the land area involved had been withdrawn by Executive Order and placed under the jurisdiction of the Department of the Interior prior to May 1, 1936, as required by the Act of May 1, 1936." This position has not been pressed or decided.[17] The final order for an injunction against petitioner does not include any ruling on that point.

Nor do we think the authority of the Secretary of the Interior to establish the Karluk Reservation, Public Land Order 128, by virtue of the use and occupancy of the area by the natives under § 8 of the Act of May 17, 1884, 23 Stat. 26, or §§ 14 or 15 of the Act of March 3, 1891, 26 Stat. 1101, need be decided. While the point is referred to in the briefs, no such issue was tendered by the complaint; no such point was raised by the assignments of error; the question was specifically pretermitted by the opinion of the Court of Appeals, 165 F. 2d at 325; it is not included in the questions presented by the petition for

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[16] *Parker* v. *Brown, supra,* 349. Seizure of a fisherman's boat is a drastic sanction. See Hearings before the Subcommittee on Alaskan Fisheries of the House Committee on Merchant Marine and Fisheries, 76th Cong., 1st Sess., pp. 45–47.

[17] 67 F. Supp. 43; 165 F. 2d 323.

certiorari and is not relied upon by the respondents to require affirmance of the Court of Appeals decree.

(a) The validity of Public Land Order 128 depends in this case on the scope of the power granted to the Secretary to establish this reservation by the language of § 2 of the Act of May 1, 1936, *supra,* authorizing the Secretary of the Interior to designate as a reservation "any other public lands which are actually occupied by Indians or Eskimos within said Territory." An administrative order is presumptively valid.[18]

In this instance, the Secretary acted under a statute, § 2, Act of May 1, 1936, and through delegation of presidential authority.[19] This delegation in turn rested on the Act of June 25, 1910, 36 Stat. 847.[20] This chain of delegated authority for the allocation of public lands in Alaska retains for future congressional action the power for the ultimate disposition of the property, land and water, within the boundaries of the reservation. Withdrawals under the Act of June 25, 1910, are "temporary" and "until revoked by him or by an Act of Congress."

The Wheeler-Howard Act of June 18, 1934, "To conserve and develop Indian lands and resources," which was extended to the Territory of Alaska by § 1 of the Act of May 1, 1936, authorized the Secretary of the Interior

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[18] *Thompson* v. *Consolidated Gas Co.,* 300 U. S. 55, 69; *Pacific States Co.* v. *White,* 296 U. S. 176, 185; *Wampler* v. *Lecompte,* 282 U. S. 172, 175; *Martin* v. *Mott,* 12 Wheat. 19, 32.

[19] Executive Order 9146, 1 C. F. R., Cum. Supp., p. 1149:

"By virtue of the authority vested in me by the act of June 25, 1910, c. 421, 36 Stat. 847, and as President of the United States, I hereby authorize the Secretary of the Interior to sign all orders withdrawing or reserving public lands of the United States, and all orders revoking or modifying such orders: . . . ."

Executive Order 8344, 1 C. F. R., Cum. Supp., 618, referred to in Public Land Order 128, temporarily withdrew Kodiak Island from settlement, location, sale or entry for classification.

[20] So far as material that act is set out in note 2, *supra.*

to restore to tribal ownership only the remaining surplus lands of any Indian reservation theretofore opened for sale or other disposition.[21] It did not authorize the creation of reservations of any kind. Its only reference to acquisition of lands by or for Indians is in § 5 where appropriations are authorized for that purpose. This section is inapplicable here.

Section 2 of the extending act, set out at the beginning of this opinion, page 91, *supra,* gives no power to the Secretary to dispose finally of federal lands. By the new section he is authorized simply "to designate as an Indian reservation" any other public lands which are actually occupied by Indians or Eskimos within said Territory. There is no language in the various acts, in their legislative history, or in Land Order 128, from which an inference can be drawn that the Secretary has or has claimed power to convey any permanent title or right to the Indians in the lands or waters of Karluk Reservation. Rather the contrary is true. In the Act of May 14, 1898, 30 Stat. 409, 48 U. S. C. § 411, "Extending the homestead laws and providing for right of way for railroads in the District of Alaska, and for other purposes," there is the express proviso that nothing contained in the Act "shall be construed as impairing in any degree the title of any State that may hereafter be erected out of the Territory of Alaska, or any part thereof, to tide lands and beds of any of its navigable waters, or the right of such State

[21] It is unnecessary to appraise the effect of such restoration. Tribal ownership may vary from an unrecognized Indian title, see *Northwestern Bands of Shoshone Indians* v. *United States,* 324 U. S. 335, 338, 340, to land so set apart to an Indian tribe by definitive treaty as to require compensation to the tribe, if the United States thereafter appropriated lands within the area. See *Shoshone Tribe* v. *United States,* 299 U. S. 476, 486; 44 Stat. 1349. The effect of restoration under the Wheeler-Howard Act will depend upon the provisions of law under which the separate reservations exist. Compare Cohen, Handbook of Federal Indian Law, c. 5, § 5A, p. 94.

to regulate the use thereof, nor the right of the United States to resume possession of such lands, it being declared that all such rights shall continue to be held by the United States in trust for the people of any State or States which may hereafter be erected out of said Territory. The term 'navigable waters,' as herein used, shall be held to include all tidal waters up to the line of ordinary high tide and all nontidal waters navigable in fact up to the line of ordinary high-water mark." Indeed the United States affirms in its brief that Karluk Reservation is merely a reservation "for a particular governmental use," not a disposal of the area. The Government says it is like *Sioux Tribe* v. *United States,* 316 U. S. 317, not like *United States* v. *Holt Bank,* 270 U. S. 49.

An Indian reservation created by Executive Order of the President conveys no right of use or occupancy to the beneficiaries beyond the pleasure of Congress or the President. Such rights may be terminated by the unilateral action of the United States without legal liability for compensation in any form even though Congress has permitted suit on the claim. *Sioux Tribe* v. *United States,* 316 U. S. 317; see *United States* v. *Santa Fe Pacific R. Co.,* 314 U. S. 339 at 347.[22] When a reservation is established by a treaty ratified by the Senate or a statute, the quality of the rights thereby secured to the occupants of the reservation depends upon the language or purpose of the congressional action.[23] Since Congress, under the Constitution, § 3 of Art. IV, has the power to dispose of

[22] Possible claims under the Indian Claims Commission Act of August 13, 1946, are not covered by this statement. See 60 Stat. 1049, 1050, § 2 (5). It refers to claims "based upon fair and honorable dealings that are not recognized by any existing rule of law or equity. No claim accruing after the date of the approval of this Act shall be considered by the Commission."

[23] *United States* v. *Shoshone Tribe,* 304 U. S. 111, 116; *Shoshone Tribe* v. *United States,* 299 U. S. 476, 485, 486, 492, *First; United States* v. *Creek Nation,* 295 U. S. 103, 109; *United States* v. *Holt*

the lands of the United States, it may convey to or recognize such rights in the Indians, even a title equal to fee simple, as in its judgment is just. *Shoshone Indians* v. *United States,* 324 U. S. 335, 339, 340. When Congress intends to delegate power to turn over lands to the Indians permanently, one would expect to and doubtless would find definite indications of such a purpose.[24]

In the present case a determination of the power delegated to the Secretary of the Interior by the Wheeler-Howard Act of June 18, 1934, and § 2 of the Act of May 1, 1936, is important. It is important for the reason that a statute that authorizes permanent disposition of federal property would be most strictly construed to avoid inclusion of fisheries by implication. Petitioner argues for a holding that the power granted covers water as well as land. If that power were broad enough to enable the Secretary to designate nonrevocable or permanent reservations of all Alaska fishing grounds for the sole benefit of natives living in villages adjacent to the fisheries, it might place in his hands the power to grant the natives

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*State Bank,* 270 U. S. 49, 58; *Ute Indians* v. *United States,* 330 U. S. 169, 176, *et seq.; Arenas* v. *United States,* 322 U. S. 419; opinions on remand, *United States* v. *Arenas,* 158 F. 2d 730; *Arenas* v. *United States,* 60 F. Supp. 411.

[24] For example, in the *Arenas* case, 322 U. S. 419, the statute read:

"SEC. 5. That upon the approval of the allotments provided for in the preceding section by the Secretary of the Interior he shall cause patents to issue therefor in the name of the allottees, which shall be of the legal effect and declare that the United States does and will hold the land thus allotted for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State of California, and that at the expiration of said period the United States will convey the same by patent to the said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever. . . ." P. 422.

the right to exclude all other fishermen from the fisheries. In this present case, for example, it might mean that the native residents of the Karluk Reservation would have the perpetual use and enjoyment of this valuable Karluk fishery for themselves and their licensees.[25] On May 23, 1944, a year after Public Land Order 128, the petitioner shows that there were 57 residents eligible to vote for approval of the designation of the reservation.[26] As indicated by the cases hereinbefore cited, a recognition of such ownership in Indians might require just compensation to them of the fair value of the fishery, if the United States should desire hereafter to reopen the area to the public under its regulations. There is much less reason to read such power of permanent disposition by the Secretary into § 2 than there was to read it into the President's "implied grant of power" to create reservations. *United States* v. *Midwest Oil Co.*, 236 U. S. 459, 475. It would take specific and unambiguous legislation to cause us to rule that Congress intended to authorize the Secretary of the Interior to alienate the Alaska fisheries permanently from public control.[27] The argument that Congress did not intend to

[25] One gets a sense of its value from the catch of a single operator. Note 10, *supra*.

[26] We understand, although it is not a fact of weight, that the number includes both men and women over twenty-one. 49 Stat. 1251; Constitution and By-Laws of the Native Village of Karluk, Alaska, Official Publication, United States Department of the Interior, Office of Indian Affairs, GPO (1939); Constitution, Art. V, § 1; Certificate of Adoption, p. 4; 48 Stat. 986–87, §§ 13 and 16.

The population of Karluk around 1880 was 302. Report on the Population, Industries, and Resources of Alaska by Ivan Petroff, p. 29, H. R. Misc. Doc. No. 42, Pt. 8, 47th Cong., 2d Sess. In 1920 it was 99; in 1929 it was 192; in 1939 it was 189. 16th Census of the United States (1940), Population, vol. 1, Number of Inhabitants, p. 1193.

[27] In the Act of May 14, 1898, 30 Stat. 409, which extended the homestead land laws of the United States to Alaska, it was specifically provided that "no entry shall be allowed extending more than eighty

authorize the designation of water or fisheries as a part of an Indian reservation has behind it the unarticulated premise that the United States must have complete power to protect, improve and regulate for the good of all our people these unrivalled sea fisheries with their wealth of food. It loses much of its force by our conclusion that Alaskan Indian reservations established or enlarged under § 2 are subject to the unfettered will of Congress.[28]

(b) An argument that the reservation is a nonrevocable grant can be made. Under the Act of June 18,

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rods along the shore of any navigable water, and along such shore a space of at least eighty rods shall be reserved from entry between all such claims, and that nothing herein contained shall be so construed as to authorize entries to be made, or title to be acquired, to the shore of any navigable waters within said District: . . . ."

[28] Compare the statute creating the Metlakahtla Reservation, 26 Stat. 1101:

"SEC. 15. That until otherwise provided by law the body of lands known as Annette Islands, situated in Alexander Archipelago in Southeastern Alaska, on the north side of Dixon's entrance, be, and the same is hereby, set apart as a reservation for the use of the Metlakahtla Indians, and those people known as Metlakahtlans who have recently emigrated from British Columbia to Alaska, and such other Alaskan natives as may join them, to be held and used by them in common, under such rules and regulations, and subject to such restrictions, as may [be] prescribed from time to time by the Secretary of the Interior." See 34 Stat. 1411 and 48 Stat. 667.

See a discussion of the limited power of the President to create even temporary reservations for Indian immigrants. 18 Op. Atty. Gen. 557.

We have carefully considered the opinion in *Miller* v. *United States,* 159 F. 2d 997, where it is held, p. 1001, that the Indian right of occupancy of Alaska lands is compensable. With all respect to the learned judges, familiar with Alaska land laws, we cannot express agreement with that conclusion. The opinion upon which they chiefly rely, *United States* v. *Alcea Band of Tillamooks,* 329 U. S. 40, is not an authority for this position. That opinion does not hold the Indian right of occupancy compensable without specific legislative direction to make payment. See also *United States* v. *10.95 Acres of Land in Juneau,* 75 F. Supp. 841.

1934, § 16, applicable to Alaska, see § 13, an Indian tribe was authorized to adopt a constitution and by-laws for its government. This was done by the Karluk Reservation Indians. There is a phrase in the section that has color of recognition of ownership of tribal lands in the Indians. It reads as follows:

> "In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: . . . to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; . . . ." 48 Stat. 987.[29]

We think, however, in view of the breadth of the coverage of the Wheeler-Howard Act that this language would be effective only where there has been specific recognition by the United States of Indian rights to control absolutely tribal lands.

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[29] In hearings before the Senate Committee on Indian Affairs, 73d Cong., 2d Sess., on S. 3645, the bill which became the Act of June 18, 1934, p. 247, the following discussion took place as to the meaning of these words:

"Senator O'MAHONEY. But what you are saying here is that the constitution shall vest in some person—what? The following rights and powers. And then you undertake to enumerate those powers. The first one that you enumerate is the right to employ counsel. The second one is the right to prevent individuals from selling and disposing of their property. Then you come to a third one and it is to represent the tribe, and that seems to me to be hanging up in the air.

"The CHAIRMAN. The second one you stated incorrectly.

"Senator O'MAHONEY. Have I?

"The CHAIRMAN. It is not to prevent them from selling individual lands; it is tribal lands.

"Senator O'MAHONEY. Yes, that is right; tribal lands."

Persuasive of this conclusion is that the bill when originally proposed by Interior provided in § 7 of Title III that "Title to any land acquired pursuant to the provisions of this section shall be taken in the name of the United States in trust for the Indian tribe or community for whom the land is acquired, *but title may be transferred by the Secretary to such community under the conditions set forth in this Act.*" The italicized words were omitted when this section was incorporated into § 5 of the Wheeler-Howard Act. See Hearings before House Committee on Indian Affairs, 73d Cong., 2d Sess., on H. R. 7902, p. 9.

Turning to § 2 of the Act of May 1, 1936, the strongest argument for the nonrevocability of a reservation created under § 2 of that Act comes from a letter of the Secretary of the Interior printed in the House and Senate Reports on the bill which became the Act in question.[30] The reports, speaking of § 2, said:

> "This provision in reality carries out the promise of this Government contained in its act approved on May 17, 1884 (23 Stat. 26), as follows:
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> " '*Provided,* That the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress.' " H. R. Rep. No. 2244, 74th Cong., 2d Sess., p. 3.

The pertinent part of the letter is set out below.[31] The legislation was, of course, a fulfillment of the aid fore-

[30] H. R. Rep. No. 2244 on H. R. 9866, 74th Cong., 2d Sess.; S. Rep. No. 1748 on S. 4420, 74th Cong., 2d Sess.

[31] "An even more important reason for the designation of reservations in Alaska is that by doing so the United States Government will have fulfilled in part its moral and legal obligations in the pro-

shadowed in the statutes referred to in the letter. Such references to general legislation on public lands in the huge Territory of Alaska, however, cannot be treated as an adequate basis for courts to declare that power was given the Secretary of the Interior to dispose finally of Alaska lands. The first section of the Act of May 1 was a mere amendment of the Wheeler-Howard Act to bring Alaska under its coverage. The Wheeler-Howard Act did not authorize the creation of Indian reservations. Section 2 of the act extending the Wheeler-Howard Act to Alaska was intended to permit the organization of the Alaska natives so that they could avail themselves

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tection of the economic rights of the Alaska natives. In at least two acts of Congress this obligation is specifically acknowledged. The act approved on May 17, 1884 (23 Stat. 26), contains the following language: '*Provided,* That the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress.'

"The act of March 3, 1891 (26 Stat. 1100), contains similar language: 'That none of the provisions of the last two preceding sections of this Act shall be so construed as to warrant the sale of any lands belonging to the United States which shall contain coal or the precious metals, or any townsite, or which shall be occupied by the United States for public purposes, or which shall be reserved for such purposes, or to which the natives of Alaska have prior rights by virtue of actual occupation.' Lands which should have been, by virtue of these acts, segregated for natives of Alaska have not been so segregated. The provisions of section 2 of H. R. 9866 will aid the Federal Government in rectifying this condition, and in protecting the interests of the natives in the future. Section 2 of the bill which gives to the Secretary of the Interior power to designate certain lands as Indian reservations is, therefore, a logical sequence of the legislative history regarding Indian lands in Alaska and provides a method by which the financial aid provisions of the Indian Reorganization Act may be extended to those Indians and Eskimos of Alaska who occupy established villages."

of the earlier Act.[32] It cannot be said, we think, that such reservations may be permanent or nonrevocable. A reading of § 2 will show that there are no words with the connotation of recognition or conveyance of title. There are no words, such as appear in other statutes,[33] reserving the right of exploration, discovery and claim for precious metals and valuable minerals. There is no discussion in the reports or the debates that show a definite intention of anyone to part with public property to establish an Alaskan Indian communal system. Under such circumstances, we think the land and water reservations created under § 2 are reservations at will.

(c) We are convinced that § 2 of the Act of May 1, 1936, authorizes the Secretary of the Interior to include in the Karluk Reservation the waters described in § 2 of Public Land Order No. 128. To interpret the clause "or any other public lands which are actually occupied by Indians or Eskimos within said Territory" to describe only land above mean low tide is too restrictive in view of the history and habits of Alaska natives

[32] This appears from the following excerpt from the Secretary's letter:

"Indian tribes do not exist in Alaska in the same sense as in continental United States. Section 19 of the Indian Reorganization Act defines the word 'tribe' as referring to 'Any Indian tribe, organized band, pueblo, or the Indians residing on one reservation.' With a few exceptions the lands occupied by natives of Alaska have not been designated as reservations. In order, therefore, to define an Alaskan tribe it is necessary to identify it with the land it occupies and in terms of the language of the act, 'reservation.' In addition, if native communities of Alaska are to set up systems of local government, it will be necessary to stipulate the geographical limits of their jurisdictions. Reservations set up by the Secretary of the Interior will accomplish this." This, with the proviso of the first section, was deemed sufficient to enable the lands to be identified and to permit the Wheeler-Howard benefits to be available to the Alaska natives.

[33] 36 Stat. 847, § 2.

and the course of administration of Indian affairs in that Territory. The title to the uplands and waters in question is in the United States.[34] The fisheries as well as the uplands are subject to its present control.[35] In 1868 Congress extended our laws relating to customs, commerce and navigation over the "mainland, islands, and waters of the territory." 15 Stat. 240. The seal

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[34] Treaty with Russia, proclaimed June 20, 1867, 15 Stat. 539, 541–542:

Art. II. "In the cession of territory and dominion made by the preceding article are included the right of property in all public lots and squares, vacant lands, and all public buildings, fortifications, barracks, and other edifices which are not private individual property. . . ."

Art. III. "The inhabitants of the ceded territory, according to their choice, reserving their natural allegiance, may return to Russia within three years; but if they should prefer to remain in the ceded territory, they, with the exception of uncivilized native tribes, shall be admitted to the enjoyment of all the rights, advantages, and immunities of citizens of the United States, and shall be maintained and protected in the free enjoyment of their liberty, property, and religion. The uncivilized tribes will be subject to such laws and regulations as the United States may, from time to time, adopt in regard to aboriginal tribes of that country."

[35] *Alaska Pacific Fisheries* v. *United States,* 248 U. S. 78, 87; *Shively* v. *Bowlby,* 152 U. S. 1, 47, and cases cited; *Mann* v. *Tacoma Land Co.,* 153 U. S. 273, 283. See also *Tulee* v. *Washington,* 315 U. S. 681. In *Knight* v. *U. S. Land Association,* 142 U. S. 161, the Court said, p. 183: "Upon the acquisition of the territory from Mexico the United States acquired the title to tide lands equally with the title to upland; but with respect to the former they held it only in trust for the future States that might be erected out of such territory." In *Alaska Pacific Fisheries* v. *United States, supra,* the statement is made, p. 87, "That Congress had power to make the reservation inclusive of the adjacent waters and submerged land as well as the upland needs little more than statement. All were the property of the United States and within a district where the entire dominion and sovereignty rested in the United States and over which Congress had complete legislative authority." Compare also *Borax, Ltd.* v. *Los Angeles,* 296 U. S. 10, 15.

islands and the waters adjacent thereto were promptly made a reservation for the preservation and exploitation of the seal fishery. 15 Stat. 348, 16 Stat. 180. A civil government for the new territory was set up in 1884. 23 Stat. 24. In that act appeared the proviso referred to *supra,* n. 31, in the letter of the Secretary of the Interior. By § 12 a commission was empowered to report upon the condition of the Indians.[36] On June 30, 1885, the Commission reported to the Secretary of the Interior as to the fisheries in the words in the margin below.[37]

By virtue of § 15 of the act of Congress of March 3, 1891, *supra,* note 28, the Congress set apart the "body of lands known as Annette Islands" in Alaska for a reservation for the Metlakahtla Indians. Nothing was said as to fishing rights. A presidential proclamation of April 28, 1916, reserved to them the surrounding waters within

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[36] 23 Stat. 27:

"SEC. 12. That the Secretary of the Interior shall select two of the officers to be appointed under this act, who, together with the governor, shall constitute a commission to examine into and report upon the condition of the Indians residing in said Territory, what lands, if any, should be reserved for their use, what provision shall be made for their education what rights by occupation of settlers should be recognized, and all other facts that may be necessary to enable Congress to determine what limitations or conditions should be imposed when the land laws of the United States shall be extended to said district; and to defray the expenses of said commission the sum of two thousand dollars is hereby appropriated out of any moneys in the Treasury not otherwise appropriated."

[37] "The General Land Laws of the United States should be extended over the Territory as early as possible. The Natives claim only the land on which their houses are built and some garden patches near their villages; they ask or expect nothing more. A deed for their lots in severalty would be a very highly prized document by them. The fisheries occupied by them before the advent of the Whites should also be secured to them against encroachment. They ask only the same rights and protection given the white man."

3,000 feet. 39 Stat. 1777.[38] After the proclamation a proceeding was brought by the United States relying upon the statute and proclamation to oust a fish trap of the Alaska Pacific Fisheries from the waters mentioned in the proclamation. Such a decree was obtained in the District Court and affirmed by the United States Court of Appeals for the Ninth Circuit on the ground "that the reservation of Annette Island by the act of Congress, and of its surrounding waters by the President's proclamation, is fully sustained." *Alaska Pacific Fisheries* v. *United States,* 240 F. 274, 283. For the validity of the proclamation, reliance was placed upon his power to reserve lands for reservations without specific authority. See *United States* v. *Midwest Oil Co., supra.* This Court affirmed the decree as to the waters within 3,000 feet of the shore lines. Although in the brief a vigorous attack was made on the power to issue the proclamation covering the waters, the proclamation was not referred to in the unanimous opinion here. This Court felt com-

[38] "Now, therefore, I, Woodrow Wilson, President of the United States of America, by virtue of the power in me vested by the laws of the United States, do hereby make known and proclaim that the waters within three thousand feet from the shore lines at mean low tide of Annette Island, Ham Island, Walker Island, Lewis Island, Spire Island, Hemlock Island, and adjacent rocks and islets, located within the area segregated by the broken line upon the diagram hereto attached and made a part of this proclamation; also the bays of said islands, rocks, and islets, are hereby reserved for the benefit of the Metlakahtlans and such other Alaskan natives as have joined them or may join them in residence on these islands, to be used by them under the general fisheries laws and regulations of the United States as administered by the Secretary of Commerce.

"Warning is hereby expressly given to all unauthorized persons not to fish in or use any of the waters herein described or mentioned."

A presidential proclamation had theretofore, 1892, set apart Afognak Island, Alaska, and its adjacent bays and territorial waters as a public reservation for fish culture without specific authority to reserve waters. 27 Stat. 1052.

pelled to decide that the fisheries were included in the language of the statute by the purpose to assist the Indians to train themselves. Fishing was said to give value to the islands. "The use of the adjacent fishing grounds was equally essential. Without this the colony could not prosper in that location." *Alaska Pacific Fisheries* v. *United States,* 248 U. S. 78, 89.

The conditions as to the waters around the Annette Islands closely parallel those of other Alaska areas actually occupied by natives. The Annette Islands case was relied upon by the Secretary of the Interior for his authority to include the fisheries under § 2 of the Act of May 1, 1936. 56 Int. Dept. 110. The Alaska aborigines, like the Metlakahtlans, are fishermen. They, too, depend upon the waters for a large part of their support. For them the adjacent fisheries are as important as, perhaps more important than, the forests, the fur-bearing animals or the minerals.

Respondents urge upon us the cases in this and other courts which have held that the phrase "public lands," the term now under consideration, used in § 2 of the Act of May 1, 1936, does not include any area extending below mean high tide.[39] As the respondents state, this case turns not on tidelands, the area between mean high and mean low tides, but on whether the Secretary could include coastal waters in the reservation, *i. e.,* the area

[39] *Borax, Ltd.* v. *Los Angeles,* 296 U. S. 10, 17, 22. This case turned on the power of the United States to convey tideland seaward of the line of mean high tide after California's admission to the Union. Public lands there could not include tidelands as they passed to California when she became a state. The cases cited in the *Borax* case to support the statement as to public lands are cases that have nothing to do with tidelands or coastal waters but depend upon whether the lands in question were subject to disposal as property of the United States, *i. e.,* public lands. See *Newhall* v. *Sanger,* 92 U. S. 761, 763; *Barker* v. *Harvey,* 181 U. S. 481, 490; *Union Pacific R. Co.* v. *Harris,* 215 U. S. 386, 388.

"3,000 feet from the shore line at mean low tide." As we understand respondents' argument and as we see this case, the question of tidelands is not significant. Reference to *Mann* v. *Tacoma Land Co.*, 153 U. S. 273, 283, will make clear respondents' position. Before the admission of Washington to statehood, November 11, 1889, 26 Stat. 1552, the United States issued land scrip to Mann for location on "unoccupied and unappropriated public lands" and the holder made location on tidelands and received the register's certificate therefor. When Mann sought to restrain trespass on the land so obtained, this Court held: "It is settled that the general legislation of Congress in respect to public lands does not extend to tide lands. There is nothing in the act authorizing the Valentine scrip, or in the circumstances which gave occasion for its passage, to make an exception to the general rule." P. 284. Respondents assert that the reference to public lands in § 2 should be construed in the same manner, since the federal land laws apply to Alaska [40] as do the reasons for excluding waters seaward of mean high tide.[41]

The Government points out that the cases relating to the limits of "public lands" are cases where final disposition, not temporary use, of the lands appeared. When one deals with a statute so large in purpose as to justify the above-quoted comment of the Secretary of the Interior that it "provides a method by which the financial aid provisions of the Indian Reorganization Act may be extended to those Indians and Eskimos of Alaska who occupy established villages," one may not fully com-

[40] Act of May 14, 1898, c. 299, 30 Stat. 409, 48 U. S. C. § 371 (homestead laws); Act of March 3, 1899, c. 424, 30 Stat. 1098, 48 U. S. C. § 351 (public land surveys); Act of March 2, 1907, c. 2537, 34 Stat. 1232, 48 U. S. C. § 365 (land districts).

[41] See also *Miller* v. *United States, supra,* note 28; *Heckman* v. *Sutter,* 128 F. 393.

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prehend the statute's scope by extracting from it a single phrase, such as "public lands," and getting the phrase's meaning from the dictionary or even from dissimilar statutes. Section 2 of the Act of May 1, 1936, is but one of a series of enactments relating to Alaska natives, lands and fisheries. It must "be taken as intended to fit into the existing system" and interpreted in that aspect.[42] There is nothing that we have found in the statute or the legislative history to justify the significance put upon the use of the words "public lands" in the clause of § 2 under discussion instead of "lands" used in the preceding clauses. If a differentiation was intended, surely it would have been more definitely expressed.

Taking into consideration the importance of the fisheries to the Alaska natives, the temporary character of the reservation, the Annette Islands case, the administrative determination, the purpose of Congress to assist the natives by the Alaska amendment to the Wheeler-Howard Act, we have concluded that the Secretary of the Interior was authorized to include the waters in the reservation. No injunction therefore may be obtained because of the invalidity of Order No. 128.

## III.

Subdivision II of this opinion has been directed toward the determination of the scope of § 2 of the Act of May 1, 1936, extending the Wheeler-Howard Act to Alaska. We were led to hold that Order 128, set out in full in note 1, *supra,* validly included in the reservation the waters to a distance of 3,000 feet from its shores. In his handling of the problems of the Karluk natives as affected by their need for a reservation and fishing rights, the Secretary of the Interior took another step under the authority of § 1 of another act, the White

[42] Cf. *United States* v. *Jefferson Electric Co.,* 291 U. S. 386, 397.

Act. The section is set out at length in the text beginning on page 92 of this opinion. The Act was for the protection of the fisheries of Alaska. Section 1 authorized the Secretary to set apart fishing areas in any of the waters of Alaska and establish in those preserves closed seasons "during which fishing may be limited or prohibited."

Pursuant to this statute detailed regulations were issued by the Secretary of Commerce and they have been continued by the Secretary of the Interior since Reorganization Plan No. II, note 4, *supra*.[43] One area established was the Kodiak Area which included the waters here in question.[44] Among the waters at first closed to commercial salmon fishing were the Karluk River spawning waters and those within 100 yards of its mouth.[45] Later the Secretary of the Interior, still acting solely under § 1 of the White Act, added the waters of the Karluk Reservation to the prohibited areas.[46] An exception was made in the regulation to the prohibition against fishing in the reservation waters. The precise language of the entire subsection (r) of the regulation, § 208.23, is on page 92 of this opinion. We repeat here the exception:

> "The foregoing prohibition shall not apply to fishing by natives in possession of said reservation, nor to fishing by other persons under authority granted by said natives (49 Stat. 1250; 48 U. S. C. 358a). Such authority shall be granted only by or pursuant to ordinance of the Native Village of Karluk, approved by the Secretary of the Interior or his duly authorized representative."

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[43] Alaska Fisheries General Regulations, 50 C. F. R., c. II, p. 2333.
[44] *Id.*, p. 2355; 3 Fed. Reg. 393.
[45] *Id.*, p. 2359.
[46] 11 Fed. Reg. 3105, 9528.

The citation to 49 Stat. 1250 is to the Act of May 1, 1936, authorizing the creation of the reservation. Perhaps it was thought that the creation of the reservation justified this exception in the White Act regulation but we do not understand that any support from that Act is claimed for the establishment of the White Act preserve.

The validity of the exception permitting fishing by natives in possession of the reservation and their licensees is challenged by respondents because of a proviso in § 1 of the White Act, reading:

> "*Provided*, That every such regulation made by the Secretary of Commerce shall be of general application within the particular area to which it applies, and that no exclusive or several right of fishery shall be granted therein, nor shall any citizen of the United States be denied the right to take, prepare, cure, or preserve fish or shellfish in any area of the waters of Alaska where fishing is permitted by the Secretary of Commerce. . . ."

Respondents alleged that the exception for fishing by natives and their licensees made § 208.23 (r) wholly illegal because it was inconsistent with the proviso of § 1 of the White Act as to exclusive or several right of fishery. The District and Circuit Courts agreed with this argument and the District Court said that the regulation must be viewed in its entirety, 67 F. Supp. 43, 49. We agree that it is not possible to separate the closing of the area from the exception and thus hold the closing applicable to everyone. A right to fish locally is too important to the natives in Alaska for us to conclude from this record that the Secretary would have promulgated the prohibition to fish for salmon in reservation waters without the exception in favor of the natives. We have no doubt, however, that the White Act authorizes the establishment of White Act preserves or

closed areas in reservations created, as the Karluk Reservation, under § 2 of the Act extending the Wheeler-Howard Act to Alaska. No implications can be drawn from the broad and clear language of the White Act that reservation waters, however valuable for fishing or fish propagation, must be left unprotected from ruthless exploitation.

What we have said heretofore in this opinion as to the importance of fisheries and their conservation to Alaska natives with reference to the Karluk River area in particular need not be repeated. The quoted section of the White Act gives power to the Secretary so that he may "(c) make such regulations as to time, means, methods, and extent of fishing as he may deem advisable." Then follows the proviso that every such regulation shall be of general application and that no exclusive or several right of fishing shall be granted therein. This section was enacted to correct alleged abuses that arose in the administration of the Act "For the protection and regulation of the fisheries of Alaska," approved June 26, 1906, 34 Stat. 478. By § 6 of the earlier act, streams or lakes could be set aside as permanent preserves but not coastal waters. Although the 1906 Act did not delegate regulatory powers in the amplitude of the White Act, fishing reservations in territorial waters were created by Executive Order and regulations were issued thereunder.[47] The policy behind these regulations and their administration was to restrict the right to fish commercially to those who had formerly fished in these areas. See Fisheries Service Bulletin No.

[47] Executive Order of Feb. 17, 1922, creating the Alaska Peninsula Fisheries Reservation; Executive Order No. 3752 of Nov. 3, 1922, creating the Southwestern Alaska Fisheries Reservation. Regulations issued under these two Executive Orders are printed in the Fisheries Service Bulletin of the Bureau of Fisheries, Dept. of Commerce, No. 92, Jan. 2, 1923.

92, Jan. 2, 1923. Congress did not propose that these rich fishing grounds should be monopolized by this defined group. The legislative history of the White Act only emphasizes what the statute clearly says, that is, no special privileges in Alaskan fishing preserves.[48] The enforcement provisions of the White Act gave stern warning to prospective violators.[49]

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[48] 65 Cong. Rec. 5974; 65 Cong. Rec. 9520–21; 65 Cong. Rec. 9681 *et seq.*; H. R. Rep. No. 357, 68th Cong., 1st Sess., p. 2; S. Rep. No. 449, 68th Cong., 1st Sess., p. 5; House Hearings, Committee on Merchant Marine and Fisheries, Fisheries of Alaska (1924), on H. R. 2714, January 31–February 8, 1924, 68th Cong., 1st Sess., p. 21, *et seq.* Note that this is a different bill than H. R. 8143 which became the White Act but the subject was the same. See H. R. Rep. No. 357, *supra,* p. 1. *Dow* v. *Ickes,* 74 App. D. C. 319, 123 F. 2d 909.

[49] 43 Stat. 466:

"SEC. 6. Any person, company, corporation, or association violating any provision of this Act or of said Act of Congress approved June 26, 1906, or of any regulation made under the authority of either, shall, upon conviction thereof, be punished by a fine not exceeding $5,000 or imprisonment for a term of not more than ninety days in the county jail, or by both such fine and imprisonment; and in case of the violation of section 3 of said Act approved June 26, 1906, as amended, there may be imposed a further fine not exceeding $250 for each day the obstruction therein declared unlawful is maintained. Every boat, seine, net, trap, and every other gear and appliance used or employed in violation of this Act or in violation of said Act approved June 26, 1906, and all fish taken therein or therewith, shall be forfeited to the United States, and shall be seized and sold under the direction of the court in which the forfeiture is declared, at public auction, and the proceeds thereof, after deducting the expenses of sale, shall be disposed of as other fines and forfeitures under the laws relating to Alaska. Proceedings for such forfeiture shall be in rem under the rules of admiralty.

"That for the purposes of this Act all employees of the Bureau of Fisheries, designated by the Commissioner of Fisheries, shall be considered as peace officers and shall have the same powers of arrest of persons and seizure of property for any violation of this Act as have United States marshals or their deputies."

For the conservation of the fisheries, it was recognized that administrative flexibility must be permitted.

> "The waters of Alaska are so vast and the local conditions so varied that it is utterly impossible to prescribe by legislation in detail the provisions necessary to meet each situation. To attempt to do so would be to defeat the purposes sought. This can be done by placing broad powers and a wide discretion in the administrative branch having charge of the subject." S. Rep. No. 449 on H. R. 8143 (which became the White Act), 68th Cong., 1st Sess., p. 2. Compare *Dow* v. *Ickes,* 74 App. D. C. 319, 323, 123 F. 2d 909, 913.

Although § 8 of the White Act [50] left a power in the Territorial Legislature of Alaska to impose taxes or licenses for fishing, we do not read § 8 as limiting the power to license fishing to the Territorial Legislature. The section does not make the legislative power exclusive. Since § 1 of the White Act not only authorizes the establishment of fishing preserves but also requires that the fishing be carried on "in conformity with such rules and regulations as the Secretary prescribes under the authority herein given," [51] we are of the opinion that licenses for fishing may be required in areas regulated under the White Act. We think, however, these licenses may be only regulatory in character and, within the discretion of the Secretary, must have their cost fixed so as not

[50] 43 Stat. 467:

"SEC. 8. Nothing in this Act contained, nor any powers herein conferred upon the Secretary of Commerce, shall abrogate or curtail the powers granted the Territorial Legislature of Alaska to impose taxes or licenses, nor limit or curtail any powers granted the Territorial Legislature of Alaska by the Act of Congress approved August 24, 1912, 'To create a legislative assembly in the Territory of Alaska, to confer legislative power thereon, and for other purposes.'"

[51] See § 1 of the White Act, pp. 92–93, *supra.*

to exceed the estimated approximate cost of reasonable policing of the area. We do not read the White Act as empowering the Secretary to raise general funds for native welfare or general conservation purposes from White Act preserves.

As § 208.23 (r) with its exception in favor of the natives in possession of Karluk Reservation and their licensees is based upon § 1 of the White Act, we think it clear that its proviso, "that no exclusive or several right of fishery shall be granted therein," applies to commercial fishing by natives equally with fishing companies, nonresidents of Alaska or other American citizens, and so applies whether those natives are or are not residents on a reservation. We find nothing in the White Act that authorizes the Secretary of the Interior to grant reservation occupants the privilege of exclusive commercial fishing rights. It seems also clear to us that the adoption of a corporate charter and a constitution by the Native Village of Karluk under §§ 16 and 17 of the Wheeler-Howard Act, discussed at pp. 106–107, *supra,* can add nothing to the power of the Secretary under the White Act. "Exclusive," as used in § 1 of the White Act, forbids not only a grant to a single person or corporation but to any special group or number of people. The legislative history set out above shows this. The offending regulations which brought about the enactment of the proviso in § 1 of the White Act were administered so as to limit fishing to those who had been using the fisheries before the regulations. The White Act fishing preserves were not intended to furnish a monopoly to a favored few. Whatever may be the powers of the Department of the Interior or the natives as to regulating the entrance of persons other than natives in possession of Karluk Reservation into or on the area of land and water in that reservation,[52] they are not broad

[52] See 27 Stat. 631, relating to representation of Indians by the United States district attorneys; Cohen, Handbook of Federal Indian

enough to allow the use of the White Act sanctions to protect the reservation against trespass. White Act sanctions are for White Act violations. The Department of the Interior by § 208.23 (r) has decided upon the conservation of fisheries in the described waters of the Karluk Reservation in accordance with the White Act, with an exception in favor of the natives that seems to rest on the fact that the natives are on a reservation that includes the White Act conservation area. This cannot be done. The welfare of the 57 electors of Karluk Reservation and their families is important. The Secretary of the Interior, however, cannot give them such preferences as are here given under the authority of the White Act. Other American citizens are equally entitled to the benefits from White Act preserves.[53] We hold that the regulation § 208.23 (r) is void as a whole because it violates the proviso of the White Act. See p. 93.

## IV.

There are problems connected with the administration of the Karluk Reservation and the protection of the fishing preserves that have not been determined by the courts or the Department of the Interior. Our holding that coastal waters may be included in the reservation waters and that the White Act cannot be used to create a monopoly in the Indians establishes a different basis for administrative and judicial conclusions. The 1945 ordinance

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Law, pp. 252–53; Powers of Indian Tribes, Solicitor of the Interior, Nathan R. Margold, October 25, 1934, M27781 pp. 55–58. See *United States* v. *Candelaria,* 271 U. S. 432; *United States* v. *Berrigan,* 2 Alaska 442; *United States* v. *Cadzow,* 5 Alaska 125.

[53] *Dow* v. *Ickes,* 74 App. D. C. 319, 326, 123 F. 2d 909, 916: "It prohibits monopoly, but it does not prohibit reasonable discriminations required by the purpose of conservation and limitations inherent in the type of fishing to which the Secretary's judgment must be applied."

must be considered; it appears in the margin.[54] It states that Public Land Order 128 restricts the right to fish commercially in the reservation waters to Karluk inhabitants. This ordinance antedates the regulation. See p. 91, *supra*. It evidently is based on the theory that the creation of the reservation gave exclusive fishing rights to the natives in possession. Permits required the approval of the Secretary of the Interior or his au-

[54] "An Ordinance. Whereas, under Public Land Order 128, of May 22, 1943, creating the Karluk Reservation, the right to fish commercially in the waters of said reservation is restricted to the inhabitants of the Native Village of Karluk and vicinity, and;

"Whereas, non-residents desire to continue their fishing operations in the waters of said reservation;

"Now, Therefore, be it ordained by the Council of the Native Village of Karluk, a federal corporation chartered under the Act of June 18, 1934, as amended;

"Section 1. That it shall be unlawful for any person, partnership, firm, association or corporation, to fish for, take or catch any fish, or to operate any fishing vessel, gear or equipment, within the waters of the Karluk Reservation except under a permit issued by the Native Village of Karluk, for which the fee shall be as follows:

"(A) For residents of the Territory of Alaska $1.00

"(B) For non-residents of the Territory of Alaska $25.00

"Provided further, that a person to qualify for a resident (Class A) permit must have resided in the Territory of Alaska for three consecutive years prior to the date of their application, or request, for a permit.

"Section 2. The possession of fish upon any vessel within said waters without a permit shall constitute prima facie evidence of a violation of this ordinance.

"Section 3. Any violation of this ordinance shall be punished by a fine of not exceeding Five Hundred Dollars ($500.)

. . . . . .

"Approved this 31st day of May, 1945."

The 1946 ordinance made the fee $2.00 for residents of Alaska and $40.00 for nonresidents.

Karluk had received its corporate charter, constitution and by-laws August 23, 1939. Official publications, Office of Indian Affairs, Department of the Interior. See §§ 16 and 17, 48 Stat. 987, 988.

thorized representative.[55] An example of the permit is printed below.[56] We know nothing from the record of the reasons for the $2 fee for residents or the $40 fee for nonresidents or their relation to the cost of policing the area. See *Haavik* v. *Alaska Packers Association,* 263

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[55] Section 5 of the Corporate Charter of the Native Village of Karluk provides that "In using its powers the corporation must not do the following things:

. . . . . .

"Make leases, permits or contracts covering any lands or waters set aside as a reserve for the Village without the approval of the Secretary of the Interior or his authorized representative."

[56] *"COMMERCIAL FISHING PERMIT*

"Karluk Indian Reservation, Karluk, Alaska, June 30, 1946.

"Pursuant to an Ordinance passed by the Council of the Native Village of Karluk, Alaska, dated May 31, 1946, permission is hereby given by the Native Village of Karluk to Ray Harmon of Kodiak, Alaska, to enter the waters and land of the Karluk Reservation for the purpose of engaging in commercial fishing for salmon, S. J. F. & P. Co., during the period:

"June 1946 to September 1946.

"This permit is issued subject to the conditions printed on the back hereof.

EWAN M. NAUMOFF
ISSUING OFFICER

PRESIDENT KARLUK
TITLE

I accept:

RAY HARMON
PERMITTEE

Approved:

H. C. BINGHAM
APPROVING OFFICER

Boat No. or Name: Caroline

ASST. TEACHER A. N. S.
TITLE

Fishing for: San Juan UGANIK BAY, ALASKA
(CANNERY) NAME ADDRESS

*"CONDITIONS*

"This permit is valid only if approved by the General Superintendent of the Indian Service in Alaska or his duly authorized representative, and is revocable in the discretion of the issuing officer. It is not transferable and must be carried on the person of the permittee

U. S. 510. So far as appears, after once approving an ordinance the Department's only direct control over the ordinance is by approval or disapproval of amendments.[57]

This is an equitable proceeding in which the respondents seek protection against unlawful action by petitioner, the Regional Director of the Fish and Wildlife Service of the Department of the Interior. The interests of respondents, the Indians of Karluk Reservation, and the efforts of the Department of the Interior to administer its responsibilities fairly to fishermen and Indians are involved.[58] These are questions of public policy which equity is alert to protect.[59] This Court is far removed from the locality and cannot have the understanding of the practical difficulties involved in the conflicts of interest that is possessed by the District Court. Therefore we think it appropriate for us to refrain from now entering a final order disposing definitively of the controversy.

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when engaged in fishing authorized hereunder, and must be exhibited to any person requesting to see it. This permit is issued and accepted by the permittee on the express condition that the permittee will comply with all of the provisions of law and regulations governing fishing on the Karluk Indian Reservation, Alaska. The permittee is warned not to interfere with the fishing activities of the Indians of the Karluk Indian Reservation nor use, disturb, or destroy any property belonging to said Indians."

[57] Article VI of the Constitution of the Native Village of Karluk provides that "Changes in this Constitution and By-laws may be made if the changes are approved by the Secretary of the Interior and by a majority vote of the Village members voting in an election called by the Secretary of the Interior at which at least 30 per cent of the voting membership take part."

[58] For a discussion of the difficulties of the preparation of regulations, compare *Addison* v. *Holly Hill Co.*, 322 U. S. 607. See also the statements of the Commissioner of Indian Affairs in Hearings before the House Committee on Indian Affairs, 73d Cong., 2d Sess., on H. R. 7902 (Wheeler-Howard Act).

[59] *Virginian R. Co.* v. *System Federation*, 300 U. S. 515, 552; *Harrisonville* v. *Dickey Clay Co.*, 289 U. S. 334, 338, note 2.

With our conclusion on the law as to the establishment of the reservation and the invalidity of the regulation before them, the Department and the parties should have a reasonable time, subject to the action of the District Court on the new proposals, to adjust their affairs so as to comply with our determinations.

We therefore vacate the decrees of the District Court and the Court of Appeals and remand this proceeding to the District Court with directions to allow thirty days from the issuance of our mandate for the Secretary of the Interior to give consideration to the effect of our decision. Unless steps are taken in this proceeding the District Court, on the expiration of thirty days, shall enter a decree enjoining the defendant Hynes and all acting in concert with him, substantially as ordered in the permanent injunction entered November 6, 1946.[60] If timely steps are taken, the District Court will, of course, be free to enter such orders as it may deem proper and not inconsistent with the present decision. Pending the entry of further orders by the District Court, the preliminary injunction entered July 18, 1946, shall apply to protect the rights of the respondents.

*It is so ordered.*

MR. JUSTICE RUTLEDGE, with whom MR. JUSTICE BLACK and MR. JUSTICE MURPHY agree, dissenting in part.

I.

Jurisdictional questions aside, I am in full agreement with the Court's conclusion that Public Land Order 128, 8 Fed. Reg. 8557,[1] is valid and was effective, according to its terms, to include in the reservation for the Karluk In-

[60] Compare *Atlantic Coast Line* v. *Florida*, 295 U. S. 301, 314–15; *Burford* v. *Sun Oil Co.*, 319 U. S. 315, 333; *Addison* v. *Holly Hill Co.*, 322 U. S. 607, 620.

[1] Set forth at note 1 of the Court's opinion.

dians the tidelands and coastal waters therein described. This action was taken pursuant to the statutory authorizations recited in the order and particularly the Act of May 1, 1936, 49 Stat. 1250, 48 U. S. C. § 358a. When approved by the Indians in accordance with the proviso of the latter Act, Order 128 withdrew the area covered from any general or public right of access for fishing or other purposes inconsistent with those of the reservation and set aside that area for the exclusive benefit of the Indian occupants and inhabitants. Cf. *Alaska Pacific Fisheries* v. *United States,* 248 U. S. 78. The necessary effect was to forbid others to enter the area for purposes inconsistent with the reservation's objects, thus making persons so entering trespassers and subject to such remedies as the law may afford to prevent or redress their wrongful entry.

By his 1946 amendments to the Alaska Fisheries General Regulations, 50 C. F. R., 1946 Supp., § 208.23 (r), the Secretary of the Interior reinforced his prior action in setting aside the Karluk Reservation, prohibiting fishing within the coastal waters included in Public Land Order 128, except "by natives in possession of said reservation" and "by other persons under authority granted by said natives . . . by or pursuant to ordinance of the Native Village of Karluk" approved by the Secretary or his duly authorized representative.[2] This action was taken pursuant to 34 Stat. 263, 478, as amended by the White Act of June 6, 1924, 43 Stat. 464, as amended June 18, 1926, 44 Stat. 752.

That Act, in the interest of "protecting and conserving the fisheries of the United States in all waters of Alaska," conferred upon the Secretary of Commerce (now Interior), broad powers to "set apart and reserve fishing areas

[2] See text of the amended regulation as quoted in the Court's opinion at p. 92.

in any of the waters of Alaska over which the United States has jurisdiction" and within such areas to "establish closed seasons during which fishing may be limited or prohibited as he may prescribe." See *Dow* v. *Ickes*, 74 App. D. C. 319. Effective penal provisions by way of criminal sanctions and for seizure and forfeiture of offending boats, gear and appliances were enacted to prevent or redress violation of the regulations made pursuant to the statute's authorization.[3]

The promulgation of Amended Regulations § 208.23(r), pursuant to the White Act's provisions, reinforced the effect of Public Land Order 128 in withdrawing the area covered by the latter from public or common right of entry for fishing and other purposes. But it had also the further effect of notifying the public that trespass upon the reserved area by persons not entitled to enter and use it would be met with the White Act sanctions[4] for enforcement of the order and the amended regulations.

Although holding Public Land Order 128 valid and effective to establish the reservation for the Indians' exclusive benefit, the Court finds Amended Regulations § 208.23 (r) "void as a whole." The chief consequence held to follow is that the White Act sanctions cannot be applied to enforce the regulations or to prevent or redress trespass upon the reservation by others than the Indians in possession or their licensees.

With this conclusion I cannot agree. The amended regulations' invalidity is said to follow solely because of the exception permitting natives and their licensees to fish in reservation waters. This is said to violate the White Act proviso, which forbids any "exclusive or sev-

[3] Reference is made to the Court's opinion at pp. 92–93 for the pertinent language of the statute and at note 49 for the Act's penal provisions.

[4] See note 49, majority opinion.

eral right of fishery" and denial to any citizen of the right to fish in any waters where fishing is permitted by the Secretary's regulations. In other words, because the Secretary allows the Indians to fish in the reservation waters he must allow all others to do so on equal terms, otherwise his regulations become totally void and the White Act sanctions unavailable for protection of the reservations and the Indians' rights.

This view, it seems to me, rests upon two fallacies. One is that the two statutes, of 1936 and 1924, are in irreconcilable collision and the Secretary cannot exercise the powers given to him by the 1936 Act and by the White Act consistently and simultaneously with reference to the same waters. The other fallacy is a corollary, namely, that the White Act proviso applies wherever the White Act prohibitions and sanctions may be made applicable, even though the area is a valid Indian reservation.

I do not think the two statutes are in such inescapable inconsistency as forbids their simultaneous and harmonious application in setting aside and protecting reservations for the exclusive use and benefit of the native Indian population. Indeed their legislative history and purposes demonstrate that they were intended to serve common objects in the conservation and protection of Alaskan fisheries.

The White Act was adopted in 1924. Its primary object was to preserve the fisheries of Alaska from the destructive private exploitation then taking place. That evil did not arise from any previous, existing, or anticipated policy of setting aside reservations for the exclusive benefit of the natives. It arose exclusively from quite the contrary policy of permitting widespread commercial exploitation by specially favored groups, not of Indians but of others who sought and secured monopolistic privileges and favors in fishing. There were therefore twin evils at

which the White Act struck. One was the rapid and virtually unrestrained depletion and destruction of the fisheries; the other, the expanding creation of commercial monopolies fostered by preexisting policy in regulating the industry. 65 Cong. Rec. 9520–9521; see also 65 Cong. Rec. 9680–9682; H. R. Rep. No. 357, 68th Cong., 1st Sess. 2; S. Rep. No. 449, 68th Cong., 1st Sess. 5; Hearings before the House Committee on Merchant Marine and Fisheries on H. R. 2714, 68th Cong., 1st Sess.

The White Act, accordingly, was not merely and exclusively an antimonopoly statute. It was both a conservation measure and one to outlaw private, commercial monopoly. The conservation features were contained in the basic general provisions giving the Secretary his broad powers of control over fishing. The more specific antimonopoly features were included in the proviso. The latter were important. But they did not override or minimize the more general provisions, apart from the proviso, giving the Secretary power to regulate the industry in the interest of "protecting and conserving the fisheries of the United States in all waters of Alaska." The proviso merely limited the manner in which his power was to be exercised in the situations to which the proviso was applicable.

So the questions arise whether the proviso was intended to have any effect in waters validly set aside by Congress, executive order, or the Secretary as reservations for the exclusive benefit of the native population and, correlatively, whether the policy of the proviso was meant to forbid the application of other provisions of the White Act, including its prohibitions and sanctions, in the protection and conservation of such reservations. In other words, was the general policy of the White Act in conflict with the policy existing at its enactment concerning Alaskan Indian reservations or later under the 1936 Act,

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so as to require that the two policies or statutes be kept entirely separate and distinct in their application and administration and to forbid them to be applied conjointly in executing their common conserving and protecting objects?

Certainly the White Act proviso had no purpose to throw open validly created Indian reservations to fishing by all comers. Its aim was not to destroy such reservations or to open them to general, common rights of fishing. In view of the legislative history cited above, which is consistently supported by subsequent administrative construction,[5] the proviso cannot be construed as expressing any policy hostile to creating such reservations with exclusive rights of fishing for the native population and protecting them against wrongful invasion. On the contrary, the statute, including the proviso, was strongly supported by the delegates in Congress from Alaska and others representing the native interests [6] as against those of commercial exploitation toward which the Act was aimed. There were numerous Indian reservations in existence at the time of the legislation, cf. *Alaska Pacific Fisheries* v. *United States, supra,* affording the natives exclusive fishing rights. But the extensive legislative history discloses no protest, complaint or concern arising on account of them. Indeed it gives strong reason for believing that the native interests joined with others in opposing continuance of the policy of monopolistic commercial exploitation and in support of the White Act, including the proviso, as a necessary method of preventing the imminent destruction of the natives' historic means

[5] See, *e. g.*, Department of Commerce, Laws and Regulations for Protection of Fisheries of Alaska (Dept. Circular No. 251, 13th ed.), Dec. 22, 1926; Op. of Solicitor, Dept. of Interior, 56 I. D. 110.

[6] See the legislative debates, reports and hearings cited in the text, *supra.*

of livelihood by that form of exploitation, and not at all by reason of any evils arising out of exclusive fishing rights granted to the native population in reservations validly created for its benefit.

Consequently, far from representing an attitude or purpose of hostility toward a policy of Indian reservations with exclusive native rights of fishing, the White Act constituted an effective step toward conserving the Alaskan fisheries, under the Secretary's broad regulatory powers, for such purposes as well as for the prevention of monopoly in open fishing areas where no reservations existed.

It follows, in my view, that the White Act proviso has, and was intended to have, no application to validly created Indian reservations, either to forbid the Secretary to exclude others than natives from fishing in the reservation waters or to compel him, if he allows the natives to fish, to permit all other citizens to do so on equal terms. The proviso had no purpose so to restrict his powers in relation to reservation areas. It was directed solely against abuses by other than native interests in waters not included within areas set aside for the natives' exclusive benefit.

But it does not follow, in my opinion, that because the proviso is inapplicable the Secretary is forbidden to exercise his regulatory and enforcing powers under the White Act in protection of reservations and the natives' exclusive rights in them or that he cannot utilize those powers and the White Act sanctions conjointly with his authority under the 1936 Act to create reservations and protect them against unlawful invasion. The White Act proviso aside as inapplicable in purpose and intent to the specific situation, *i. e.*, one involving a validly created reservation, nothing in either statute forbids his doing so. Each is in terms a conservation measure, having the

common object of preserving and protecting the Alaskan fisheries from unrestricted exploitation and destruction by commercial interests. That community of purpose is not affected by the fact that the one Act secures this protection for the public generally, the other for the special benefit of the native population. That difference merely means that two interests require and are given protection against a third, not that the latter acquires immunity against protection afforded either or both of the other two.

Accordingly, in my opinion, the White Act proviso being inapplicable to waters included in a valid Indian reservation, the two statutes may be applied to serve their basic common objects of conserving and protecting fisheries in all Alaskan waters, including those set apart as valid Indian reservations, as against the private, commercial exploitation and monopoly which the White Act and the Act of 1936 were intended to prevent. The statutes should be construed, and Congress, I think, intended them to be construed, so as to work together harmoniously, not irreconcilably, to achieve this object.

I therefore cannot regard Amended Regulations § 208.23 (r) as "void as a whole." The regulations are valid, in my judgment, and enforceable by application of the White Act sanctions, except possibly in one respect. This is the feature by which the Secretary has delegated to the Village of Karluk the authority by ordinance to license others than natives of the village to fish on terms fixed by the ordinance subject to the Secretary's approval. Conceivably that power might be exercised by the village, through licensing others than native inhabitants, in a manner which would violate the spirit of the White Act proviso, *i. e.*, by licensing favored commercial interests so as to create essentially the type or types of monopoly or favoritism the proviso intended to forbid.

It is one thing of course for the Secretary to give the natives exclusive rights of fishing in the reservation's waters. It may be entirely another for him to delegate to them the licensing of others, even retaining the power to approve the licensing ordinance as Amended Regulations § 208.23 (r) does.

II.

Whether or not the authority conferred by the regulations upon the village to license others is valid is a question, however, which I think it neither necessary nor appropriate to answer in this proceeding, for reasons affecting the existence and propriety of exercising equity jurisdiction in this cause, now to be stated.

I seriously doubt the existence of equity jurisdiction on the showing made by this record. But in any event I do not think it should be exercised to afford respondents the relief they have sought. The Secretary of the Interior, whose regulations and authority are at stake, has not been made a party to the suit. Nor has the Village of Karluk, which obviously is vitally interested. Moreover, the allegations concerning threatened enforcement of the regulations by White Act sanctions seem questionably sufficient to establish the basis for equitable intervention, in view of circumstances appearing in the record and asserted in briefs filed here questioning their sufficiency.

But, if all these factors are put to one side, one other remains which in my opinion precludes granting the equitable relief respondents seek. Their claim was founded in the complaint, as I think it had to be, not only upon the alleged invalidity of Amended Regulations § 208.23 (r), but also upon the asserted invalidity of Public Land Order 128. However, they have not been successful in the latter attack, for the Court holds that Public

Land Order 128 is valid and was effective to create the Karluk Reservation according to that order's terms.

This ruling cuts all valid ground from beneath respondents' claim to aid from a court of equity. With it, they come not as persons entitled of right to enter the reservation and fish, but solely as trespassers having no right of entry, but seeking only to avert the incidence of possible remedies for threatened wrongful entry. In effect the Court's decision is that respondents, although they have not put forward their case in this light, are entitled to have it so determined and to have equitable relief which prevents possible application of White Act sanctions against them. I cannot agree that persons so situated have standing to invoke the assistance of a court of equity. Accordingly I think the judgment should be reversed and the cause should be remanded with instructions to dismiss it.

MR. JUSTICE DOUGLAS joins in Part I of this opinion.

## SMITH *v.* UNITED STATES.

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

No. 292. Argued March 4, 7, 1949.—Decided May 31, 1949.

In a prosecution for violations of the Second War Powers Act and for conspiracy to violate the Emergency Price Control Act of 1942, petitioner claimed immunity under § 202 of the latter Act, which incorporates the immunity provisions of the Compulsory Testimony Act of 1893. The charges involved misuse of priorities for materials and conspiracy to sell goods at above-ceiling prices. The claim of immunity from prosecution was based on testimony given by petitioner before an examiner of the Office of Price Administration in response to subpoenas issued by that office. *Held:*

1. Petitioner having claimed and relied on his privilege from the beginning of his examination, and his testimony, in part at least, having borne directly on the subsequent charges, he was entitled to immunity from prosecution. Pp. 146–149.

2. Petitioner's immunity from prosecution on facts concerning which he was compelled to testify was not waived in this case by a subsequent "voluntary statement." Pp. 149–152.

(a) Although the privilege against self-incrimination may be waived, a waiver is not lightly to be inferred. Pp. 149–150.

(b) A witness can not properly be held after claim to have waived his privilege and consequent immunity upon vague and uncertain evidence. P. 150.

3. As to the conspiracy charge, petitioner testified concerning transactions, matters and things substantially connected with parts of the conspiracy; his testimony was not wholly exculpatory; and he was entitled to the claimed immunity from prosecution. Pp. 152–153.

169 F. 2d 856, reversed.

Petitioner's conviction on charges of violating the Second War Powers Act and of conspiring to violate the Emergency Price Control Act of 1942 was affirmed in part by the Court of Appeals. 169 F. 2d 856. This Court granted certiorari. 335 U. S. 882. *Reversed,* p. 153.

*Walter R. Hart* argued the cause for petitioner. With him on the brief was *Julian C. Tepper.*

*Harold D. Cohen* argued the cause for the United States. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Campbell* and *Robert S. Erdahl.*

MR. JUSTICE REED delivered the opinion of the Court.

Petitioner, George Smith, together with Daisart Sportswear, Inc., and another person, was charged by the United States in two informations of forty-one counts each with violations of § 301 of the Second War Powers Act[1] and Priorities Regulations Nos. 1 and 3.[2] The first information charged petitioner and his co-defendants with the intentional misuse of priority ratings in forty-one instances in order to purchase certain cotton and rayon materials and the second information charged them with the unlawful utilization of the textiles so obtained. The same defendants were also indicted in the same court for conspiring to violate the Emergency Price Control Act of 1942[3] and the regulations thereunder by selling finished piece goods above the established maximum price and by keeping false records of their transactions. The two informations and the indictment were consolidated for trial in the District Court of the United States for the Southern District of New York; after trial before a jury petitioner was found guilty on the indictment and on thirty-five counts of each of the informations. On appeal the Court of Appeals for the Second Circuit affirmed the conviction as to the indictment and twenty-

[1] 56 Stat. 176, 177; 58 Stat. 827; 60 Stat. 868.

[2] 32 C. F. R., Cum. Supp. §§ 944.1–944.21; 32 C. F. R., Cum. Supp. § 944.23.

[3] 56 Stat. 23 *et seq.*, as amended, 56 Stat. 767, 58 Stat. 632, 59 Stat. 306, 60 Stat. 664.

three counts of each of the informations, but reversed as to twelve counts of each of the two informations. *United States* v. *Daisart Sportswear,* 169 F. 2d 856.

During 1944 and 1945 the petitioner, Smith, was the sole owner and officer of Daisart Sportswear, Inc. (hereinafter called Daisart), a corporation engaged in the fabrication, purchase, and sale of textile goods. Its actual operation was as a contractor working on the goods of others. As part of its business Daisart was to furnish Metals Disintegrating Corporation with cloth bags for filtering and packing the metal powders manufactured by Metals Disintegrating under contracts with the Army and Navy. The War Production Board had granted Metals Disintegrating high preference ratings to secure the materials necessary to fulfill its government contracts. Because of its inability to provide the particular cloth used to make powder bags, which was of a greyish white duck color, very similar to the canvas used in tents, Metals Disintegrating gave Daisart high blanket preference ratings which Daisart was to apply or extend [4] to purchase all the piece goods needed to manufacture the bags.

There is evidence which would justify a jury in finding the following facts. Through the use of these top priorities petitioner obtained piece goods for his company, and in the orders he certified that the goods were to be manufactured into powder bags. Over two and a half million square yards of material were thus invoiced to and paid for by Daisart. Metals Disintegrating, however, purchased from Daisart only 11,987 powder bags, consisting of 48,920 square yards of material. Moreover these piece

[4] A footnote to the opinion of the Court of Appeals, 169 F. 2d 856 at 859, states: "These terms are explained in United States v. Bradford, 2 Cir., 160 F. 2d 729, certiorari denied 331 U. S. 829, 67 S. Ct. 1351. A preference rating is *applied* by the original recipient to obtain commodities from a supplier who then *extends* (uses) the rating to secure the needed commodities from subsuppliers."

goods which petitioner obtained by means of preference ratings consisted of fabrics of a wide variety of colors and finishes. They were resold by Daisart, often still in their original packing, to manufacturers of civilian clothing at prices far in excess of the maximum established by law. In these transactions petitioner and his corporation in conspiracy with the other person indicted used fictitious names, gave false descriptions of goods and prices, and falsified invoices, but the money paid for the goods arrived by circuitous and devious routes into the bank accounts of either petitioner or Daisart Sportswear, Inc.

Such evidence is amply sufficient to sustain petitioner's conviction on the informations and indictment, but he insists that he is immune from prosecution for the acts of which he stands convicted. He bases his claim to immunity on § 202 of the Emergency Price Control Act of 1942, as amended, 56 Stat. 23, 58 Stat. 632, which reads as follows:

> "(a) The Administrator is authorized to make such studies and investigations, to conduct such hearings, and to obtain such information as he deems necessary or proper to assist him in prescribing any regulation or order under this Act, or in the administration and enforcement of this Act and regulations, orders, and price schedules thereunder.
>
> . . . . . .
>
> "(c) For the purpose of obtaining any information under subsection (a), the Administrator may by subpena require any other person to appear and testify or to appear and produce documents, or both, at any designated place.
>
> . . . . . .
>
> "(g) No person shall be excused from complying with any requirements under this section because of

his privilege against self-incrimination, but the immunity provisions of the Compulsory Testimony Act of February 11, 1893 (U. S. C., 1934 edition, title 49, sec. 46), shall apply with respect to any individual who specifically claims such privilege."

The Compulsory Testimony Act of February 11, 1893, 27 Stat. 443, 49 U. S. C. § 46, provides:

"That no person shall be excused from attending and testifying or from producing books, papers, tariffs, contracts, agreements and documents before the Interstate Commerce Commission, or in obedience to the subpoena of the Commission, . . . on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise, before said Commission, or in obedience to its subpoena, . . . *Provided,* That no person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying."

Petitioner's plea of immunity arose out of his testifying before an examiner of the Office of Price Administration in response to subpoenas issued by that office. In August, 1945, investigators of the War Production Board began an inquiry into the transactions of Daisart Sportswear, Inc. Two subpoenas were issued by the Office of Price Administration summoning petitioner individually and as an officer of Daisart to appear before an official of the Office of Price Administration. The subpoenas directed petitioner to produce all records and documents "pertaining to the purchase, sale, manufacture, fabrication and/or finishing piece goods, materials, fabrics from January 1,

1945, up to the present time." On April 30, 1946, pursuant to the subpoenas, petitioner appeared with counsel before an examiner of the O. P. A. After a ruling, unchallenged by respondent, that the appearance was under the compulsion of a valid subpoena, petitioner was sworn in as a witness and advised erroneously that he could not be compelled to make any self-incriminating statements and further advised that he had certain constitutional guarantees. This was an obvious reference to the Fifth Amendment's protection against self-incrimination as recognized by § 202 of the Emergency Price Control Act of 1942, quoted above.

After a few questions of a preliminary nature, petitioner stated: "I want to claim privilege as to anything that I say." Thereafter, in answer to questions by the examiner, petitioner explained that the records required by the subpoenas had either been destroyed, lost, or misplaced. He testified that he was the sole owner and officer of Daisart Sportswear, Inc., which until it went out of business in October, 1945, was engaged in the manufacture, purchase, and sale of textiles and allied products. In carrying on this business, the material out of which products were made was often furnished to Daisart by the organization, a so-called manufacturer, for whom Daisart contracted to make the product. Smith then testified that from various operations Daisart sold surplus fabrics and textiles; that for Metals Disintegrating Company, Daisart made bags and that for certain manufacturing operations Daisart had to acquire materials and fabrics. He denied that Daisart bought any material for the sole purpose of reselling it and stated that Daisart sold only material which was surplusage from its various operations. As examples of his company's operations, petitioner said that Daisart was a contractor for five companies which he specifically named and for many others whose names had slipped his mind, and that

Daisart also manufactured ammunition bags as a subcontractor for Metals Disintegrating Company, which had a prime contract with the Government. In reply to the question as to how Daisart arrived at its selling price with respect to the material it sold, petitioner answered: "Since it was surplus, it was sold at the price billed to me plus freight and haulage and less discount allowed to me."

Petitioner gave the names of "A. Steinman & Co.," "L. Lazarus & Co.," and "Southeastern Cottons" as three of the firms from whom Daisart purchased materials and fabrics, stated that Daisart received invoices from the suppliers for its purchases, and that Daisart paid for its purchases by check at all times. He disclosed the Fidelity Union Trust Company of Newark, N. J., as the bank where Daisart maintained its account, and gave the name of the accountant who had the social security and bank statements of Daisart. He testified that these records would reflect the total overall business of Daisart, including the purchase and sale of all materials. According to petitioner, Daisart usually received the material from the manufacturer with whom it was contracting, and Daisart merely supplied labor and trimming. The manufacturer did not bill Daisart for the material, but simply shipped it for use by Daisart, who in turn billed the manufacturer for the finished garments. It was tacitly understood that if Daisart could save any of the material, it could do as it pleased with that excess material. Petitioner said that the waste from the making of ammunition bags approximated the amount actually used in the bags, and that Metals Disintegrating knew this fact but never made any claim with respect to the waste.

After the foregoing evidence, there occurred the following colloquy between petitioner and the examiner:

> "Question [by O. P. A. examiner]: So that with respect to Daisart Sportswear Inc., contracting ac-

tivities on ammunition bag materials, were shipped by the manufacturer without bill?

"Answer [by petitioner]: It was not. Metals Disintegrating Company being a foreign concern and being unable to furnish this material, they asked me to purchase materials for them. They were aware that I cannot do that without proper priorities. Those priorities were forthcoming in a blanket sum. No stipulated amount and I was further told to maintain a constant stock for any orders they may call. I mean Daisart Sportswear Inc., for any orders they may call for. Their orders came to me sometimes dated and never in any set size or specified form. They charged from day to day. I then went about purchasing material for their work. When and if I had a surplus, I would notify them and ask them if they had anything immediately on hand as I am overstocked, at which time they told me they had not and to dispose of it.

"Question: This is a voluntary statement. You do not claim immunity with respect to that statement?

"Answer: No.

"Question: I assume that anything you tell us, Mr. Smith, is subject to verification? You state that after a time Metals Disintegrating Company, although it had a contract with the government, was not in a position to furnish you with the materials necessary for Daisart to manufacture this item?

"Answer: Right.

"Question: And that because of that situation, Daisart was required to obtain priorities so that Daisart could obtain the materials and that it did so?

"Answer: In a blanket amount.

"Question: And that pursuant to that priority, Daisart thereafter acquired materials, some of which

were used in the manufacture of ammunition bags for Metals, and some of it was disposed of by Daisart, is that correct?

"Answer: Yes.

"Question: And those disposals by Daisart formed a good part of the sales of fabrics made by Daisart?

"Answer: They did."

When the prosecution during the trial sought to introduce the transcript of this testimony before the O. P. A. official, petitioner moved for a dismissal of the informations and the indictment against him upon the ground that he was granted immunity from prosecution by the Price Control Act of 1942 for the acts concerning which he was questioned. Petitioner asserted that the hearing before the O. P. A. official covered essentially the same matters which formed the basis for the informations and the indictment. The trial judge reserved decision on the motion and received the transcript of the testimony in evidence against petitioner and the corporation. Subsequently the court ruled that the transcript was not admissible against petitioner, but was only admissible against the defendant corporation, and the jury was so instructed. The trial court also overruled the motion for a dismissal of the charges against petitioner and stated that "the testimony does not prove any part or feature of the commission of a crime, nor will it tend to a conviction when combined with proof of other circumstances which others may supply." This the trial court thought was the test. Conviction followed on 35 counts of each of the two informations and on the indictment for conspiracy. Petitioner was sentenced to pay $10,000 on each count, a total of $710,000 in fines and to imprisonment in such a way that he would have three years to serve.

The Court of Appeals reversed the conviction of petitioner on twelve counts of each of the two informations

on the ground that because he had "not waived immunity in respect to his earlier disclosure that A. Steinam & Co., L. Lazarus & Co., and Southeastern Cottons were sellers to the corporation, he cannot be prosecuted on the counts based on transactions with those companies." 169 F. 2d at 861. These were the three companies specifically named by petitioner in his testimony before the examiner of the Office of Price Administration. This reversal reduced the amount of the fines imposed upon petitioner by $240,000, but not his sentence of three years' imprisonment. The Court of Appeals affirmed the rest of the sentences on the informations and the indictment. It held that petitioner's claim to immunity by reason of his testimony before the examiner was clear and good but for the statement made by petitioner set out above. This the court thought was voluntary and waived all immunity on the facts therein stated and that these were the essential facts in the convictions. 169 F. 2d at 860, 862. One judge dissented in part on the ground that by his testimony before the O. P. A. official petitioner had acquired immunity from prosecution for the transactions charged in the indictment. Because of the importance of the problem in the administration of federal criminal justice, we brought the case here by certiorari. 335 U. S. 882.

*First.* The evolution of congressional policy in dealing with immunity from criminal prosecution in return for evidence has been adequately discussed recently by this Court. *United States* v. *Monia,* 317 U. S. 424 (1943), and *Shapiro* v. *United States,* 335 U. S. 1 (1948). Through *Counselman* v. *Hitchcock,* 142 U. S. 547, it was established that absolute immunity from federal criminal prosecution for offenses disclosed by the evidence must be given a person compelled to testify after claim of privilege against self-incrimination. To meet that requirement Congress amended the immunity provisions of the Interstate Commerce Act, 24 Stat. 383, § 12, that protected a wit-

ness from use against him of evidence so given in any subsequent criminal proceeding so as to provide that the witness should not be "prosecuted . . . for or on account of any transaction, matter or thing, concerning which he may testify . . . ." P. 141, *supra.* This remission of responsibility for criminal acts met the "absolute" test of the constitutional provision against self-incrimination. *Brown* v. *Walker,* 161 U. S. 591. If a witness could not be prosecuted on facts concerning which he testified, the witness could not fairly say he had been compelled in a criminal case to be a witness against himself. He might suffer disgrace and humiliation but such unfortunate results to him are outside of constitutional protection. *Id.,* p. 598. Cf. pp. 630–631. This compulsory testimony statute was further amended in 1906 to provide that the immunity should extend only to a natural person testifying under oath in obedience to a subpoena. 34 Stat. 798. The *Monia* case, *supra,* decided in 1943 that it was not necessary for a witness to claim his privilege against self-incrimination under the compulsory testimony statute as thus amended. This conclusion was reached on an interpretation of the immunity statute, p. 430, despite a contrary rule requiring a claim of privilege under the self-incrimination provision of the Fifth Amendment. See *Vajtauer* v. *Commissioner,* 273 U. S. 103, 113. Cf. *Heike* v. *United States,* 227 U. S. 131.

In the light of these decisions adjusting a witness' duty of testimony to his constitutional protection against self-incrimination, Congress has been enabled, through the use of the Compulsory Testimony Act of 1893 as a model, to legislate so as to force from the lips of the guilty testimony believed necessary to administer a variety of acts.[5] By the date of the *Monia* decision, Congress had, foresightedly, added to the standard immunity clause, drawn from

[5] See *Shapiro* v. *United States, supra,* p. 6; *Heike* v. *United States,* 227 U. S. 131, 142.

the Interstate Commerce Act, the provision that the witness must claim his privilege.[6] By this addition the statute on compulsory testimony as to this requirement was put on a parity with the constitutional privilege against self-incrimination. It is such a supplemented immunity statute that we are called upon to apply in this case.

Petitioner was compelled to testify at the examination under the Price Control Act.[7] He was subpoenaed and put under oath. At the beginning of the examination, he raised a question as to the validity of the subpoena so as to assure himself that he was not voluntarily present. He promptly declared: "I want to claim privilege as to anything that I say." In response to the examiner's queries as to his and Daisart's business activities, petitioner thereafter made the statements set out at pp. 142 to 145, *supra*. These statements as to the organization of his business, his use of priorities, his suppliers and customers, his banking connections and the method of computing the selling price of surplus materials are clearly more than suggestions from which it might be imagined evidence as to his operations could be obtained. *Brown* v. *Walker, supra,* at 599. Some, at least, of the disclosures, such as the use of blanket priorities of Metals Disintegrating to procure textiles and the method of fixing prices on surplus sales, bore directly on the subsequent charges of misuse of priorities and the goods obtained thereby as well as the charge of conspiracy to violate the Price Control Act. The facts brought out in his examination are not facts disassociated from his prosecution as in *Heike* v. *United States,* 227 U. S. 131, but in the language of the Compulsory Testimony Act are pertinent to the prosecution and "con-

[6] *United States* v. *Monia, supra,* at 429; cf. p. 442, *et seq.*

[7] *United States* v. *Monia, supra,* at 429.

cerning which" petitioner testified.[8] The facts were links in the chain of evidence. The Government does not contest the conclusion that part of the testimony before the examiner concerns the criminal charges.

*Second.* The Government, however, contends that petitioner's immunity from prosecution on facts concerning which he was compelled to testify was waived by a subsequent voluntary statement. This statement as given in question and answer form is set out above at p. 144.[9]

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[8] In the *Heike* case, the accused had testified in a grand jury investigation as to violations of the Sherman Act. Such testimony did not earn the immunity of the Act of February 25, 1903, 32 Stat. 854, 904, on a subsequent indictment for a fraud on the revenue by the secret introduction of springs in scales to cause them to indicate less than the actual weight. A table of annual meltings of sugar had been given at the monopoly investigation by Heike. This Court said: "The table of meltings by the year had no bearing on the frauds, as it was not confined to the sugar fraudulently weighed and it does not appear how the number of pounds was made up. The mere fact that a part of the sugar embraced in the table was the sugar falsely weighed did not make the table evidence concerning the frauds. The same consideration shows that it did not tend to incriminate the witness. It neither led nor could have led to a discovery of his crime." 227 U. S. at 143.

See *United States* v. *Monia,* 317 U. S. 424, 430; *Brown* v. *Walker,* 161 U. S. 591, 599; *United States* v. *Weisman,* 111 F. 2d 260; *United States* v. *Molasky,* 118 F. 2d 128, 134.

[9] The Government's argument is that voluntary statements are not protected by privilege and do not earn immunity. It is suggested, too, that the answers were not responsive to the question and that a witness cannot volunteer facts and secure immunity any more than he can secure remission of penalties by appearing as a witness without compulsion. Further, the Government relies upon the voluntary character of the above statement as a waiver of privilege, not only as to facts included in the statement but also as to similar facts that the witness had disclosed previously under compulsion after claim of privilege. This position is based on the opinion of the Court of Appeals, where it was said: "Even where this testimony repeated previous answers which would have been subject to the witness' initial general claim of immunity, we see no reason why

Privilege can be waived and with the waiver the statutory immunity disappears.[10] Since the purpose of the remission of penalties is to force out evidence that is protected by privilege against self-incrimination, a waiver of that protection makes the testimony available for prosecution of the witness. Nor do we see any reason why claim of privilege to all or any part of testimony may not be withdrawn. Although the privilege against self-incrimination must be claimed, when claimed it is guaranteed by the Constitution. Thereafter only absolute immunity from federal criminal prosecution is sufficient to compel the desired testimony. Waiver of constitutional rights, however, is not lightly to be inferred.[11] A witness cannot properly be held after claim to have waived his privilege and consequent immunity upon vague and uncertain evidence.

It is plain here that petitioner relied from the beginning of his examination upon his privilege. The United States had notice that the witness sought protection against prosecution for any facts to which he was compelled to testify. The Government had then to decide whether to pay the price to secure the facts of the suspected criminal operation.[12] Just before the question that opened the colloquy quoted at p. 144, the examination had elicited that Daisart often contracted with manufacturers to do work on goods bought and furnished by the manufacturer. Then came the question above

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a witness cannot qualify and limit his claim as the examination proceeds, just as he can make new claims as to issues he has not waived." 169 F. 2d at 861.

[10] *Raffel* v. *United States,* 271 U. S. 494, 496, and cases cited; *Vajtauer* v. *Commissioner,* 273 U. S. 103, 113; *United States* v. *Monia,* 317 U. S. 424, 427; *Johnson* v. *United States,* 318 U. S. 189, 195.

[11] *Hodges* v. *Easton,* 106 U. S. 408, 412; *Ohio Bell Tel. Co.* v. *Comm'n,* 301 U. S. 292, 306; *Aetna Ins. Co.* v. *Kennedy,* 301 U. S. 389, 394; *Johnson* v. *Zerbst,* 304 U. S. 458, 464.

[12] *United States* v. *Monia,* 317 U. S. 424, 430.

quoted, pp. 143–144, as to the practice on the ammunition-bag contract. The answer, we think, was responsive. Then came the question: "This is a voluntary statement. You do not claim immunity with respect to that statement?" And the answer, "No." Whether the "No" applied to the first or second sentence is not known. In view of the specific claim of privilege, it seems unlikely that petitioner would waive the privilege and testify, voluntarily and without protection against prosecution, as to the details of his operations with Metals Disintegrating, the source of the blanket priorities that lay at the base of the charges by information and indictment. No question is made as to the correctness of the transcription. Without any effort to clarify the "No," the examiner went ahead and had the witness restate the substance of the long answer quoted on p. 144 without any further intimation that the subsequent answers were considered by the examiner to be voluntary.[13] We do not think under these circumstances this equivocal "No" is a waiver of the previous definite claim of general privilege against self-incrimination.

The trial court excluded the entire statement before the examiner, including the question just discussed, as evidence against petitioner. Since that court did not think the statement contained testimony proving any part or feature of the commission of a crime and did not tend to a conviction when combined with proof of other circumstances which others might supply, it refused the motion for a directed acquittal.

Furthermore, before the question was asked the answer to which the Government argues is a voluntary statement, petitioner, testifying under unquestioned privilege

[13] Compare *United States* v. *St. Pierre,* 128 F. 2d 979, 980: "Nor is it material that appellant stated at several points that he had committed no federal crime; such a contradiction, especially by a nervous or excitable witness would not overcome a clear claim of privilege if he was otherwise entitled to the privilege."

with immunity, gave the information that is detailed above at pp. 141 to 143, inclusive. Without restating the entire substance of the testimony, we think the statements concerning the necessity of Daisart to acquire fabrics for manufacturing, together with information as to the names of the suppliers, the name of Daisart's bank and as to the manner of Daisart's receipts, disbursements and sales prices, were sufficient to give petitioner the immunity claimed.

*Third.* Finally the Government presses upon us the argument that, as to the indictment, the testimony petitioner gave at the examination under the Price Control Act was wholly self-exonerating and therefore did not secure immunity from prosecution by the indictment. The contention is that since the immunity granted by § 202 (g) of the Emergency Price Control Act was an exchange for the constitutional privilege against self-incrimination and since this evidence is not incriminating, it therefore cannot be used to secure immunity from prosecution for conspiracy to violate the Price Control Act. See *Shapiro* v. *United States,* 335 U. S. 1; 8 Wigmore, Evidence, § 2282.

The indictment was for conspiracy to sell finished piece goods in excess of prices fixed under the Price Control Act. The position of the Government is that the only testimony relating to the charge of the indictment is that petitioner testified that he sold the goods at prices within the allowable limits.[14] But the indictment also

[14] The testimony referred to is as follows:

"Question: Can you tell me how Daisart Sportswear Inc., arrived at its selling price with respect to the items that it sold?

"Answer: Since it was surplus, it was sold at the price billed to me plus freight and haulage and less discount allowed to me.

"Question: In other words, Daisart Sportswear Inc., sold at cost plus freight less any discounts, cash or otherwise, received by Daisart Sportswear Inc.?

"Answer: Correct."

charged as a part of the conspiracy a plan through false invoices to secure payments for the goods by checks to fictitious persons which the conspirators cashed.

A glance at the details of the testimony set out at pp. 142 through 145, *supra*, will demonstrate that petitioner's testimony at the examination went beyond the exculpatory language concerning the sale price. Petitioner testified as to the business organization of Daisart, its acquisition of materials through the priorities furnished by Metals Disintegrating from named firms on their invoices and its payment for these goods at all times by check. Daisart's bank was named. Since the argument on this point relates only to exculpatory statements and not to waivers, it is also to be noted that all testimony contained in the answer printed on p. 144, above, is to be taken into consideration. Certainly many of these disclosures furnished leads that could have uncovered evidence of the unlawful conspiracy charged in the indictment. Petitioner testified concerning transactions, matters and things substantially connected with parts of the conspiracy for which he was indicted—for example, the testimony that he bought material under invoice from a named supplier and paid for it by check on a named bank. This evidence, being substantially connected with the conspiracy, was ample to give immunity from the conspiracy prosecution. The Compulsory Testimony Act of February 11, 1893, gives immunity from prosecution on account "of any transaction, matter or thing, concerning which" the witness is compelled to testify in return for such evidence. Consequently, we need not decide whether, if only exculpatory evidence was given concerning matters pertinent to the criminal charge, the statute would grant immunity.

*Reversed.*

# EMPRESA SIDERURGICA, S. A., ET AL. *v.* COUNTY OF MERCED ET AL.

APPEAL FROM THE SUPREME COURT OF CALIFORNIA.

No. 327. Argued February 9, 1949.—Decided May 31, 1949.

A cement plant in California was sold to a foreign purchaser for export. An export license was obtained and a letter of credit in favor of the seller deposited here. Title passed and possession was taken for the purchaser. A common carrier was employed to dismantle the plant and prepare it for shipment. As the dismantling proceeded, shipments were labeled with the purchaser's name as consignee and delivered to a rail carrier. When 12% had been shipped, 10% had been prepared for shipment, 34% had been dismantled but not prepared for shipment and 44% had not been dismantled, a municipality, acting under a California statute, levied a personal property tax on the portion which had not actually been shipped. *Held:* This was not a tax on an export contrary to Art. I, § 10, Cl. 2 of the Constitution. Pp. 155–157.

(a) The process of exportation begins upon entrance of the articles into the export stream. P. 157.

(b) It is not enough that on the tax date there was a purpose and plan to export the property; nor that in due course the plan was fully executed. P. 157.

(c) The fact that the dismantler was a licensed carrier for interstate and foreign commerce and that its employment included the loading of the property on railroad cars for shipment to the seaboard does not here require a different result. P. 157.

32 Cal. 2d 68, 194 P. 2d 527, affirmed.

In a suit for refund of a municipal personal property tax paid under protest, a state court granted judgment for the plaintiff. The State Supreme Court reversed. 32 Cal. 2d 68, 194 P. 2d 527. On appeal to this Court, *affirmed,* p. 157.

*Scott D. Kellogg* argued the cause and filed a brief for appellants.

*James E. Sabine,* Deputy Attorney General of California, argued the cause for appellees. With him on the brief were *Fred N. Howser,* Attorney General, and *Gregory P. Maushart.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

There was a cement plant in Merced County, California, which was sold to petitioner—a corporation of Colombia—for export to South America. An export license was obtained and a letter of credit in favor of the seller deposited here. Title passed and possession was taken for the purchaser. A company, which was a common carrier, was employed to do the dismantling and packaging for shipment. As the dismantling proceeded, shipments were labeled with appellant's name as consignee and delivered to a rail carrier.

Respondent, acting under a California statute,[1] levied a personal property tax on the property for the tax year 1945–1946. The tax date was March 5, 1945. On that date 12 per cent of the plant had been shipped out of the county. That portion was relieved of the tax. The balance was taxed. That included the 10 per cent which had been dismantled and crated or prepared for shipment, 34 per cent which had been dismantled but not crated or prepared for shipment, and 44 per cent which had not been dismantled. But before the end of January, 1946, all the property had been shipped by rail to a port and was en route to South America by ocean carrier.

Article I, § 10, Cl. 2 of the Constitution provides in part 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 . . . ." Appellant claimed

[1] Rev. and Tax. Code (Deering, 1939), Div. I, §§ 103, 106, 201, 202 (e), 405.

that this tax was laid on an export and was therefore unconstitutional. It paid the tax under protest and brought this suit to recover it. The trial court, holding that the entire plant was an export on the tax assessment day, granted judgment for appellant. The Supreme Court of California reversed. 32 Cal. 2d 68, 194 P. 2d 527. The case is here on appeal. 28 U. S. C. § 1257 (2).

". . . goods do not cease to be part of the general mass of property in the State, subject, as such, to its jurisdiction, and to taxation in the usual way, until they have been shipped, or entered with a common carrier for transportation to another State, or have been started upon such transportation in a continuous route or journey." *Coe* v. *Errol,* 116 U. S. 517, 527. That test was fashioned to determine the validity under the Commerce Clause of a nondiscriminatory state tax. But as we noted in *Richfield Oil Corp.* v. *State Board,* 329 U. S. 69, 79, it is equally applicable to cases arising either under Art. I, § 10, Cl. 2 (the Import-Export Clause) or under Art. I, § 9, Cl. 5, which prohibits Congress from laying any tax on "Articles exported from any State." [2]

Under that test it is not enough that there is an intent to export, or a plan which contemplates exportation, or an integrated series of events which will end with it. See *Turpin* v. *Burgess,* 117 U. S. 504; *Cornell* v. *Coyne,* 192 U. S. 418. The tax immunity runs to the process of exportation and the transactions and documents embraced in it. *Fairbank* v. *United States,* 181 U. S. 283; *United States* v. *Hvoslef,* 237 U. S. 1; *Thames & Mersey Ins. Co.* v. *United States,* 237 U. S. 19. Delivery of packages to an exporting carrier for shipment abroad (*Spalding & Bros.* v. *Edwards,* 262 U. S. 66) and the delivery of oil into the hold of the ship furnished by the foreign purchaser to carry the oil abroad (*Richfield Oil Corp.* v.

[2] The meaning of "export" is the same under the two Clauses. See *Richfield Oil Corp.* v. *State Board,* 329 U. S. 69, 83 and cases cited.

*State Board, supra*) have been held sufficient. It is the entrance of the articles into the export stream that marks the start of the process of exportation. Then there is certainty that the goods are headed for their foreign destination and will not be diverted to domestic use. Nothing less will suffice.

So in this case it is not enough that on the tax date there was a purpose and plan to export this property. Nor is it sufficient that in due course that plan was fully executed. Part of the plant that is taxed was dismantled, but it had not been delivered to any carrier for export or otherwise started on its journey on the tax date. It might still have been diverted into the domestic market. The fact that any such diversion would entail a breach of contract, that a part of the plant had already started on its export journey, that an export license had been obtained and a letter of credit deposited in this country increases the expectation on the tax date that exportation of the entire plant would eventuate. But that prospect, no matter how bright, does not start the process of exportation. On the tax date the movement to foreign shores had neither started nor been committed.

Some reliance is apparently placed on the fact that the dismantler was a licensed carrier for interstate and foreign commerce and that its employment included the loading of the property on railroad cars for shipment to the seaboard. But the dismantler had not in this case started the movement of the property to the rail carrier. Hence we need not determine whether that intermediate transportation would be part of the export process.

*Affirmed.*

MR. JUSTICE FRANKFURTER, dissenting.

Though figures of speech may aid analysis, they do not dispense with the need for it. When a State seeks to tax what is to leave the United States, we may agree

that its privilege to do so ceases when the export enters "the export stream." But the problem for decision is to determine when that point has been reached. The Export-Import Clause of the Constitution (Art. I, § 10) embodies one phase of the accommodation between the States and the Union; it can be applied only by considering the bearing of a particular exertion of State power on the fulfillment or frustration of its purpose. A mechanistic formula, whether derived from phrases in *Coe* v. *Errol,* 116 U. S. 517, or elsewhere culled, advances us little toward the solution of such a concrete problem.

The case before us is peculiarly ill-fitted for mechanical disposition; it presents unusual circumstances giving rise to unusual contentions. It involves the sale to a Colombian purchaser of what the contract of sale describes as "all machinery, equipment, removable structures, removable facilities, spare parts, supplies and miscellaneous items comprising" the Yosemite Portland Cement Plant located at Merced, California, but "excluding the land upon which the plant is situated" and various other specified items. The appellant urges that the objects of this sale, which are collectively referred to by the contract as "the cement plant," should be regarded as interdependent parts of an organic whole like a 200-inch telescope or a cyclotron. Since no such part has a separate usefulness comparable to its usefulness as a supporting member of the structure or as a link in the productive process for which the structure is designed, shipment of part—in this case 14 of an eventual total of 123 carloads—makes virtually certain that the rest will follow. In the case of such an export, so runs the argument, it is a degree of certainty fully equivalent to the certainty marked by delivery to a common carrier of a bulk cargo, like oil or grain or timber, for whatever part of a cargo of the latter sort has not actually left the country can

even then be diverted and separately sold without loss in value either to the diverted or to the exported part. It is the degree of certainty, moreover, and not conformity to a prescribed ritual like delivery to a carrier, that is significant:

> "The certainty that the goods are headed to sea and that the process of exportation has started may normally be best evidenced by the fact that they have been delivered to a common carrier for that purpose. But the same degree of certainty may exist though no common carrier is involved." *Richfield Oil Corp.* v. *State Board,* 329 U. S. 69, 82.

The case was submitted to the Superior Court of Merced County on an agreed statement of facts which leaves in doubt whether the items comprising the "cement plant" were actually interdependent, as appellant contends, or consisted merely of a collection of machines and other pieces of equipment which could have been individually installed without loss of usefulness in any other cement plant. Tending to establish appellant's position are provisions of the dismantling contract which indicate that the existing structure was to be carefully taken apart like a Chinese puzzle so that it could be fitted together again in Colombia exactly the way it was before. "Contractor shall take at least one photograph of each machine or piece of equipment before dismantling said machine or piece of equipment, and shall also take at least one photograph after such machine or piece of equipment is dismantled." "All separations shall be made at the point of joinder, and there shall be no cutting or disassembling of any part of the Cement Plant which will have as its effect the weakening of the structure or parts when such structure or parts are reassembled . . . ." "The Contractor shall match-mark all parts of the plant and equipment . . . ."

Tending to look the other way is an itemized list of all the items to be exported which was attached to the export license issued to appellant by the War Production Board. Those items, ranging from thousand-ton kilns and locomotives to friction tape, seem to be things of a sort which are independently useful; each is assigned a dollar value and the total of all these separate values exactly equals the sale price of the "plant." Appellee insists, moreover, that so many parts of the original plant were excepted from the contract of sale that what was sold cannot be considered an organic unit.

The Superior Court resolved this issue of fact in favor of the interpretation urged by appellant and reached a conclusion based on that interpretation:

> "I think that the payment for the property and proceeding to change it from parts in place of a complete building, into a mass of disconnected materials made the completion of the exportation economically imperative. This was not a mere preparation of the plant for exportation; by such action and change the parts had 'been started upon such transportation' with the degree of certainty demanded by Coe vs. Errol and the many cases which have endorsed it. . . .
>
> "If the exportation of the materials of the plant was not before assured, that became certain when the twelve per cent of the corpus of the building had been sent abroad. . . . Whatever possibility there might have been that after plaintiff had torn the plant down and carried the parts off the premises that it would sell them or re-erect them into a plant in California would be rendered extremely improbable when it appeared that it had kept here only a part of the

> materials of the plant which of course could not be sold as the materials from which a plant could be built or used to reassemble the old one."

The appellant presented the same contentions to the Supreme Court of California. Without explicitly rejecting these contentions, it referred to the objects of export and of taxation merely as "the machinery and equipment of a cement plant" and alluded to the above-quoted portion of the Superior Court's opinion only as "another basis for the decision." Its opinion is open, therefore, to two very different interpretations.

1. The Supreme Court of California may have exercised a right under California law to draw its own inferences from uncontroverted facts and thus have found that what was called a "plant" was really only a collection of machinery and equipment. If that is what it did, we would not, of course, reinstate the findings of the Superior Court merely in order to raise an interesting question under the Export-Import Clause. Affirmance would be amply supported by bare citation of cases holding that intent to export, no matter how firm, is not by itself enough to confer immunity from taxation.

2. The Supreme Court of California may have taken the view that only delivery to a carrier of each successive part even of an organic whole removed that part from the State's taxing power. This would have been in effect to say, "Upon the facts as found by the Superior Court, it makes no difference to the taxing power of the County of Merced that parts of this integrated plant had left the country since the County is merely taxing the remaining parts." Surely this is a doubtful proposition; it presents, at any rate, a difficult question of the adjustment of local needs to the protection of exports from local interference.

Between these two possible interpretations of the situation before the Supreme Court of California, therefore, lies the difference between a simple question of Constitutional power and a very troublesome one. Since the record leaves in doubt whether the troublesome question is presented, to assume that it is presented and then to pass upon it would be to embrace unnecessarily what may be a hypothetical issue. We should, therefore, remand the case for the resolution of the crucial question of fact upon which depends what Constitutional issue we are called upon to decide. Cf. *Hammond* v. *Schappi Bus Line, Inc.*, 275 U. S. 164.

Syllabus.

# URIE *v.* THOMPSON, TRUSTEE.

CERTIORARI TO THE SUPREME COURT OF MISSOURI.

No. 129. Argued January 3, 1949.—Decided May 31, 1949.

1. The coverage of the Federal Employers' Liability Act and the Boiler Inspection Act is not confined to injuries resulting from accidents but includes injuries in the nature of occupational diseases, such as silicosis. Pp. 173–175, 180–196.

   (a) Negligence of an interstate railroad which results in a locomotive fireman contracting silicosis as a result of inhaling silica dust gives rise to a cause of action under the Federal Employers' Liability Act independently of the Boiler Inspection Act. Pp. 173–175, 180–187.

   (b) Failure of an interstate railroad to maintain sanders on its locomotives in good condition, pursuant to provisions of the Boiler Inspection Act, is negligence *per se* and gives rise to a cause of action under the Federal Employers' Liability Act in favor of a locomotive fireman who contracted silicosis from inhaling silica dust as a result of the malfunctioning of the sanders. Pp. 187–195.

2. A complaint which sufficiently charged an interstate railroad with knowingly having used, in excessive quantities, a dangerous sand material likely to cause silicosis and in fact causing complainant to contract it and become permanently disabled, due in part to faulty adjustment of sanders and failure to use due care in adjusting them, was sufficient to state a cause of action under the Federal Employers' Liability Act independently of the Boiler Inspection Act. Pp. 175–180.

3. The Boiler Inspection Act vests in the Interstate Commerce Commission rule-making power adequate to protect employees against disease as well as against accidents; and injury resulting from violations of these rules is compensable under the Federal Employers' Liability Act. Pp. 193–194.

4. That petitioner's contraction of silicosis resulted from the inhalation of silica dust over a period of thirty years and he may have had silicosis without knowing it for more than three years before he sued for compensation under the Federal Employers' Liability Act, did not bar his claim when the time which elapsed between his discovery of his condition and the filing of suit did not exceed three years, the period of limitations then prescribed by that Act. Pp. 168–171.

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5. Petitioner sued for compensation under the Federal Employers' Liability Act, alleging that he had contracted silicosis as a result of the railroad's negligence and without claiming any violation of the Boiler Inspection Act. The trial court sustained a demurrer to the complaint. The State Supreme Court held that the allegations of negligence were not sufficient to sustain the action under the Federal Employers' Liability Act alone; but it remanded the case for trial, because it thought that the complaint sufficiently alleged a breach of the Boiler Inspection Act. Petitioner amended his complaint to charge specifically violations of the Boiler Inspection Act; the jury found in his favor; and he obtained a judgment. On a second appeal, the State Supreme Court reversed this judgment on the ground that the Boiler Inspection Act applies only to accidental injuries and not to occupational diseases. *Held:*

   (a) Although the question was neither raised nor considered on the second appeal to the State Supreme Court, the sufficiency of petitioner's original claim for negligence involved in the first appeal is reviewable here, since the first judgment of the State Supreme Court was not a final judgment. Pp. 171–172.

   (b) Complainant did not waive that question by amending his complaint to state a claim specifically under the Boiler Inspection Act or by proceeding with trial on that theory. P. 172.

6. Local rules of practice cannot bar this Court's independent consideration of all substantial federal questions actually determined in earlier stages of litigation by a state court whose final adjudication is brought here for review. Pp. 172–173.

A state trial court sustained a demurrer to a complaint seeking recovery under the Federal Employers' Liability Act for injuries incurred by contracting silicosis as a result of a railroad's negligence. The State Supreme Court reversed and remanded the case for trial, holding that the complaint was sufficient to allege a breach of the Boiler Inspection Act. 352 Mo. 211, 176 S. W. 2d 471. After amending his complaint so as to allege specifically a violation of the Boiler Inspection Act, complainant obtained a judgment in the trial court. On a second appeal, the State Supreme Court reversed, holding that the Boiler Inspection Act was inapplicable to in-

juries sustained except through accidents. 357 Mo. 738, 210 S. W. 2d 98. This Court granted certiorari. 335 U. S. 809. *Reversed,* p. 196.

*Guy W. Green* argued the cause for petitioner. With him on the brief was *Louis N. Wolf.*

*Lyman J. Bishop* argued the cause for respondent. With him on the brief were *Thomas J. Cole* and *D. C. Chastain.*

*Daniel W. Knowlton* and *J. Stanley Payne* filed a brief for the Interstate Commerce Commission as *amicus curiae.*

MR. JUSTICE RUTLEDGE delivered the opinion of the Court.

The primary question is whether the coverage of the Federal Employers' Liability Act and the Boiler Inspection Act [1] includes injuries in the nature of occupational disease, here silicosis, or is confined exclusively to injuries inflicted by accident. After having been twice before the Supreme Court of Missouri, the case is here on certiorari, 335 U. S. 809, for review of its final decision on the second appeal that recovery may not be had for other than accidental injuries. A statement of the course taken by the proceedings in the state courts, as well as of the facts, becomes necessary for resolving the issues presented.

In 1941 petitioner Tom Urie filed suit under the Federal Employers' Liability Act against respondent Thompson, trustee of the Missouri Pacific Railroad. According to petitioner's allegations, he had been employed as a fireman on steam locomotives of the interstate Missouri Pacific for roughly thirty years. In 1940 he had been forced to cease work by a pulmonary disease diagnosed

[1] Respectively 45 U. S. C. § 51 *et seq.* and 45 U. S. C. § 23 *et seq.*

as silicosis. This permanently disabling affliction had been caused by continuous inhalation of silica dust blown or sucked into the cabs of the locomotives on which he had worked. The injurious concentration of silica dust in the air breathed by petitioner arose from the railroad's use in its locomotives' sanding boxes of sand materials containing 80 to 90 per cent of silica or silicon dioxide and the emission by the locomotives' faultily adjusted "sanders" [2] of such sand materials in excessive amounts beyond those needed to provide traction for locomotive wheels. Respondent Thompson, trustee of the railroad since 1933, "knew, or by the exercise of due care should have known," of the danger of silicosis arising from the conditions of petitioner's employment.[3]

The trial court sustained respondent's demurrer to the complaint. On appeal the Missouri Supreme Court held that the action could not be maintained by virtue of the Federal Employers' Liability Act alone, for the reason that respondent could not have "anticipated plaintiff's injury, and . . . therefore . . . the petition does not state facts sufficient to constitute a cause of action for negligence under the Federal Employers Liability Act." 352 Mo. 211, 219. The court felt, however, that the claimed malfunctioning of the locomotives' sanders was in substance an allegation of breach of § 2 of the Boiler Inspection Act and that, since proof of breach of the latter Act would support a recovery under the Federal

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[2] "Sander" is, colloquially, the name given by railroad men to the entire apparatus appurtenant to a locomotive which stores sand and pipes it to the rails, as needed, to provide traction. The apparatus is mandatory equipment in interstate commerce, I. C. C. Rule 120, 49 C. F. R. § 91.120; I. C. C. Rule 235, 49 C. F. R. § 91.235. For succinct descriptions of a compressed-air powered sanding apparatus, see the successive opinions in *Anderson* v. *Baltimore & O. R. Co.*, 89 F. 2d 629 and 96 F. 2d 796.

[3] See note 9.

Employers' Liability Act without regard to respondent's negligence, *Lilly* v. *Grand Trunk R. Co.*, 317 U. S. 481, 485–486, petitioner had stated a cause of action. Furthermore, the court held that the Federal Employers' Liability Act's three-year statute of limitations, 45 U. S. C. § 56, did not bar petitioner's claim since his "cause of action accrued in May, 1940, when he became incapacitated . . . ." 352 Mo. at 222. Accordingly the court reversed the judgment and remanded the cause for trial.

On remand petitioner amended his complaint to charge specifically violations of the Boiler Inspection Act. Section 2 of that Act, as amended, makes it "unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb . . . ." 45 U. S. C. § 23.[4] The violations alleged were (1) that the sanders were broken or faultily adjusted so as to release too much sand and (2) that the locomotive decks and cabs were in a bad state of repair,

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[4] The section continues, "and unless said locomotive, its boiler, tender, and all parts and appurtenances thereof have been inspected from time to time . . . and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for." 45 U. S. C. § 23, 36 Stat. 913, 38 Stat. 1192, 43 Stat. 659.

Section 2 was first enacted in 1911 to cover the locomotive boiler and its appurtenances, 36 Stat. 913. It was broadened in 1915 to include the entire locomotive and tender, 38 Stat. 1192; and see the 1924 amendment. 43 Stat. 659.

The second amended complaint, to which the demurrer involved in the first appeal applied, did not mention specifically either the Federal Employers' Liability Act or the Boiler Inspection Act, but set forth facts generally from which the state supreme court's conclusions concerning the applicability of those acts were drawn.

admitting dust through various cracks and openings in the cab's floor and elsewhere which ought to have been sealed off.

The case was tried to a jury, under instructions that negligence was not in issue and that petitioner should prevail if he proved that he had contracted silicosis by reason of respondent's breach of an "absolute and continuing duty to have such locomotive engines and all their parts and appurtenances thereof, in proper condition and safe to operate . . . without unnecessary peril to the life of Tom Urie . . . ." The jury found for petitioner in the amount of $30,000.

Upon respondent's appeal the Missouri Supreme Court reversed the judgment entered on this verdict. 357 Mo. 738. Noting that on the former review it did not "treat with a contention that 'silicosis' is not an evil at which the Act is aimed," *id.* at 746, the court concluded that the Boiler Inspection Act "is aimed at promoting safety from accidental injury, as distinguished from injury due to the gradual inhalation of harmful dusts." *Id.* at 749. It was to review the state supreme court's successive constructions of the Federal Employers' Liability and Boiler Inspection Acts that our writ was issued.

## I.

Two preliminary contentions first engage our attention. We are met at the outset by the question whether, without regard to the legal sufficiency of petitioner's claim under either Act, that claim is barred as to both Acts by operation of the Federal Employers' Liability Act's statute of limitations.

Urie filed suit on November 25, 1941. Under the terms of the then prevailing three-year statute of limitations,[5]

[5] 45 U. S. C. § 56. The former two-year statute of limitations, 35 Stat. 66, was lengthened to three years by the 1939 amendment. 53 Stat. 1404.

the court could not entertain the claim if Urie's "cause of action accrued" before November 25, 1938. Respondent contends that Urie, having been exposed to silica dust since approximately 1910, must unwittingly have contracted silicosis long before 1938, and hence that his "cause of action" must be deemed to have "accrued" longer than three years before the institution of this action. Alternatively it may be argued that each inhalation of silica dust was a separate tort giving rise to a fresh "cause of action," and that Urie is therefore limited to a claim for inhalations between November 25, 1938, and the spring day in 1940 when he became incapacitated.[6]

In our view, however, neither of the outlined constructions of the statute of limitations can be sustained. For, if we assume that Congress intended to include occupational diseases in the category of injuries compensable under the Federal Employers' Liability and Boiler Inspection Acts, such mechanical analysis of the "accrual" of petitioner's injury—whether breath by breath, or at one unrecorded moment in the progress of the disease—can only serve to thwart the congressional purpose.

If Urie were held barred from prosecuting this action because he must be said, as a matter of law, to have contracted silicosis prior to November 25, 1938, it would be clear that the federal legislation afforded Urie only a delusive remedy. It would mean that at some past moment in time, unknown and inherently unknowable even in retrospect, Urie was charged with knowledge of the slow and tragic disintegration of his lungs; under this view Urie's failure to diagnose within the applicable statute of limitations a disease whose symptoms had not yet obtruded on his consciousness would constitute waiver of his right to compensation at the ultimate day of discovery and disability.

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[6] Cf. *Pieczonka* v. *Pullman Co.*, 89 F. 2d 353, 356–357.

Nor can we accept the theory that each intake of dusty breath is a fresh "cause of action." In the present case, for example, application of such a rule would, arguably, limit petitioner's damages to that aggravation of his progressive injury traceable to the last eighteen months of his employment. Moreover petitioner would have been wholly barred from suit had he left the railroad, or merely been transferred to work involving no exposure to silica dust, more than three years before discovering the disease with which he was afflicted.[7]

We do not think the humane legislative plan intended such consequences to attach to blameless ignorance. Nor do we think those consequences can be reconciled with the traditional purposes of statutes of limitations, which conventionally require the assertion of claims within a specified period of time after notice of the invasion of legal rights. The record before us is clear that Urie became too ill to work in May of 1940 and that diagnosis of his condition was accomplished in the following weeks. There is no suggestion that Urie should have known he had silicosis at any earlier date. "It follows that no specific date of contact with the substance can be charged with being the date of injury, inasmuch as the injurious consequences of the exposure are the product of a period of time rather than a point of time; consequently the afflicted employee can be held to be 'injured' only when the accumulated effects of the deleterious substance manifest themselves . . . ." *Associated Indemnity Corp.* v. *Industrial Accident Commission,* 124 Cal. App. 378, 381. The quoted language, used in a state workmen's compensation case, seems to us applicable in every relevant particular to the construction of the federal statute of limitations with which we are here concerned. Accordingly we agree with the view expressed by the Missouri

[7] See *Pieczonka* v. *Pullman Co.,* 89 F. 2d 353, 356–357.

Supreme Court on the first appeal of this case, that Urie's claim, if otherwise maintainable, is not barred by the statute of limitations.[8]

We may readily dispose of another preliminary question concerning the issues which are now properly before us. Respondent argues, somewhat surprisingly, that the sufficiency of petitioner's original claim for negligence involved in the first appeal is not properly here, since it was neither raised nor considered on the second appeal to the Missouri Supreme Court. The short answer is that petitioner has brought the claim to this Court at his first opportunity; and it was not necessary for him to relitigate that claim a second time through the state courts in order to preserve it for our consideration on review of the final judgment rendered in the cause.

From the opinions of the state supreme court we know judicially[9] that its judgment negating the general claim for negligence was coupled with its subsequently repudiated conclusion that petitioner had stated a cause of action under the Boiler Inspection Act and that, consequently, the court remanded the cause for trial, not for dismissal. The judgment therefore was not final; it was interlocutory and not reviewable here within the meaning

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[8] Compare the New York Court of Appeals' similar application, to a silicosis claim, of the Federal Employers' Liability Act's statute of limitations. *Sadowski* v. *Long Island R. Co.*, 292 N. Y. 448, 457–458.

[9] The opinion rendered on the first appeal, 352 Mo. 211, extensively quotes the original complaint's allegations concerning negligence, *id.* at 215–216; and a copy of that complaint appearing in the present record shows that the quotations comprehend substantially all of the allegations in that respect. The present record does not include a copy of the text of the judgment rendered on the first appeal; but that deficiency is merely formal, if it is a deficiency in any sense, since the opinions on both appeals supply us with full knowledge of the nature and effect of that judgment.

of our jurisdictional statute. 28 U. S. C. § 344 (b) [now § 1257 (3)].[10]

Although the Missouri Supreme Court's disposition of the first appeal precluded review here at that time of the ruling adverse to petitioner, Urie did not waive that question by amending his complaint, in conformity with the court's mandate, to state his claim more specifically in terms of the Boiler Inspection Act or by proceeding with trial on that theory. As the case then stood, this was his only remaining chance for success unless he was to waive it, ask for final judgment to be entered against him on the general negligence issue, and rely solely upon securing review of that judgment and reversal by this Court.

Whatever the effect of the state supreme court's ruling for further proceedings in the state courts,[11] it could not impose such an alternative upon petitioner. Local rules of practice cannot bar this Court's independent consideration of all substantial federal questions actually determined in earlier stages of the litigation by the court whose final adjudication is brought here for review. *Zeckendorf* v. *Steinfeld,* 225 U. S. 445, 454; *Messenger* v. *Anderson,* 225 U. S. 436, 444. Even so, we think sound practice would see to it that such questions were expressly preserved in the later stages of review. But, as this Court has had occasion heretofore to observe, its power to probe issues disposed of on appeals prior to the one under review is, in the last analysis, a "necessary correlative" of the rule which limits it to the examination

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[10] "As its judgment upon the first writ was merely for a reversal of the court below and for a . . . trial, such judgment, not being final, could not be made the subject of a writ . . . from this court." *United States* v. *Denver & R. G. R. Co.,* 191 U. S. 84, 93. See *Coe* v. *Armour Fertilizer Works,* 237 U. S. 413, 418–419; *Gospel Army* v. *Los Angeles,* 331 U. S. 543, and authorities cited.

[11] Cf. *Creason* v. *Harding,* 344 Mo. 452, 463–464.

of final judgments. *Louisiana Navigation Co.* v. *Oyster Commission,* 226 U. S. 99, 102.[12]

Accordingly, even if it should be held that petitioner has stated no claim under the Boiler Inspection Act, the judgment now in review cannot stand unless the Missouri Supreme Court rightly concluded, on the first appeal, that petitioner's original complaint stated no cause of action for negligence under the Federal Employers' Liability Act, considered apart from any effect of the Boiler Inspection Act. That question is properly presented and to it we now turn.

II.

Section 1 of the Federal Employers' Liability Act provides:

> "Every common carrier by railroad while engaging in commerce . . . shall be liable in damages to any

[12] If it were otherwise, our corrective hand could be stayed by any local procedure which chose to resolve all substantial federal questions in an intermediate phase of litigation. The present case lends point to language used by this Court in dismissing a writ of error to a state court for lack of a final judgment: "When the litigation in the state courts is brought to a conclusion, the case may be brought here upon the federal questions already raised as well as any that may be raised hereafter; for although the state courts, in the proceedings still to be taken, presumably will feel themselves bound by the decision heretofore made by the [state] Supreme Court . . . as laying down the law of the case, this court will not be thus bound." *Grays Harbor Co.* v. *Coats-Fordney Co.,* 243 U. S. 251, 256–257. Accordingly, even if it were assumed that no federal question of substance was decided on the second appeal and that the "basis for our jurisdiction must be found, if at all, in the decision and opinion of the state supreme court upon a prior appeal in the same case," petitioner Urie has "invoked the jurisdiction of this court at the first opportunity open to [him], and the federal question, having been considered by the state supreme court, is properly here." *Gant* v. *Oklahoma City,* 289 U. S. 98, 100. See, generally, Boskey, Finality of State Court Judgments under the Federal Judicial Code, 43 Col. L. Rev. 1002, 1007, 1016.

> person *suffering injury* while he is employed by such carrier in such commerce . . . *for such injury or death resulting in whole or in part from the negligence* of any of the officers, agents, or employees of such carrier, *or by reason of any defect or insufficiency, due to its negligence,* in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." 45 U. S. C. § 51. (Emphasis added.)

The section does not define negligence, leaving that question to be determined, as the Missouri Supreme Court said, "by the common law principles as established and applied in the federal courts." 352 Mo. at 218. *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, has no application. What constitutes negligence for the statute's purposes is a federal question, not varying in accordance with the differing conceptions of negligence applicable under state and local laws for other purposes. Federal decisional law formulating and applying the concept governs.[13] Hence the Missouri Supreme Court's decision on the first appeal, that the complaint did not state a cause of action for negligence, is subject to our independent review and is not to be taken as governed conclusively by the state court decisions which alone were cited in support of the determination.

Of course if silicosis caused by the employment is not an "injury" within the statute's intended coverage, no cause of action could be stated for that injury under the statute, even though the allegations of fault and causation

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[13] *Bailey* v. *Central Vermont R. Co.,* 319 U. S. 350, 352; *Chesapeake & Ohio R. Co.* v. *Kuhn,* 284 U. S. 44, 46–47; *St. Louis & I. M. R. Co.* v. *McWhirter,* 229 U. S. 265, 277; *Second Employers' Liability Cases,* 223 U. S. 1, 54–55, 57–58. Cf. *Schlemmer* v. *Buffalo, R. & P. R. Co.,* 205 U. S. 1.

were wholly sufficient. The Missouri Supreme Court's first decision, however, assumed that silicosis fell within the statute's broad term "injury," and held that it would not "be reasonable to hold, under the facts admitted by the demurrer, that defendant should have anticipated plaintiff's injury . . . ." 352 Mo. at 219. Accordingly, the court ruled that no cause of action for negligence under the Act had been stated.

Upon the assumption that silicosis when caused by the employment is a compensable employee "injury," the adequacy of petitioner's claim turns solely on whether his original complaint alleged facts raising a triable issue of negligence. We think that under the standards heretofore set and followed by this Court,[14] the facts alleged in the complaint and taken as admitted by the demurrer clearly stated a cause of action for negligence.

Those facts have been briefly, though only partially, summarized above. They charged that respondent used in the locomotives' sanders a sand material containing a very high percentage of silica or silicon dioxide; that often the material would come to the rails from the sanders in excessive and unnecessary quantities and would there be ground to dust; that the dust containing "such usual and unusual quantity of silican [*sic*] dioxide would come" into the engine cabs and, "frequently of unusual quantity," would be breathed by petitioner; and that respondent "knew, or by the exercise of due care should have known," that the sand contained the high percentage of silicon dioxide; that "the dust would form and frequently of excessive quantity because of said sanders,"

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[14] See, *e. g.*, *Ellis* v. *Union Pacific R. Co.*, 329 U. S. 649; *Western & Atl. Railroad* v. *Hughes*, 278 U. S. 496. Cf. *Brady* v. *Southern R. Co.*, 320 U. S. 476; *Chicago, M. & St. P. R. Co.* v. *Coogan*, 271 U. S. 472.

come into the cab and be breathed by petitioner; and that over a period of time the breathing was "dangerous to the health and life and would likely cause to the plaintiff the condition resulting to the plaintiff." The complaint then stated the further allegations set forth in the margin,[15] together with the following paragraph:

> "Plaintiff further alleges that the sanding devices on said engines were all of the usual and customary type and used for the usual and customary purpose and if ordinary care was exercised in keeping them adjusted such large quantities of such sandy silica material would not escape; that plaintiff does not know whether the same kind of sand containing such high quality of silica was used by other railroads operating over or through such parts of the country of Missouri; that such sanding devices operated in the same manner by the same means as devices on locomotives of other railroads, and if kept in normal and regular working condition would not allow such large quantities of silica dust to form as above stated."

These and other allegations sufficiently charged respondent with knowingly having used, in excessive quan-

[15] "(2) Defendant negligently failed to furnish plaintiff a reasonably safe place in which to work in that the locomotives on which plaintiff was required to work as fireman were supplied with sand for the sanders thereof which contained a very high percentage of silica or silican [*sic*] dioxide as above, and defendant knew such fact and still defendant used same and used said engines under the conditions above described.

"(3) Although the defendant was using sandy substance containing such quantity of silica, and using said locomotives that would cause and allow large quantities of silica dust containing silica to be created and come into the cab and be inhaled, yet defendant negligently failed to warn the plaintiff and negligently failed to furnish him with a respirator or device to prevent the inhalation of said silica dust."

tities due in part to faulty adjustment of the sanders and respondent's failure to use due care in adjusting them, a dangerous sand material likely to cause silicosis and in fact causing petitioner to contract it and become permanently disabled. This would seem to be clearly adequate for stating a cause of action for negligence resulting in injury within the meaning of the statute and the applicable judicial standards to which we have referred. All the usual elements are comprehended, including want of due or ordinary care, proximate causation of the injury, and injury within our assumption for present purposes of statutory coverage.

To sustain the contrary view, however, the Missouri Supreme Court seems to have ruled as a matter of law that respondent had adhered to the customary standards of the trade, stressing the admission in petitioner's complaint that the sanding devices alleged to have been faultily adjusted were of the kind ordinarily used throughout the railroad industry. Contrary to the court's apparent conclusion, this obviously was not an admission that respondent had complied with the usual standards of the trade. There was neither admission by petitioner nor evidence of anything more than that respondent's sanders were "all of the usual and customary type" which, if kept properly adjusted by ordinary care, would not have allowed such large and excessive quantities of silica dust to escape, concentrate in the cab, and be breathed by petitioner. There was no admission that other railroads generally or in the region customarily used such high silica content materials for sanding purposes or that, if they did, they did not take steps to minimize potentially harmful effects. Moreover, assuming the premise that maintenance of trade standards negatives negligence, we cannot grasp its significance in this context absent any indication

that *faultily adjusted* sanding devices are the rule rather than the exception on American steam locomotives.

But we also reject the premise, for we think that negligence, within the meaning of the Federal Employers' Liability Act, attached if respondent "knew, or by the exercise of due care should have known," that prevalent standards of conduct were inadequate to protect petitioner and similarly situated employees. Cf. *Hill* v. *Atlantic Coast Line R. Co.*, 336 U. S. 911, reversing 229 N. C. 236. See also *Sadowski* v. *Long Island R. Co.*, 292 N. Y. 448, 456–457.[16] Respondent's knowledge, actual or constructive, of the alleged inadequacies of the sanding equipment was a jury question. Whether petitioner was then or now would be able to shoulder the burden of proving respondent's knowledge we need not surmise, though the evidence adduced by petitioner at trial under the Boiler Inspection Act—indicating that others besides petitioner had observed and reported defects in respond-

[16] The decision in *Sadowski* v. *Long Island R. Co.*, 292 N. Y. 448, sustaining a recovery for silicosis under the Federal Employers' Liability Act, contained the following statements, which are relevant to the apparent ruling of the Missouri Supreme Court with respect to compliance with customary trade standards: "Evidence that *some* railroads furnished no such contrivances as plaintiff claimed were necessary for the use of men working under similar conditions or furnished similar places to work for men doing work similar to that required of plaintiff does not establish, as matter of law, that no such contrivances or no different place in which to work or no different appliances to carry on the work were required in the case at bar in the exercise of ordinary care. The ultimate question of fact was not what particular protective means someone else used in similar work. It was whether or not, under the particular conditions described in this case, the defendant furnished plaintiff a reasonably safe place in which to work and such protection in connection with his work against the inhalation of silica dust as would be expected of a person in the exercise of ordinary care under those conditions." 292 N. Y. at 456–457.

ent's locomotive equipment—underscores our insistence that issues of fact are matters for the jury.[17]

Accordingly we think the state court's ruling that the facts stated in the original complaint were insufficient to constitute a charge of negligence on respondent's part, within the meaning of the Federal Employers' Liability Act considered apart from the effect of the Boiler Inspection Act, was wrong and must be overruled. What was said by the New York Court of Appeals in *Sadowski* v. *Long Island R. Co., supra* at 455–456, in sustaining a recovery for silicosis under the Act, fits very closely the facts of this case and represents, in our opinion, the correct view:

> "Ordinary care must be in proportion to the danger to be avoided and the consequences that might reasonably be anticipated from the neglect (*Railroad Co.* v. *Jones,* 95 U. S. 439; *Bailey* v. *Central Vermont Ry., supra* [319 U. S. 350]). It must be commensurate with known dangers. Defendant created the

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[17] After quoting petitioner's admission referred to above, the Missouri Supreme Court's opinion stated: "The implication from this allegation is that the sanders as such were not defective, but that the trouble was maladjustment. Just what was wrong with the adjustment is not alleged, and plaintiff does not claim that the situation is one for the res ipsa loquitur rule." 352 Mo. at 219.

The inference drawn by the court was, in effect, either a rule of law that using maladjusted sanders could not be negligence even though caused, as petitioner expressly alleged, by respondent's want of due care; or alternatively a ruling, as matter of law, that to constitute a sufficient showing of negligence the allegation of maladjustment must specifically state the types and causes of it. Neither conclusion accords with applicable federal standards in such cases. If the latter was the court's intention, the matter was at most one for permitting amendment or cure by proof; if the former, the conclusion ran in the teeth both of federal and of generally accepted standards for showing negligence.

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> place in which the work was done and supervised the doing of the work by plaintiff and was aware for a period of at least sixteen years of the conditions under which plaintiff was required to work and of the means and methods by which its work was accomplished. It is a matter of common knowledge that it is injurious to the lungs and dangerous to health to work in silica dust, a fact which defendant was bound to know." [18]

The question remains whether silicosis is an "injury" within the meaning of that term as used in the Federal Employers' Liability Act. It is a novel one for this Court. But we think silicosis is within the statute's coverage when it results from the employer's negligence. Considerations arising from the breadth of the statutory language, the Act's humanitarian purposes, its accepted standard of liberal construction in order to accomplish those objects, the absence of anything in the legislative

[18] Nor do we find merit in respondent's contention that Urie, prior to the 1939 amendment abolishing assumption of risk as a defense to ordinary negligence suits under the Federal Employers' Liability Act, 45 U. S. C. § 54, 53 Stat. 1404, amending 35 Stat. 66, assumed the risk of injury. Nothing in Urie's original complaint remotely suggests such knowledge on his part of the likelihood of contracting silicosis as would justify the conclusion that Urie "anticipated and decided to chance the particular risk . . . ." *Owens* v. *Union Pacific R. Co.*, 319 U. S. 715, 723. Accordingly we are not called on to determine whether any retroactive effect is to be given the 1939 amendment, which this Court has described as requiring that "cases tried under the Federal Act . . . be handled as though no doctrine of assumption of risk had ever existed." *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, 64. Specifically we need not consider whether, even assuming the amendment was not intended to cover injuries accruing before its enactment but sued on thereafter (an open question in this Court, see *Owens* v. *Union Pacific R. Co.*, *supra* at 725), the amendment nonetheless covers injuries which, like Urie's, accrued and were sued on thereafter but where the beginning of the alleged assumption of risk may have antedated the amendment.

history indicating a congressional intent to require a restricted interpretation or expressly to exclude such occupational disease, and the trend of existing authorities dealing with the question, combine to support this conclusion.

We recognize of course that, when the statute was enacted, Congress' attention was focused primarily upon injuries and death resulting from accidents on interstate railroads.[19] Obviously these were the major causes of injury and death resulting from railroad operations. But accidental injuries were not the only ones likely to occur. And nothing in either the language or the legislative history discloses expressly any intent to exclude from the Act's coverage any injury resulting "in whole or in part from the negligence" of the carrier. If such an intent can be found, it must be read into the Act by sheer inference.

The language is as broad as could be framed: "any person suffering injury while he is employed"; "such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier"; "by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances," etc. On its face, every injury suffered by any employee while employed by reason of the carrier's negligence was made compensable. The wording was not restrictive as to the employees covered; the cause of injury, except that it must constitute negligence attributable to the carrier; or the particular kind of injury resulting.

To read into this all-inclusive wording a restriction as to the kinds of employees covered, the degree of negligence required, or the particular sorts of harms inflicted, would be contradictory to the wording, the remedial and humanitarian purpose, and the constant and established

[19] See 42 Cong. Rec. 4265, 4426–4439, 4526–4551, 4755; H. R. Rep. No. 1386, 60th Cong., 1st Sess.; S. Rep. No. 460, 60th Cong., 1st Sess.

course of liberal construction of the Act followed by this Court.[20]

We recognize, with respondent, that the Federal Employers' Liability Act is founded on common-law concepts of negligence and injury, subject to such qualifications as Congress has imported into those terms. If respondent were right in suggesting that the common law does not recognize occupational disease as a category of compensable injury, he would lend substance to the argument that Congress' use of the word "injury" was less broad than the word's surface connotation indicates. However, although the contrary view has been advanced,[21] we are satisfied that the difficulties which have attached to tort recovery for occupational disease inhere not in the nature of the wrong but in the difficulty of proving negligence. For, as the Ohio Supreme Court observed with reference to silicosis, "In the early period of industrial development there was little medical knowledge regarding the origin of diseases peculiar to the various employments . . . ." *Triff* v. *National Bronze & Aluminum Foundry Co.*, 135 Ohio St. 191, 195. We do not doubt that at "common law the incurring of a disease or harm to health is such a personal wrong as to warrant a recovery if the other elements of liability for tort are present." [22]

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[20] "The Act is not to be narrowed by refined reasoning . . . . It is to be construed liberally to fulfill the purposes for which it was enacted . . . ." *Jamison* v. *Encarnacion*, 281 U. S. 635, 640. Similarly, the Boiler Inspection Act, "like the Safety Appliance Act, is to be liberally construed in the light of its prime purpose, the protection of employees and others by requiring the use of safe equipment." *Lilly* v. *Grand Trunk R. Co.*, 317 U. S. 481, 486.

[21] See, e. g., *Cell* v. *Yale & Towne Mfg. Co.*, 281 Mich. 564, 566; but cf. *id.* at 567–568.

[22] *Hurle's Case*, 217 Mass. 223, 224; see *Hood & Sons* v. *Maryland Casualty Co.*, 206 Mass. 223; cf. *Gentry* v. *Swann Chemical Co.*, 234 Ala. 313, 317–318. See Banks, Employer's Liability for Occupational Diseases, 16 Rocky Mt. L. Rev. 60, 61–64.

Viewing the Federal Employers' Liability Act as a negligence statute, we think that arguments drawn from the coverage accorded occupational diseases in state workmen's compensation statutes cannot control the present inquiry. And yet we may note in passing that decisions under such statutes, to whatever extent they may be thought relevant, offer little support to respondent's narrow view of the federal legislation before us. True it is that the British Workmen's Compensation Act of 1897, 60 & 61 Vict. c. 37, although covering anthrax contracted by claimant from a particular and identifiable processing of wool, *Turvey* v. *Brintons, Ltd.*, [1904] 1 K. B. 328, affirmed [1905] A. C. 230, was held to exclude gradual lead poisoning. *Steel* v. *Cammell, Laird & Co.*, [1905] 2 K. B. 232. But it is equally true that the statute there construed provided for compensation only in cases of "personal injury *by accident,*" (emphasis added), a limitation much stressed by the opinions in *Steel* v. *Cammell, Laird & Co., supra.* And see *Walker* v. *Lilleshall Coal Co.*, [1900] 1 Q. B. 488. Decisions in this country have uniformly followed the early British rule in construing such terms as "accident" and "accidental injury," as well as "personal injury by accident." [23]

But decisions construing "personal injury"—more nearly akin to the simple "injury" of the Federal Employers' Liability Act—are in conflict. Thus the Supreme

[23] See, e. g., *Jeffreyes* v. *Sager Co.*, 198 App. Div. 446, affirmed 233 N. Y. 535; *Iwanicki* v. *State Industrial Accident Commission,* 104 Ore. 650. Restrictive constructions of the term "accident" and its variants have generally been followed by agitation, now largely successful, for legislation specifically extending compensation to occupational disease. See, *e. g.*, Perry, Occupational Disease Legislation, 5 Newark L. Rev. 83; Occupational Disease Compensation, 26 Am. Lab. Leg. Rev. 2; Andrews, The Tragedy of Silicosis, *id.* at 3. For local studies of the problems posed see Owens, Diseases and Injuries to Health under the Wisconsin Workmen's Compensation Act, 1945 Wis. L. Rev. 357; 3 John Marshall L. Q. 241.

Court of Ohio excluded occupational diseases in view of the special legislative and constitutional context of the statute considered, while recognizing that otherwise it would be "no difficult matter to bring within the purview of the words 'personal injuries sustained in the course of employment' occupational diseases incurred in course of employment." *Industrial Commission* v. *Brown,* 92 Ohio St. 309, 312–313; cf. *Industrial Commission* v. *Roth,* 98 Ohio St. 34. The Connecticut Supreme Court, relying on its common-law view that "typical" occupational diseases were not compensable, likewise excluded occupational diseases from its "personal injury" statute. *Miller* v. *American Steel & Wire Co.,* 90 Conn. 349. But against this line of authority may be set the view of the Supreme Judicial Court of Massachusetts, speaking by Chief Justice Rugg, which held that blindness caused by noxious industrial vapors was a "personal injury" within the meaning of the Massachusetts statute. *Hurle's Case,* 217 Mass. 223.

Consonant with the Massachusetts statute is the one compensation act the meaning of which may be thought directly to bear on congressional use of the word "injury" in the federal negligence statute with which we are today concerned. The Federal Employees' Compensation Act of May 30, 1908, 35 Stat. 556, approved less than two months after the Federal Employers' Liability Act, provided compensation for certain classes of federal employees "injured in the course of . . . employment." Under this statute compensation was awarded for, *inter alia,* inhalation of dust and fine scale,[24] lead poisoning,[25]

[24] Claim of Edward Edmonds, June 23, 1913, Opinions of Solicitor, U. S. Department of Labor (1915) 259.

[25] Claim of Willard E. Jule, July 28, 1913, Opinions of Solicitor, U. S. Department of Labor (1915) 261; cf. Claim of C. M. Arata, Dec. 31, 1913, *id.* at 264 (lead poisoning and bronchitis).

cardiac hypertrophy caused by inhalation of ether,[26] and throat tuberculosis aggravated by brass poisoning.[27] In short, the workmen's compensation cases offer little com-

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[26] Claim of Basil E. Clark, Apr. 11, 1914, Opinions of Solicitor, U. S. Department of Labor (1915) 270.

[27] Claim of Edward Devine, Feb. 9, 1915, Opinions of Solicitor, U. S. Department of Labor (1915) 277. Whether the earlier decision that pneumonia was not compensable, Claim of John Sheeran, Apr. 25, 1910, 28 Op. Atty. Gen. 254, is consistent with the foregoing cases, or with cases awarding compensation for "the bends," Claim of Wm. Murray, Nov. 3, 1911, Opinions of Solicitor, U. S. Department of Labor (1915) 239, or sunstroke, Claim of J. J. Walsh, Mar. 16, 1911, *id.* at 231, we need not determine; Congress' dissatisfaction with the distinction is clear from the course of subsequent legislation:

When the Federal Employees' Compensation Act of May 30, 1908, was superseded in 1916 by the broader and still extant general federal employee compensation system, 5 U. S. C. § 751 *et seq.*, the statute as originally enacted provided compensation for "disability" or "personal injury" without further qualification or definition. 39 Stat. 742. Proposals specifically to include occupational disease were rejected, at least in part, for the reasons that at the committee hearings "there was considerable difficulty in defining the term 'occupational disease'; and it was also called to our attention that in quite a number of cases in a number of States the court held this language which we have in the bill would cover occupational diseases in certain cases—at least a number of them . . . ." 53 Cong. Rec. 10899. In 1924 the 1916 Act was amended, 43 Stat. 389, "to correct two rulings of the Comptroller General of the United States . . . ." H. R. Rep. No. 280, 68th Cong., 1st Sess. 1. One of the rulings remedied was that occupational diseases were not included within the 1916 Act; the other ruling was that the Comptroller General had power to review decisions of the United States Employees' Compensation Commission. As to the first of these errors, the House Judiciary Committee, in reporting out the 1924 amendment, expressly referred to its 1916 report, H. R. Rep. No. 678, 64th Cong., 1st Sess. 7, to show that in drafting the 1916 Act "the committee intended to remedy the inadequacy of the act of May 30, 1908, with reference to 'occupational diseases.'" H. R. Rep. No. 280, 68th Cong., 1st Sess. 3. See 65 Cong. Rec. 8154.

fort to respondent's view of the Federal Employers' Liability Act.

While no decision of this Court involving the Federal Employers' Liability Act has dealt specifically with silicosis, the New York Court of Appeals, as we have indicated above, has sustained recovery under the Act for that disease when resulting from the carrier's negligence. This was done in circumstances not substantially different from those alleged in petitioner's original complaint, except that the facts involved no possible application of the Boiler Inspection Act. *Sadowski* v. *Long Island R. Co., supra.* Moreover, other state and federal decisions have authorized recovery under the Act for injuries not caused by accidental or violent means. These include *Shelton* v. *Thomson,* 148 F. 2d 1; 157 F. 2d 709, where recovery was permitted for carbon monoxide poisoning; *B. & O. R. Co.* v. *Branson,* 128 Md. 678, reversed on other grounds, 242 U. S. 623, in which recovery was allowed for paint poisoning. Cf. *C. R. I. & P. R. Co.* v. *Cheek,* 105 Okla. 91. Not all of these decisions could be sustained if the statutory term "injury" were held to require that the harm suffered from the employer's negligence must be confined to that inflicted by "external, violent and accidental" means or be an "accidental injury," as respondent's narrow view of the statute's coverage seems to contemplate.

We would be most hesitant to adopt a construction of "injury" as used in this Act which would overrule the decisions last cited or seriously impair their authority. We think they were made in the spirit the statute contemplated for its administration and application. That spirit is one not in conformity with importing nice distinctions in applying the Act's broad and general terms or cutting down their full scope by inference or implication.

In our view, when the employer's negligence impairs or destroys an employee's health by requiring him to work

under conditions likely to bring about such harmful consequences, the injury to the employee is just as great when it follows, often inevitably, from a carrier's negligent course pursued over an extended period of time as when it comes with the suddenness of lightning. Silicosis is as much "injury," leading in time as certainly to permanent disability, as scalding from a boiler's explosion. We do not think the mere difference in the time required for different acts of negligence to take effect and disclose their harmful, disabling consequences would justify excluding the one type of injury from the Act's coverage or that such an exclusion would be consistent with its language, purposes, or unvarying standards of construction.

Accordingly it follows, as the Missouri Supreme Court assumed on the first appeal, that petitioner's original complaint did not fail in stating a cause of action under the Federal Employers' Liability Act for want of allegation of sufficient injury. Petitioner was entitled to go to trial at that time without restriction requiring him to show violation of the Boiler Inspection Act.

This conclusion, if it were all that is involved in the case, would compel reversal of the state supreme court's decision and remand for trial upon the original complaint. However, it remains to consider the effect of the Boiler Inspection Act and whether the verdict rendered for petitioner under that Act, in conjunction with the Federal Employers' Liability Act, should be allowed to stand.

## III.

By virtue of the course taken by the case in the state courts, the Missouri Supreme Court did not squarely hold that silicosis was not an injury within the coverage of the Federal Employers' Liability Act considered apart from the Boiler Inspection Act. As the case took shape that question did not arise on the first appeal. And by

virtue of the ruling on the remand for trial, that the only cause of action stated was that arising under the Boiler Inspection Act, the court on the second appeal treated the question whether silicosis was a compensable injury substantially as if the Boiler Inspection Act was a wholly independent statute, unrelated in the scope of its coverage, for purposes of employees' suits for breach of its provisions, to the Employers' Liability Act's terms, *i. e.*, as if the question arose solely under the Boiler Inspection Act.

But by its own terms the Boiler Inspection Act, like the Safety Appliance Acts,[28] does not purport to confer any right of action upon injured employees. It merely makes violation of its prohibitions "unlawful." [29] Yet it has been held consistently that the Boiler Inspection Act supplements the Federal Employers' Liability Act by imposing on interstate railroads "an absolute and continuing duty" to provide safe equipment. *Lilly* v. *Grand Trunk R. Co., supra* at 485; *Southern R. Co.* v. *Lunsford,* 297 U. S. 398, 401; cf. *Baltimore & O. R. Co.* v. *Groeger,* 266 U. S. 521, 528–529.

This conclusion stems, not from any express statutory language, but by implication from §§ 3 and 4 of the Federal Employers' Liability Act, 45 U. S. C. §§ 53, 54, which bar pleadings of, respectively, contributory negligence and assumption of risk "in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee." [30] But it is § 1 of the Federal Employers'

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[28] 45 U. S. C. § 1 *et seq.*

[29] See note 4 and text.

[30] In ordinary negligence claims under the Federal Employers' Liability Act, contributory negligence while not a bar to the action is available in diminution of damages, 45 U. S. C. § 53, 35 Stat. 65, 66. Assumption of risk was a complete defense to negligence claims, *Seaboard Air Line* v. *Horton,* 233 U. S. 492, 503, until its abolition

Liability Act, and not §§ 3 and 4, which expressly creates a cause of action for negligence; and by the same token it is § 1 which is the basis of an employee's suit for violation of the Boiler Inspection or Safety Appliance Acts. For where § 1 "refers to 'any defect or insufficiency, *due to its negligence,* in its cars, engines, appliances,' etc., it clearly is the legislative intent to treat a violation of the Safety Appliance Act as 'negligence'—what is sometimes called negligence *per se.*" *San Antonio & A. P. R. Co.* v. *Wagner,* 241 U. S. 476, 484.

In this view the Safety Appliance Acts, together with the Boiler Inspection Act, are substantively if not in form amendments to the Federal Employers' Liability Act. They dispense, for the purposes of employees' suits, with the necessity of proving that violations of the safety statutes constitute negligence; and making proof of such violations is effective to show negligence as a matter of law. Thus taken, as has been the consistent practice, the Boiler Inspection and Safety Appliance Acts cannot be regarded as statutes wholly separate from and independent of the Federal Employers' Liability Act. They are rather supplemental to it, having the purpose and effect of facilitating employee recovery, not of restricting such recovery or making it impossible.

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in 1939. 45 U. S. C. § 54, 53 Stat. 1404, amending 35 Stat. 66. See *Tiller* v. *Atlantic Coast Line R. Co.,* 318 U. S. 54.

The quoted statutory phrase was held to acknowledge creation of a cause of action "under the Federal Employers' Liability Act" for personal injury to an employee due to violation of the Safety Appliance Acts, 45 U. S. C. § 1 *et seq.,* since, "By the phrase 'any statute enacted for the safety of employees' the Congress evidently intended to embrace its Safety Appliance Acts." *Moore* v. *C. & O. R. Co.,* 291 U. S. 205, 210. Similarly an employee injury suit alleging violation of the Boiler Inspection Act is brought "under the Federal Employers' Liability Act . . . ." *Lilly* v. *Grand Trunk R. Co.,* 317 U. S. 481, 485.

Regarded in this light, the Boiler Inspection and Safety Appliance Acts would take on highly incongruous character if, at the very time they were expediting employee recovery under the Employers' Liability Act by substituting the comparatively light burden of proving violation of their prohibitions for the heavier one of proving negligence, they were also contracting the scope of compensable injuries and to that extent defeating recovery altogether. We do not think that Congress intended to act so inconsistently or that, by dispensing with the employee's burden of proving negligence in certain classes of Employers' Liability Act suits, it had any purpose to withdraw from that Act's coverage any injury caused by the employment which was covered by its terms. In the absence of any specific showing that Congress had in mind such a restrictive and inconsistent object, we are not free to create one by inference, more especially when it is derived from approaching the problem as if the Boiler Inspection and Safety Appliance Acts were wholly independent of and separate in design and purpose from the Employers' Liability Act.

The congressional purpose underlying the Boiler Inspection Act is basically the same as that underlying the Safety Appliance Acts and the Employers' Liability Act. In requiring that the boiler, and, not long after, that the entire locomotive, be maintained "in proper condition and safe to operate," Congress by its own statement was attempting to insure that such equipment "be employed in . . . active service . . . without unnecessary peril to life or limb . . . ." 45 U. S. C. § 23. Certain requirements of the Safety Appliance Acts, as for example the use of the automatic coupler, 45 U. S. C. § 2, are made mandatory by express statutory language. Others, like those of the Boiler Inspection Act, simply outline a general standard which may be more specifically articulated in rules enunciated by the carriers subject to the approval

of the Interstate Commerce Commission, 45 U. S. C. § 28, or directly promulgated by the Commission, *Napier* v. *Atlantic Coast Line R. Co.*, 272 U. S. 605, 611–613, on the basis of proper findings. *United States* v. *B. & O. R. Co.*, 293 U. S. 454. Violations of the Commission's rules are violations of the statute, giving rise not only to damage suits by those injured, *Lilly* v. *Grand Trunk R. Co., supra,* but also to money penalties recoverable by the United States. 45 U. S. C. § 34.

As with the Employers' Liability Act, we do not doubt that the prime purpose of the Boiler Inspection Act was the protection of railroad employees and perhaps also of passengers and the public at large, cf. *Fairport, P. & E. R. Co.* v. *Meredith,* 292 U. S. 589, from injury due to industrial accident. The safety of all those affected by railroading was uppermost in the legislative mind. But again, as with the Employers' Liability Act, we cannot accept the view that protection of employee health is not embraced by the congressional plan.[31] Indeed, as to the Boiler Inspection Act, this Court has twice had

[31] Respondent places some reliance on the proposition that congressional limitation of the Boiler Inspection Act to accidental injury must be inferred from the provision requiring the carrier to report every locomotive "accident" resulting in "serious injury." 45 U. S. C. § 32. We see no reason to think that a policy requiring the reporting of all injuries the causes of which are readily identifiable in terms of time and place compels the conclusion that other injuries, the origins of which may be remote and ill-defined at the moment of diagnosis, should not be compensable when the carrier's underlying responsibility becomes a matter of demonstrable fact. It is to be noted, furthermore, that an argument similar to respondent's was rejected with reference to congressional intent to include occupational diseases in the 1916 Federal Employees' Compensation Act, H. R. Rep. No. 280, 68th Cong., 1st Sess. 3, and, although advanced with reference to the 1908 Federal Employees' Compensation Act, Claim of A. E. Clark, Dec. 17, 1908, Opinions of Solicitor, U. S. Department of Labor (1915) 188, 190, did not bar compensation of the questionably "accidental" injuries described in the text at notes 24–27 *supra.*

occasion to make clear its contrary view, *Napier* v. *Atlantic Coast Line R. Co., supra; United States* v. *B. & O. R. Co., supra* at 458–459.

In the *Napier* case the question for decision was the validity of Wisconsin and Georgia regulations requiring locomotives to be equipped with, respectively, cab curtains and an automatic fire door. Each state regulation was challenged as an invasion of power over interstate commerce which Congress, through enactment and amendment of the Boiler Inspection Act, had seen fit to exercise. Each regulation was defended as being directed to protection of the health, rather than the safety, of railroad employees. The unanimous Court, speaking through Mr. Justice Brandeis, struck down both regulations "because the Boiler Inspection Act, as we construe it, was intended to occupy the field. The broad scope of the authority conferred upon the Commission leads to that conclusion. Because the standard set by the Commission must prevail, requirements by the States are precluded, however commendable or however different their purpose." 272 U. S. at 613.

This last-quoted sentence merely recognized that theretofore the Interstate Commerce Commission had not regulated with an eye to employee health; it did not and does not support the view that employee health was thought not to be within the compass of the Act, as other language in *Napier,* 272 U. S. at 611–613, makes amply clear:

> "The requirements here in question are, in their nature, within the scope of the authority delegated to the Commission. An automatic firedoor and an effective cab curtain may promote safety. Keeping firemen and engineers in good health, like preventing excessive fatigue through limiting the hours of service, clearly does so, although indirectly . . . .

> "If the protection now afforded by the Commission's rules is deemed inadequate, application for relief must be made to it. The Commission's power is ample."

Thus the Boiler Inspection Act vests in the Interstate Commerce Commission rule-making power adequate to protect employees against disease as well as against accident; and the power to make rules for employee health has been exercised.[32]

In view of these considerations, it cannot be said that the Commission's rule-making power is confined to safe-

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[32] *E. g.*, the requirement for closing "unnecessary or excessive openings in locomotive cabs," imposed by I. C. C. Rule 116 (g), 49 C. F. R. § 91.116 (g), after the *Napier* decision, was, as the opinion announcing the rule makes plain, designed to protect the health of firemen and engineers from wind, snow and rain. *Wisconsin R. R. Comm'n* v. *A. & R. R. Co.*, 142 I. C. C. 199. The rule, not squarely applicable to the present case since limited to the winter months, was formulated after extended hearings in a proceeding in which the Missouri Pacific, like almost every other major American railroad, was a named party defendant. *Wisconsin R. R. Comm'n* v. *A. & R. R. Co., supra,* Transcript of Record, Complaint of Railroad Commission of Wisconsin, p. 17. In the light of the instant case, it is of interest to note that the Engineers' Brotherhood and the Firemen's Brotherhood, interveners in support of the proposed rule, alleged need for protection from, *inter alia,* "excessive . . . sand and dust storms." Transcript of Record, *supra,* Joint Petition of Intervention of Alvanley Johnston and D. B. Robertson, p. 3; Amended Joint Petition of Intervention of Alvanley Johnston and D. B. Robertson, p. 3. No substantial evidence seems to have been adduced to support the allegation, Transcript of Record, *supra,* Brief for Intervening Brotherhoods, pp. 14–15, although there was evidence of severe winter wind in Missouri, Transcript of Record, *supra,* at 2056, and in other parts of the country, *id.* at 2136, 2369, 4541, 5005, 6088, 6350. The Interstate Commerce Commission noted in its opinion that "The amendments to rule 116 should be regarded as minimum requirements which are not intended to take care of the most extreme conditions." 142 I. C. C. 199, 210.

guarding against accidental injury; nor are we free to lay down a rule of law which would so restrict the Commission's authority. Since we are unable to find in the Boiler Inspection Act's terms, purposes or legislative history either explicit provision or any sufficient basis for inferring one cutting down the scope of recovery allowed under § 1 of the Employers' Liability Act, we conclude that the injury for which recovery may be had for violation of the Boiler Inspection Act is no narrower in scope than the injury for which recovery is authorized under § 1 of the Employers' Liability Act.

We hold that petitioner's injury is one compensable under the Boiler Inspection Act. We hold further, in the light of the trial instructions and such evidence as appears in the record before us,[33] that the jury was justified in finding (1) that respondent breached the Boiler

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[33] The only evidence before us is the partial summary of petitioner's case by the Missouri Supreme Court on the second appeal: "Bruce Brill, a witness for plaintiff, testified he had worked at the Missouri Pacific roundhouse at Joplin for about 18 years and until November 4, 1942; that the 'engines that came in . . . I would say most of them, at least three out of five, would have the sanders reported in bad order . . . maybe it was a broken nipple, something in the dome, or a loose connection.' A broken nipple would cause the sand to dribble on to the rails under the drivers, and the 'speed would suck it up into the cab after it was ground under the wheels.' The dust would be sucked in 'through the deck and around the boiler head or openings in the grate shakers.' When the witness cleaned out the cabs he found sand particles and roadbed dust. . . . Plaintiff testified the (sand) dust would 'come up through the openings in the cab floors, around the grate shaker riggings and the stoker head in the deck of the engine on each side of the fire door against the boiler head. . . . Sometimes there would be wide cracks between the boiler head and the deck floor where the bolts were broken off and it was worn and loose. The deck boards would be cracked and sometimes slivered out, and it would come through any openings like that; . . . would collect on the lights; . . . would get our clothing very dusty; . . . make your mouth and nose very dry.'" 357 Mo. at 744–745.

Inspection Act (as more specifically articulated in I. C. C. Rule 120, governing sanders)[34] and (2) that such breach was a proximate cause of petitioner's injury.

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[34] I. C. C. Rule 120, 49 C. F. R. § 91.120, applicable to steam locomotives, provides: "Locomotives shall be equipped with proper sanding apparatus, which shall be maintained in safe and suitable condition for service, and tested before each trip. Sand pipes must be securely fastened in line with the rails."

It is of no consequence that Rule 120 may not have been specifically called to the jury's attention. *Lilly* v. *Grand Trunk R. Co.*, 317 U. S. 481, 488–489. It is urged upon us that Rule 120 was designed to insure an adequate auxiliary braking system rather than to protect employees against silicosis, and hence that, notwithstanding respondent's breach of the rule and the governing statute, petitioner cannot complain of an injury flowing from the breach which was not the injury the Interstate Commerce Commission sought to guard against. We do not dispute the narrow scope of Rule 120; nor do we doubt that conventional tort doctrine imposes absolute liability for violation of a statutory duty only where the injury is one the statute was designed to prevent. See, e. g., *DiCaprio* v. *New York Central R. Co.*, 231 N. Y. 94; but cf. the remarks of Mr. Justice Brewer in *Atchison, T. & S. F. R. Co.* v. *Reesman*, 60 F. 370, 373. But we think the liability imposed by the Boiler Inspection Act is of broader character and that the correct rule is the one laid down in *Louisville & N. R. Co.* v. *Layton*, 243 U. S. 617, 621, which this Court has had repeated occasion to apply in connection with the Safety Appliance Acts: "The language of the acts and the authorities we have cited make it entirely clear that the liability in damages to employees for failure to comply with the law springs from its being made unlawful to use cars not equipped as required,—not from the position the employee may be in or the work which he may be doing at the moment when he is injured. This effect can be given to the acts and their wise and humane purpose can be accomplished only by holding, as we do, that carriers are liable to employees in damages whenever the failure to obey these safety appliance laws is the proximate cause of injury to them when engaged in the discharge of duty." See *Davis* v. *Wolfe*, 263 U. S. 239, 243; *Coray* v. *Southern Pacific Co.*, 335 U. S. 520, 522–523; *Brady* v. *Terminal R. Assn.*, 303 U. S. 10, 16; *Swinson* v. *Chicago, St. P., M. & O. R. Co.*, 294 U. S. 529, 531; *Fairport, P. & E. R. Co.* v. *Meredith*, 292 U. S. 589. Cf. *Minneapolis & St. Louis R. Co.* v. *Gotschall*, 244 U. S. 66; *St. Louis & S. F. R. Co.* v. *Conarty*, 238 U. S. 243.

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We conclude that petitioner stated a valid claim for negligent injury under the Federal Employers' Liability Act on his first appeal and that petitioner stated on both appeals and proved on his second a valid claim for injury flowing from violation of the Boiler Inspection Act. The record before us reveals no error in the jury's verdict for petitioner, which was based on the second theory of the case; the damages awarded are consistent with either theory. We have considered and disposed of the various grounds of affirmance urged by respondent; grounds not urged, whether on the record before us or on such supplemental portions of the state court record as respondent might have asked us to review, are waived. Accordingly the judgment is reversed and the cause is remanded with instructions to reinstate the judgment on the verdict for petitioner.

*Reversed.*

MR. JUSTICE FRANKFURTER, concurring in part.

At the risk of wearisome reiteration it is relevant to say again that the common-law concept of negligence is an antiquated and uncivilized basis for working out rights and duties for disabilities and deaths inevitably due to the conduct of modern industry. In the conscious or unconscious endeavor not to have the human cost of industry fall with cruel injustice upon workers and their families, the law of negligence gives rise to endless casuistry. So long as the gamble of an occasional heavy verdict is not replaced by the security of a modern system of insurance, courts must continue to apply the notion of negligence in situations for which it was never intended. Therefore, if a claim is made that an injury is causally related to a carrier's failure to maintain standards of care appropriate for employment on a railroad, the Federal Employers' Liability Act entitles an employee to establish that claim to a jury's satisfaction. Damages are re-

coverable under that Act for suffering "injury." That term, it seems to me, is sufficiently broad to include bodily injury which nowadays is more specifically characterized as "occupational disease." Accordingly, I agree that recovery may be had under the Federal Employers' Liability Act for silicosis, where the facts sustain such a claim, as is illustrated by the case of *Sadowski* v. *Long Island R. Co.*, 292 N. Y. 448, 55 N. E. 2d 497.

On the other hand, I agree with the Missouri Supreme Court that occupational diseases cannot be fitted into the category of "accidents" for which the Boiler Inspection Act devised a scheme of regulation and a basis of liability. 36 Stat. 913, as amended, 45 U. S. C. §§ 22–34. I think I appreciate the humane impulse which seeks to bring occupational diseases within such a regime. But due regard for the limits of judicial interpretation precludes such free-handed application of a statute to situations outside its language and its purpose. To do so, moreover, is, I believe, a disservice to the humane ends which are sought to be promoted. Legislation is needed which will effectively meet the social obligations which underlie the incidence of occupational disease. See National Insurance (Industrial Injuries) Act, 1946, 9 & 10 Geo. 6, 488, particularly Part IV. The need for such legislation becomes obscured and the drive for it retarded if encouragement is given to the thought that there are now adequate remedies for occupational diseases in callings subject to Congressional control. The result of the present decision is to secure for this petitioner the judgment which the jury awarded him. It does not secure a proper system for dealing with occupational diseases.

I would reverse this judgment and remand the case to the Supreme Court of Missouri for proceedings consistent with this opinion.

MR. JUSTICE REED, MR. JUSTICE JACKSON, and MR. JUSTICE BURTON join in this opinion.

# UNITED STATES *v.* PENN FOUNDRY & MANUFACTURING CO., INC.

CERTIORARI TO THE COURT OF CLAIMS.

No. 253. Argued January 7, 10, 1949.—Decided May 31, 1949.

It was error for the Court of Claims to give a judgment to a manufacturer against the United States for loss of anticipated profits under a contract for the manufacture of gun mounts for the Navy which was cancelled a few days after it was awarded, when the Court failed to make any affirmative finding that the manufacturer was ready and able to perform its contractual obligations and when it made affirmative findings which precluded any inference that such readiness and capacity existed. Pp. 199, 210–214.

(a) In the absence of actual tenders of the required gun mounts, the manufacturer's readiness and capacity to deliver them in the quantities and at the times required by the contract was essential to its right to receive payments under the contract. Pp. 210–211.

(b) The affirmative findings in this case add up to an inescapable ultimate finding that the manufacturer was neither ready nor able to make the deliveries required by the contract. Pp. 202–203, 212–213.

(c) A finding that, "If the plaintiff had been permitted to perform its contract, it would have made a net profit of not less than $80,000," was no more than a rough estimate of the amount of its reasonably anticipated profits (if the contract were completed) and cannot be taken as a finding that it was ready and able to make the deliveries upon which such profits depended. P. 213.

(d) The mere hope of being able to obtain from the Government gratuitous extensions of time or concessions in the numbers of gun mounts to be delivered cannot justify an award of money damages for loss of unearned anticipated profits dependent upon such gratuitous extensions or concessions. Pp. 213–214.

110 Ct. Cl. 374, 75 F. 2d 319, reversed.

The Court of Claims awarded a judgment to a manufacturer for loss of anticipated profits under a contract for the manufacture of gun mounts for the Navy which was cancelled a few days after it was awarded. 110 Ct.

Cl. 374, 75 F. 2d 319. This Court granted certiorari. 335 U. S. 857. *Reversed,* p. 214.

*Melvin Richter* argued the cause for the United States. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Morison* and *Paul A. Sweeney.*

*Robert H. McNeill* and *David G. Bress* argued the cause for respondent. With them on the brief were *Sheldon E. Bernstein* and *T. Bruce Fuller.*

MR. JUSTICE BURTON delivered the opinion of the Court.

This is an action which was brought in the Court of Claims by the respondent, Penn Foundry and Manufacturing Company, Inc., against the United States for loss of anticipated profits alleged to have been caused by the latter's cancellation of a contract for gun mounts for the Navy. The cancellation occurred a few days after the contract had been awarded by the United States to the respondent on February 23, 1942. The question presented is whether the findings of fact made by the Court of Claims are sufficient to sustain its judgment requiring the United States to pay for such loss. 110 Ct. Cl. 374, 75 F. Supp. 319. We hold that they are not. We so hold because of (1) the absence of any finding of the readiness and capacity of the respondent to perform certain of its contractual obligations upon which its profits were contingent and (2) the presence of certain affirmative findings which preclude the drawing of any sufficient inference of such readiness and capacity from the other findings.

The record includes only the pleadings and accompanying exhibits filed in the Court of Claims and that court's special findings of fact, conclusion of law, opinion, judgment and refusal to grant a new trial. We do not have before us the report which its Commissioner made to the

Court of Claims or the testimony upon which he or that court relied. While additional claims were made by the respondent in its original petition to the Court of Claims and while the United States originally contested the binding force of the contract, the errors specified in the present proceeding question only the right of the respondent to recover $80,000 as damages for its alleged loss of anticipated profits. We granted certiorari because of the possible relation of the result in this case to claims under many war contracts cancelled by the United States. 335 U. S. 857.

The findings of fact show the following:

In 1911, the respondent bought a manufacturing plant consisting of six buildings in Waynesboro, Virginia. The main buildings, each 57 x 100 feet, had been built in 1890 and were referred to respectively as the machine shop, the foundry and the blacksmith shop. At one time the respondent manufactured circular saws and, at another, did work on brake shoes. Since 1931, the plant had been used only for minor engagements, requiring not more than four or five employees. It had been idle for some years when, late in 1940 or early in 1941, the respondent's officers became desirous of engaging in the National Defense Program. Most of those officers were then in other businesses at or near Pittsburgh, Pennsylvania. One stockholder and director was in the real estate business in Waynesboro. He had been the local manager of the plant when it was in operation and had continued thereafter as such and as the statutory agent of the company.

In January, 1941, the respondent engaged an additional man as assistant to the president and, on February 24, 1942, an engineer as general manager. In April, 1941, it submitted a proposal to the Navy for the manufacture of 500 3-inch 50-caliber gun mounts. In July, a representative of the Gun Mount Section of the Navy Department inspected the plant. Following a conference in

September, the respondent was asked by the Government to furnish information as to financial ability, commitments of subcontractors, and a detailed study of the machine tool operations, predicated upon a possible award of 150 3-inch 50-caliber mounts. In October and December, the respondent submitted additional information and slightly modified its proposals. December 22, the respondent's proposal as to prices, quantities, delivery schedule, payments and options for additional mounts was accepted as satisfactory and the respondent agreed to secure a letter from a surety company indicating that a bond of the nature required by the Navy's Bureau of Supplies and Accounts would be furnished.

The respondent received a "letter of intent," dated December 29, 1941, signed by the Paymaster General of the Navy as contracting officer and approved by the Under Secretary of the Navy. It stated that it was anticipated that the Navy Department would place an order with the respondent for the manufacture of 150 gun mounts. It specified the delivery of two complete mounts in May, 1942, three in June, five in July, and thereafter at a minimum rate of ten mounts per month. The letter also authorized the respondent to purchase materials and spare parts, subject to confirmation by the Government's purchasing officer, and to proceed with the production of the mounts in anticipation of the placing of the order for their production. However, under date of January 7, 1942, the Government held up this authorization of expenditures until such time as the respondent furnished the Government with the firm commitment of an approved surety company to act as surety on a performance bond. January 10, the respondent accepted the letter of intent. January 29, the Navy Department stated that the necessary letter from a surety company had not been received and that failure promptly to submit such a letter might result in the termination of the

letter of intent. February 3, the respondent's representatives submitted a letter from a surety company indicating that that company thought that a bond in connection with a contract of this size would have to be reinsured and that, unless some change were made in the financial setup, reinsurance would be declined. It added, however, that, if either of two suggested plans relative to refinancing were accomplished and if the respondent furnished certain information as to new key personnel to be engaged by the respondent, then the reinsurance could be obtained and the surety company could execute a bond. The findings of fact disclose a difference in the testimony as to the reaction of the Government's representative to this letter. There is no finding that the Government's requirement in this regard ever was met.

Much in the following findings of fact Nos. 5–8 is vital to the issue before us:

> "5. On January 16 and 17, 1942, plaintiff's plant was visited by inspectors of the Philadelphia Inspection District of the Navy Department to instruct plaintiff's personnel as to the Navy inspection requirements. *At the time there was no one at the plant except the watchman and the local manager. No work at all was being performed at the time.* On February 19, 1942, a production specialist from the War Production Board visited the plant. His duties were to assist production in factories in the production of naval ordnance. *At that time only the watchman was at the plant.* The production specialist inspected the plant with the local manager, who was called from his real estate office, and also talked with Mr. Johnson [the new assistant to the president], who was called to Waynesboro for that purpose. Reports of these visits were given to the Navy Department. *At that time the company was*

*not prepared to undertake work of the character proposed by the contract, and would not for an indefinite time be prepared successfully to complete a contract for 150 gun mounts. Plaintiff's foundry was incapable of production of the cast steel forgings required for the gun mounts.* It was plaintiff's plan, as shown by its proposal to the Government, to subcontract for these castings, as well as for other parts of the work. Plaintiff had contacted certain producers, who were willing to furnish castings and other parts, but *no contracts for the castings or any other parts had been made by plaintiff. There was no reason to suppose that the plaintiff could not have obtained these parts from subcontractors.* Plaintiff planned to use around 150 mechanics, skilled, semi-skilled, and unskilled, in the machining and assembling of the gun mounts. Plaintiff had expected to secure former railroad shop mechanics residing near Waynesboro as the bulk of its employees. *The construction of gun mounts is difficult and exacting work. Manufacturers experienced in somewhat similar work with large organizations and trained mechanics required from seven months to one year from the time of receiving notice to proceed until the first gun mounts were produced. Plaintiff had no manufacturing organization and no force of trained personnel to train unskilled employees. Plaintiff's proposed general manager was at this time a regular employee of another company in Ohio.* He had been assisting plaintiff in its plans under the expectation that he would sever his connection with the other company and become plaintiff's general manager. A contract between plaintiff and the engineer under the terms of which the engineer was engaged as general manager was executed on February 24, 1942.

"6. Under date of February 23, 1942, the Navy Department mailed to plaintiff a notice of award of contract, No. LL96553, for gun mounts, in the amount of $2,087,555, which notice of award was received by the plaintiff on February 24, 1942. On February 24, 1942, after it had received the notice of award, plaintiff received a telegram as follows:

"NOTICE OF AWARD CONTRACT NOS 96553 FORWARDED IN ERROR RETURN FOR CANCELLATION NO AWARD TO YOU ACKNOWLEDGE REFERRING SYMBOL SPF—
"RAY SPEAR PAYMASTER GENERAL NAVY

"On March 5, 1942, the Navy Department prepared and mailed to plaintiff a letter as follows:

. . . . . .

"*As it is apparent that you cannot secure a bond to insure faithful performance of the contract,* no contract will be issued to you, and the Letter of Intent LL–NOs–96553 (SPC), dated 29 December 1941, is hereby cancelled.

"Since no authority has been given you to incur any expenses under the Letter of Intent, there can be no liability on the Government by reason of the cancellation of the Letter of Intent.

"Please return the original and all copies of the Letter of Intent, unsigned, to the Bureau of Supplies and Accounts for cancellation.

"7. . . . *The evidence does not disclose that any expenditures or expenses were incurred in reliance on the letter of intent or notice of award of contract.*

"8. *If the plaintiff had been permitted to perform its contract, it would have made a net profit of not less than $80,000.*" (Emphasis supplied.) 110 Ct. Cl. at pp. 378–381.

We are bound by the foregoing findings in testing the court's conclusion of law and judgment that the respondent is entitled to recover $80,000 for the loss of anticipated but unearned profits. *United States* v. *Causby,* 328 U. S. 256, 267; *United States* v. *Seminole Nation,* 299 U. S. 417, 422; *United States* v. *Esnault-Pelterie,* 299 U. S. 201, 205, 206; *Crocker* v. *United States,* 240 U. S. 74, 78; *Stone* v. *United States,* 164 U. S. 380, 382, 383.

The restricted scope of the errors sought to be reached by the petition for certiorari has eliminated all questions as to the binding force of the contract.[1] The Government, however, argues that, under the then existing statutes and regulations, it had a right to cancel the contract at its option without incurring liability for the respondent's alleged loss of anticipated profits caused by such cancellation.[2] It argues also that the practice of insert-

[1] The Government's brief says in a footnote that "The finding of the court below that a binding contract was consummated is, in our view, of doubtful soundness." However, in the same brief, the Government says that "The United States does not question in this Court the Court of Claims' holding that the notice of award sent by the Award Section of the Navy Department's Bureau of Supplies and Accounts created a binding contract between the United States and respondent on February 23, 1943 [1942]." The Court of Claims said in its opinion: "We think that the Government made a contract with the plaintiff, and that no mistake of the kind which would vitiate a contract occurred." 110 Ct. Cl. at p. 385. In its specification of errors to be urged, and in its statement of the questions presented by its petition for a writ of certiorari, the Government does not question the binding force of the contract. "Only the questions specifically brought forward by the petition for writ of certiorari will be considered." Rule 38, ¶ 2, of this Court.

[2] Title II, First War Powers Act of 1941, c. 593, 55 Stat. 839, § 201, 50 U. S. C. App. § 611; Executive Order No. 9001, 3 C. F. R. Cum. Supp. 1054–1056. See also, Contract Settlement Act of 1944, c. 358, 58 Stat. 649, 41 U. S. C. § 101, *et seq.;* Act of August 7, 1946, c. 864, 60 Stat. 902, 41 U. S. C. § 106 note; Regulation No. 7, Office of Contract Settlement, 32 C. F. R. 1944 Supp., § 8006.3 (c),

ing, in each contract for war supplies, an express provision permitting such a cancellation by the United States had developed to such an extent that we should recognize the provisions as constituting a part of the formal contract which the Government stated was to follow the award made to the respondent, February 23, 1942.[3] It is

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p. 3065; Office of Contract Settlement, A History of War Contract Terminations and Settlements, p. 27 (July, 1947). As to comparable legislation affecting contracts for supplies in World War I, see Act of June 15, 1917, c. 29, 40 Stat. 182; Act of March 2, 1919, c. 94, 40 Stat. 1272; *De Laval Steam Turbine Co.* v. *United States,* 284 U. S. 61; *Barrett Co.* v. *United States,* 273 U. S. 227; *College Point Boat Corp.* v. *United States,* 267 U. S. 12; *Russell Co.* v. *United States,* 261 U. S. 514.

[3] See letter from James Forrestal, Acting Secretary of the Navy, October 10, 1943, Hearings before a Subcommittee on Contract Termination of the Senate Committee on Military Affairs on S. 1268, S. 1280 and S. J. Res. 80, 78th Cong., 1st Sess. 270–273 (1943), in which he said (p. 271):

"The Navy Department commenced in the summer of 1941 the consideration of contract termination as it might affect procurement. At that time there were few actual terminations in contemplation. Contractors were, nevertheless, questioning the Government's right to terminate contracts and fair provisions permitting such termination without cause and defining the rights of the parties in such event were deemed necessary to facilitate the urgently needed procurement and to minimize difficulties in the event of changing needs. A contract clause endeavoring to meet the procurement problem and safeguard the interests of both the Government and the contractors was then adopted and, except in respect of the ship construction contracts (a special problem), is in general form and substance in use in Navy contracts today."

See also, memorandum of the Industrial Readjustment Branch, submitted by James Forrestal, as Under Secretary of the Navy, January 11, 1944, in which it was stated that in the Navy—

"Standard termination clauses for fixed price contracts were developed late in 1941, and in general form and substance have been inserted in most contracts entered into since that time except for ship-construction contracts, which constitute a separate problem. The Department has not undertaken to modify outstanding contracts by the insertion of such clauses." Appendix II, *id.* at p. 553 (1944).

not necessary, however, to sustain those claims in order to support the disposition which we are making of this case.

The Government argues further that the amount of the damages claimed by the respondent is not established with reasonable certainty by the findings of fact. The only finding as to the amount of such damages is the ultimate finding of fact No. 8, which says that "If the plaintiff had been permitted to perform its contract, it would have made a net profit of not less than $80,000."[4] There are no findings of evidentiary or primary facts on the subject of damages or the computation of anticipated net profits. The total payment to be made to the respondent for full performance of its part of the contract was fixed by the award at $2,087,555. Accordingly, the amount of the *gross* receipts anticipated by the respondent is not a remote or speculative estimate of the kind often encoun-

[4] The scope of our review of judgments of the Court of Claims is a limited one. The early practice and rules are discussed in *Luckenbach S. S. Co.* v. *United States,* 272 U. S. 533, 536–540. At the time of all the proceedings in the Court of Claims in the instant case, the authority of this Court to review causes upon petition for a writ of certiorari was set forth expressly in the Act of February 13, 1925, c. 229, 43 Stat. 939, § 3 (b), as amended by the Act of May 22, 1939, c. 140, 53 Stat. 752, which became 28 U. S. C. § 288 (b). It provided:

"(b) In any case in the Court of Claims, . . . it shall be competent for the Supreme Court, upon the petition of either party, whether Government or claimant, to require, by certiorari, that the cause be certified to it for review and determination of all errors assigned, with the same power and authority, and with like effect, as if the cause had been brought there by appeal. In such event, the Court of Claims shall include in the papers certified by it the findings of fact, the conclusions of law, and the judgment or decree, as well as such other parts of the record as are material to the errors assigned, to be settled by the Court.

. . .

"In such cases the Supreme Court shall have authority to review, in addition to other questions of law, errors assigned to the effect that there is a lack of substantial evidence to sustain a finding of fact; *that an ultimate finding or findings are not sustained by the*

tered in claims for anticipated profits. This Court long has recognized the right to recover damages for the loss of anticipated profits when they result from a breach of contract and when there is a sufficient basis for estimating them with reasonable certainty.[5] However, finding No. 8 as to the anticipated *net* profits in the instant case stands alone. Its sufficiency is open to argument in the absence of any findings as to the costs of production. The respondent seeks support for it in the indirect light

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*findings of evidentiary or primary facts; or that there is a failure to make any finding of fact on a material issue.*" (Emphasis supplied.)

The foregoing expressly controlled the practice until repealed by the new Judicial Code, effective September 1, 1948. The new Code, 28 U. S. C. § 1255, said merely:

"Cases in the Court of Claims may be reviewed by the Supreme Court by the following methods:

"(1) By writ of certiorari granted on petition of the United States or the claimant; . . . ."

The Reviser's Notes to that Section said:

"Provisions for authority to review, in addition to other questions of law, 'errors assigned to lack of evidence to sustain a finding of facts; that an ultimate finding or findings are not sustained by findings of evidentiary or primary facts; or that there is a failure to make a finding of fact on a material issue,' *were omitted as unnecessary.*" (Emphasis supplied.) H. R. Rep. No. 308, 80th Cong., 1st Sess. A107 (1947).

[5] After discussing the general rule against the recovery of remote and speculative anticipated profits, this Court said in *Howard* v. *Stillwell & Bierce Mfg. Co.*, 139 U. S. 199, 206:

"But it is equally well settled that the profits which would have been realized had the contract been performed, and which have been prevented by its breach, are included in the damages to be recovered in every case where such profits are not open to the objection of uncertainty or of remoteness, or where from the express or implied terms of the contract itself, or the special circumstances under which it was made, it may be reasonably presumed that they were within the intent and mutual understanding of both parties at the time it was entered into. *United States* v. *Behan*, 110 U. S. 338, 345, 346, 347; *Western Union Tel. Co.* v. *Hall*, 124 U. S. 444, 454, 456;

thrown upon it by the opinion of the court below. However, even if that opinion may be resorted to to help interpret, although not to supplement, the court's findings of fact, it does not materially strengthen the respondent's position. For example, after reciting certain of the respondent's handicaps in supplying the gun mounts, to say nothing of supplying them at a net profit, the opinion says (p. 387):

> "We think that the consideration and tolerance with which the Government, during the time here in question, treated contractors actually engaged in producing defense material, if the contractor in good faith did his best to perform, is an indication that the plaintiff, if allowed to perform, would probably have succeeded in making a profit.
>
> "On the other hand, it must be said that the plaintiff would have had problems and difficulties that an active, going concern would not have had, and those difficulties would probably have adversely affected its profits. On the whole we can do only what a jury would do in a similar case. We conclude that the plaintiff would probably have made net profits of about 4% of the gross contract price, and we award it $80,000."

The opinion contributes nothing on the subject of costs except an emphasis upon the burden of them. The opinion points only to a suggested rule of thumb as a means of estimating the respondent's anticipated net profits.

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*Philadelphia, Wilmington & Baltimore Railroad Co.* v. *Howard,* 13 How. 307."

See also, *Anvil Mining Co.* v. *Humble,* 153 U. S. 540, 550; *Cincinnati Gas Co.* v. *Western Siemens Co.,* 152 U. S. 200, 206; *United States* v. *Behan,* 110 U. S. 338, 344; *United States* v. *Speed,* 8 Wall. 77, 84; *Masterton* v. *The Mayor of Brooklyn,* 7 Hill (N. Y.) 61, 71; Restatement, Contracts § 331 (1932).

It suggests that the net profits, under the circumstances of this case, should be "about 4% of the gross contract price, . . . ."

Whether or not a reexamination of all the evidence that was before the court below might cure this uncertainty we cannot tell. We can conclude only that, on the limited findings before us, the amount, if any, of the respondent's anticipated *net* profit rests upon that court's rough estimate rather than upon its findings of evidentiary facts. We do not, however, decide the case on that issue. More fundamental to the respondent's case than the amount of its anticipated profits is the need for proof of the highly material facts of its willingness, readiness and capacity to manufacture and deliver the required gun mounts in the quantities and at the times specified.

1. *There is no finding of the readiness and capacity of the respondent to deliver the gun mounts in the quantities and at the times required by the contract.*—In the absence of actual tenders of the required gun mounts, such readiness and capacity are essential facts material to the respondent's right to receive payments under the contract. Without a right to such payments the respondent could realize no profits. See Restatement, Contracts §§ 284, 280 (1), 281, 318 (c), 395, 397 (1932). This issue goes deeper than that of the required reasonable certainty of the amount of the anticipated net profits claimed as damages. In a number of cases where this Court has allowed recovery for the loss of anticipated profits, it has emphasized its finding of a demonstrated willingness, readiness and capacity, on the part of the claimant, to perform the obligations which, if performed, would have entitled the claimant to payment under the contract. For example, in *United States* v. *Purcell Envelope Co.,* 249 U. S. 313, the United States, without adequate cause to do so, cancelled a recently made contract to purchase, from the

Purcell Envelope Company, a four-years' supply of envelopes and wrappers for the Post Office Department for $2,460,556.22. This Court affirmed a judgment of the Court of Claims awarding the company $185,331.76 for its loss of anticipated net profits which it would have received if it had been allowed to perform the contract. In that case this Court said (p. 316): "The Envelope Company had, however, already made arrangements and contracts for the supplying to it of the necessary materials to fulfill the terms of the contract and was ready and willing at all times to fully perform it according to its terms." Again (p. 319): "There is no charge of default against the Envelope Company, no charge of inability to perform its contract, . . . ." And finally (p. 321): "The court [of Claims] in its opinion expressly declares that the findings showed that the Envelope Company had fulfilled all the requirements of the Postmaster General and was ready and willing to furnish the envelopes and wrappers . . . ." See also, *Hinckley* v. *Pittsburgh Steel Co.*, 121 U. S. 264, 276; *Smoot's Case,* 15 Wall. 36, 44; *United States* v. *Speed,* 8 Wall. 77, 84.

In its petition for a writ of certiorari in the instant case, the United States specified that the Court of Claims erred in failing to make the finding that the respondent had not proved that it could have successfully performed the contract and made a profit thereon. Whether or not it was error to fail to make such an express finding of the respondent's failure of proof, it is clear that there was wholly absent from the court's findings any express statement that the respondent was ready and capable of performing its obligations under the contract. It did constitute error to render judgment for recovery of damages by the respondent in the absence of that material fact. There remains only the question whether an inference of the required readiness and capacity of the respondent

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to perform its obligations under the contract can be inferred from the other findings.

2. *The presence of certain affirmative findings precludes the drawing of any sufficient inference of the respondent's readiness and capacity to deliver the gun mounts in the quantities and at the times required.*— The respondent has the burden of proof. Finding of fact No. 5, quoted in full, *supra,* at pp. 202–203, tells the story. The affirmative evidentiary findings there made add up to an inescapable ultimate finding that the respondent was *not either ready or capable* of making the required deliveries of two complete gun mounts in May, 1942, three in June, five in July and thereafter at a minimum rate of ten gun mounts a month. February 19, about three and one-third months before the first delivery was due, production was not under way, even in a preliminary stage.

> "At that time the company was not prepared to undertake work of the character proposed by the contract, and would not for an indefinite time be prepared successfully to complete a contract for 150 gun mounts. . . . Manufacturers experienced in somewhat similar work with large organizations and trained mechanics required from seven months to one year from the time of receiving notice to proceed until the first gun mounts were produced. Plaintiff had no manufacturing organization and no force of trained personnel to train unskilled employees." Finding No. 5, 110 Ct. Cl. at p. 379.

The findings of fact show also that the following statement was made to the respondent in the Government's letter of March 5, 1942, after the Government's insistence upon a performance bond: "As it is apparent that you cannot secure a bond to insure faithful performance of the contract, no contract will be issued to you,. . . . ." Finding No. 6, *id.* at p. 380. There is no

finding that the respondent ever met or was capable of meeting this requirement.

As against these devastating findings, only finding of fact No. 8 even suggests the respondent's readiness and capacity to perform the obligations necessary to entitle it to compensation under the contract. It says: "If the plaintiff had been permitted to perform its contract, it would have made a net profit of not less than $80,000." *Id.* at p. 381.

This is no more than a rough estimate by the Court of Claims of what would be the amount of the respondent's reasonably anticipated profits if the contract were completed. It is not a finding that the respondent was ready and capable of making the deliveries upon which such profits must depend. The striking fact is that the other findings of the Court of Claims show that the respondent was *not* prepared to make those deliveries and that this was due to the respondent's own lack of capacity to perform its obligations. To support the judgment of the court below, this ultimate finding of fact No. 8 would have to be read as itself supplying the missing finding of the respondent's readiness and capacity to perform its full obligations. In that role it fails utterly. It not only contains no evidentiary findings on the subject but if it is regarded as implying them they come into direct conflict with the evidentiary findings of fact, Nos. 5 and 6, to the contrary.

The possibility, suggested in the opinion, of securing from the Government gratuitous extensions of time or concessions in the numbers of gun mounts to be delivered may have justified the respondent's hope that it might ultimately produce, with inexperienced labor in its rehabilitated plant, the new products called for by the contract. Such a possibility, however, cannot justify the award of money damages by the Court of Claims to equal a loss of unearned anticipated profits dependent

upon such possible gratuitous extensions or concessions. Even assuming the willingness of the respondent to perform its obligations, proof of its essential readiness and capacity to do so is missing.

The judgment of the Court of Claims accordingly is reversed and the cause is remanded with direction to enter judgment in favor of the United States.

*Reversed.*

MR. JUSTICE REED and MR. JUSTICE JACKSON concur in the reversal and dissent from the order to enter judgment in favor of the United States. In their opinion, respondent should have an opportunity to meet the stated requirements of proof.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK, MR. JUSTICE MURPHY, and MR. JUSTICE RUTLEDGE agree, concurring.

It is clear and undisputed that the contract which the parties made was to be reduced to formal terms. Both the "letter of intent" [1] and the "official award" [2] by their express terms state that a "formal contract" was contemplated. That circumstance raises difficulties for respondent which neither it nor the Court of Claims nor this Court has surmounted.

During the period of time relevant here, the Navy (apart from exceptions inapplicable to the type of contract involved in this case) had "standard termination clauses for fixed price contracts" which "in general form

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[1] The "letter of intent" indicated the manner in which respondent could approve the proposal, "thereby constituting this letter a contract until the execution of a formal contract . . . ."

[2] The "official award" stated that the Navy's acceptance of respondent's proposal was authority to commence performance "without waiting for the formal contract."

and substance" were inserted "in most contracts." [3] They provided that in the event of cancellation "for the convenience of the Government" the contractor would be paid "for all costs, including a proper allocation of overhead expenses to the contract, incurred up to the time of termination, plus an allowance of 6% or 7% profit on all such costs except purchases of materials and unfinished goods, for which the contractor was reimbursed at cost." [4]

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[3] Memorandum from James Forrestal, Under Secretary of the Navy, Jan. 11, 1944, Senate Hearings on S. 1268, S. 1280, and S. J. Res. 80, 78th Cong., 1st Sess., 551, 553, where it is said:

"Standard termination clauses for fixed price contracts were developed late in 1941, and in general form and substance have been inserted in most contracts entered into since that time except for ship-construction contracts, which constitute a separate problem. The Department has not undertaken to modify outstanding contracts by the insertion of such clauses. It is difficult to estimate the time which would be required to incorporate such a clause by amendment in all contracts. However, it is doubted that such action would be administratively feasible except upon the initiative of the contractor."

And see letter of the Acting Secretary, Oct. 10, 1943, *id.*, 270–271.

[4] See record p. 177 in *Pownall* v. *United States,* 334 U. S. 742, and record p. 227 in *Alexander Wool Combing Co.* v. *United States,* 334 U. S. 742. And see H. R. Hearings on H. R. 3022, 78th Cong., 1st Sess. 27. At the time, Title II of the First War Powers Act, § 201, 55 Stat. 839, 50 U. S. C. App. § 611, was in effect empowering the President to authorize any department or agency exercising functions in connection with the prosecution of the war effort under regulations prescribed by him "to enter into contracts and into amendments or modifications of contracts heretofore or hereafter made . . . without regard to the provisions of law relating to the making, performance, amendment, or modification of contracts whenever he deems such action would facilitate the prosecution of the war . . . ." By Executive Order 9001, dated Dec. 27, 1941, 6 Fed. Reg. 6787, 3 C. F. R. Cum. Supp. 1054, the President delegated this authority to various agencies, including the Navy Department. He also authorized the Navy "by agreement" to modify or amend or settle "claims" under contracts and provided that the amendments and modifications "may be with or without consideration and may be utilized to accomplish the same things as any original contract could have accomplished hereunder,

That policy of the Navy, revealed as it was in official communications to Congress, is a matter of which we can take judicial notice. We have heretofore amplified findings of facts by reports of the Secretary of War. *Tempel* v. *United States,* 248 U. S. 121, 130. The official communications which disclose the policy of the Navy in this case, like reports, rules and regulations of agencies[5] or other communications to Congress,[6] are equally reliable and authoritative and need no further proof.

Respondent, however, has not carried the burden of showing that it would have been saved from the application of that policy. It has not shown that its contract falls in an exempt class. It has not shown that what was usual or customary for other contracts of this type would not be written into the formalized agreement to which its contract with the Government was to be reduced. It has not shown how it could escape application of the Navy's general policy and be granted the favor of a contract without a termination clause.

Yet unless it can make that showing, it has not established by "clear and direct proof," as *United States* v. *Behan,* 110 U. S. 338, 344, requires, that it would have been free to make the profits which it claims as damages for breach of the contract. For the customary termination clause relieved the promisor of any liability for unearned profits of the character claimed here. Since respondent did not show that at least in all probability its contract would have been free of that provision, it failed at the threshold of the case to carry the burden which rested on it.

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irrespective of the time or circumstances of the making of or the form of the contract amended or modified, or of the amending or modifying contract, and irrespective of rights which may have accrued under the contract, or the amendments or modifications thereof."

[5] See *Lilly* v. *Grand Trunk R. Co.,* 317 U. S. 481, 488; *Labor Board* v. *Atkins & Co.,* 331 U. S. 398, 406–407.

[6] See *Ludecke* v. *Watkins,* 335 U. S. 160, 166–170.

Syllabus.

# NATIONAL LABOR RELATIONS BOARD *v.* CROMPTON-HIGHLAND MILLS, INC.

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

No. 197. Argued January 31, 1949.—Decided May 31, 1949.

1. An employer producing goods for interstate commerce engaged in extensive negotiations as to many matters, including rates of pay, with a union duly certified as the collective bargaining representative of most of its production and maintenance employees at a certain plant. It offered a small wage increase, which was rejected, and the negotiations reached something of an impasse. Twelve days later, the employer, without consulting the union, put into effect a substantially greater general wage increase applicable to most of the employees represented in the negotiations. *Held:* In these circumstances, this action constituted an unfair labor practice within the meaning of §§ 8 and 9 of the National Labor Relations Act. Pp. 218–219, 223–225.
2. After hearings, the National Labor Relations Board made certain findings of fact and ordered the employer not only to cease and desist from granting general wage increases without consulting the union but also to bargain collectively, upon request, as to rates of pay, hours of work, and other conditions of employment, to post certain notices and to report steps taken to comply with the order. Its petition for enforcement was denied by the Court of Appeals. *Held:*

   (a) A decree should be entered enforcing so much of the Board's order as is supported by its findings of fact based upon substantial evidence. Pp. 218–219, 220–221.

   (b) On the record in this case, the Board was justified in issuing an order requiring the employer to cease and desist from refusing to bargain collectively by taking action, without prior consultation with the authorized collective bargaining representative of the employees, with respect to general rates of pay which are substantially different from, or greater than, any which the employer has proposed during its negotiations with such representative. P. 225.

   (c) There were no findings by the Board that established any other lack of good faith or lack of consistency with the principle of collective bargaining on the part of the employer; and there

is no reason for enlarging the scope of the enforcement decree beyond that feature, and little, if any, need for orders requiring either specific affirmative action to be taken by the employer or the posting of any notices by it. Pp. 226–227.

167 F. 2d 662, reversed.

The National Labor Relations Board issued an order requiring an employer to cease and desist from certain unfair labor practices and to take certain affirmative actions. 70 N. L. R. B. 206. The Court of Appeals denied a petition for enforcement. 167 F. 2d 662. This Court granted certiorari. 335 U. S. 812. *Reversed,* p. 227.

*David P. Findling* argued the cause for petitioner. With him on the brief were *Solicitor General Perlman, Ruth Weyand* and *Bernard Dunau.*

*Ralph Williams* argued the cause for respondent. With him on the brief was *S. Y. Austin, Jr.*

Mr. Justice Burton delivered the opinion of the Court.

In this case a collective bargaining representative was certified, under the National Labor Relations Act,[1] to represent all employees working in a certain appropriate bargaining unit. Their employer engaged in extended negotiations with this representative as to many matters, including rates of pay. December 19, 1945, the negotiations reached something of an impasse. The question here presented is whether this employer engaged in an unfair labor practice when, on January 1, 1946, it put into effect as of December 31, 1945, without prior consultation with the bargaining representative, a general increase in the rates of pay applicable to most of the employees who had been represented in the negotiations. This increase

[1] § 9 of the National Labor Relations Act, 49 Stat. 453, 29 U. S. C. (1940 ed.) § 159; *In the Matter of Crompton-Highland Mills,* 62 N. L. R. B. 1346.

was a substantially greater one than any which the employer had offered during the negotiations. For the reasons to be stated, we hold that, under the circumstances, this action constituted an unfair labor practice and that a decree should be entered enforcing an order prohibiting such conduct. The case also raises questions as to the nature of the impasse which was reached and as to the proper scope and terms of the enforcement decree.

August 13, 1945, the Textile Workers Union of America, Congress of Industrial Organizations, following an election under the statute, was certified as the exclusive collective bargaining representative for about 800 employees of Crompton-Highland Mills, respondent herein. These employees included most of its production and maintenance employees at Griffin, Georgia, where it manufactured cotton and other goods. Much of the material entering into those goods and most of the finished goods there produced were bought, sold or transported in interstate commerce, so that the unfair labor practice, if any, concededly affected such commerce. From August 31, 1945, at least until December 19, a committee of this union engaged in collective bargaining with the respondent on numerous appropriate subjects, including rates of pay. Many tentative agreements were reached.

January 1, 1946, without prior consultation with any member of the bargaining committee, the employer announced a general and substantial increase in the rates of pay of its employees, amounting to about two to six cents an hour, effective as of December 31, 1945. This increase applied to most, but not all, of the employees in the bargaining unit. Simultaneously with its posting of the announcement of this increase, the employer told the employee members of the bargaining committee about it. At the same time, the employer mailed an announcement of it to one of the two nonemployee members of the bargaining committee.

January 31, 1946, the National Labor Relations Board, petitioner herein, in response to charges made by the union, filed a complaint against the employer, alleging several unfair labor practices.[2] These included the above-described increase in rates of pay. After hearings before a trial examiner and consideration of that examiner's intermediate report, the employer's exceptions and brief relating to that report and the entire record and oral arguments, the Board, on August 21, 1946, issued a cease and desist order. 70 N. L. R. B. 206. The Court of Appeals for the Fifth Circuit denied a petition for enforcement. 167 F. 2d 662. Because of the importance of the issue in the administration of the labor relations statutes, we granted certiorari. 335 U. S. 812.

The precise issue presented is what decree, if any, should be issued by the Court of Appeals for the enforcement of the order of the National Labor Relations Board.[3] If a decree is to be issued, its scope and terms should be based upon such part, or all, of the Board's cease and desist order as is supported by its findings of fact. Those findings are binding upon us to the extent that they are sustained by substantial evidence.[4] We are satisfied

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[2] Under §§ 7, 8 (1) and (5), and 10 of the National Labor Relations Act, 49 Stat. 452–455, 29 U. S. C. (1940 ed.) §§ 157, 158 (1) and (5), and 160.

[3] For the Board's order, see Appendix A, *infra*, pp. 227–229.

[4] "The findings of the Board as to the facts, if supported by evidence, shall be conclusive." § 10 (e) of the National Labor Relations Act, 49 Stat. 454, 29 U. S. C. (1940 ed.) § 160 (e). "The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive." § 10 (e), as amended by the Labor Management Relations Act, 1947, 61 Stat. 148, 29 U. S. C. (1946 ed., Supp. I) § 160 (e).

"We have repeatedly held that Congress, by providing, § 10 (c), (e) and (f), of the National Labor Relations Act, that the Board's findings 'as to the facts, if supported by evidence, shall be conclusive,' precludes the courts from weighing evidence in reviewing the Board's

that there is substantial evidence to support the material findings of fact made by the Board as to the issue before us and, therefore, see no need to set forth that evidence here. The primary issue for discussion is, rather, the extent to which the Board's findings of fact support its cease and desist order and justify a decree for the enforcement of that order.

The controlling specific findings of the Board are as follows:

> "As fully discussed in the Intermediate Report, the respondent, during the course of negotiations with the Union, refused to accede to the Union's wage demands and it was not until their last conference on December 19, 1945, that the respondent made its first and only counterproposal of approximately 1 to 1½ cents an hour raise, which the Union rejected. *Thereafter, the respondent made no further effort to settle the wage dispute but, instead, on January 1, 1946, only 12 days later, granted its employees a substantially larger increase than that previously offered to the Union, without consulting the Union or affording it an opportunity to negotiate with respect thereto.* In our opinion, such action taken as [so] soon after the Union was attempting through the bargaining process to reach an agreement with the respondent, among other things, on wages, clearly *shows that the respondent was not acting in good faith during the negotiations, and is manifestly in-*

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orders, and if the findings of the Board are supported by evidence the courts are not free to set them aside, even though the Board could have drawn different inferences." *Labor Board* v. *Nevada Consolidated Copper Corp.*, 316 U. S. 105, 106–107.

See also, *Medo Photo Supply Corp.* v. *Labor Board,* 321 U. S. 678, 681, n. 1; *Consolidated Edison Co.* v. *Labor Board,* 305 U. S. 197, 229; *Washington, V. & M. Coach Co.* v. *Labor Board,* 301 U. S. 142, 146–147.

*consistent with the principle of collective bargaining.* Nor are we impressed with the respondent's attempted justification for its action on the ground that the Union broke off negotiations on December 19 and that the respondent was therefore relieved of the obligation to deal with it. *Concededly, the respondent never proposed to the Union as a possible basis of agreement a wage increase comparable to that granted on January 1, 1946.* Moreover, the record fails to support the respondent's contention that the Union's representatives assumed an unequivocal position at the last meeting which foreclosed further bargaining concerning wages or other terms or conditions of employment. Under these circumstances, *we find, as did the Trial Examiner, that the respondent, by its action with respect to the wage increase, failed to perform its statutory duty to bargain collectively with the Union and thereby interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in the Act.*" (Emphasis supplied.) 70 N. L. R. B. at pp. 206–207.[5]

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[5] In addition to its own findings, quoted in the text, the Board adopted, in general terms, all of the findings of the trial examiner, with certain modifications and exceptions not here material. A number of such adopted findings, which are of significance in securing a full appreciation of the basis for the Board's order, are set forth in Appendix B, *infra,* pp. 230–234.

The increase in pay was explained by Herbert A. Pickford, manager of the respondent, as follows in his testimony before the trial examiner:

"Q. Mr. Pickford, explain why you made the wage increase on January 1, 1946.—A. We had heard the end of the previous week that numerous mills throughout the state had made wage adjustments, and we heard through rumor, more or less through the grape vine, that local mills were planning to make wage adjustments. I checked into that rumor with various mills and found that wage

I. *The employer engaged in an unfair labor practice when, without consulting the employees' collective bargaining representative, it put into effect, for most of its employees who had been represented in the bargaining negotiations, a general increase in rates of pay which was substantially greater than any that the employer had offered.*

The specific findings of the Board, coupled with the findings adopted by it from the trial examiner's report, leave no room for doubt as to the adequacy of the facts upon which its cease and desist order was based. For significant findings adopted from the examiner's report, see Appendix B, *infra,* pp. 230–234. The facts so found distinguish this case from any in which no collective bargaining representative has been certified or otherwise authorized to represent the employees in an appropriate unit.[6] In the instant case, the wish of the employees to

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adjustments were going to be made, although I didn't get any specific dates as to when they would be made.

"We had steadfastly said throughout our bargaining conferences that if and when wage increases in our area were made, we would be amongst the first, as we had always been, to make such increases. And when we heard that wage increases were to take place, we wanted to maintain our position as being amongst the first to make the increase and also maintain our position in the local labor market by making an increase ourselves.

"Q. Do you know, Mr. Pickford, what wage increases were made by any of the other mills in Griffin?—A. I do not know the definite figures aside from what I saw in the paper.

"Q. Did you join with any mills in making any announcement about a wage increase?—A. No; we did not. We made our announcement independently of anyone else, as we have always done."

[6] "SEC. 8. It shall be an unfair labor practice for an employer—

. . . . . .

"(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a)." 49

be consulted and to bargain collectively as to the terms of any general wage increase is established by the findings and the negotiations. Cf. *Labor Board* v. *Columbian Enameling & Stamping Co.*, 306 U. S. 292, 297. We do not have here a case where the bargaining had come to a complete termination cutting off the outstanding invitation of the certified collective bargaining representative to bargain as to any new issue on such a matter as rates of pay. Cf. *Labor Board* v. *Sands Mfg. Co.*, 306 U. S. 332. The opening which a raise in pay makes for the correction of existing inequities among employees and for the possible substitution of shorter hours, vacations or sick leaves, in lieu of some part of the proposed increase in pay, suggests the infinite opportunities for bargaining that are inherent in an announced readiness of an employer to increase generally the pay of its employees. The occasion is so appropriate for collective bargaining that it is difficult to infer an intent to cut off the opportunity for bargaining and yet be consistent with the purposes of the National Labor Relations Act.

We do not here have a unilateral grant of an increase in pay made by an employer after the same proposal has been made by the employer in the course of collective bargaining but has been left unaccepted or even rejected in those negotiations. Such a grant might well carry no disparagement of the collective bargaining proceedings. Instead of being regarded as an unfair labor practice, it

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Stat. 452–453, and also in 61 Stat. 140–141, 29 U. S. C. (1946 ed., Supp. I) § 158.

"Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: . . . ." 49 Stat. 453, and also in 61 Stat. 143, 29 U. S. C. (1946 ed., Supp. I) § 159 (a).

might be welcomed by the bargaining representative, without prejudice to the rest of the negotiations. See *In the Matter of W. W. Cross & Co.*, 77 N. L. R. B. 1162; *In the Matter of Exposition Cotton Mills Co.*, 76 N. L. R. B. 1289; *In the Matter of Southern Prison Co.*, 46 N. L. R. B. 1268.

We hold that the Board's order to cease and desist is justified, under the circumstances of this case, to the extent that the order requires the employer to cease and desist from refusing to bargain collectively by taking action, without prior consultation with the authorized collective bargaining representative of the employees, with respect to general rates of pay which are substantially different from, or greater than, any which the employer has proposed during its negotiations with such representative. The need for this order depends in part upon the Board's finding that the action by the employer, on January 1, 1946, taken so soon after the meeting of December 19, 1945, showed that "the respondent [employer] was not acting in good faith during the negotiations, and is manifestly inconsistent with the principle of collective bargaining." 70 N. L. R. B. at p. 207. See *May Dept. Stores Co.* v. *Labor Board*, 326 U. S. 376; *Medo Photo Supply Corp.* v. *Labor Board*, 321 U. S. 678; *Labor Board* v. *Newark Morning Ledger Co.*, 120 F. 2d 262; *Jeffery-DeWitt Insulator Co.* v. *Labor Board*, 91 F. 2d 134.[7]

[7] Even though the employer, since January 1, 1946, may have carried on collective bargaining in good faith as to rates of pay and other matters, a decree enforcing the original order against making a general increase without consulting the collective bargaining representatives is justifiable. ". . . an order of the character made by the Board, lawful when made, does not become moot because it is obeyed or because changing circumstances indicate that the need for it may be less than when made." *Labor Board* v. *Pennsylvania Greyhound Lines*, 303 U. S. 261, 271. See also, *Federal Trade Comm'n* v. *Goodyear Tire & Rubber Co.*, 304 U. S. 257.

II. *The decree of enforcement should not extend further than necessary to prevent the taking of the prohibited action by the employer.*

There are no findings by the Board that establish a lack of good faith or lack of consistency with the principle of collective bargaining on the part of the employer other than in the connection above discussed. The Board declined to uphold the trial examiner in his findings and recommendations as to several alleged unfair labor practices other than this one. The Board's own finding as to the employer's interference with, and restraint and coercion of, its employees is expressly limited to this one item. It reads:

> "Under these circumstances, we find, as did the Trial Examiner, that the respondent, *by its action with respect to the wage increase,* failed to perform its statutory duty to bargain collectively with the Union and *thereby* interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in the Act." (Emphasis supplied.) *Id.* at p. 207.

Accordingly, there appears no reason for enlarging the scope of the enforcement decree beyond that feature, and little, if any, need for orders requiring either specific affirmative action to be taken by the employer or the posting of any notices by it.[8]

[8] ". . . The breadth of the order, like the injunction of a court, must depend upon the circumstances of each case, the purpose being to prevent violations, the threat of which in the future is indicated because of their similarity or relation to those unlawful acts which the Board has found to have been committed by the employer in the past. . . . We hold only that the National Labor Relations Act does not give the Board an authority, which courts cannot rightly exercise, to enjoin violations of all the provisions of the statute merely because the violation of one has been found. To justify an order restraining other violations it must appear that they bear some resemblance to that which the employer has committed or that danger

For these reasons, the judgment is reversed and the cause is remanded to the Court of Appeals for action consistent with this opinion.

*It is so ordered.*

MR. JUSTICE DOUGLAS, MR. JUSTICE MURPHY and MR. JUSTICE RUTLEDGE join in Part I of this opinion, but think the Board's order should be enforced without modification.

## APPENDIX A.

Order of National Labor Relations Board *In the Matter of Crompton-Highland Mills, Inc., and Textile Workers Union of America, CIO,* Case No. 10–C–1812.—Decided August 21, 1946.

### "ORDER

"Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the respondent, Crompton-Highland Mills, Inc., Griffin, Georgia, and its officers, agents, successors and assigns shall:

"1. Cease and desist from:

"(a) Refusing to bargain collectively with Textile Workers Union of America, CIO, as the exclusive representative of the respondent's production and maintenance employees at the Griffin plant, including watchmen, but excluding office, clerical, technical, and laboratory employees, section men in the spinning room, head loom

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of their commission in the future is to be anticipated from the course of his conduct in the past. That justification is lacking here." *Labor Board* v. *Express Pub. Co.,* 312 U. S. 426, 436–437, and see pp. 438–439.

See also, *May Dept. Stores Co.* v. *Labor Board,* 326 U. S. 376, 392–393; *J. I. Case Co.* v. *Labor Board,* 321 U. S. 332, 341–342.

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fixers in the weave room, head fixers in the card room, all supervisory employees of the grade of second hand and above, and all other supervisory employees with authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees, or effectively recommend such action, by taking action, without prior consultation with said organization, with respect to rates of pay, wages, hours of employment, and other conditions of employment.

"(b) In any manner interfering with the efforts of Textile Workers Union of America, CIO, to bargain collectively with it as the representative of its employees in the appropriate unit described above.

"2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

"(a) Upon request, bargain collectively with Textile Workers Union of America, CIO, as the exclusive representative of all its employees in the appropriate unit described above with respect to rates of pay, wages, hours of employment, and other conditions of employment;

"(b) Post at its plant at Griffin, Georgia, copies of the notice attached hereto, marked 'Appendix A.' Copies of such notice, to be furnished by the Regional Director for the Tenth Region, shall, after being duly signed by the respondent's representative, be posted by the respondent immediately upon receipt thereof, and maintained by it for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the respondent to insure that said notices are not altered, defaced, or covered by any other material;

"(c) Notify the Regional Director for the Tenth Region (Atlanta, Georgia), in writing, within ten (10) days from the date of this Order, what steps the respondent has taken to comply herewith." 70 N. L. R. B. at pp. 208–209.

"APPENDIX A

"Notice to All Employees

"Pursuant to a Decision and Order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

"WE WILL BARGAIN collectively with Textile Workers Union of America, CIO, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours of employment, and other conditions of employment.

"WE WILL NOT make any changes with respect to rates of pay, wages, hours of employment, or other conditions of employment of our employees in the bargaining unit described below, without prior consultation with Textile Workers Union of America, CIO.

"WE WILL NOT in any manner interfere with the efforts of Textile Workers Union of America, CIO, as the exclusive representative of our employees in the unit described below, to bargain collectively with us.

"The bargaining unit is: All production and maintenance employees at our Griffin plant, including watchmen, but excluding office, clerical, technical and laboratory employees, section men in the spinning room, head loom fixers in the weave room, head fixers in the card room, all supervisory employees of the grade of second hand and above, and all other supervisory employees with authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees, or effectively recommend such action.

"CROMPTON-HIGHLAND MILLS, INC.

"By .....

"Dated ..... (REPRESENTATIVE.) (TITLE.)

"This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material." *Id.* at pp. 210–211.

## APPENDIX B.

Quotations from the "FINDINGS OF FACT" as to—"III. THE UNFAIR LABOR PRACTICES, *A. The refusal to bargain*" as stated in the Intermediate Report of the Trial Examiner, adopted by the National Labor Relations Board and printed by the Board following its Decision and Order.

"No further conference was held until December 19, when a meeting was held at the request of the Union.

"The issues upon which the parties were still in disagreement at this time involved wages, work assignments, insurance provisions, severance pay, vacations, union security, arbitration, union activity upon company time, and the preamble of the contract, in which the respondent sought to define the parties to the agreement as the respondent and the 'employees' in the appropriate unit, as opposed to the Union's position that the Union be denominated as party to the contract. On the issue of union security, although the Union had offered to compromise for maintenance of membership, the respondent refused to grant any form of security. As to wages, although it had originally rejected the Union's proposals for any wage increase, it proposed what amounted to an increase of about one or one and one-half cents per hour at this time.

"On January 1, 1946, the members of the union negotiation committee, employed at the plant, were summoned to the office of Plant Manager Pickford and informed that the respondent was granting a general wage increase to all employees,[18] amounting to about 2 to 6 cents per hour.

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"[18] As will be seen, certain employees were not included in the wage increase."

Pickford read to the committee the following letter under that date, addressed to Union Director Douty:

> "In the course of our extended contract negotiations we have repeatedly told you that our mill would be among the first to make wage adjustments in this locality. We have learned that certain of the mills in this locality are about to adjust their wages and we are, therefore, making comparable adjustments in our wage rates effective Monday, December 31st, 1945. A copy of the notice which has been posted in the mill today outlining the various rate adjustments is attached hereto.

"Attached to the letter were notices directed to the respective departments listing the various wage increases. The letter was received by Douty the next day. While the negotiating committee was in Pickford's office, copies of the notices announcing the wage increases were being posted on the bulletin boards in the respective departments.

"It will be seen from the foregoing that neither the Union nor the negotiating committee was consulted from December 19, the date of the last conference, to January 1, 1946, the date of the granting of the wage increase. Nor was the committee consulted on the latter date. The respondent merely presented it with a *fait accompli,* without affording the Union an opportunity to negotiate with respect to the amount of the increase, the employees to whom the increase would be applicable,[19] the effective date of the increase or any of the factors normally envisaged in the collective bargaining process.

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"[19] The increase did not affect janitors, sweepers, scrubbers, outside help, and various other categories of employees included in the unit represented by the Union."

"It cannot be disputed, nor does the respondent deny, that the granting of the wage increase at that time, constituted unilateral action. . . .

. . . . . .

"While it is evident that the Union was insistent in its demand for some form of union security during its negotiations with the respondent, the preponderance of the credible evidence does not support the respondent's position that the Union had, in effect, presented an ultimatum that no contract would be consummated which did not afford union security. As has already been indicated, union security was only one of several matters, aside from the wage question, upon which agreement had not yet been reached. If, as the respondent contends, it had left no doubt as to its position on the issue of union security in the conferences of October 17 and 18, and it was convinced that the Union was adamant on this issue, it seems unlikely that the parties would have conferred on November 7 and 8, and again on December 19, when the Union submitted a written wage proposal.

"It is clear, therefore, and the undersigned finds, that, although the parties had reached a temporary impasse on December 19 on some issues, principally wages, union security, and check-off, there is no substantial basis for concluding that the Union had abandoned negotiations at this time. Moreover, even if the parties had reached an impasse in their negotiations, this obviously could not affect the Union's status as majority representative. The principle that 'a bargaining relationship once rightly established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed,' is well-established.[20] Equally clear is the proposition that the granting of a unilateral wage increase

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"[20] See *Franks Bros. Co.* v. *N. L. R. B.*, 321 U. S. 702, 705."

or other concession by an employer to his employees while the designated union is attempting to bargain concerning the same subject matter, constitutes a violation of the employer's duty to bargain with the union.[21] It is not a question, contrary to the respondent's argument, of giving the Union credit for a wage increase which it did not obtain, but rather of the conduct of the respondent in granting the increase in derogation of the Union's status as statutory representative, by depriving the Union of its right to bargain with respect to such increase.

. . . . .

"Upon the basis of the foregoing, and upon the entire record, the undersigned concludes and further finds that, by failing and refusing to furnish the Union with essential and pertinent information relating to the respondent's wage structure under its 'point plan,' job specifications, work assignments, and information appertaining thereto, *and by granting its employees a unilateral wage increase on January 1, 1946, the respondent has from August 31, 1945, to December 19, 1945, and thereafter to date, including January 1, 1946, failed and refused to bargain with the Union as the exclusive collective bargaining representative of the employees in the appropriate unit above described, and has thereby interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed under* the Act." (Emphasis in this paragraph is supplied.) 70 N. L. R. B. at pp. 220–221, 222, 223–224.

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"[21] See *Aluminum Ore Company* v. *N. L. R. B.*, 131 F. (2d) 485, 487, (C. C. A. 7), enf'g. 39 N. L. R. B. 1286, 1295–1299; *May Department Stores* v. *N. L. R. B.*, 326 U. S. 376. See also, *Majority Rule in Collective Bargaining*, by Ruth Weyand, Columbia Law Review, Vol. XLV, 579–583, and footnotes at 581, for an excellent discussion and citation of authority on, *The Power of a Statutory Representative to Bar Unilateral Changes by Employer.*"

The Board left no doubt that it relied *solely* on the granting of the wage increase, when it issued its decision and order in this case. This appears from the following express statement in the Board's decision and order:

"1. The Trial Examiner found that the respondent, in violation of Section 8 (1) and (5) of the Act, failed to bargain collectively with the Union as the statutory representative of the respondent's employees by refusing to furnish the Union with certain detailed information relating to the incentive wage plan *and by granting a wage increase to its employees without consulting the Union. Although we agree with the Trial Examiner's conclusion, we, however, rest our determination solely on the latter ground.*" (Emphasis supplied.) *Id.* at p. 206.

Syllabus.

## YOUNG *v.* RAGEN, WARDEN.

CERTIORARI TO THE CIRCUIT COURT OF RANDOLPH COUNTY, ILLINOIS.*

No. 50. Argued November 17, 1948.—Decided June 6, 1949.

1. Convicted in an Illinois circuit court and sentenced to prison, petitioner applied to the same court for habeas corpus, claiming denial of due process under the Fourteenth Amendment. His petition was denied without a hearing on the ground that it was "insufficient in law and substance." On review here, the State Attorney General conceded that the petition raised substantial federal questions; argued that habeas corpus was not an appropriate remedy under state law when the petition was denied; but admitted that it probably is an appropriate remedy under "announcements" contained in subsequent decisions of the Illinois Supreme Court, though other Illinois trial courts have continued to deny habeas corpus on procedural grounds. *Held:* The order denying habeas corpus is vacated and the cause is remanded for consideration of the present applicability of that remedy in the light of the State Supreme Court's "announcement" in *People* v. *Loftus,* 400 Ill. 432, 81 N. E. 2d 495, and other relevant Illinois decisions. Pp. 236–240.

(a) More than a question of state procedure is involved when a state court of last resort closes the door to *any* consideration of a claim of denial of a federal right. P. 238.

(b) The doctrine that federal courts will not grant habeas corpus to prisoners under judgments of state courts until all state remedies have been exhausted, *Ex parte Hawk,* 321 U. S. 114, 28 U. S. C. § 2254, presupposes the existence of some adequate remedy under state law. Pp. 238–239.

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*Together with No. 47, Misc., *Evans* v. *Nierstheimer, Warden,* on petition for certiorari to the Circuit Court of St. Clair County, Illinois; No. 106, Misc., *Willis* v. *Ragen, Warden,* No. 109, Misc., *Thompson* v. *Ragen, Warden,* No. 184, Misc., *Lewis* v. *Ragen, Warden,* and No. 372, Misc., *Sherman* v. *Ragen, Warden, et al.,* all on petition for certiorari to the Criminal Court of Cook County, Illinois; No. 760, *Smith* v. *Ragen, Warden,* on certiorari to the Circuit Court of Will County, Illinois; and No. 374, Misc., *Banks* v. *Ragen, Warden,* on petition for certiorari to the Circuit Court of Will County, Illinois.

2. The orders in seven other cases in which Illinois courts had denied habeas corpus without hearings are likewise vacated and remanded for similar consideration. P. 240.

Orders vacated and causes remanded.

In No. 50, an Illinois trial court denied without a hearing a petition for habeas corpus raising substantial questions under the Due Process Clause of the Fourteenth Amendment. This Court granted certiorari. 334 U. S. 810. It also granted certiorari in No. 760 (336 U. S. 966), and now grants certiorari in the six other cases. *Orders vacated and causes remanded,* p. 240.

*Edward H. Levi* argued the cause and filed a brief for petitioner in No. 50.

*William C. Wines,* Assistant Attorney General of Illinois, argued the cause for respondent in No. 50. With him on the brief were *George F. Barrett,* then Attorney General, *Raymond S. Sarnow* and *James C. Murray,* Assistant Attorneys General.

Petitioners *pro se* in Misc. Nos. 47, 106, 109, 184, 372 and 374.

*Herbert A. Friedlich,* by appointment of the Court, for petitioner in No. 760.

*Ivan A. Elliott,* Attorney General of Illinois, and *William C. Wines,* Assistant Attorney General, were on the briefs for respondent in Misc. Nos. 106, 109 and 184, and No. 760. With them on the brief in No. 760 were *James C. Murray* and *Raymond S. Sarnow.*

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

We are once again faced with the recurring problem of determining what, if any, is the appropriate post-trial procedure in Illinois by which claims of infringement of federal rights may be raised. See *Woods* v. *Nierstheimer,*

328 U. S. 211; *Marino* v. *Ragen,* 332 U. S. 561; *Loftus* v. *Illinois,* 334 U. S. 804. In 1946, petitioner pleaded guilty to an indictment charging him with having committed burglary and larceny and was sentenced to five to seven years imprisonment. A year later he filed a petition for a writ of habeas corpus in the Circuit Court of Randolph County, Illinois, the sentencing court, containing allegations which, if true, raise substantial questions under the due process clause of the Fourteenth Amendment. The Attorney General of Illinois concedes that petitioner is entitled to a hearing into the truth or falsity of the charges. The court to which the petition for a writ of habeas corpus was directed denied the petition without holding a hearing, however, for the reason that it "is insufficient in law and substance." We granted the petition for a writ of certiorari, 334 U. S. 810, to consider the question thus presented.

The Attorney General explains the circuit court's denial of the petition for the writ as based upon state procedural grounds: that habeas corpus was not an appropriate remedy for the relief of denials of due process. He contends, however, that while the circuit court was correct in its interpretation of Illinois law when it denied the petition, certain statements in the Illinois Supreme Court's opinions in *People* v. *Loftus,* 400 Ill. 432, 81 N. E. 2d 495; *People* v. *Shoffner,* 400 Ill. 174, 79 N. E. 2d 200; and *People* v. *Wilson,* 399 Ill. 437, 78 N. E. 2d 514, all of which were handed down subsequent to the circuit court's denial of relief, strongly indicate that habeas corpus would now be the appropriate Illinois procedure in a case such as the one before us. His contention is, in other words, that while the petition for habeas corpus was properly denied when acted upon below, the decisions just cited probably broaden the scope of habeas corpus in Illinois, so that a denial of a hearing would be erroneous if the petition were again presented to the circuit court.

The situation is further complicated, however, by the fact that many circuit courts, whose decisions upon habeas corpus are unreviewable by the state supreme court under Illinois law, have continued to deny petitions for habeas corpus on procedural grounds since the supreme court's "announcement" in *People* v. *Loftus, supra.* The Attorney General's position concerning these denials, as we understand it, is that these decisions may be wrong, depending upon whether his interpretation of the *Loftus* "announcement" is the correct one, but that whether right or wrong, they are decisions solely upon a question of Illinois procedural law and thus do not warrant invocation of the jurisdiction of this Court.

Of course we do not review state decisions which rest upon adequate nonfederal grounds, and of course Illinois may choose the procedure it deems appropriate for the vindication of federal rights. *Loftus* v. *Illinois, supra.* But it is not simply a question of state procedure when a state court of last resort closes the door to *any* consideration of a claim of denial of a federal right. And that is the effect of the denials of habeas corpus in a number of cases now before this Court, for in none of the cases does the Attorney General suggest that either of the other two Illinois post-trial remedies, writ of error and *coram nobis,* is appropriate. Unless habeas corpus is available, therefore, we are led to believe that Illinois offers no post-trial remedy in cases of this kind. The doctrine of exhaustion of state remedies, to which this Court has required the scrupulous adherence of all federal courts, see *Ex parte Hawk,* 321 U. S. 114[1] and cases

[1] Existing law as declared by *Ex parte Hawk* was made a part of the statute by the new Judicial Code, 28 U. S. C. § 2254, which provides:

"An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the reme-

cited, presupposes that some adequate state remedy exists. We recognize the difficulties with which the Illinois Supreme Court is faced in adapting available state procedures to the requirement that prisoners be given some clearly defined method by which they may raise claims of denial of federal rights. Nevertheless, that requirement must be met. If there is now no post-trial procedure by which federal rights may be vindicated in Illinois, we wish to be advised of that fact upon remand of this case.

Seven other petitions for certiorari which raise substantial questions under the due-process clause of the Fourteenth Amendment are now before this Court following denials of habeas corpus by Illinois circuit courts or the Criminal Court of Cook County. In none of these cases was a hearing held or the petitioner permitted to submit proof of the truth of his allegations. In three instances, the denial of habeas corpus occurred prior to the supreme court's "announcement" in *People* v. *Loftus, supra,* as was true in the case of Young. A similar disposition of these petitions is therefore required.

Four petitions for certiorari involve denials of habeas corpus subsequent to the *Loftus* "announcement." It may well be that these decisions represent the opinion of four Illinois circuit judges that habeas corpus is not an appropriate remedy under Illinois law despite the *Loftus* opinion. Out of an abundance of caution, we have concluded, however, that these cases should also be re-

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dies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

"An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

manded to the state courts, since it is possible that the *Loftus* "announcement" was not brought to their attention or its possible significance pointed out. As in the other cases, we wish to be advised, if a hearing is again denied, whether the court is of the opinion that habeas corpus is not an appropriate remedy in Illinois in cases raising questions under the due-process clause of the Fourteenth Amendment.

Accordingly, the order denying the petition for a writ of habeas corpus in No. 50, *Young* v. *Ragen,* is vacated and the cause remanded for consideration of the present availability of habeas corpus in the light of the State Supreme Court's "announcement" in *People* v. *Loftus, supra,* and other relevant Illinois decisions. The petitions for certiorari in No. 47, Misc., *Evans* v. *Nierstheimer;* in No. 106, Misc., *Willis* v. *Ragen;* in No. 109, Misc., *Thompson* v. *Ragen;* in No. 184, Misc., *Lewis* v. *Ragen;* in No. 372, Misc., *Sherman* v. *Ragen et al.;* and in No. 374, Misc., *Banks* v. *Ragen,* are granted. The orders denying petitions for writs of habeas corpus in these cases, together with that in No. 760, *Smith* v. *Ragen,*[2] are vacated and the causes remanded for similar consideration.

*Orders will be entered accordingly.*

[2] Certiorari granted, 336 U. S. 966. (Docketed as No. 265, Misc.)

# WILLIAMS *v.* NEW YORK.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 671. Argued April 21, 1949.—Decided June 6, 1949.

The Due Process Clause of the Fourteenth Amendment does not require that a person convicted after a fair trial be confronted with and permitted to cross-examine witnesses as to his prior criminal record considered by the judge in accordance with a state statute in determining what sentence to impose pursuant to broad discretion vested in him under state law—even when the jury recommends life imprisonment and the judge imposes a death sentence. Pp. 242–252.

(a) It has long been the practice to permit the sentencing judge to exercise a wide discretion as to the sources and types of information used to assist him in determining the sentence to be imposed within the limits fixed by law. P. 246.

(b) Modern concepts individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial. Pp. 246–249.

(c) To deprive the sentencing judge of information contained in reports of probation officers would undermine modern penological procedural policies that have been cautiously adopted throughout the nation after careful consideration and experimentation. Pp. 249–250.

(d) In considering the sentence to be imposed after conviction, the sentencing judge is not restricted to information received in open court. Pp. 250–251.

(e) A different result is not required when a death sentence is imposed. Pp. 251–252.

298 N. Y. 803, 83 N. E. 2d 698, affirmed.

After a fair trial, appellant was convicted of murder in the first degree and the jury recommended life imprisonment. After considering information as to his previous criminal record without permitting him to confront or cross-examine the witnesses on that subject, the trial

judge sentenced him to death. The Court of Appeals of New York affirmed. 298 N. Y. 803, 83 N. E. 2d 698. On appeal to this Court, *affirmed*, p. 252.

*John F. Finerty* argued the cause for appellant. With him on the brief was *Edward H. Levine.*

*Solomon A. Klein* argued the cause for respondent. With him on the brief was *Miles F. McDonald.*

MR. JUSTICE BLACK delivered the opinion of the Court.

A jury in a New York state court found appellant guilty of murder in the first degree.[1] The jury recommended life imprisonment, but the trial judge imposed sentence of death.[2] In giving his reasons for imposing the death sentence the judge discussed in open court the evidence upon which the jury had convicted stating that this evidence had been considered in the light of additional information obtained through the court's "Probation Department, and through other sources." Consideration of

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[1] "The killing of a human being, unless it is excusable or justifiable, is murder in the first degree, when committed:

. . . . . .

"2. By an act imminently dangerous to others, and evincing a depraved mind, regardless of human life, although without a premeditated design to effect the death of any individual; or without a design to effect death, by a person engaged in the commission of, or in an attempt to commit a felony, either upon or affecting the person killed or otherwise . . . ." New York Penal Law § 1044.

[2] "Murder in the first degree is punishable by death, unless the jury recommends life imprisonment as provided by section ten hundred forty-five-a." New York Penal Law § 1045.

"A jury finding a person guilty of murder in the first degree, as defined by subdivision two of section ten hundred forty-four, may, as a part of its verdict, recommend that the defendant be imprisoned for the term of his natural life. Upon such recommendation, the court may sentence the defendant to imprisonment for the term of his natural life." New York Penal Law § 1045–a.

this additional information was pursuant to § 482 of New York Criminal Code which provides:

> ". . . Before rendering judgment or pronouncing sentence the court shall cause the defendant's previous criminal record to be submitted to it, including any reports that may have been made as a result of a mental, phychiatric [*sic*] or physical examination of such person, and may seek any information that will aid the court in determining the proper treatment of such defendant."

The Court of Appeals of New York affirmed the conviction and sentence over the contention that as construed and applied the controlling penal statutes are in violation of the due process clause of the Fourteenth Amendment of the Constitution of the United States "in that the sentence of death was based upon information supplied by witnesses with whom the accused had not been confronted and as to whom he had no opportunity for cross-examination or rebuttal . . . ." 298 N. Y. 803, 804, 83 N. E. 2d 698, 699. Because the statutes were sustained over this constitutional challenge the case is here on appeal under 28 U. S. C. § 1257 (2).

The narrow contention here makes it unnecessary to set out the facts at length. The record shows a carefully conducted trial lasting more than two weeks in which appellant was represented by three appointed lawyers who conducted his defense with fidelity and zeal. The evidence proved a wholly indefensible murder committed by a person engaged in a burglary. The judge instructed the jury that if it returned a verdict of guilty as charged, without recommendation for life sentence, "The Court must impose the death penalty," but if such recommendation was made, "the Court may impose a life sentence." The judge went on to emphasize that "the Court is not bound to accept your recommendation."

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About five weeks after the verdict of guilty with recommendation of life imprisonment, and after a statutory pre-sentence investigation report to the judge, the defendant was brought to court to be sentenced. Asked what he had to say, appellant protested his innocence. After each of his three lawyers had appealed to the court to accept the jury's recommendation of a life sentence, the judge gave reasons why he felt that the death sentence should be imposed. He narrated the shocking details of the crime as shown by the trial evidence, expressing his own complete belief in appellant's guilt. He stated that the pre-sentence investigation revealed many material facts concerning appellant's background which though relevant to the question of punishment could not properly have been brought to the attention of the jury in its consideration of the question of guilt. He referred to the experience appellant "had had on thirty other burglaries in and about the same vicinity" where the murder had been committed. The appellant had not been convicted of these burglaries although the judge had information that he had confessed to some and had been identified as the perpetrator of some of the others. The judge also referred to certain activities of appellant as shown by the probation report that indicated appellant possessed "a morbid sexuality" and classified him as a "menace to society." The accuracy of the statements made by the judge as to appellant's background and past practices was not challenged by appellant or his counsel, nor was the judge asked to disregard any of them or to afford appellant a chance to refute or discredit any of them by cross-examination or otherwise.

The case presents a serious and difficult question. The question relates to the rules of evidence applicable to the manner in which a judge may obtain information to guide him in the imposition of sentence upon an already convicted defendant. Within limits fixed by statutes,

New York judges are given a broad discretion to decide the type and extent of punishment for convicted defendants. Here, for example, the judge's discretion was to sentence to life imprisonment or death. To aid a judge in exercising this discretion intelligently the New York procedural policy encourages him to consider information about the convicted person's past life, health, habits, conduct, and mental and moral propensities. The sentencing judge may consider such information even though obtained outside the courtroom from persons whom a defendant has not been permitted to confront or cross-examine. It is the consideration of information obtained by a sentencing judge in this manner that is the basis for appellant's broad constitutional challenge to the New York statutory policy.

Appellant urges that the New York statutory policy is in irreconcilable conflict with the underlying philosophy of a second procedural policy grounded in the due process of law clause of the Fourteenth Amendment. That policy as stated in *In re Oliver,* 333 U. S. 257, 273, is in part that no person shall be tried and convicted of an offense unless he is given reasonable notice of the charges against him and is afforded an opportunity to examine adverse witnesses.[3] That the due process clause does provide these salutary and time-tested protections where the question for consideration is the guilt of a defendant seems entirely clear from the genesis and historical evolution of the clause. See, e. g., *Chambers* v. *Florida,* 309 U. S. 227, 236–237, and authorities cited in note 10.

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[3] Other due process requirements mentioned in the *Oliver* case were that the defendant should be permitted to offer evidence in his own behalf and be represented by counsel. Appellant, however, was represented by counsel both when tried and sentenced, and the sentencing judge did not decline to permit introduction of any evidence. In response to the judge's inquiry, statements were made by appellant and his counsel.

Tribunals passing on the guilt of a defendant always have been hedged in by strict evidentiary procedural limitations.[4] But both before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law.[5] Out-of-court affidavits have been used frequently, and of course in the smaller communities sentencing judges naturally have in mind their knowledge of the personalities and backgrounds of convicted offenders.[6] A recent manifestation of the historical latitude allowed sentencing judges appears in Rule 32 of the Federal Rules of Criminal Procedure. That rule provides for consideration by federal judges of reports made by probation officers containing information about a convicted defendant, including such information "as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant . . . ."[7]

In addition to the historical basis for different evidentiary rules governing trial and sentencing procedures there are sound practical reasons for the distinction. In a trial before verdict the issue is whether a defendant is guilty of having engaged in certain criminal conduct of which he has been specifically accused. Rules of evi-

[4] Courts have treated the rules of evidence applicable to the trial procedure and the sentencing process differently. See, e. g., *Snyder* v. *Massachusetts,* 291 U. S. 97, 107, 128–129; *Graham* v. *West Virginia,* 224 U. S. 616, 619; *United States* v. *Dalhover,* 96 F. 2d 355, 359–360. But cf. *State* v. *Stevenson,* 64 W. Va. 392, 62 S. E. 688.

[5] See cases collected in 14 Am. & Eng. Ann. Cas. 968, *et seq.;* 77 A. L. R. 1211, *et seq.;* 86 A. L. R. 832, *et seq.* See also Note, *The Admissibility of Character Evidence in Determining Sentence,* 9 U. of Chi. L. Rev. 715 (1942).

[6] See Pound, Criminal Justice in America 178 (1930).

[7] See *Stephan* v. *United States,* 133 F. 2d 87, 100. See also 18 U. S. C. § 3655.

dence have been fashioned for criminal trials which narrowly confine the trial contest to evidence that is strictly relevant to the particular offense charged. These rules rest in part on a necessity to prevent a time-consuming and confusing trial of collateral issues. They were also designed to prevent tribunals concerned solely with the issue of guilt of a particular offense from being influenced to convict for that offense by evidence that the defendant had habitually engaged in other misconduct. A sentencing judge, however, is not confined to the narrow issue of guilt. His task within fixed statutory or constitutional limits is to determine the type and extent of punishment after the issue of guilt has been determined. Highly relevant—if not essential—to his selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics.[8] And modern concepts individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial.

Undoubtedly the New York statutes emphasize a prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime. *People* v. *Johnson,* 252 N. Y. 387, 392, 169 N. E. 619, 621. The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender. This whole country has traveled far from the period in which the death sentence was an automatic and commonplace result of convictions—even for offenses today deemed

[8] Myerson, *Views on Sentencing Criminals,* 7 Law Soc. J. 854 (1937); Glueck, *Principles of a Rational Penal Code,* 41 Harv. L. Rev. 453 (1928); Warner and Cabot, *Administration of Criminal Justice,* 50 Harv. L. Rev. 583, 607 (1937); Comment, *Reform in Federal Penal Procedure,* 53 Yale L. J. 773 (1944).

trivial.[9] Today's philosophy of individualizing sentences makes sharp distinctions for example between first and repeated offenders.[10] Indeterminate sentences the ultimate termination of which are sometimes decided by non-judicial agencies have to a large extent taken the place of the old rigidly fixed punishments.[11] The practice of probation which relies heavily on non-judicial implementation has been accepted as a wise policy.[12] Execution of the United States parole system rests on the discretion of an administrative parole board. 36 Stat. 819, 18 U. S. C. §§ 714, 716, now §§ 4202, 4203. Retribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence.[13]

Modern changes in the treatment of offenders make it more necessary now than a century ago for observance

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[9] 2 Blackstone, Commentaries on the Laws of England (Lewis' ed. 1897) 1756–1757.

[10] With respect to this policy in the administration of the Probation Act this Court has said: "It is necessary to individualize each case, to give that careful, humane and comprehensive consideration to the particular situation of each offender which would be possible only in the exercise of a broad discretion." *Burns* v. *United States*, 287 U. S. 216, 220. In *Pennsylvania* v. *Ashe*, 302 U. S. 51, 55, this Court further stated: "For the determination of sentences, justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender." And see Wood and Waite, Crime and Its Treatment 438–442 (1941).

[11] Wood and Waite, Crime and Its Treatment 437 (1941); Orfield, Criminal Procedure from Arrest to Appeal 556–565 (1947). See, *e. g.*, Ill. Rev. Stat. c. 38, § 802 (1939); Cal. Pen. Code (Deering, 1941) § 1168.

[12] Glueck, Probation and Criminal Justice 232 (1933); National Probation Assn., Directory of Probation and Parole Officers 275 (1947); Cooley, Probation and Delinquency (1927).

[13] Judge Ulman writing on The Trial Judge's Dilemma discusses the problems that confront the sentencing judge and quotes from

of the distinctions in the evidential procedure in the trial and sentencing processes. For indeterminate sentences and probation have resulted in an increase in the discretionary powers exercised in fixing punishments. In general, these modern changes have not resulted in making the lot of offenders harder. On the contrary a strong motivating force for the changes has been the belief that by careful study of the lives and personalities of convicted offenders many could be less severely punished and restored sooner to complete freedom and useful citizenship. This belief to a large extent has been justified.

Under the practice of individualizing punishments, investigational techniques have been given an important role. Probation workers making reports of their investigations have not been trained to prosecute but to aid offenders. Their reports have been given a high value by conscientious judges who want to sentence persons on the best available information rather than on guesswork and inadequate information.[14] To deprive sentenc-

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one of his court opinions as to the factors that a judge should consider in imposing sentence:

"1st. The protection of society against wrong-doers.

"2nd. The punishment—or much better—the discipline of the wrong-doer.

"3rd. The reformation and rehabilitation of the wrong-doer.

"4th. The deterrence of others from the commission of like offenses.

"It should be obvious that a proper dealing with these factors involves a study of each case upon an individual basis. Was the crime a crime against property only, or did it involve danger to human life? Was it a crime of sudden passion or was it studied and deliberate? Is the criminal a man so constituted and so habituated to war upon society that there is little or no real hope that he ever can be anything other than a menace to society—or is he obviously amenable to reformation?" Glueck, Probation and Criminal Justice 113 (1933).

See also 12 Encyc. of Soc. Science, Penal Institutions 57–64 (1934).

[14] The late Federal Judge Lewis B. Schwellenbach in his article on the difficulties that confront a sentencing judge wrote: "The knowledge of the life of a man, his background and his family, is the only

ing judges of this kind of information would undermine modern penological procedural policies that have been cautiously adopted throughout the nation after careful consideration and experimentation. We must recognize that most of the information now relied upon by judges to guide them in the intelligent imposition of sentences would be unavailable if information were restricted to that given in open court by witnesses subject to cross-examination. And the modern probation report draws on information concerning every aspect of a defendant's life.[15] The type and extent of this information make totally impractical if not impossible open court testimony with cross-examination. Such a procedure could endlessly delay criminal administration in a retrial of collateral issues.

The considerations we have set out admonish us against treating the due process clause as a uniform command that courts throughout the Nation abandon their age-old

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proper basis for the determination as to his treatment. There is no substitute for information. The sentencing judge in the federal court has the tools with which to acquire that information. Failure to make full use of those tools cannot be justified." Schwellenbach, *Information vs. Intuition in the Imposition of Sentence*, 27 J. Am. Jud. Soc. 52 (1943). And see McGuire and Holtzoff, *The Problem of Sentence in the Criminal Law*, 20 B. U. L. Rev. 423 (1940).

[15] A publication circulated by the Administrative Office of the United States Courts contains a suggested form for all United States probation reports and serves as an example of the type of information contained in the reports. This form consists of thirteen "marginal headings." (1) Offense; (2) Prior Record; (3) Family History; (4) Home and Neighborhood; (5) Education; (6) Religion; (7) Interests and Activities; (8) Health (physical and mental); (9) Employment; (10) Resources; (11) Summary; (12) Plan; and (13) Agencies Interested. Each of the headings is further broken down into sub-headings. The form represents a framework into which information can be inserted to give the sentencing judge a composite picture of the defendant. Administrative Office of the United States Courts, The Presentence Investigation Report, Pub. No. 101 (1943).

practice of seeking information from out-of-court sources to guide their judgment toward a more enlightened and just sentence. New York criminal statutes set wide limits for maximum and minimum sentences.[16] Under New York statutes a state judge cannot escape his grave responsibility of fixing sentence. In determining whether a defendant shall receive a one-year minimum or a twenty-year maximum sentence, we do not think the Federal Constitution restricts the view of the sentencing judge to the information received in open court. The due process clause should not be treated as a device for freezing the evidential procedure of sentencing in the mold of trial procedure. So to treat the due process clause would hinder if not preclude all courts—state and federal—from making progressive efforts to improve the administration of criminal justice.

It is urged, however, that we should draw a constitutional distinction as to the procedure for obtaining information where the death sentence is imposed. We cannot accept the contention. Leaving a sentencing judge free to avail himself of out-of-court information in making such a fateful choice of sentences does secure to him a broad discretionary power, one susceptible of abuse. But in considering whether a rigid constitutional barrier should be created, it must be remembered that there is possibility of abuse wherever a judge must choose between life imprisonment and death. And it is con-

[16] A few New York criminal statutes will illustrate the broad statutory limits within which the sentencing judge must fix a defendant's penalty. Robbery in the first degree is punishable by imprisonment for not "less than ten years" nor "more than thirty years." New York Penal Law § 2125. Rape in the first degree is "punishable by imprisonment for not more than twenty years." New York Penal Law § 2010. Burglary in the first degree is punishable by imprisonment from ten to thirty years, burglary in the second degree "for a term not exceeding fifteen years." New York Penal Law § 407.

ceded that no federal constitutional objection would have been possible if the judge here had sentenced appellant to death because appellant's trial manner impressed the judge that appellant was a bad risk for society, or if the judge had sentenced him to death giving no reason at all. We cannot say that the due process clause renders a sentence void merely because a judge gets additional out-of-court information to assist him in the exercise of this awesome power of imposing the death sentence.

Appellant was found guilty after a fairly conducted trial. His sentence followed a hearing conducted by the judge. Upon the judge's inquiry as to why sentence should not be imposed, the defendant made statements. His counsel made extended arguments. The case went to the highest court in the state, and that court had power to reverse for abuse of discretion or legal error in the imposition of the sentence.[17] That court affirmed. We hold that appellant was not denied due process of law.[18]

*Affirmed.*

MR. JUSTICE RUTLEDGE dissents.

MR. JUSTICE MURPHY, dissenting.

A combination of factors in this case impels me to dissent.

Petitioner was convicted of murder by a jury, and sentenced to death by the judge. The jury which heard the

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[17] *People* v. *Stein*, 96 Misc. 507, 161 N. Y. S. 1107; *People* v. *Fox*, 202 N. Y. 616, 96 N. E. 1126; *People* v. *Johnson*, 252 N. Y. 387, 393, 169 N. E. 619, 621. And see *Commonwealth* v. *Johnson*, 348 Pa. 349, 35 A. 2d 312. As to English procedure see 28 Cr. App. R. 89, 90–91. Also see Note, *Right of Criminal Offenders to Challenge Reports Used in Determining Sentence*, 49 Col. L. Rev. 567 (1949).

[18] What we have said is not to be accepted as a holding that the sentencing procedure is immune from scrutiny under the due process clause. See *Townsend* v. *Burke*, 334 U. S. 736.

trial unanimously recommended life imprisonment as a suitable punishment for the defendant. They had observed him throughout the trial, had heard all the evidence adduced against him, and in spite of the shocking character of the crime of which they found him guilty, were unwilling to decree that his life should be taken. In our criminal courts the jury sits as the representative of the community; its voice is that of the society against which the crime was committed. A judge, even though vested with statutory authority to do so, should hesitate indeed to increase the severity of such a community expression.

He should be willing to increase it, moreover, only with the most scrupulous regard for the rights of the defendant. The record before us indicates that the judge exercised his discretion to deprive a man of his life, in reliance on material made available to him in a probation report, consisting almost entirely of evidence that would have been inadmissible at the trial. Some, such as allegations of prior crimes, was irrelevant. Much was incompetent as hearsay. All was damaging, and none was subject to scrutiny by the defendant.

Due process of law includes at least the idea that a person accused of crime shall be accorded a fair hearing through all the stages of the proceedings against him. I agree with the Court as to the value and humaneness of liberal use of probation reports as developed by modern penologists, but, in a capital case, against the unanimous recommendation of a jury, where the report would concededly not have been admissible at the trial, and was not subject to examination by the defendant, I am forced to conclude that the high commands of due process were not obeyed.

# CITY OF MORGANTOWN *v.* ROYAL INSURANCE CO., LTD.

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

No. 396. Argued February 9, 1949.—Decided June 6, 1949.

An insurer brought suit in the District Court for reformation of a policy of insurance, alleging that the policy, though in terms covering loss by fire, was mutually intended to cover only loss by windstorm. The policyholder, who had suffered a loss by fire, filed a counterclaim upon the policy to recover the amount of the loss; and, under Rule 38 (b) of the Federal Rules of Civil Procedure, demanded a jury trial. *Held:* An order of the District Court denying the demand for trial by jury was not appealable. Pp. 255–259.

(a) The order denying the demand for a jury trial in this case was not an order refusing an injunction within the meaning of 28 U. S. C. § 227 (now § 1292). *Enelow* v. *New York Life Ins. Co.*, 293 U. S. 379; *Ettelson* v. *Metropolitan Life Ins. Co.*, 317 U. S. 188, distinguished. Pp. 256–258.

(b) Notwithstanding its importance and its effect on the litigation, the order denying a jury trial was interlocutory in form and substance, and to permit an appeal therefrom would encourage piecemeal appeals. Pp. 258–259.

169 F. 2d 713, affirmed.

In a suit in the District Court by an insurer for reformation of a policy of insurance on the ground of mutual mistake, the policyholder filed a counterclaim upon the policy to recover for a loss and demanded a jury trial. An appeal from an order denying a jury trial was dismissed by the Court of Appeals. 169 F. 2d 713. This Court granted certiorari. 335 U. S. 890. *Affirmed,* p. 259.

*Mary Frances Brown* argued the cause, and *W. G. Stathers* filed a brief, for petitioner.

*James M. Guiher* argued the cause for respondent. With him on the brief was *Louis A. Johnson.*

MR. JUSTICE MURPHY delivered the opinion of the Court.

This case raises two questions: the appealability of an order denying a demand for trial by jury in a federal court, and whether the constitutional right to a jury applies to the trial of an issue of mutual mistake.

The facts are these. Petitioner in August of 1947 was carrying insurance with respondent on a hangar at its Municipal Airport. The policy by its terms insured petitioner against loss by fire or lightning in the amount of $22,000. On August 20, the hangar was completely destroyed by fire. Petitioner filed proof of loss. Shortly thereafter respondent instituted an action in the District Court for the Northern District of West Virginia for reformation and correction of the policy. It alleged in substance that during the preceding year petitioner had carried only windstorm insurance on the hangar, in the same amount; that the policy currently in force was intended by the parties to be a renewal of the prior policy; that the premium paid was the same as had been paid for windstorm insurance, an amount much less than the premium for fire insurance; and the policy had been written as a fire policy through the inadvertence of both parties and did not express the intent of either. It prayed for reformation to correct the mutual mistake and for a declaration of no liability for the loss by fire. Petitioner answered, denying mistake, and filed a counterclaim to recover on the policy as written. Respondent answered the counterclaim, alleging the same facts as in its complaint. Petitioner filed a demand for jury trial under Rule 38 (b); respondent moved to strike the demand; the court granted the motion and set the case for trial to the court without a jury. Petitioner appealed from this ruling. On motion of respondent, the Court of Appeals dismissed the appeal, 169 F. 2d 713, and the case is here on a writ of certiorari. 335 U. S. 890.

In this posture of the case, we are first confronted with the question of the appealability of the trial court's order denying jury trial. Not being a final decision, it is appealable, if at all, only as an interlocutory decree granting or refusing an injunction under § 129 of the Judicial Code (28 U. S. C. § 227).[1] Petitioner urges *Enelow* v. *New York Life Ins. Co.,* 293 U. S. 379, and *Ettelson* v. *Metropolitan Life Ins. Co.,* 317 U. S. 188, upon us as conclusive in favor of appealability. In each of those cases, the plaintiff had commenced an action to recover according to the terms of an insurance policy; in each of them the insurance company denied liability, alleging fraud in the procurement of the policy, and moved that the issue of fraud be tried to the court without a jury. The trial court in each case granted the motion, and this Court held on review that the rulings thus made were appealable under § 129.

The substance of § 129 has been a part of federal law since 1891, 26 Stat. 828, and its relation to other aspects of procedure has not been rigid. Since 1912 the history of the law governing procedure in the federal courts has manifested a slow but consistent process of coalescing of the practice in the law and equity sides of the courts. In that year this Court adopted new equity rules, of which Rule 22 and Rule 23 made a significant start in procedural unification. A major step occurred in 1915, with the enactment of the Law and Equity Act, 38 Stat. 956, which added §§ 274 (a) and 274 (b) to the Judicial Code. The net effect of these additions was to allow transfer of action begun on either side of the court to the other side,

[1] "Where . . . an injunction is granted, continued, modified, refused, or dissolved by an interlocutory order or decree, or an application to dissolve or modify an injunction is refused, . . . an appeal may be taken from such interlocutory order or decree . . . ." The substance of this provision has been retained in Revised Title 28, U. S. C. § 1292, 62 Stat. 869.

without the necessity of commencing a new action, to permit determination of law questions arising in equity actions in those actions, and to allow equitable defenses to be offered and equitable relief to be granted in an action at law.

In this state of a partly blended law and equity procedure arose the *Enelow* case, *supra.* The Court there held, with regard to an order denying trial by jury, that by analogy to practice at common law the order was one granting an injunction within the meaning of § 129.

The coalescing of law and equity procedure was completed in 1938, with the adoption of the Rules of Civil Procedure. Their purpose, among others, was "to secure the just, speedy, and inexpensive determination of every action," and to that end they prescribed identical procedure for all actions, whether cognizable formerly at law or in equity. After their adoption, the identical problem presented by the *Enelow* case arose in *Ettelson* v. *Metropolitan Life Ins. Co., supra.* It was argued that the adoption of the rules had so unified the federal procedure that the type of order in question could no longer be considered an injunction and appealable. We held the order appealable, since the rules had not changed its substantial effect, noting that the position of the parties was the same as it would have been if a state equity court had enjoined an action at law.

Whatever the present validity of the analogy to common-law practice which supported those cases, it is of no help here. This is not a situation where a "chancellor" in denying a demand for jury trial can be said to be enjoining a "judge" who has cognizance of a pending action at law. This is rather a case of a judge making a ruling as to the manner in which he will try one issue in a civil action pending before himself. The fiction of a court with two sides, one of which can stay proceedings in the other, is not applicable where there is no

other proceeding in existence to be stayed. The ruling from which the appeal in this case was prosecuted is an order interlocutory in form and substance. Nothing in the language of the rules or the Judicial Code brings it within the class of appealable decisions, and distinctions from common-law practice which supported our conclusions in the *Enelow* and *Ettelson* cases supply no analogy competent to make an injunction of what in any ordinary understanding of the word is not one.

Trial by jury is a vital and cherished right, integral in our judicial system. It is argued that the importance of an interlocutory order denying or granting jury trial is such that it should be appealable. Many interlocutory orders are equally important, and may determine the outcome of the litigation, but they are not for that reason converted into injunctions. The Constitution guarantees to litigants in the federal courts the right to have their cases tried by juries, and Rule 38 of the Rules of Civil Procedure explicitly implements that guarantee. Denial of the right in a case where the demanding party is entitled to it is of course error. The rulings of the district courts granting or denying jury trials are subject to the most exacting scrutiny on appeal.

But piecemeal appeals have never been encouraged. The growth of the law of procedure in the United States during the last half-century has been steadily in the direction of simplicity and directness in the administration of justice. To that end, and with careful regard for the constitutional rights of the parties, this Court, pursuant to specific authorization by Congress, adopted the Rules of Civil Procedure, abolishing procedural distinctions between law and equity and establishing a single unified practice. We would ill serve the stated purposes of the Rules of Civil Procedure were we to perpetuate by analogy distinctions which the rules expressly disavow. The

Court of Appeals was correct in dismissing the appeal and its judgment is affirmed.

With the case disposed of in this manner, we do not reach the second question presented: whether petitioner is entitled to a jury on the issue of mutual mistake.

*Affirmed.*

MR. JUSTICE BURTON concurs in the judgment of the Court.

MR. JUSTICE FRANKFURTER, concurring.

On occasion a problem arises which calls for a more discriminating analysis than is conveyed by the phrase "law and equity are now fused" to indicate the procedural development whereby an action at law and a suit in equity in relation to it may be disposed of in a single litigation. In this case, the deeply rooted historical distinction between an action at law and a suit in equity becomes decisive. Since I would not reverse or impair the ruling in *Enelow* v. *New York Life Ins. Co.*, 293 U. S. 379, and *Ettelson* v. *Metropolitan Life Ins. Co.*, 317 U. S. 188, I should like to add a few words to the Court's opinion, in which I join, to make clear why the present decision leaves those decisions unimpaired.

In the two earlier cases an action at law was brought on an insurance policy. Of course this entitled the plaintiff to a trial by jury. The defendant asked for a cancellation of the policy because of fraud. The district court entered an order suspending the action at law, to be tried by a jury, until the later-begun equitable proceeding—trial without a jury—was concluded. This Court was called upon to construe § 129 of the Judicial Code allowing appeals in limited categories of interlocutory decisions. 28 U. S. C. § 227, now § 1292. With due regard to the actualities of the situation, the Court

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held that the staying of an action at law by the chancellor is an interlocutory injunction and as such appealable, even though the chancellor who granted such an interlocutory order be the same judge before whom the earlier action at law was pending. The ground of the decision in the *Enelow* case leaves no doubt as to its scope. Section 129 of the Judicial Code, wrote Mr. Chief Justice Hughes for the Court,

> ". . . contemplates interlocutory orders or decrees which constitute an exercise of equitable jurisdiction in granting or refusing an injunction, as distinguished from a mere stay of proceedings which a court of law, as well as a court of equity, may grant in a cause pending before it by virtue of its inherent power to control the progress of the cause so as to maintain the orderly processes of justice. The power to stay proceedings in another court appertains distinctively to equity in the enforcement of equitable principles, and the grant or refusal of such a stay by a court of equity of proceedings at law is a grant or refusal of an injunction within the meaning of § 129. And, in this aspect, it makes no difference that the two cases, the suit in equity for an injunction and the action at law in which proceedings are stayed, are both pending in the same court . . . ." 293 U. S. at 381–82.

In this case the plaintiff instituted a suit in equity for the reformation of an instrument. The insured, by way of counterclaim, contested that suit and, in addition, sought recovery on the policy. The latter was a conventional action at law which, under the Constitution, entitled the defendant to a jury trial. The judge continued this action at law until the prior equitable proceeding could be concluded. The facts, therefore, are precisely the opposite of those in the *Enelow* case. Here

there was no intervention by a court of equity in proceedings at law, but "a mere stay of proceedings which a court of law, as well as a court of equity, may grant in a cause pending before it by virtue of its inherent power to control the progress of the cause so as to maintain the orderly processes of justice." 293 U. S. at 381–82. Since an interlocutory proceeding in an action at law cannot possibly be brought within the limited class of appealable interlocutory decisions under the old § 129 of the Judicial Code (now 28 U. S. C. § 1292), there is an end to the matter.

A layman may see no difference between the postponement by a trial judge of an action at law, and the postponement of such an action by an equitable proceeding resulting in an interlocutory injunction. But the Congress has seen fit to allow an appeal from one such result and not from the other. Nonappealability of intermediate orders in the federal courts has been a deep-rooted general principle limiting those courts since their establishment. A very few types of interlocutory orders are appealable. The *Enelow* and *Ettelson* cases presented an order that was appealable because it was a stay by a court of equity of a common-law action. This is not such a stay, and in affirming the judgment the Court leaves *Enelow* and *Ettelson* untouched.

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

I think it an undesirable practice for this Court to overrule past cases without saying so. The effect of the Court's holding here is to overrule *Ettelson* v. *Metropolitan Ins. Co.*, 317 U. S. 188, decided by a unanimous Court in 1942. The Court's holding today rejects the interpretation of § 129 of the Judicial Code (28 U. S. C. § 227, as amended 28 U. S. C. § 1292) given that section in the *Ettelson* case and in *Enelow* v. *New York Life Ins.*

*Co.*, 293 U. S. 379. And to support its new interpretation of that section the Court now adopts reasons and arguments that were expressly urged and expressly rejected in the *Enelow* and *Ettelson* cases.

Today the Court brushes aside the *Enelow* and *Ettelson* cases, implying that this, unlike either of the other two, is "a case of a judge making a ruling as to the manner in which he will try one issue in a civil action pending before himself." But this was true in the *Enelow* and *Ettelson* cases. In the *Enelow* case the Court said at p. 382 that "it makes no difference that the two cases . . . are both pending in the same court, in view of the established distinction between 'proceedings at law and proceedings in equity in the national courts and between the powers of those courts when sitting as courts of law and when sitting as courts of equity.'" The Court also implies that this case can be distinguished from the *Enelow* and *Ettelson* cases because the order in this case is "interlocutory in form and substance." But this was true in the *Enelow* and *Ettelson* cases. In the *Enelow* case the Court said at p. 383, that "although interlocutory, it [the order] was appealable . . . under § 129." In the *Enelow* case the order of the trial court held appealable (p. 381) required hearing of the equitable issue raised "in advance of the trial by jury at law of any purely legal issues." That was precisely the effect of the trial court's order in this case; it required hearing of the equitable issue of reformation in advance of a trial by jury of the legal issues raised by the counterclaim. Today the Court says this order is not an "injunction . . . in any ordinary understanding of the word . . . ." In the *Enelow* case this Court said that such an order "in effect grants or refuses an injunction . . . ." (p. 383).

The Court today seems to rest its departure from the *Enelow* case on the Federal Rules of Civil Procedure and their purpose as set out in Rule 1 "to secure the just,

speedy, and inexpensive determination of every action." The *Ettelson* case, *supra,* came to this Court after adoption of these rules. The insurance company there specifically pointed to Rule 1 as a reason why this Court should not follow the *Enelow* case. We unanimously rejected the contention. We pointed out at p. 191 that "As in the *Enelow* case . . . the result of the District Judge's order is the postponement of trial of the jury action based upon the [insurance] policies; and it may, in practical effect, terminate that action. It is as effective in these respects as an injunction issued by a chancellor. . . . The plaintiffs are . . . in no different position than if a state equity court had restrained them from proceeding in the law action. Nor are they differently circumstanced than was the plaintiff in the *Enelow* case. The relief afforded by § 129 is not restricted by the terminology used. The statute looks to the substantial effect of the order made."

Thus despite our unanimous rejection of the contention in *Ettelson* the Court now holds that the Rules of Civil Procedure have displaced both the *Enelow* and *Ettelson* interpretation of § 129 of the Judicial Code. The basis for overruling the *Enelow* and *Ettelson* cases appears to be the Court's hostility to "piecemeal appeals" and the Court's belief that overruling the two cases will promote "simplicity and directness in the administration of justice." But to grant appeal here would not sustain appeals from every adverse ruling made in the process of a trial. Denial of trial by jury is not to be classified with ordinary trial errors, such as an admission or rejection of evidence. The question here relates to the whole trial of the issues involved: what tribunal shall hear and resolve the evidence, judge or jury? And neither simplicity nor directness of judicial administration are necessarily furthered by compelling two trials where one would suffice. Moreover, there is much to be said against

the idea of inflexibly barring appeals in regard to alleged substantial errors that may fatally invalidate an entire trial procedure.*

In considering whether the dogma against "piecemeal appeals" is to be unduly exalted in this case we should not lose sight of the fact that the Bill of Rights guarantees trial by jury in appropriate cases. Had petitioner here filed a common-law suit on its policy in a state court it would have been entitled to trial by jury. In that event the federal court could have restrained trial, if at all, only by an injunction, which confessedly would have been appealable under § 129. But under Rules 2 and 13 (a) of the Federal Rules of Civil Procedure petitioner was compelled to sue on its policy by filing counterclaim in the federal court. Cf. *American Mills Co.* v. *American Surety Co.*, 260 U. S. 360, 364, 366. Because of that federal compulsion the Court now penalizes petitioner by denying it a right of appeal. As a result, petitioner's alleged constitutional right to have the facts of its case determined by a jury is at least postponed. There are many prior decisions of this Court that justify a more considerate treatment of contentions that invoke the Bill of Rights guarantee of trial by jury. See, e. g., *Scott* v. *Neely*, 140 U. S. 106, 109, 110; *Insurance Co.* v. *Bailey*, 13 Wall. 616.

*Moore and Vestal, *Present and Potential Role of Certification in Federal Appellate Procedure*, 35 Va. L. Rev. 1 (1949); see dissenting opinion by Judge Frank in *American Machine and Metals, Inc.* v. *De Bothezat Impeller Co.*, 173 F. 2d 890.

Syllabus.

# FEDERAL COMMUNICATIONS COMMISSION *v.* WJR, THE GOODWILL STATION, INC. ET AL.

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

No. 495. Argued April 22, 1949.—Decided June 6, 1949.

Without notice to Radio Station WJR, which was licensed as a Class I Station, the Federal Communications Commission granted another party an application for a permit to construct a Class II Station to broadcast on the same frequency previously used exclusively by WJR. Alleging that the new station would cause "objectionable interference" with its broadcast signal, WJR petitioned for reconsideration of the application and for a hearing to which it might be made a party or, in the alternative, that final action on the application be postponed until the conclusion of a pending "clear channel" proceeding, in which the Commission was considering allowing WJR and other stations to increase their power. The applicant challenged the legal sufficiency of WJR's petition on the ground that WJR had not set forth facts which, if accepted as true, would constitute interference with WJR's "normally protected contour." The Commission denied WJR's petition without oral argument. *Held:*

1. The Commission was under no duty to WJR to postpone final action on the application for the permit until it had disposed of the "clear channel" proceeding. P. 272.

2. The Due Process Clause of the Fifth Amendment did not require that the Commission afford WJR an opportunity for oral argument upon its petition for reconsideration of the application. Pp. 272–285.

(a) Procedural due process under the Fifth Amendment does not require that an opportunity for oral argument be afforded on every question of law raised before a judicial or quasi-judicial tribunal, excepting such questions as may be involved in interlocutory orders. Pp. 274–277.

(b) The procedure provided by Congress in the Communications Act, for determination of the questions raised by WJR, is not lacking in due process. Pp. 277–285.

(c) The provision of § 409 (a) for oral argument before the Commission in proceedings heard initially before an examiner is inapplicable here, since this proceeding was not heard or assigned

for hearing in the first instance before an examiner and WJR's claimed right of participation arises under § 312 (b). Pp. 277–278.

(d) By §§ 312 (b) and 4 (j), Congress has committed to the Commission's discretion the questions whether and under what circumstances it will allow or require oral argument, except where the Act expressly requires it. Pp. 281–282.

(e) The provision of § 312 (b) for "reasonable opportunity to show cause" is not to be construed as always including opportunity for oral argument. Pp. 282–283.

(f) This Court can not say that the Commission abused its discretion in determining WJR's petition on the written submission. P. 284.

3. It was error for the Court of Appeals to decline to decide the merits of the question whether WJR's petition stated a legally sufficient case of (indirect) modification of its license within the terms of § 312 (b), as well as to decide, without determining that question, that WJR was entitled to be made a party to and participate as such in the proceedings on the application. P. 284.

4. The cause is remanded to the Court of Appeals for decision of the basic issue on the merits, uncomplicated by questions of constitutionality relating to the Commission's procedure. P. 285.

84 U. S. App. D. C. 1, 174 F. 2d 226, reversed.

The Federal Communications Commission denied WJR's petition for reconsideration of an order granting to another an application for a permit to construct a radio station. The Court of Appeals reversed and remanded the case to the Commission. 84 U. S. App. D. C. 1, 174 F. 2d 226. This Court granted certiorari. 336 U. S. 917. *Reversed and remanded,* p. 285.

*Solicitor General Perlman* argued the cause for petitioner. With him on the brief were *Stanley M. Silverberg, Benedict P. Cottone, Max Goldman, Richard A. Solomon* and *Paul Dobin.*

*Louis G. Caldwell* argued the cause for respondents. With him on the brief for WJR, The Goodwill Station, Inc., were *Donald C. Beelar* and *Percy H. Russell, Jr.*

*Frank U. Fletcher* was also of counsel for the Coastal Plains Broadcasting Co., Inc., respondent.

MR. JUSTICE RUTLEDGE delivered the opinion of the Court.

Most broadly stated, the important question presented by this case is the extent to which due process of law, as guaranteed by the Fifth Amendment, requires federal administrative tribunals to accord the right of oral argument to one claiming to be adversely affected by their action, more particularly upon questions of law. Lest this spacious form of statement be taken as too sweeping and abstract to pose a justiciable issue, we think the specific context of fact and decision out of which the question has arisen must be set forth. But before this is done we should say that, as we understand the Court of Appeals' decision, it has ruled that Fifth Amendment procedural due process requires an opportunity for oral argument to be given "on every question of law raised before a judicial or quasi-judicial tribunal, including questions raised by demurrer or as if on demurrer, except such questions of law as may be involved in interlocutory orders such as orders for the stay of proceedings *pendente lite*, for temporary injunctions and the like," 174 F. 2d 226, 233, and on this basis has remanded this cause to the Federal Communications Commission for oral argument.

Involved in the controversy are two radio stations and the Commission, which is the petitioner here. One of the stations is the respondent WJR. It is licensed by the Commission as a "Class I–A Station," [1] to broadcast day and night from Detroit, Michigan, on a frequency of 760

[1] Federal Communications Commission Rules Governing Standard Broadcast Stations § 3.22 (a): "A 'Class I Station' is a dominant station operating on a clear channel and designed to render primary and secondary service over an extended area and at relatively long distances. Its primary service area is free from objectionable interference from other stations on the same and adjacent channels, and its secondary service area free from interference, except from stations on the adjacent channel, and from stations on the same channel in

kilocycles and with a strength of 50 kilowatts. The other station is the intervenor, Coastal Plains (formerly Tarboro) Broadcasting Company.

Prior to August 22, 1946, Tarboro filed written application with the Commission for a permit to construct a "Class II Station" [2] to broadcast from Tarboro, North Carolina. On that date the Commission granted the application. The permit specified that the new station was to broadcast during the day from Tarboro at a strength of one kilowatt on the frequency of 760 kilocycles, which previously had been used exclusively by WJR. The construction permit was granted without notice to WJR and without oral hearing or other participation by it in the proceedings before the Commission.

On September 10 following, WJR filed with the Commission a written "Petition for reconsideration and hearing." This alleged that the proposed broadcasting range of the Coastal Plains station would cause "objectionable interference" with respondent's broadcast signal. Interference was said to be anticipated principally in certain areas of Michigan where "the field intensity of WJR averages 32 microvolts per meter or less during the day-

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accordance with the channel designation in Sec. 3.25 or in accordance with the 'Engineering Standards of Allocation'. The operating power shall be not less than 10 kw nor more than 50 kw (also see Sec. 3.25 (a) for further power limitation)." 4 Fed. Reg. 2715.

[2] Federal Communications Commission Rules Governing Standard Broadcast Stations § 3.22 (b): "A 'Class II Station' is a secondary station which operates on a clear channel (see Sec. 3.25) and is designed to render service over a primary service area which is limited by and subject to such interference as may be received from Class I stations. A station of this class shall operate with power not less than 0.25 kilowatts nor more than 50 kilowatts. Whenever necessary a Class II station shall use a directional antenna or other means to avoid interference with Class I stations and with other Class II stations, in accordance with the 'Engineering Standards of Allocation.'" 4 Fed. Reg. 2715.

time hours," [3] but where "WJR provides the best signal available"; limited interference "during the winter season" was also expected within "contours" of field intensity "much higher" than 32 microvolts; interference of unspecified extent was also thought likely in neighboring states, though as to such areas it was conceded that "a better signal is provided by other stations."

On the basis of these allegations WJR asked that the Commission hold a hearing on the Coastal Plains application to which WJR might be made a party or, in the alternative, postpone final action on the Coastal Plains application until the conclusion of the then pending "Clear Channel" [4] proceeding. In that proceeding, essentially legislative in character, the Commission was considering the desirability of changing its rules so as to allow WJR and other stations to increase their broadcast strengths to 500 kilowatts. The basis for the alternative request was WJR's fear that a grant of the Coastal Plains construction permit might prejudice a possible future WJR application for increased signal strength in the event the decision in the clear channel proceeding should so modify the Commission's rules as to facilitate such an application.

Coastal Plains filed an opposition to WJR's petition for reconsideration, asserting among other grounds for denial that WJR had not alleged that the proposed new operation "would cause any interference within the normally protected service area of station WJR" and had neither

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[3] For the meaning of the term "field intensity," and for the relation of a broadcast signal's "field intensity" to the legal concept of a licensed radio station's "normally protected contour," see note 5.

[4] Federal Communications Commission Rules Governing Standard Broadcast Stations § 3.21 (a): "A 'clear channel' is one on which the dominant station or stations render service over wide areas and which are cleared of objectionable interference, within their primary service areas and over all or a substantial portion of their secondary service areas." 4 Fed. Reg. 2715.

alleged nor proved "any interference within its normally protected contours." The opposition was based on the theory that under the Commission's regulations WJR's license conferred no right to protection against interference outside its normally protected contours as specified in the regulations, that the interference alleged was outside those contours, and hence WJR's petition was legally insufficient on its face to state any basis for WJR to be made a party to or to be heard in the Coastal Plains proceeding.

No response to the opposition was filed by WJR and some three months later, on December 17, 1946, the Commission denied WJR's application in a written opinion, rendered without prior oral argument. The opinion first disposed of the allegations of interference:

> "Station WJR is a Class I–A station. Under the Commission's Rules and Standards, Class I–A stations are normally protected daytime to the 100 microvolt-per-meter contour. The area sought by petitioner to be protected is, according to the engineering affidavit accompanying the petition, served by Station WJR during the daytime with a signal intensity of 32 microvolts-per-meter or less, and is therefore outside the normally protected contour." [5]

As the Court of Appeals later treated this ruling, it was the equivalent of holding as a matter of law, in

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[5] The dissenting opinion in the Court of Appeals decision here under review offers a succinct exposition of these technical terms:

"This concept of normal protection in the daytime is clear. The circumference of the protected area is a contour line, which is fixed by measurement of the strength of the radio waves from the particular station. That strength, or intensity, is measured in terms of microvolts (millionths of a volt) or millivolts (thousandths of a volt) per meter, abbreviated as uv/m and mv/m respectively. The wave which is measured is the groundwave, which follows the

judicial parlance essentially as though raised upon demurrer, that WJR's petition did not state facts sufficient to raise any legal issue concerning (indirect) modification of WJR's license or rights under the license. The Commission also denied WJR's alternate request to stay the Coastal Plains application, concluding that postponement of the newly authorized service out of deference to any possible "future assignment of facilities" to WJR "would not serve the public interest."

WJR then appealed to the Court of Appeals. The court agreed that the Commission had not abused its discretion in refusing to stay the Coastal Plains permit until completion of the clear channel proceeding. It held, however, that WJR's claim of objectionable interference with its broadcast signal presented a question of law and, by a closely divided vote, in the broad language quoted

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surface of the earth and extends greater or less distances depending upon the nature of the earth, its topography, and such obstacles as noise and steel structures. Generally speaking, the greater the distance from the station, the less the strength of the station signal. The '100 uv/m ground wave contour' named in the Commission's Standards, is the imaginary line which connects all points at which the ground wave of the station is of 100 microvolts per meter strength." 174 F. 2d 226, 244.

The "Commission's Standards" to which the opinion refers are the Standards of Good Engineering Practice Concerning Broadcast Stations. Under the subheading "Engineering Standards of Allocation," paragraph (2) (a) provides as follows: "The Class I stations in Group 1 are those assigned to the channels allocated by Section 3.25, paragraph (a) [including, inter alia, the 760 kilocycle frequency assigned to WJR, 4 Fed. Reg. 2716], on which duplicate nighttime operation is not permitted, that is, no other station is permitted to operate on a channel with a Class I station of this group within the limits of the United States (the Class II stations assigned the channels operate limited time or daytime only) and during daytime the Class I station is protected to the 100 uv/m ground wave contour." 4 Fed. Reg. 2862.

above,[6] that, concerning the merits of that question, the Fifth Amendment assured to WJR the right of oral argument before the Commission. Accordingly, it refused to consider whether the Commission was right in its legal conclusion that areas of signal intensity lower than 100 microvolts per meter were not within the "normally protected contour" of a Class I–A station, reversed the Commission's denial of WJR's petition, and remanded the case for oral argument before the Commission. 174 F. 2d 226. To consider the questions of importance to the administrative process thus determined, we issued our writ of certiorari. 336 U. S. 917.

At the outset we note our complete agreement with the Court of Appeals that the Commission was under no duty to WJR to postpone final action on the Coastal Plains permit until it had disposed of the clear channel proceeding. As the court pointed out, WJR had no vested right in the "supposititious eventualities" that the Commission at some indeterminate time might modify its rules governing clear channel stations. Furthermore, the judicial regulation of an administrative docket sought by WJR "would require [the Court of Appeals] to direct the order in which the Commission shall consider its cases." And this, as the court said, it "cannot do." 174 F. 2d at 231. "Only Congress could confer such a priority." *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 145.

Obviously the most important question is the Court of Appeals' ruling that Fifth Amendment due process re-

[6] The case was first argued before three justices, Chief Justice Groner and Justices Clark and Prettyman. By direction of the court it was reargued before Justices Stephens, Edgerton, Clark, Wilbur K. Miller and Prettyman. The decision was rendered pursuant to an opinion of Justice Stephens, in which Justices Clark and Miller concurred. Justice Prettyman filed a dissenting opinion in which Justice Edgerton joined.

quired the Commission to afford respondent an opportunity for oral argument upon its petition for reconsideration of Coastal Plains' application, together with its grounding of that ruling in the even broader one that such an opportunity is an inherent element of procedural due process in all judicial or quasi-judicial, *i. e.*, administrative, determinations of questions of law, outside of such questions as may arise upon interlocutory matters involving stays *pendente lite,* temporary injunctions and the like.

That the scope of its decision might not be misunderstood, the court expressly stated: "A ruling upon a demurrer is obviously not interlocutory for if the demurrer is sustained the pleader's cause (or defense) is dismissed upon the merits . . . ." [7] Moreover, except as to the indicated interlocutory matters, the right of oral argument on questions of law ("as well as . . . those of fact" when raised) was said to be "not conditional upon the *ex parte* view of the tribunal as to whether there is a substantial question as to the sufficiency of the allegations of a complainant." 174 F. 2d at 240.

Accordingly, although it was urged both by the Commission and by WJR to consider and determine the "threshold" question of law upon its merits, namely, whether the Commission's decision in denying WJR's petition was wrong, the court refused to consider or decide that question. In its view the question of the Commission's duty to accord a hearing, "*i. e.*, to hear argument

[7] The statement, taken in its context and the pervading sense of the opinion, related not merely to judicial rulings technically "raised by demurrer" but also to judicial and administrative rulings "as if on demurrer," *i. e.*, as expressly stated later in the opinion, to rulings "raised by demurrer or motion to dismiss or, in an administrative proceeding, by some less formally named instrument of like purpose, or by the tribunal's *sua sponte* treatment of a petition as if under demurrer . . . ." 174 F. 2d at 236.

before deciding whether the allegations of WJR's petition were sufficient" in law, was "a procedural question quite separate from the question on the merits whether or not the allegations of the petition, assuming their truth, were sufficient." 174 F. 2d at 240. The statutory scheme of the Communications Act, the court thought, "contemplates, before review in this court, proper exercise of the Commission's primary jurisdiction, *i. e.*, valid first instance hearings properly conducted from the procedural—due process—standpoint." *Ibid.* Accordingly, the majority felt that the court "must therefore remand the case with directions to the Commission to allow a hearing to WJR. Then if after hearing the Commission decides that the allegations were insufficient and dismisses the petition . . . an appeal to this court will bring properly before us the question of the correctness of the Commission's decision on the merits . . . ." *Ibid.*[8]

I.

Taken at its literal and explicit import, the Court's broad constitutional ruling cannot be sustained. So taken, it would require oral argument upon every ques-

[8] Both from the wording of the immediate reference, quoted above, and from other language in context, it is clear that the court's reference to "the statutory scheme set up in the Communications Act" was not designed as a ruling that the statutory scheme itself, considered wholly as such and apart from any requirement of due process, affords the right of oral argument upon all questions of law, other than the interlocutory exceptions, before the Commission. Rather, the reference was intended to construe the Act as incorporating the court's reiterated conception of due-process requirements in this respect, in effect as a construction required by the Fifth Amendment. It is clear also that in this ruling the court identified "hearing" with "oral argument" insofar as determination of questions of law are concerned. We are thus confronted, so far as the court's decision went, with no question purely of statutory construction but solely, at bottom, with one of constitutional import and effect.

tion of law, apart from the excluded interlocutory matters, arising in administrative proceedings of every sort. This would be regardless of whether the legal question were substantial or insubstantial; of the substantive nature of the asserted right or interest involved; of whether Congress had provided a procedure, relating to the particular interest, requiring oral argument or allowing it to be dispensed with; and regardless of the fact that full opportunity for judicial review may be available.

We do not stop to consider the effects of such a ruling, if accepted, upon the work of the vast and varied administrative as well as judicial tribunals of the federal system and the equally numerous and diversified interests affected by their functioning; or indeed upon the many and different types of administrative and judicial procedures which Congress has provided for dealing adjudicatively with such interests. It is enough to say that due process of law, as conceived by the Fifth Amendment, has never been cast in so rigid and all-inclusive confinement.

On the contrary, due process of law has never been a term of fixed and invariable content.[9] This is as true with reference to oral argument as with respect to other elements of procedural due process. For this Court has held in some situations that such argument is essential to a fair hearing, *Londoner* v. *Denver,* 210 U. S. 373, in

[9] "The Fifth Amendment guarantees no particular form of procedure; it protects substantial rights." *Labor Board* v. *Mackay Co.,* 304 U. S. 333, 351. "The requirements imposed by that guaranty [Fifth Amendment due process] are not technical, nor is any particular form of procedure necessary." *Inland Empire Council* v. *Millis,* 325 U. S. 697, 710. See also *Bowles* v. *Willingham,* 321 U. S. 503, 519–521; *Opp Cotton Mills* v. *Administrator,* 312 U. S. 126, 152–153; *Buttfield* v. *Stranahan,* 192 U. S. 470, 496–497; *Anniston Mfg. Co.* v. *Davis,* 301 U. S. 337, 342, 343; *United States* v. *Ju Toy,* 198 U. S. 253, 263; *Chicago, B. & Q. R. Co.* v. *Chicago,* 166 U. S. 226, 235; *Phillips* v. *Commissioner,* 283 U. S. 589, 596–597.

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others that argument submitted in writing is sufficient. *Morgan* v. *United States,* 298 U. S. 468, 481. See also *Johnson & Wimsatt* v. *Hazen,* 69 App. D. C. 151; *Mitchell* v. *Reichelderfer,* 61 App. D. C. 50.

The decisions cited are sufficient to show that the broad generalization made by the Court of Appeals is not the law. Rather it is in conflict with this Court's rulings, in effect, that the right of oral argument as a matter of procedural due process varies from case to case in accordance with differing circumstances, as do other procedural regulations. Certainly the Constitution does not require oral argument in all cases where only insubstantial or frivolous questions of law, or indeed even substantial ones, are raised. Equally certainly it has left wide discretion to Congress in creating the procedures to be followed in both administrative and judicial proceedings, as well as in their conjunction.

Without in any sense discounting the value of oral argument wherever it may be appropriate or, by virtue of the particular circumstances, constitutionally required, we cannot accept the broad formula upon which the Court of Appeals rested its ruling. To do so would do violence not only to our own former decisions but also, we think, to the constitutional power of Congress to devise differing administrative and legal procedures appropriate for the disposition of issues affecting interests widely varying in kind.[10]

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[10] For example, what may be appropriate or constitutionally required by way of procedure, including opportunity for oral argument, in protection of an alien's claims of right to enter the country, cf. *Johnson* v. *Shaughnessy,* 336 U. S. 806, may be very different from what is required to determine an alleged citizen's right of entry or reentry, cf. *Ng Fung Ho* v. *White,* 259 U. S. 276, 282; *Carmichael* v. *Delaney,* 170 F. 2d 239, 243–244; a claimed right of naturalization, *Tutun* v. *United States,* 270 U. S. 568, 576–578; a claim of just compensation for land condemned, cf. *Roberts* v. *New York City,* 295 U. S. 264, 277–278; or the right to defend against an indictment for crime.

It follows also that we should not undertake in this case to generalize more broadly than the particular circumstances require upon when and under what circumstances procedural due process may require oral argument. That is not a matter, under our decisions, for broadside generalization and indiscriminate application. It is rather one for case-to-case determination, through which alone account may be taken of differences in the particular interests affected, circumstances involved, and procedures prescribed by Congress for dealing with them. Only thus may the judgment of Congress, expressed pursuant to its power under the Constitution to devise both judicial and administrative procedures, be taken into account. Any other approach would be, in these respects, highly abstract, indeed largely in a vacuum.

## II.

Descending to the concrete setting of this case in the provisions of the Communications Act,[11] we are unable to conclude that the procedure Congress has provided for determination of the questions respondent raises affords any semblance of due process deficiency.

The statute itself provides in terms for oral argument before the Commission in a single situation only, namely, in proceedings heard initially before an examiner under § 409 (a).[12] That provision however has no pertinence to this case, since it was not heard or assigned for hearing in the first instance before an examiner and respondent's claimed right of participation arises under § 312 (b). 47 U. S. C. § 312 (b). That section authorizes the Commission to modify station licenses "if in the judgment

[11] Act of June 19, 1934, c. 652, 48 Stat. 1064, 1081, 47 U. S. C. § 301 ff.

[12] The section reads in part: "In all cases heard by an examiner the Commission shall hear oral arguments . . . ." 47 U. S. C. § 409 (a).

of the Commission such action will promote the public interest, convenience, and necessity," but provides "That no such order of modification shall become final until the holder of such outstanding license . . . shall have been notified in writing of the proposed action and the grounds or reasons therefor and shall have been given reasonable opportunity to show cause why such an order of modification should not issue."

As bearing on the meaning of § 312 (b), account must be taken also of two other factors. One is § 4 (j) of the Act [47 U. S. C. § 154 (j)], which provides: "The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. . . . Any party may appear before the Commission and be heard in person or by attorney. . . ." The other factor consists in this Court's decision in *Federal Communications Commission* v. *National Broadcasting Co.,* 319 U. S. 239, the so-called *KOA* case.

That case held that the granting of a license to broadcast on a frequency and at a strength which would interfere with the broadcast signal of a prior licensee within the protection of the latter's license as afforded by the Commission's existing rules constitutes an indirect modification of the prior outstanding license. From this it was held to follow that § 312 (b) gave the prior licensee the right to be made a party to the proceeding and hence to "have notice in writing of the proposed action and the grounds therefor and . . . a reasonable opportunity to show cause why an order of modification should not issue." 319 U. S. at 245–246. Then followed the Court's conclusion that by virtue of KOA's right to be a party, it had also the right under § 402 (b) (2), as a "person aggrieved or whose interests are adversely affected," to appeal to the Court of Appeals from the Commission's

denial of its petition to intervene and participate as a party in the proceedings before it.

It is in this context of statutory provisions and judicial decision that WJR's claim of right to participate in the Commission's proceedings, including the right of oral argument, and of denial of due process through the denial of its petition for reconsideration arises and must be considered.

WJR's petition presents the question whether upon its face it states facts sufficient to show (indirect) modification of its license by the granting of Coastal Plains' application. This in turn depends on whether allegations not asserting interference within the 100 microvolt-per-meter contour or, as the Commission held, allegations asserting interference only "outside the normally protected contour" of WJR's license, set forth any legally sufficient basis for a claim of right to be made a party and participate in the proceedings. And, again, according to respondent, the answer to that question turns on whether the Commission's Standards of Good Engineering Practice Concerning Standard Broadcast Stations constitute a part of and a limitation upon WJR's license.[13]

Respondent insists that those Standards, as a matter of law, do not limit its license or measure the protection it affords against "objectionable interference"; it necessarily argues in addition that the degree of interference its petition alleges brings about an (indirect) modification of its license (conversely stated, that the license protected it against the alleged degree of interference) and hence, as in the *KOA* case, the proposed grant of

[13] The Standards, 4 Fed. Reg. 2862, expressly state that "during daytime the Class I station is protected to the 100 uv/m ground wave contour." § 1 (2) (a). The Commission's Standards of Good Engineering Practice Concerning Standard Broadcast Stations were adopted in 1939 after formal and informal hearings. Fifth Annual Report of the Federal Communications Commission (1940) 37.

a new license entitles it under § 312 (b) to be made a party to the Coastal Plains proceeding and to participate in it as § 312 (b) provides.

This is the claim which the Court of Appeals purported expressly to refuse to consider or decide, prior to oral argument upon it before the Commission. But two things may be noted. One is that, contrary to the situation here, in the *KOA* case the Commission's proposed grant of a new license to Station WHDH concededly created interference against which the existing rules of the Commission protected the prior license of KOA.[14]

In the second place, the majority's disclaimer here of decision upon the merits seems hardly consistent with its opinion's flat ruling, as we understand it, that WJR's allegations qualified it as a party to the proceeding and not, as the dissenting judges thought, merely as a stranger seeking to come in as an intervenor.[15] For that question here, *viz.*, whether WJR's allegations entitle it to standing as a party, is but another way of phrasing the issue

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[14] In other words, the interference alleged was *within* the conceded "normal contours" of KOA's protection, not without them. There was therefore no question such as is presented here whether the existing station's license protected it against the interference alleged. The *KOA* decision therefore cannot be taken as ruling that one asserting interference outside the scope of its license protection, afforded by the Commission's rules and regulations, is entitled to be made a party and to participate in proceedings involving the issuance of a new license creating only such interference.

[15] The court's opinion stated: "WJR as an outstanding licensee is not a mere permissive intervener or, as the minority puts it, an 'outsider'." 174 F. 2d at 240. The statement of the minority to which this rejoinder was made was: "The ruling [of the majority] is that a petitioner for intervention in an administrative proceeding is entitled to an oral hearing as a matter of constitutional right, no matter what or how little he says in his petition. . . . [WJR's petition] was basically a petition to intervene, as it asked that WJR be made a party to the Coastal Plains proceeding." *Id.* at 243.

whether its petition states a legally sufficient claim of (indirect) modification, since under § 312 (b) only a prior licensee who states such a claim is entitled to be made a party and to participate in the proceedings. To decide that one has the status of a party is therefore to decide the question of modification *vel non.*

In view of the court's mandate, however, we think we must accept its disclaimer. But we also think that, in the light of the disclaimer, its ruling, if it was such, that WJR is entitled to be made a party must be rejected and that question must be regarded as inherently involved in, indeed as identical with, the undetermined issue of modification *vel non,* if any effect is to be given to the provisions of § 312 (b).[16]

We think the limitations of that section must be given effect. Indeed it is our view that the Act's procedural scheme and its application in this case have not deprived the respondent of any procedural right guaranteed by the due-process requirement of the Fifth Amendment. That is true, notwithstanding the Commission's failure to afford respondent an opportunity for oral argument upon its allegations in this case.

Congress, we think, has committed to the Commission's discretion, by the terms of § 312 (b) and § 4 (j) of the Communications Act, the questions whether and under what circumstances it will allow or require oral argument, except where the Act itself expressly requires it.

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[16] The Court of Appeals was not simply construing the statute, but was influenced throughout its opinion by its broad constitutional generalization concerning oral argument. In that view necessarily the Act's specific terms, including those of § 312 (b), sank into the generalization's constitutional coloring. In that light, perhaps, the majority's disclaimer and its ruling that WJR was entitled to come in as a party bore semblance of consistency. But without the coloration, § 312 (b) identifies showing of modification with standing as a party; and, unless this limitation is invalid for constitutional reasons, it must be given effect.

As we have noted, Congress has required oral argument expressly in proceedings heard initially before an examiner under § 409 (a). But no such requirement was made by § 312 (b). While that section requires notice and statement of grounds for any proposed order of modification before such order "shall become final," it does not specify that further proceedings shall include the right to oral argument; it requires only that the holder of the outstanding license to be modified "shall have been given reasonable opportunity to show cause why such an order of modification should not issue" before the order becomes final.

In view of the contrast between this language and that of § 409 (a), it is hardly to be taken that Congress intended the "reasonable opportunity to show cause" always to include opportunity for oral argument. Indeed, in the absence of any such explicit requirement as that of § 409 (a), the terms of § 312 (b) must be read in the light of the Act's general procedural authorization in § 4 (j), which empowers the Commission to "conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice."

In this wording Congress was mindful not only of the ends of justice but also of the proper dispatch of the Commission's business, a matter not unrelated to achieving the ends of justice, and left largely to its judgment the determination of the manner of conducting its business which would most fairly and reasonably accommodate those ends. Moreover it was dealing with substantive interests involving the use, pursuant to federal license, of channels of radio communication "but not the ownership thereof," § 301, as to which moreover the Act expressly provides that "no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license." *Ibid.*

In this connection it cannot be recalled too often that "'public convenience, interest, or necessity' was the touchstone for the exercise of the Commission's authority" in matters relating to construction permits and licensing, and that this criterion "serves as a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy." *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 137–138. "Necessarily, therefore, the subordinate questions of procedure in ascertaining the public interest, when the Commission's licensing authority is invoked—the scope of the inquiry, whether applications should be heard contemporaneously or successively, whether parties should be allowed to intervene in one another's proceedings, and similar questions—were explicitly and by implication left to the Commission's own devising, so long, of course, as it observes the basic requirements designed for the protection of private as well as public interest." *Id.* at 138.

We need not go again over the ground which was covered by this decision and others. Suffice it to say that the Commission has not seen fit to provide for oral argument in all such cases as this arising under § 312 (b); nor is there any basis in the section or the Act for believing that Congress intended to require it to do so. "Reasonable opportunity to show cause," as used in § 312 (b), comprehends, in the light of § 4 (j) and this Court's prior decisions, that the Commission shall have broad discretion in determining whether and when oral argument shall be required or permitted, as it does with respect to other procedural matters.[17]

[17] That is true even though § 4 (j) also provides that "Any party may appear before the Commission and be heard in person or by attorney." That provision does not nullify the Commission's discretion as to the manner in which the "reasonable opportunity to

Respondent does not contend that it was denied any opportunity to present for the Commission's consideration any matter of fact or law in connection with its application or that the Commission has not given all matters submitted by it due and full consideration. We cannot say, in view of the statute and of the subject matter involved, that the Commission abused its discretion in hearing respondent's application on the written submission.[18]

Accordingly we think it was error for the court to decline to decide the merits of the question whether respondent's application stated a legally sufficient case of (indirect) modification of its license within the terms of § 312 (b) as well as to decide, without determining that question, that respondent was entitled to be made a party to and participate as such in the Coastal Plains proceeding. As we have said, in the situation here presented, the two forms of statement pose the same question in substance, together with the further question, under the *KOA* decision, whether respondent has standing to appeal as a party aggrieved. The statutory sequence identifies (1) a legally sufficient claim of modification with (2) right to standing as a party and (3) right to appeal.

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show cause" afforded by § 312 (b) shall be given. It only assures the right to participate "in person or by attorney" in the manner reasonably found by the Commission to be appropriate.

[18] Federal Rule 78, the terms of which were noted by the dissent in the Court of Appeals, 174 F. 2d 226, 247, provides in part, as to United States District Courts: "To expedite its business, the court may make provision by rule or order for the submission and determination of motions without oral hearing upon brief written statements of reasons in support and opposition." Fed. Rules Civ. Proc., Rule 78. Similar notice may be taken of Rule 7 (2) of this Court which, governing not only motion practice in appellate cases but motions for leave to initiate original proceedings, provides in part: "Oral argument will not be heard on any motion unless the court specially assigns it therefor . . . ."

This threefold issue presents a question of law respondent is entitled to have determined. The dissenting judges in the Court of Appeals considered the question insubstantial, because they thought, contrary to respondent's position, that the Commission's Standards of Good Engineering Practice applied as a limitation upon respondent's license and therefore excluded it from protection against interference such as respondent alleged, *i. e.*, outside the contours prescribed by the Standards.

That question, being one of law, might now be decided here. But since the statute, if it affords respondent a right of appeal, provides that it shall be to the Court of Appeals, and since that court has not decided the basic issue on the merits, we think the cause should be remanded to the Court of Appeals for decision of that question, uncomplicated by questions of constitutionality relating to the Commission's procedure. Accordingly the court's decision is reversed and the cause is remanded to it for further proceedings not inconsistent with this opinion.

*Reversed and remanded.*

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

# JOY OIL CO., LTD. *v.* STATE TAX COMMISSION.

CERTIORARI TO THE SUPREME COURT OF MICHIGAN.

No. 223. Argued January 6–7, 1949.—Decided June 13, 1949.

Petitioner, a Canadian corporation, purchased in Michigan 1,500,000 gallons of gasoline, certified that it was purchased for export, shipped it by rail to Detroit under bills of lading marked "For Export to Canada," and placed it in storage tanks in Dearborn, Michigan. Fifteen months later, when only 50,000 gallons had been exported to Canada, Dearborn assessed an *ad valorem* property tax on the remaining gasoline. Because of a shortage of shipping space, it was more than eighteen months after storage before all of the gasoline had been exported to Canada. *Held:* The tax was not in violation of the Export-Import Clause, Art. I, § 10, cl. 2, of the Federal Constitution. Pp. 286–289.

321 Mich. 335, 32 N. W. 2d 472, affirmed.

An *ad valorem* tax assessed by a Michigan municipality upon a Canadian corporation's stores of gasoline was sustained by the State Supreme Court against a claim of invalidity under the Export-Import Clause of the Federal Constitution. 321 Mich. 335, 32 N. W. 2d 472. This Court granted certiorari. 335 U. S. 812. *Affirmed,* p. 289.

*Clayton F. Jennings* argued the cause and filed a brief for petitioner.

*Edmund E. Shepherd,* Solicitor General of Michigan, argued the cause for respondent. With him on the brief were *Eugene F. Black,* Attorney General, *Daniel J. O'Hara,* Assistant Attorney General, *Dale H. Fillmore* and *Joel K. Underwood.*

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

On December 29, 1945, petitioner Joy Oil Company, Ltd., a Canadian corporation, purchased 1,500,000 gal-

lons of gasoline from Mid-West Refineries, Inc., of Grand Rapids, Michigan. The bills of lading issued by the railroad to which the gasoline was delivered were marked "For Export to Canada," but the gasoline was consigned to petitioner at Detroit. In order to secure the benefits of lower export freight rates and exemption from the federal transportation and manufacturers' excise taxes, petitioner furnished Mid-West Refineries and the railroad with prescribed forms certifying that the gasoline was purchased for export. Rail shipments were begun in January and completed in February of 1946. As the gasoline reached Detroit it was accumulated in storage tanks leased by petitioner at Dearborn.

On April 1, 1947, the city of Dearborn assessed an *ad valorem* property tax on the gasoline, all of which, except 50,000 gallons, shipped to Canada by truck over the Ambassador Bridge, had then been in the Dearborn tanks for fifteen months. Shipment by truck was halted by a federal regulation prohibiting the transportation of inflammables over any international bridge, and petitioner apparently chose not to ship the gasoline by rail across the Detroit River. In July of 1947 petitioner began to ship it to Canada by water; the last tanker load departed on August 22, 1947. Petitioner explains the delay as due to inability to obtain shipping space at any earlier date.

Petitioner resisted payment of the tax on the ground that it infringed Art. I, § 10, cl. 2, of the Constitution. The Tax Commission of Michigan sustained Dearborn's assessment of the tax, and the Supreme Court of Michigan affirmed. 321 Mich. 335, 32 N. W. 2d 472. We granted certiorari because the case presented a sufficiently important question in the accommodation of State and Federal interests under the Constitution. 335 U. S. 812.

The circumstances which tended, at the time when the tax was assessed, to establish petitioner's intent to export the gasoline and the fact that the gasoline was eventually exported are not enough, by themselves, to confer immunity from local taxation. See, e. g., *Cornell* v. *Coyne,* 192 U. S. 418; *Empresa Siderurgica* v. *County of Merced,* 337 U. S. 154. Nor is it enough that by the rail shipment to Detroit one step in the process of exportation had been taken or that a part of the total bulk had already departed for its foreign destination. It is of course true that commodities destined for shipment by water must be transshipped at the water's edge and so may require a brief period of storage at that point which will not be deemed a delay sufficient to interrupt the continuity of the export process. *Carson Petroleum Co.* v. *Vial,* 279 U. S. 95; see *Southern Pacific Terminal Co.* v. *Interstate Commerce Comm'n,* 219 U. S. 498; *Texas & N. O. R. Co.* v. *Sabine Tram Co.,* 227 U. S. 111. But here the period of storage at Dearborn was so long as to preclude holding that the first step toward exportation would inevitably be followed by others. See, by way of contrast, *Hughes Bros. Timber Co.* v. *Minnesota,* 272 U. S. 469. While in storage, the gasoline might have been diverted to domestic markets without disruption of any existing arrangement for its transshipment and without even breach of any contractual commitment to a foreign purchaser. Neither the character of the property nor any event equivalent to its redelivery to a common carrier made export certain for all practical purposes. See *Richfield Oil Corp.* v. *State Board,* 329 U. S. 69, 82.

The Export-Import Clause was meant to confer immunity from local taxation upon property being exported, not to relieve property eventually to be exported from its share of the cost of local services. See *Coe* v. *Errol,*

116 U. S. 517, 527–28. The fifteen-month delay at Dearborn barred immunity of petitioner's gasoline from the taxing power of the municipality.

*Affirmed.*

MR. CHIEF JUSTICE VINSON, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE JACKSON join, dissenting.

The Court holds that fifteen months' delay in transshipment of the gasoline in question was so long that continuity of the process of exportation was broken, because during that period it might have been diverted to domestic markets. I think that this rationale and the conclusion which follows therefrom mark a substantial and unwarranted departure from our previous decisions in this field.

As I understand it, the Court's opinion reflects the view that a long delay in transshipment makes it uncertain whether the gasoline will eventually be exported, and further, that a delay of fifteen months makes it possible for this Court to say as a matter of law that the uncertainty is so great that the process of exportation has ceased, whatever the reason for the delay. But the Court concedes that petitioner intended to export the gasoline at the time the tax was imposed, and petitioner's uncontradicted evidence shows that it had that intent throughout the period of delay, which was caused by its inability to procure water transportation. That intent was manifested in a number of ways. The bills of lading by which the gasoline moved from Grandville and Alma, Michigan, to Dearborn, a Great Lakes port, were marked "For Export to Canada"; petitioner certified that the gasoline was to be exported in order to secure an exemption under the federal manufacturer's excise tax and to qualify for lower freight rates accorded exports; it transported 50,000 gallons of the gasoline by truck over the Ambassador Bridge

into Canada until a federal regulation closed the bridge to inflammable materials; and finally, petitioner exported all of the gasoline to Canada when shipping space became available. There is nothing in the record to indicate either that petitioner at any time deviated from that expressed intent, or that the delay was not due solely to lack of shipping space.

The Court is in the anomalous position, therefore, of holding as a matter of law that a fifteen-month delay in transshipment breaks the "stream of export" because of the resulting uncertainty that the goods will ultimately be exported, when all of the evidence is to the effect that the shipper's intent to export has never wavered; that exportation was as certain as of the date of the tax as it had been fifteen months before. The Court has previously considered the question to be quite a different one. We have held that

> "The character of the shipment in such a case depends upon all the evidential circumstances looking to what the owner has done in the preparation for the journey and in carrying it out. The mere power of the owner to divert the shipment already started does not take it out of interstate commerce, if the other facts show that the journey has already begun in good faith and temporary interruption of the passage is reasonable and in furtherance of the intended transportation, as in the *Champlain* case." *Hughes Brothers Timber Co.* v. *Minnesota,* 272 U. S. 469, 475–476 (1926).

This test was quoted with approval by Mr. Chief Justice Hughes in *Minnesota* v. *Blasius,* 290 U. S. 1, 10 (1933), and he added, "The question is always one of substance, and in each case it is necessary to consider the particular occasion or purpose of the interruption during which the tax is sought to be levied." See also to the same effect,

*Champlain Realty Co.* v. *Town of Brattleboro,* 260 U. S. 366, 377 (1922); *Carson Petroleum Co.* v. *Vial,* 279 U. S. 95, 102 (1929); *United States* v. *Erie R. Co.,* 280 U. S. 98, 102 (1929). The Court now refuses to look at any circumstances except the delay—not even the reason for the delay.

It is true that petitioner could have moved the gasoline more quickly had it used the more expensive all-rail service. But in almost every case of delay a quicker method of moving the goods might have been devised. No doubt the logs held up by low water in *Coe* v. *Errol,* 116 U. S. 517 (1886), could have been drawn overland by mules or oxen. And it would have been possible, though not practical, for oil to have been transferred directly from tank cars to waiting ships in *Carson Petroleum Co.* v. *Vial, supra,* yet this Court found that the delay necessarily attendant upon the accumulation of oil in tanks at the waterfront to await the arrival of ships did not constitute interruption of the process of exportation. The delay was "reasonable and in furtherance of the intended transportation."

Concededly, the gasoline here involved was in the process of exportation when taxed unless the delay was alone enough to break the stream of export. It had been started on its journey with every indication that it was to be transshipped for export. If actual exportation had followed its arrival in Dearborn by a few days or weeks, there is no question that it would have been a commodity in the process of exportation and thus exempt from tax. In this situation, the Court has always, until today, applied "a liberal construction of what is continuity of the journey, in cases where the Court finds from the circumstances that export trade has been actually intended and carried through." *Carson Petroleum Co.* v. *Vial, supra* at pp. 105–106. But the Court now treats as immaterial the fact that the process of exportation had

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started, which has always been considered the decisive factor, *Cornell* v. *Coyne,* 192 U. S. 418 (1904), *Empresa Siderurgica* v. *County of Merced,* 337 U. S. 154 (1949), and assumes that a delay of fifteen months conclusively demonstrates that certainty of exportation had been undermined. It is almost always possible in cases of this kind that the owner of the goods may change his mind before exportation is actually carried out, as Mr. Justice Holmes pointed out in *Spalding & Bros.* v. *Edwards,* 262 U. S. 66, 70 (1923). Delay undoubtedly increases the possibility, but it does not work such a change as a matter of law. The question, instead, is that previously pointed out, namely, whether "the journey has already begun in good faith and [whether] temporary interruption of the passage is reasonable and in furtherance of the intended transportation." *Hughes Brothers Timber Co.* v. *Minnesota, supra,* at 476.

The result is that the Court, without consideration of the fact that the gasoline had been started on its journey with the intent that it be transshipped for immediate export to Canada, holds that fifteen months' unavoidable delay is so productive of uncertainty that the process of exportation ceases as a matter of law. It might be pointed out that in the leading case of *Coe* v. *Errol, supra,* logs being floated down a river were held up by low water for about a year, but this Court did not consider that delay enough to break the continuity of the interstate journey. The line now seems to be drawn somewhere between twelve and fifteen months, whatever the other circumstances. Such an arbitrary demarcation is hardly consonant with "the liberal protection that hitherto [exports] have received." *Spalding & Bros.* v. *Edwards, supra,* at p. 70. I would adhere to the test set out in our previous decisions: whether the delay was reasonable under all the circumstances and in furtherance of the intended transportation.

Syllabus.

# STANDARD OIL COMPANY OF CALIFORNIA ET AL. *v.* UNITED STATES.

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

No. 279. Argued March 3–4, 1949.—Decided June 13, 1949.

1. Under contracts entered into by an oil company with independent dealers in petroleum products and automobile accessories, the dealer agreed to purchase exclusively from the company all of his requirements of one or more of the products marketed by the company. In 1947 the contracts affected a gross business of $58,000,000, comprising 6.7% of the total in a seven-state area in which the company sold its products. *Held:* The contracts were violative of § 3 of the Clayton Act and the company was properly enjoined from enforcing or entering into them. Pp. 294–314.
2. The requirement of § 3 of the Clayton Act of a showing that the effect of the contracts "may be to substantially lessen competition" is here satisfied by proof that competition has been foreclosed in a substantial share of the line of commerce affected. Pp. 299–314.

   (a) In view of the widespread adoption of such contracts by the company's competitors and the availability of alternative ways of obtaining an assured market, evidence that competitive activity has not actually declined is inconclusive. P. 314.

   (b) The company's use of the contracts creates just such a potential clog on competition as it was the purpose of § 3 to remove wherever, were it to become actual, it would impede a substantial amount of competitive activity. P. 314.
3. The fact that nearly all the products sold by the company to California dealers are produced in that State does not exempt the company's requirements contracts with California dealers as not substantially affecting interstate commerce, since the effect of those contracts is to prevent the California dealers from dealing with out-of-State as well as local suppliers and thus to lessen competition in both interstate and intrastate commerce. *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211, distinguished. Pp. 314–315.

78 F. Supp. 850, affirmed.

In a suit brought by the United States under the anti-trust laws, the District Court enjoined an oil company and its wholly owned subsidiary from enforcing or entering into exclusive supply contracts with independent dealers in petroleum products and automobile accessories. 78 F. Supp. 850. The companies appealed directly to this Court. *Affirmed,* p. 315.

*John M. Hall* argued the cause for appellants. With him on the brief was *Marshall P. Madison.*

*Assistant Attorney General Bergson* argued the cause for the United States. With him on the brief were *Solicitor General Perlman, Walker Smith, Robert G. Seaks* and *Stanley M. Silverberg.*

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

This is an appeal to review a decree enjoining the Standard Oil Company of California and its wholly-owned subsidiary, Standard Stations, Inc.,[1] from enforcing or entering into exclusive supply contracts with any independent dealer in petroleum products and automobile accessories. 78 F. Supp. 850. The use of such contracts was successfully assailed by the United States as violative of § 1 of the Sherman Act [2] and § 3 of the Clayton Act.[3]

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[1] Standard Stations, Inc., has no independent status in these proceedings; since 1944 its activities have been confined to managing service stations owned by the Standard Oil Co. of California.

[2] "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: . . . ." 26 Stat. 209, as amended, 50 Stat. 693, 15 U. S. C. § 1.

[3] "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the

The Standard Oil Company of California, a Delaware corporation, owns petroleum-producing resources and refining plants in California and sells petroleum products in what has been termed in these proceedings the "Western area"—Arizona, California, Idaho, Nevada, Oregon, Utah and Washington. It sells through its own service stations, to the operators of independent service stations, and to industrial users. It is the largest seller of gasoline in the area. In 1946 its combined sales amounted to 23% of the total taxable gallonage sold there in that year: sales by company-owned service stations constituted 6.8% of the total, sales under exclusive dealing contracts with independent service stations, 6.7% of the total; the remainder were sales to industrial users. Retail service-station sales by Standard's six leading competitors absorbed 42.5% of the total taxable gallonage; the remaining retail sales were divided between more than seventy small companies. It is undisputed that Standard's major competitors employ similar exclusive dealing arrangements. In 1948 only 1.6% of retail outlets were what is known as "split-pump" stations, that is, sold the gasoline of more than one supplier.

Exclusive supply contracts with Standard had been entered into, as of March 12, 1947, by the operators of 5,937 independent stations, or 16% of the retail gasoline outlets in the Western area, which purchased from Standard in 1947, $57,646,233 worth of gasoline and

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District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce." 38 Stat. 731, 15 U. S. C. § 14.

$8,200,089.21 worth of other products. Some outlets are covered by more than one contract so that in all about 8,000 exclusive supply contracts are here in issue. These are of several types, but a feature common to each is the dealer's undertaking to purchase from Standard all his requirements of one or more products. Two types, covering 2,777 outlets, bind the dealer to purchase of Standard all his requirements of gasoline and other petroleum products as well as tires, tubes, and batteries. The remaining written agreements, 4,368 in number, bind the dealer to purchase of Standard all his requirements of petroleum products only. It was also found that independent dealers had entered 742 oral contracts by which they agreed to sell only Standard's gasoline. In some instances dealers who contracted to purchase from Standard all their requirements of tires, tubes, and batteries, had also orally agreed to purchase of Standard their requirements of other automobile accessories. Of the written agreements, 2,712 were for varying specified terms; the rest were effective from year to year but terminable "at the end of the first 6 months of any contract year, or at the end of any such year, by giving to the other at least 30 days prior thereto written notice . . . ." Before 1934 Standard's sales of petroleum products through independent service stations were made pursuant to agency agreements, but in that year Standard adopted the first of its several requirements-purchase contract forms, and by 1938 requirements contracts had wholly superseded the agency method of distribution.

Between 1936 and 1946 Standard's sales of gasoline through independent dealers remained at a practically constant proportion of the area's total sales; its sales of lubricating oil declined slightly during that period from 6.2% to 5% of the total. Its proportionate sales of tires and batteries for 1946 were slightly higher than they were in 1936, though somewhat lower than for some

intervening years; they have never, as to either of these products, exceeded 2% of the total sales in the Western area.

Since § 3 of the Clayton Act was directed to prohibiting specific practices even though not covered by the broad terms of the Sherman Act,[4] it is appropriate to consider first whether the enjoined contracts fall within the prohibition of the narrower Act. The relevant provisions of § 3 are:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States . . . on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods . . . of a competitor or competitors of the . . . seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

Obviously the contracts here at issue would be proscribed if § 3 stopped short of the qualifying clause beginning, "where the effect of such lease, sale, or contract

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[4] After the Clayton Bill, H. R. 15657, 63d Cong., 2d Sess., had passed the House, the Senate struck § 4, the section prohibiting tying clauses and requirements contracts, on the ground that such practices were subject to condemnation by the Federal Trade Commission under the then pending Trade Commission Bill. In support of a motion to reconsider this vote, Senator Reed of Missouri argued that the Trade Commission would be unlikely to outlaw agreements of a type held by this Court, in *Henry* v. *A. B. Dick Co.*, 224 U. S. 1, not to be in violation of the Sherman Act. See 51 Cong. Rec. 14088, 14090–92. The motion was agreed to. *Id.* at 14223.

for sale . . . ." If effect is to be given that clause, however, it is by no means obvious, in view of Standard's minority share of the "line of commerce" involved, of the fact that that share has not recently increased, and of the claims of these contracts to economic utility, that the effect of the contracts may be to lessen competition or tend to create a monopoly. It is the qualifying clause, therefore, which must be construed.

The District Court held that the requirement of showing an actual or potential lessening of competition or a tendency to establish monopoly was adequately met by proof that the contracts covered "a substantial number of outlets and a substantial amount of products, whether considered comparatively or not." 78 F. Supp. at 875. Given such quantitative substantiality, the substantial lessening of competition—so the court reasoned—is an automatic result, for the very existence of such contracts denies dealers opportunity to deal in the products of competing suppliers and excludes suppliers from access to the outlets controlled by those dealers. Having adopted this standard of proof, the court excluded as immaterial testimony bearing on "the economic merits or demerits of the present system as contrasted with a system which prevailed prior to its establishment and which would prevail if the court declared the present arrangement [invalid]." The court likewise deemed it unnecessary to make findings, on the basis of evidence that was admitted, whether the number of Standard's competitors had increased or decreased since the inauguration of the requirements-contract system, whether the number of their dealers had increased or decreased, and as to other matters which would have shed light on the comparative status of Standard and its competitors before and after the adoption of that system. The court concluded:

> "Grant that, on a comparative basis, and in relation to the entire trade in these products in the area,

> the restraint is not integral. Admit also that control of distribution results in lessening of costs and that its abandonment might increase costs. . . . Concede further, that the arrangement was entered into in good faith, with the honest belief that control of distribution and consequent concentration of representation were economically beneficial to the industry and to the public, that they have continued for over fifteen years openly, notoriously and unmolested by the Government, and have been practiced by other major oil companies competing with Standard, that the number of Standard outlets so controlled may have decreased, and the quantity of products supplied to them may have declined, on a comparative basis. Nevertheless, as I read the latest cases of the Supreme Court, I am compelled to find the practices here involved to be violative of both statutes. For they affect injuriously a sizeable part of interstate commerce, or,—to use the current phrase,—'an appreciable segment' of interstate commerce."

The issue before us, therefore, is whether the requirement of showing that the effect of the agreements "may be to substantially lessen competition" may be met simply by proof that a substantial portion of commerce is affected or whether it must also be demonstrated that competitive activity has actually diminished or probably will diminish.[5]

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[5] It is clear, of course, that the "line of commerce" affected need not be nationwide, at least where the purchasers cannot, as a practical matter, turn to suppliers outside their own area. Although the effect on competition will be quantitatively the same if a given volume of the industry's business is assumed to be covered, whether or not the affected sources of supply are those of the industry as a whole or only those of a particular region, a purely quantitative measure of this effect is inadequate because the narrower the area of competition, the greater the comparative effect on the area's competitors. Since

Since the Clayton Act became effective, this Court has passed on the applicability of § 3 in eight cases, in five of which it upheld determinations that the challenged agreement was violative of that Section. Three of these—*United Shoe Machinery Corp.* v. *United States,* 258 U. S. 451; *International Business Machines Corp.* v. *United States,* 298 U. S. 131; *International Salt Co.* v. *United States,* 332 U. S. 392—involved contracts tying to the use of a patented article all purchases of an unpatented product used in connection with the patented article. The other two cases—*Standard Fashion Co.* v. *Magrane-Houston Co.,* 258 U. S. 346; *Fashion Originators' Guild* v. *Federal Trade Comm'n,* 312 U. S. 457—involved requirements contracts not unlike those here in issue.

The *Standard Fashion* case, the first of the five holding that the Act had been violated, settled one question of interpretation of § 3. The Court said:

> "Section 3 condemns sales or agreements where the effect of such sale or contract of sale 'may' be to substantially lessen competition or tend to create monopoly. . . . But we do not think that the purpose in using the word 'may' was to prohibit the mere possibility of the consequences described. It was intended to prevent such agreements as would under the circumstances disclosed probably lessen competition, or create an actual tendency to monopoly." 258 U. S. at 356–57. See also *Federal Trade Comm'n* v. *Morton Salt Co.,* 334 U. S. 37, 46, n. 14.

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it is the preservation of competition which is at stake, the significant proportion of coverage is that within the area of effective competition. Cf. *Indiana Farmer's Guide Publishing Co.* v. *Prairie Farmer Publishing Co.,* 293 U. S. 268, 279; *United States* v. *Yellow Cab Co.,* 332 U. S. 218, 226. The criteria of substantiality deemed relevant in cases involving a nationwide market are thus also relevant in measuring the effect of Standard's requirements contracts in the seven-state Western area.

The Court went on to add that the fact that the Section "was not intended to reach every remote lessening of competition is shown in the requirement that such lessening must be substantial," but because it deemed the finding of two lower courts that the contracts in question did substantially lessen competition and tend to create monopoly amply supported by evidence that the defendant controlled two-fifths of the nation's pattern agencies, it did not pause to indicate where the line between a "remote" and a "substantial" lessening should be drawn.

All but one of the later cases also regarded domination of the market as sufficient in itself to support the inference that competition had been or probably would be lessened. In the *United Shoe Machinery* case, referring, *inter alia*, to the clause incorporated in all United's leases of patented machinery requiring the use by the lessee of materials supplied by United, the Court observed:

> "That such restrictive and tying agreements must necessarily lessen competition and tend to monopoly is, we believe, . . . apparent. When it is considered that the United Company occupies a dominating position in supplying shoe machinery of the classes involved, these covenants signed by the lessee and binding upon him effectually prevent him from acquiring the machinery of a competitor of the lessor except at the risk of forfeiting the right to use the machines furnished by the United Company which may be absolutely essential to the prosecution and success of his business." 258 U. S. at 457–58.

In the *International Business Machines* case, the defendants were the sole manufacturers of a patented tabulating machine requiring the use of unpatented cards. The lessees of the machines were bound by tying clauses to use in them only the cards supplied by the defendants,

who, between them, divided the whole of the $3,000,000 annual gross of this business also. The Court concluded:

> "These facts, and others, which we do not stop to enumerate, can leave no doubt that the effect of the condition in appellant's leases 'may be to substantially lessen competition,' and that it tends to create monopoly, and has in fact been an important and effective step in the creation of monopoly." 298 U. S. at 136.

The *Fashion Originators' Guild* case involved an association of dress manufacturers which sold more than 60% of all but the cheapest women's garments. In rejecting the relevance of evidence that the Guild's use of requirements contracts was a "reasonable and necessary" measure of protection against "the devastating evils growing from the pirating of original designs," the Court again emphasized the presence and the consequences of economic power:

> "The purpose and object of this combination, its potential power, its tendency to monopoly, the coercion it could and did practice upon a rival method of competition, all brought it within the policy of the prohibition declared by the Sherman and Clayton Acts." 312 U. S. at 467–68.

It is thus apparent that none of these cases controls the disposition of the present appeal, for Standard's share of the retail market for gasoline, even including sales through company-owned stations, is hardly large enough to conclude as a matter of law that it occupies a dominant position, nor did the trial court so find. The cases do indicate, however, that some sort of showing as to the actual or probable economic consequences of the agreements, if only the inferences to be drawn from the fact of dominant power, is important, and to that extent they tend to support appellant's position.

Two of the three cases decided by this Court which have held § 3 inapplicable also lend support to the view that such a showing is necessary. These are, *Federal Trade Comm'n* v. *Sinclair Co.*, 261 U. S. 463, and *Pick Mfg. Co.* v. *General Motors Corp.*, 299 U. S. 3. The third—*Federal Trade Comm'n* v. *Curtis Pub. Co.*, 260 U. S. 568—went off on the ground that the contract involved was one of agency and so is of no present relevance. The *Sinclair* case involved the lease of gasoline pumps and storage tanks on condition that the dealer would use them only for Sinclair's gasoline, but Sinclair did not own patents on the pumps or tanks and evidently did not otherwise control their supply. Although the Trade Commission had found that few dealers needed more than one pump, the Court concluded that "the record does not show that the probable effect of the practice will be unduly to lessen competition." 261 U. S. at 475. The basis of this conclusion was thus summarized:

> "Many competitors seek to sell excellent brands of gasoline and no one of them is essential to the retail business. The lessee is free to buy wherever he chooses; he may freely accept and use as many pumps as he wishes and may discontinue any or all of them. He may carry on business as his judgment dictates and his means permit, save only that he cannot use the lessor's equipment for dispensing another's brand. By investing a comparatively small sum, he can buy an outfit and use it without hindrance. He can have respondent's gasoline, with the pump or without the pump, and many competitors seek to supply his needs." *Id.* at 474.

The present case differs of course in the fact that a dealer who has entered into a requirements contract with Standard cannot consistently with that contract sell the petroleum products of a competitor of Standard's no

matter how many pumps he has,[6] but the case is significant for the importance it attaches, in the absence of a showing that the supplier dominated the market, to the practical effect of the contracts. The same is true of the *Pick* case, in which this Court affirmed in a brief *per curiam* opinion the finding of the District Court, concurred in by the Court of Appeals, that the effect of contracts by which dealers agreed not to sell other automobile parts than those manufactured by General Motors "had not been in any way substantially to lessen competition or to create a monopoly in any line of commerce." 299 U. S. at 4.

But then came *International Salt Co.* v. *United States,* 332 U. S. 392. That decision, at least as to contracts tying the sale of a nonpatented to a patented product, rejected the necessity of demonstrating economic consequences once it has been established that "the volume of business affected" is not "insignificant or insubstantial" and that the effect of the contracts is to "foreclose competitors from [a] substantial market." *Id.* at 396. Upon that basis we affirmed a summary judgment granting an injunction against the leasing of machines for the utilization of salt products on the condition that the lessee use in

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[6] Standard urges that the effect of its contracts is similarly confined in view of the fact that they apply not to all sales by a dealer but only to those made through a designated service station. Putting aside the fact that it does not appear that dealers commonly own more than one service station, there is marked difference between a contract which confines an entire retail outlet to the sale of a single brand and a contract which merely confines the use of a dispensing mechanism to a single brand: service-station sites, and therefore retail outlets, are limited in number; the number of pumps which a dealer may choose to set up is not, or so, at least, the Court assumed in the *Sinclair* case. It is reasonable to assume, therefore, that competition between suppliers is directed rather toward exclusive contracts with the maximum number of strategically located outlets than toward exclusive arrangements with dealers as such.

them only salt supplied by defendant. It was established by pleadings or admissions that defendant was the country's largest producer of salt for industrial purposes, that it owned patents on the leased machines, that about 900 leases were outstanding, and that in 1944 defendant sold about $500,000 worth of salt for use in these machines. It was not established that equivalent machines were unobtainable, it was not indicated what proportion of the business of supplying such machines was controlled by defendant, and it was deemed irrelevant that there was no evidence as to the actual effect of the tying clauses upon competition.[7] It is clear, therefore, that unless a distinction is to be drawn for purposes of the applicability of § 3 between requirements contracts and contracts tying the sale of a nonpatented to a patented product, the showing that Standard's requirements contracts affected a gross business of $58,000,000 comprising 6.7% of the total in the area goes far toward supporting the inference that competition has been or probably will be substantially lessened.[8]

In favor of confining the standard laid down by the *International Salt* case to tying agreements, important economic differences may be noted. Tying agreements serve hardly any purpose beyond the suppression of com-

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[7] The Court considered and found inadequate defendant's attempt to establish that the successful use of the machines depended upon a quality of salt which only it could supply, but the Court's willingness to consider such evidence does not weaken the holding that coverage of a more than insignificant volume of business by such tying clauses is an adequate basis for finding a lessening of competition or a tendency to monopoly.

[8] It may be noted in passing that the exclusive supply provisions for tires, tubes, batteries, and other accessories which are a part of some of Standard's contracts with dealers who have also agreed to purchase their requirements of petroleum products should perhaps be considered, as a matter of classification, tying rather than requirements agreements.

petition. The justification most often advanced in their defense—the protection of the good will of the manufacturer of the tying device—fails in the usual situation because specification of the type and quality of the product to be used in connection with the tying device is protection enough. If the manufacturer's brand of the tied product is in fact superior to that of competitors, the buyer will presumably choose it anyway. The only situation, indeed, in which the protection of good will may necessitate the use of tying clauses is where specifications for a substitute would be so detailed that they could not practicably be supplied. In the usual case only the prospect of reducing competition would persuade a seller to adopt such a contract and only his control of the supply of the tying device, whether conferred by patent monopoly or otherwise obtained, could induce a buyer to enter one. See Miller, Unfair Competition 199 *et seq.* (1941); Note, 49 Col. L. Rev. 241, 246 (1949). The existence of market control of the tying device, therefore, affords a strong foundation for the presumption that it has been or probably will be used to limit competition in the tied product also.

Requirements contracts, on the other hand, may well be of economic advantage to buyers as well as to sellers, and thus indirectly of advantage to the consuming public. In the case of the buyer, they may assure supply, afford protection against rises in price, enable long-term planning on the basis of known costs,[9] and obviate the expense and risk of storage in the quantity necessary for a commodity having a fluctuating demand. From the seller's point of view, requirements contracts may make possible the substantial reduction of selling expenses, give pro-

[9] This advantage is not conferred by Standard's contracts, each of which provides that the price to be paid by the dealer is to be the "Company's posted price to its dealers generally at time and place of delivery."

tection against price fluctuations, and—of particular advantage to a newcomer to the field to whom it is important to know what capital expenditures are justified—offer the possibility of a predictable market. See Stockhausen, *The Commercial and Anti-Trust Aspects of Term Requirements Contracts,* 23 N. Y. U. L. Q. Rev. 412, 413–14 (1948). They may be useful, moreover, to a seller trying to establish a foothold against the counter-attacks of entrenched competitors. See *id.* at 424 *et seq.; Excelsior Motor Mfg. & Supply Co.* v. *Sound Equipment, Inc.,* 73 F. 2d 725, 728 (C. A. 7th Cir.); *General Talking Pictures Corp.* v. *American Tel. & Tel. Co.,* 18 F. Supp. 650, 666 (D. Del.).[10] Since these advantages of requirements contracts may often be sufficient to account for their use, the coverage by such contracts of a substantial amount of business affords a weaker basis for the inference that competition may be lessened than would similar coverage by tying clauses, especially where use of the latter is combined with market control of the tying device. A patent, moreover, although in fact there may be many competing substitutes for the patented article, is at least *prima facie* evidence of such control. And so we could not dispose of this case merely by citing *International Salt Co.* v. *United States,* 332 U. S. 392.

Thus, even though the qualifying clause of § 3 is appended without distinction of terms equally to the prohibition of tying clauses and of requirements contracts, pertinent considerations support, certainly as a matter of economic reasoning, varying standards as to each for the

[10] Some members of the House opposed § 4 of H. R. 15657, 63d Cong., 2d Sess. (the equivalent of what is now § 3) as denying this benefit to the newcomer, see 51 Cong. Rec. 9267, and Representative McCoy of New Jersey offered an amendment, *id.* at 9398, to make the agreements in question illegal only when entered "with the intent of obtaining or establishing a monopoly or of destroying the business of a competitor," which he and others supported on this ground. See *id.* at 9400–02, 9409. The amendment was rejected. *Id.* at 9410.

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proof necessary to fulfill the conditions of that clause. If this distinction were accepted, various tests of the economic usefulness or restrictive effect of requirements contracts would become relevant. Among them would be evidence that competition has flourished despite use of the contracts, and under this test much of the evidence tendered by appellant in this case would be important. See, as examples of the consideration of such evidence, *B. S. Pearsall Butter Co.* v. *Federal Trade Comm'n,* 292 Fed. 720 (C. A. 7th Cir.); *Pick Mfg. Co.* v. *General Motors Corp.,* 80 F. 2d 641, 644 (C. A. 7th Cir.), aff'd, 299 U. S. 3. Likewise bearing on whether or not the contracts were being used to suppress competition, would be the conformity of the length of their term to the reasonable requirements of the field of commerce in which they were used. See *Corn Products Refining Co.* v. *Federal Trade Comm'n,* 144 F. 2d 211, 220 (C. A. 7th Cir.), aff'd, 324 U. S. 726; *United States* v. *Pullman Co.,* 50 F. Supp. 123, 127–29 (E. D. Pa.). Still another test would be the status of the defendant as a struggling newcomer or an established competitor. Perhaps most important, however, would be the defendant's degree of market control, for the greater the dominance of his position, the stronger the inference that an important factor in attaining and maintaining that position has been the use of requirements contracts to stifle competition rather than to serve legitimate economic needs. See *Standard Fashion Co.* v. *Magrane-Houston Co., supra,* 258 U. S. 346; *Fashion Originators' Guild* v. *Federal Trade Comm'n, supra,* 312 U. S. 457.[11]

Yet serious difficulties would attend the attempt to apply these tests. We may assume, as did the court below, that no improvement of Standard's competitive

[11] For an exposition of the considerations here summarized, see Stockhausen, *The Commercial and Anti-Trust Aspects of Term and Requirements Contracts,* 23 N. Y. U. L. Q. Rev. 412, 417–31 (1948).

position has coincided with the period during which the requirements-contract system of distribution has been in effect. We may assume further that the duration of the contracts is not excessive and that Standard does not by itself dominate the market. But Standard was a major competitor when the present system was adopted, and it is possible that its position would have deteriorated but for the adoption of that system. When it is remembered that all the other major suppliers have also been using requirements contracts, and when it is noted that the relative share of the business which fell to each has remained about the same during the period of their use,[12] it would not be farfetched to infer that their effect has been to enable the established suppliers individually to maintain their own standing and at the same time collectively, even though not collusively, to prevent a late arrival from wresting away more than an insignificant portion of the market. If, indeed, this were a result of the system, it would seem unimportant that a short-run by-product of stability may have been greater efficiency and lower costs, for it is the theory of the antitrust laws that the long-run advantage of the community depends upon the removal of restraints upon competition. See *Fashion Originators' Guild* v. *Federal Trade Comm'n*, 312 U. S. 457, 467–68; *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 427–29 (C. A. 2d Cir.).

Moreover, to demand that bare inference be supported by evidence as to what would have happened but for

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[12] Upon the request of Standard, its six largest competitors filled out questionnaires showing the number of retail dealers who distributed their products during the years 1937 through 1946. Though their position relative to each other has fluctuated, the figures show that as a group they have maintained or improved their control of the market. Together with Standard, these six companies distributed, as of 1946, through 26,439 of approximately 35,000 independent service stations in the Western area.

the adoption of the practice that was in fact adopted or to require firm prediction of an increase of competition as a probable result of ordering the abandonment of the practice, would be a standard of proof, if not virtually impossible to meet, at least most ill-suited for ascertainment by courts.[13] Before the system of requirements contracts was instituted, Standard sold gasoline through independent service-station operators as its agents, and it might revert to this system if the judgment below were sustained. Or it might, as opportunity presented itself, add service stations now operated independently to the number managed by its subsidiary, Standard Stations, Inc. From the point of view of maintaining or extending competitive advantage, either of these alternatives would be just as effective as the use of requirements contracts, although of course insofar as they resulted in a tendency to monopoly they might encounter the anti-monopoly provisions of the Sherman Act. See *United States* v. *Aluminum Co. of America,* 148 F. 2d 416 (C. A. 2d Cir.). As appellant points out, dealers might order petroleum products in quantities sufficient to meet their estimated needs for the period during which requirements contracts are now effective, and even that would foreclose competition to some degree. So long as these diverse ways of restricting competition remain open, therefore, there can be no conclusive proof that the use of requirements contracts has actually re-

[13] The dual system of enforcement provided for by the Clayton Act must have contemplated standards of proof capable of administration by the courts as well as by the Federal Trade Commission and other designated agencies. See 38 Stat. 734, 736, as amended, 15 U. S. C. §§ 21, 25. Our interpretation of the Act, therefore, should recognize that an appraisal of economic data which might be practicable if only the latter were faced with the task may be quite otherwise for judges unequipped for it either by experience or by the availability of skilled assistance.

duced competition below the level which it would otherwise have reached or maintained.

We are dealing here with a particular form of agreement specified by § 3 and not with different arrangements, by way of integration or otherwise, that may tend to lessen competition. To interpret that section as requiring proof that competition has actually diminished would make its very explicitness a means of conferring immunity upon the practices which it singles out. Congress has authoritatively determined that those practices are detrimental where their effect may be to lessen competition. It has not left at large for determination in each case the ultimate demands of the "public interest," as the English lawmakers, considering and finding inapplicable to their own situation our experience with the specific prohibition of trade practices legislatively determined to be undesirable, have recently chosen to do.[14] Though it may be that such an alternative to the present system as buying out independent dealers and making

[14] The Monopolies and Restrictive Practices (Inquiry and Control) Act, 1948, adopted July 30, 1948, provides, as one mode of procedure, for reference of restrictive trade practices by the Board of Trade to a permanent Commission for investigation in order to determine "whether any such things as are specified in the reference . . . operate or may be expected to operate against the public interest." 11 & 12 Geo. VI, c. 66, § 6 (2). The Act does not define what is meant by "the public interest," although in § 14 it sets up broad criteria to be taken into account. It is noteworthy, however, that, having established so broad a basis for investigation, the Act entrusts the task to an expert body without provision for judicial review. This approach was repeatedly contrasted in debate with that of the United States. See 449 H. C. Deb. 2046–47, 2058, 2063 (5th ser. 1948); 157 H. L. Deb. 350 (5th ser. 1948). Compare § 5 (2) of the Interstate Commerce Act, as amended, 41 Stat. 480, 49 U. S. C. § 5 (2), referring to the Interstate Commerce Commission determination of the more defined issues of "public interest" under review in *New York Central Securities Corp.* v. *United States*, 287 U. S. 12, 24; *United States* v. *Lowden*, 308 U. S. 225.

them dependent employees of Standard Stations, Inc., would be a greater detriment to the public interest than perpetuation of the system, this is an issue, like the choice between greater efficiency and freer competition, that has not been submitted to our decision. We are faced, not with a broadly phrased expression of general policy, but merely a broadly phrased qualification of an otherwise narrowly directed statutory provision.

In this connection it is significant that the qualifying language was not added until after the House and Senate bills reached Conference. The conferees responsible for adding that language were at pains, in answering protestations that the qualifying clause seriously weakened the section, to disclaim any intention seriously to augment the burden of proof to be sustained in establishing violation of it.[15] It seems hardly likely that, having with one hand set up an express prohibition against a practice thought to be beyond the reach of the Sherman Act, Congress meant, with the other hand, to reestablish the necessity of meeting the same tests of detriment to the public interest as that Act had been interpreted as re-

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[15] Representative Floyd of Arkansas, one of the managers on the part of the House, explained the use of the word "substantially" as deriving from the opinion of this Court in *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211, and quoted the passage from *id.* at 229 in which it is said that "the power of Congress to regulate interstate commerce comprises the right to enact a law prohibiting the citizen from entering into those private contracts which directly and substantially, and not merely indirectly, remotely, incidentally and collaterally, regulate to a greater or less degree commerce among the States." 51 Cong. Rec. 16317–18. Senator Chilton, one of the managers on the part of the Senate, denying that the clause weakened the bill, stated that the words "where the effect may be" mean "where it is possible for the effect to be." *Id.* at 16002. Senator Overman, also a Senate conferee, argued that even the elimination of competition in a single town would substantially lessen competition. *Id.* at 15935.

quiring.[16] Yet the economic investigation which appellant would have us require is of the same broad scope as was adumbrated with reference to unreasonable restraints of trade in *Chicago Board of Trade* v. *United States,* 246 U. S. 231.[17] To insist upon such an investigation would be to stultify the force of Congress' declaration that requirements contracts are to be prohibited wherever their effect "may be" to substantially lessen competition. If in fact it is economically desirable for service stations to confine themselves to the sale of the petroleum products of a single supplier, they will continue

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[16] See *United States* v. *American Tobacco Co.,* 221 U. S. 106, 179: "Applying the rule of reason to the construction of the statute, it was held in the *Standard Oil Case* that as the words 'restraint of trade' at common law and in the law of this country at the time of the adoption of the Anti-trust Act only embraced acts or contracts or agreements or combinations which operated to the prejudice of the public interests by unduly restricting competition or unduly obstructing the due course of trade or which, either because of their inherent nature or effect or because of the evident purpose of the acts, etc., injuriously restrained trade, that the words as used in the statute were designed to have and did have but a like significance." See also Handler, *A Study of the Construction and Enforcement of the Federal Antitrust Laws* 3–9 (T. N. E. C. Monograph No. 38, 1941). Compare § 4 of the Australian Industries Preservation Act, 1906, which forbids combinations entered into "with intent to restrain trade or commerce to the detriment of the public," construed in *Attorney General* v. *Adelaide S. S. Co.,* [1913] A. C. 781, as requiring proof of actual economic detriment.

[17] "The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts." 246 U. S. at 238.

to do so though not bound by contract, and if in fact it is important to retail dealers to assure the supply of their requirements by obtaining the commitment of a single supplier to fulfill them, competition for their patronage should enable them to insist upon such an arrangement without binding them to refrain from looking elsewhere.

We conclude, therefore, that the qualifying clause of § 3 is satisfied by proof that competition has been foreclosed in a substantial share of the line of commerce affected. It cannot be gainsaid that observance by a dealer of his requirements contract with Standard does effectively foreclose whatever opportunity there might be for competing suppliers to attract his patronage, and it is clear that the affected proportion of retail sales of petroleum products is substantial. In view of the widespread adoption of such contracts by Standard's competitors and the availability of alternative ways of obtaining an assured market, evidence that competitive activity has not actually declined is inconclusive. Standard's use of the contracts creates just such a potential clog on competition as it was the purpose of § 3 to remove wherever, were it to become actual, it would impede a substantial amount of competitive activity.

Since the decree below is sustained by our interpretation of § 3 of the Clayton Act, we need not go on to consider whether it might also be sustained by § 1 of the Sherman Act.

One last point remains to be disposed of. Appellant contends that its requirements contracts with California dealers, because nearly all the products sold to them are produced in California, do not substantially affect interstate commerce and therefore should have been exempted from the decree. It finds support for this contention in *Addyston Pipe & Steel Co.* v. *United States,* 175 U. S. 211, 247. But the effect of appellant's requirements contracts with California retail dealers is to prevent them

from dealing with suppliers from outside the State as well as within the State and is thus to lessen competition in both interstate and intrastate commerce. Appellant has not suggested that if these dealers were not bound by their contracts with it that they would continue to purchase only products originating within the State. The *Addyston* case, on the other hand, dealt not with the diminution of competition between suppliers brought about by the action of one at the expense of the rest, whether within or without the State, but a combination among them to restrain competition. Modification of the decree was required only to make clear that it did not reach a combination among the defendants doing business in a single State which was confined to transactions taking place within that same State.

The judgment below is

*Affirmed.*

MR. JUSTICE DOUGLAS.

The economic theories which the Court has read into the Anti-Trust Laws have favored rather than discouraged monopoly. As a result of the big business philosophy underlying *United States* v. *United Shoe Machinery Co.*, 247 U. S. 32; *United States* v. *United States Steel Corp.*, 251 U. S. 417; *United States* v. *International Harvester Co.*, 274 U. S. 693, big business has become bigger and bigger. Monopoly has flourished. Cartels have increased their hold on the nation. The trusts wax strong.[1] There is less and less place for the independent.

[1] See Final Report and Recommendations of the Temporary National Economic Committee, S. Doc. No. 35, 77th Cong., 1st Sess. (1941). For more detailed analyses, see Competition and Monopoly in American Industry (TNEC Monograph 21, 1940) pp. 299 *et seq.*; The Structure of Industry (TNEC Monograph 27, 1941) pp. 231 *et seq.*; The Distribution of Ownership in the 200 Largest Nonfinancial Corporations (TNEC Monograph 29, 1940); Relative

The full force of the Anti-Trust Laws has not been felt on our economy. It has been deflected. Niggardly interpretations have robbed those laws of much of their efficacy. There are exceptions. Price fixing is illegal *per*

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Efficiency of Large, Medium-Sized, and Small Business (TNEC Monograph 13, 1941).

The merger and acquisition movement, which has been evident since the turn of the century and which contributed to the spiraling concentration of corporate wealth into the hands of the few, has not ended. We are presently in the midst of a similar movement. See the Federal Trade Commission report, The Present Trend of Corporate Mergers and Acquisitions, Sen. Doc. No. 17, 80th Cong., 1st Sess. (1947), p. 6, where it is shown that "the increase in the merger movement following VJ-day parallels very closely the sharp upward movement which took place at the end of World War I." The causes which have recently contributed to the growing bigness of big corporations are varied. See Lynch, The Concentration of Economic Power (1946), pp. 3–4 where it is said:

"Even before the entrance of the United States into the war the placing of defense contracts served to augment the growth of bigness in industry and to intensify the struggle for survival by small concerns. By 1941 the pattern of defense contracts which, with modifications, was to remain for the duration of the war had been established. It is reported that in that year fifty-six firms, less than one-half of 1 percent of the manufacturing establishments of the country, were awarded 75 percent of all the contracts. Concentration was even more marked within this group, however, inasmuch as six corporations held 31 percent of the total. Between June, 1940, and March, 1943, more than 100 million dollars worth of prime war-supply contracts were awarded. Seventy percent of these were held by the leading 100 corporations; 10 corporations held 32 percent, and the leading 50 held 60 percent.

"Studies by the United States Department of Commerce during 1943–1944 throw additional light on this trend toward industrial concentration. After Pearl Harbor the total number of firms in business declined precipitously. Despite the wartime industrial boom, the number of firms which discontinued operations was greater than that replaced by new entries; it is estimated that the number in business in 1943 was nearly 17 percent less than in 1941. There

*se*.[2] The use of patents to obtain monopolies on unpatented articles is condemned.[3] Monopoly that has been built as a result of unlawful tactics, *e. g.*, through practices that are restraints of trade, is broken up.[4] But when it comes to monopolies built in gentlemanly ways—by mergers, purchases of assets or control and the like—the teeth have largely been drawn from the Act.

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are numerous indications that the relative importance of small business has declined during the war period and that the dominance of big business has become more marked. Between 1938 and 1942 it appears that the total number of workers employed by 95 percent of the nation's corporations (the smallest) declined 23 percent, whereas those employed by 5 percent of the corporations (the largest) increased 22 percent. A related study indicates that between January 1, 1941, and January 1, 1943, business firms employing fewer than 125 workers each experienced an increase in employment of 1 percent and an increase in the value of their product (attributable principally to price increases) of 16 percent; during the same period, however, the increase in employment by the large establishments employing more than 125 workers was 62 percent and the increase in the value of the product, 96 percent."

[2] See for example *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150.

[3] See for example *Mercoid Corp.* v. *Mid-Continent Co.*, 320 U. S. 661.

[4] See *United States* v. *Griffith*, 334 U. S. 100; *Schine Theatres* v. *United States*, 334 U. S. 110; *United States* v. *Paramount Pictures*, 334 U. S. 131, 172.

Those cases have largely expended the force of *Hartford-Empire Co.* v. *United States*, 323 U. S. 386—an indefensible decision whereby the Court allowed those who had built one of the tightest monopolies in American history largely to retain their ill-gotten gains and continue their hold on the economy. The philosophy of that decision can be summed up in the words Brandeis used to describe the decree effecting a so-called dissolution of the American Tobacco Co. He said that its defenders "appear to have discovered in the Constitution a new implied prohibition: '*What man has illegally joined together, let no court put asunder.*'" The Curse of Bigness (1935), p. 103.

We announced that the existence of monopoly power, coupled with the purpose or intent to monopolize, was unlawful.[5] But to date that principle has not shown bright promise in application.[6] Under the guise of increased efficiency big business has received approval for easy growth. *United States* v. *Columbia Steel Co.*, 334 U. S. 495, represents the current attitude of the Court on this problem. In that case United States Steel—the giant of the industry—was allowed to fasten its tentacles tighter on the economy by acquiring the assets of a steel company in the Far West where competition was beginning to develop.

The increased concentration of industrial power in the hands of a few has changed habits of thought. A new age has been introduced. It is more and more an age of "monopoly competition." Monopoly competition is a regime of friendly alliances, of quick and easy accommodation of prices even without the benefit of trade associations, of what Brandeis said was euphemistically called "cooperation."[7] While this is not true in all fields, it has become alarmingly apparent in many.

The lessons Brandeis taught on the curse of bigness have largely been forgotten in high places. Size is allowed to become a menace to existing and putative competitors. Price control is allowed to escape the influences of the competitive market and to gravitate into the hands of the few. But beyond all that there is the effect on the community when independents are swallowed up by the trusts and entrepreneurs become employees of absentee

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[5] See *Schine Theatres* v. *United States, supra,* pp. 129–130.

[6] It should be noted in this connection that a majority of the Court could not be obtained for holding illegal *per se* the vertical integration in the motion picture industry. See *United States* v. *Paramount Pictures, supra,* pp. 173–174.

[7] Other People's Money (1933), p. 110.

owners. Then there is a serious loss in citizenship. Local leadership is diluted. He who was a leader in the village becomes dependent on outsiders for his action and policy. Clerks responsible to a superior in a distant place take the place of resident proprietors beholden to no one. These are the prices which the nation pays for the almost ceaseless growth in bigness on the part of industry.

These problems may not appear on the surface to have relationship to the case before us. But they go to the very heart of the problem.

It is common knowledge that a host of filling stations in the country are locally owned and operated. Others are owned and operated by the big oil companies. This case involves directly only the former. It pertains to requirements contracts that the oil companies make with these independents. It is plain that a filling-station owner who is tied to an oil company for his supply of products is not an available customer for the products of other suppliers. The same is true of a filling-station owner who purchases his inventory a year in advance. His demand is withdrawn from the market for the duration of the contract in the one case and for a year in the other. The result in each case is to lessen competition if the standard is day-to-day purchases. Whether it is a substantial lessening of competition within the meaning of the Anti-Trust Laws is a question of degree and may vary from industry to industry.

The Court answers the question for the oil industry by a formula which under our decisions promises to wipe out large segments of independent filling-station operators. The method of doing business under requirements contracts at least keeps the independents alive. They survive as small business units. The situation is not ideal

from either their point of view [8] or that of the nation. But the alternative which the Court offers is far worse from the point of view of both.

The elimination of these requirements contracts sets the stage for Standard and the other oil companies to build service-station empires of their own. The opinion of the Court does more than set the stage for that development. It is an advisory opinion as well, stating to the oil companies how they can with impunity build their empires. The formula suggested by the Court is either the use of the "agency" device, which in practical effect means control of filling stations by the oil companies (cf. *Federal Trade Commission* v. *Curtis Co.*, 260 U. S. 568), or the outright acquisition of them by subsidiary corporations or otherwise. See *United States* v. *Columbia Steel Co., supra.* Under the approved judicial doctrine either of those devices means increasing the monopoly of the oil companies over the retail field.

When the choice is thus given, I dissent from the outlawry of the requirements contract on the present facts. The effect which it has on competition in this field is minor as compared to the damage which will flow from the judicially approved formula for the growth of bigness tendered by the Court as an alternative. Our choice must be made on the basis not of abstractions but of the realities of modern industrial life.

Today there is vigorous competition between the oil companies for the market. That competition has left some room for the survival of the independents. But when this inducement for their survival is taken away, we

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[8] For the plight of the independent service-station operator see Control of the Petroleum Industry by Major Oil Companies (TNEC Monograph No. 39, 1941) pp. 46, 47, 52. See also Review and Criticism on Behalf of Standard Oil Co. (New Jersey) and Sun Oil Co. of Monograph No. 39 with Rejoinder by Monograph Author (TNEC Monograph 39–A, 1941).

can expect that the oil companies will move in to supplant them with their own stations. There will still be competition between the oil companies. But there will be a tragic loss to the nation. The small, independent business man will be supplanted by clerks. Competition between suppliers of accessories (which is involved in this case) will diminish or cease altogether. The oil companies will command an increasingly larger share of both the wholesale and the retail markets.

That is the likely result of today's decision. The requirements contract which is displaced is relatively innocuous as compared with the virulent growth of monopoly power which the Court encourages. The Court does not act unwittingly. It consciously pushes the oil industry in that direction. The Court approves what the Anti-Trust Laws were designed to prevent. It helps remake America in the image of the cartels.

MR. JUSTICE JACKSON, with whom THE CHIEF JUSTICE and MR. JUSTICE BURTON join, dissenting.

I am unable to join the judgment or opinion of the Court for reasons I will state, but shortly.

Section 3 of the Clayton Act does not make any lease, sale, or contract unlawful unless "the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce." 38 Stat. 730, 731, 15 U. S. C. § 14. It is indispensable to the Government's case to establish that either the actual or the probable effect of the accused arrangement is to substantially lessen competition or tend to create a monopoly.

I am unable to agree that this requirement was met. To be sure, the contracts cover "a substantial number of outlets and a substantial amount of products, whether considered comparatively or not." 78 F. Supp. 850, 875.

But that fact does not automatically bring the accused arrangement within the prohibitions of the statute. The number of dealers and the volume of sales covered by the arrangement of course was sufficient to be substantial. That is to say, this arrangement operated on enough commerce to violate the Act, provided its effects were substantially to lessen competition or tend to create a monopoly. But proof of their quantity does not prove that they had this forbidden quality; and the assumption that they did, without proof, seems to me unwarranted.

Moreover, the trial court not only made the assumption but he did not allow the defendant affirmatively to show that such effects do not flow from this arrangement. Such evidence on the subject as was admitted was not considered in reaching the decision that these contracts are illegal.

I regard it as unfortunate that the Clayton Act submits such economic issues to judicial determination. It not only leaves the law vague as a warning or guide, and determined only after the event, but the judicial process is not well adapted to exploration of such industry-wide, and even nation-wide, questions.

But if they must decide, the only possible way for the courts to arrive at a fair determination is to hear all relevant evidence from both parties and weigh not only its inherent probabilities of verity but also compare the experience, disinterestedness and credibility of opposing witnesses. This is a tedious process and not too enlightening, but without it a judicial decree is but a guess in the dark. That is all we have here and I do not think it is an adequate basis on which to upset long-standing and widely practiced business arrangements.

I should therefore vacate this decree and direct the court below to complete the case by hearing and weighing the Government's evidence and that of defendant as to the effects of this device.

However, if the Court refuses to do that, I cannot agree that the requirements contract is *per se* an illegal one under the antitrust law, and that is the substance of what the Court seems to hold. I am not convinced that the requirements contract as here used is a device for suppressing competition instead of a device for waging competition. If we look only at its effect in relation to particular retailers who become parties to it, it does restrain their freedom to purchase their requirements elsewhere and prevents other companies from selling to them. Many contracts have the effect of taking a purchaser out of the market for goods he already has bought or contracted to take. But the retailer in this industry is only a conduit from the oil fields to the driver's tank, a means by which the oil companies compete to get the business of the ultimate consumer—the man in whose automobile the gas is used. It means to me, if I must decide without evidence, that these contracts are an almost necessary means to maintain this all-important competition for consumer business, in which it is admitted competition is keen. The retail stations, whether independent or company-owned, are the instrumentalities through which competition for this ultimate market is waged.

It does not seem to me inherently to lessen this real competition when an oil company tries to establish superior service by providing the consumer with a responsible dealer from which the public can purchase adequate and timely supplies of oil, gasoline and car accessories of some known and reliable standard of quality. No retailer, whether agent or independent, can long remain in business if he does not always, and not just intermittently, have gas to sell. Retailers' storage capacity usually is limited and they are in no position to accumulate large stocks. They can take gas only when and as they can sell it. The Government can hardly force someone to contract to stand by, ever ready to fill

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fluctuating demands of dealers who will not in turn undertake to buy from that supplier all their requirements. And it is important to the driving public to be able to rely on retailers to have gas to retail. It is equally important that the wholesaler have some incentive to carry the stocks and have the transport facilities to make the irregular deliveries caused by varied consumer demands.

It may be that the Government, if required to do so, could prove that this is a bad system and an illegal one. It may be that the defendant, if permitted to do so, can prove that it is, in its overall aspects, a good system and within the law. But on the present record the Government has not made a case.[1]

If the courts are to apply the lash of the antitrust laws to the backs of businessmen to make them compete, we cannot in fairness also apply the lash whenever they hit upon a successful method of competing. That, insofar as I am permitted by the record to learn the facts, appears to be the case before us. I would reverse.

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[1] The Government can derive no comfort for this sort of thing from *International Salt Co.* v. *United States*, 332 U. S. 392. There the defendant started with a patent monopoly of the machine for utilization of its product. The customers, canners, were in effect the ultimate consumers of salt as such. But they could get the advantages of the invention only if they tied themselves to use no other salt therein.

# UNITED STATES *v.* CORS.

CERTIORARI TO THE COURT OF CLAIMS.

No. 132. Argued February 4, 1949.—Decided June 13, 1949.

In March, 1942, respondent purchased from the Coast Guard a 47-year-old worn-out tug. He repaired and improved it and, in April, 1942, obtained a permit to operate it as a towing steam vessel in the coastal trade for one year. His total expenditures were $8,574.78, plus his own labor. The War Shipping Administration requisitioned the tug in October, 1942, under § 902 of the Merchant Marine Act of 1936, as amended, 46 U. S. C. § 1242, and it was used to heat fuel oil and pump it from barges into naval combat vessels. The Court of Claims found that, prior to the taking, its market value had been enhanced $5,000 due (1) to the great increase in shipping and harbor traffic because of the war, and (2) to the Government's need for vessels in the prosecution of the war. It awarded him a judgment based upon a fair market value of $15,500, holding that he was entitled to no less than he could have received on the market from others than the Government. *Held:* It erred in doing so. Pp. 325–336.

1. On the facts of this case, the requirement of § 902 (a) of the Merchant Marine Act of 1936, as amended, 46 U. S. C. § 1242, that the owner of any vessel requisitioned thereunder shall be paid "just compensation . . . but in no case shall the value of the property taken or used be deemed enhanced by the causes necessitating the taking or use," is coterminous with the just compensation requirement of the Fifth Amendment. Pp. 331–334.

2. Under the provisions of § 902 (a), any enhancement of value must be deducted where it is due (a) to the Government's need of vessels which has necessitated the taking, (b) to the previous taking of vessels of similar type, or (c) to a prospective taking reasonably probable. P. 334.

3. The enhancement which is excluded is that which arose before as well as after the declaration of a national emergency on May 27, 1941. P. 334.

4. The findings of the Court of Claims are not sufficient to enable this Court to determine whether any part of the $15,500 which it found to be the fair market value at the time of taking includes any deductible enhancement in value, since they do not

show with sufficient particularity what was the effect of the Government's activities in the particular market. Pp. 334–336.

5. Respondent plainly would be entitled to any increase in value due to his expenditure of money for labor and materials and his performance of part of the labor. P. 336.

110 Ct. Cl. 66, 75 F. Supp. 235, reversed.

The Court of Claims awarded respondent a judgment for a vessel requisitioned by the War Shipping Administration after the declaration of an emergency by the President. 110 Ct. Cl. 66, 75 F. Supp. 235. This Court granted certiorari. 335 U. S. 810. *Reversed,* p. 336.

*Oscar H. Davis* argued the cause for the United States. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Morison, Paul A. Sweeney* and *Paul D. Page, Jr.*

*John Lord O'Brian* argued the cause for respondent. With him on the brief were *Frank C. Mason, Harold A. Kertz, John G. Laylin, Charles A. Horsky* and *Donald Hiss.*

*Charles B. McInnis* filed a brief for the R. T. C. No. 11 Corporation et al., as *amici curiae,* in support of respondent.

Mr. Justice Douglas delivered the opinion of the Court.

This is a suit in the Court of Claims under § 902 of the Merchant Marine Act of 1936, 49 Stat. 2015, as amended, 53 Stat. 1255, 46 U. S. C. § 1242, to recover the balance of "just compensation" alleged to be due respondent from the United States for requisitioning his steam tug, the *MacArthur,* in October, 1942. The tug was a Coast Guard boat built in 1895 and used by it in harbor duties at Baltimore until 1939. It was then transferred to the Coast Guard base at Portland, Maine.

In September, 1941, the Coast Guard advertised it for sale to the highest bidder. Respondent was the highest bidder, purchasing the tug in Maine on March 19, 1942, for $2,875. Thereafter he expended $5,699.78 on labor and materials in repairing and improving the vessel, an amount which would have been substantially greater had he not performed part of the work himself. In April, 1942, respondent received from the Department of Commerce a certificate designating the vessel as a towing steam vessel and authorizing him to employ it in the coastal trade for one year. Respondent then brought the tug to Staten Island, New York, where it remained until requisitioned by the War Shipping Administration on October 15, 1942. A survey by the Navy had indicated it was suitable as a steam-heating plant for heating and pumping fuel oil from oil barges into naval combat vessels. Its condition was said to be "fair to good"; and its original cost was estimated to be $45,000; its replacement cost, $56,000; and its present value $9,000. It was used as a steam plant to heat oil for use in combat ships.

The War Shipping Administration determined that $9,000 was "just compensation" for the tug and offered that amount to respondent. Respondent accepted 75 per cent of the award, as he was permitted to do by § 902 (d) of the Act, and brought suit to recover the balance of the $20,000 which he alleged was the "just compensation" to which he was entitled, plus interest.

Section 902 (a) of the Act,[1] after providing that the owner of any vessel requisitioned by the Commission shall

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[1] Section 902 (a) provides:

"Whenever the President shall proclaim that the security of the national defense makes it advisable or during any national emergency declared by proclamation of the President, it shall be lawful for the Commission to requisition or purchase any vessel or other watercraft owned by citizens of the United States, or under construction within the United States, or for any period during such emergency,

be paid "just compensation for the property taken or for the use of such property," goes on to state "but in no case shall the value of the property taken or used be deemed enhanced by the causes necessitating the taking or use." It is around this latter clause that the present controversy turns.

The Court of Claims found that the fair market value at the time of the taking was $15,500 and that respondent was entitled to receive that amount, less the sum already paid, plus interest. 110 Ct. Cl. 66, 75 F. Supp. 235. The importance of that decision in the settlement of claims arising as a result of the requisitioning program during the period of recent hostilities led us to grant the petition for certiorari.

The United States admitted liability for only $10,500, claiming that $5,000 of the market value was due to an enhancement brought about by its need for vessels which necessitated their taking. The Court of Claims found that at the time of the requisitioning there existed in and about the Port of New York "a rising market and a strong demand for tugs of all types" due in part at least to the government's requisitioning program. It found that the

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to requisition or charter the use of any such property. The termination of any emergency so declared shall be announced by a further proclamation by the President. When any such property or the use thereof is so requisitioned, the owner thereof shall be paid just compensation for the property taken or for the use of such property, *but in no case shall the value of the property taken or used be deemed enhanced by the causes necessitating the taking or use.* If any property is taken and used under authority of this section, but the ownership thereof is not required by the United States, such property shall be restored to the owner in a condition at least as good as when taken, less ordinary wear and tear, or the owner shall be paid an amount for reconditioning sufficient to place the property in such condition. *The owner shall not be paid for any consequential damages arising from a taking or use of property under authority of this section.*" (Italics added.)

market value of the tug had been enhanced $5,000 by October 15, 1942, due (1) to the great increase in shipping and harbor traffic because of the war and (2) to the government's need for vessels in the prosecution of the war.[2] But the Court of Claims held that an owner of property taken by the government was entitled to no

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[2] The findings on these issues were as follows:

"At the time of the requisition, there existed in and about the Port of New York a rising market and a strong demand for tugs of all types, including the *MacArthur*. This situation was due to the greatly increased traffic in the harbor during the period of the war, to the fact that the Government had been requisitioning tugs and to the resulting shortage of tugs. Tugs were operated day and night in an effort to handle the increased business and, under those conditions most tug owners were reluctant to sell. However, from August 1941 to February 1943, six tugboats were sold on the open market in or near the Port of New York. None of these sales involved a vessel closely comparable to the *MacArthur* in design, power, and equipment. . . ."

"Beginning on September 8, 1939, the date on which the President proclaimed the existence of a limited national emergency, and continuing up to the date that plaintiff's vessel was requisitioned, there was a general rise in the market values of nearly all vessels in and about the Port of New York. This increase in values between September 8, 1939 and May 27, 1941, the date on which the President proclaimed the existence of a general national emergency, was due to the demand for vessels which followed the outbreak of war in Europe. After May 27, 1941 and particularly after December 7, 1941, the date of the Japanese attack on Pearl Harbor, the rise in market values was due to the Government's need for vessels, which necessitated the taking of many vessels, and to the great increase in shipping and in harbor traffic which occurred during the period of the war. These conditions combined to create a demand for and a shortage of tugs. As a result, the market value of the *MacArthur* had been enhanced by the sum of $5,000.00 by October 15, 1942.

"Prior to the time the defendant requisitioned the *MacArthur* there was no reasonable prospect that she would be requisitioned, and no part of the enhancement in her value was due to such a prospect."

less than he could have received on the market from others, which in the present case was $15,500.

The Comptroller General has ruled that § 902 (a) prohibits the payment of compensation to the extent that it may be based on values in excess of those existing on the date of the President's proclamation of a limited national emergency (September 8, 1939),[3] provided that such excess be determined as due to economic conditions directly caused by the national emergency.[4]

The Advisory Board on Just Compensation [5] formulated various rules for the guidance of the War Shipping Administration in its requisitioning program, including the following:

> "From the value at the time of taking, there should be deducted any enhancement due, to the Government's need of vessels which has necessitated the taking, to the previous taking of vessels of similar type, or to a prospective taking, reasonably probable, whether such need, taking, or prospect, occurred be-

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[3] See 3 C. F. R. Cum. Supp. 114.

[4] 22 Comp. Gen. 497, 608.

[5] See Exec. Order 9387, Oct. 15, 1943, 8 Fed. Reg. 14105, 3 C. F. R., 1943 Supp. 48–49. The Executive Order provided in part:

"The Board, in accordance with the applicable provisions of the Constitution and the laws of the United States, shall establish fair and equitable standards, rules and formulae of general applicability for the guidance of the War Shipping Administration in determining the just compensation to be paid for all vessels requisitioned, purchased, chartered or insured by the Administration. The Board may prescribe such rules, regulations and procedures as it deems necessary or advisable in carrying out its functions.

"In determining the amount of just compensation which should be paid for each vessel, the War Shipping Administration will be guided by the general standards, rules and formulae established by the Board."

This Board was composed of Learned Hand, John J. Parker, and Joseph C. Hutcheson, Jr.

> fore or after the declaration of the national emergency of May 27, 1941. Enhancement due to a general rise in prices or earnings, whenever occurring, should not be deducted. In the application of this rule neither the proclamation of limited emergency of September 8, 1939, nor the facts existing at that time, are in themselves of significance. The Board does not determine whether any enhancement after May 27, 1941, other than as enumerated above as deductible, should be excluded; since the Board is advised that the value of oceangoing vessels was higher on May 27, 1941, than at the time of taking, and that any enhancement since May 27, 1941, in vessels of other types, not deductible under the foregoing, is attributable to a general rise in prices or earnings, and should therefore not be deducted."

The Department of Justice agrees with both the Comptroller General and the Advisory Board that the enhancement which is excluded is not limited to that accruing in the period after the declaration of a national emergency on May 27, 1941 [6] and contends for a construction which would eliminate any enhancement on values due to the war. It argues that the Act as so construed, though different from hitherto announced judicial rules of construction of "just compensation" within the meaning of the Fifth Amendment, is nevertheless constitutional.

Respondent, relying largely on *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312, argues that if that construction is adopted it makes the enhancement clause unconstitutional because it conflicts with the judicial construction of "just compensation" and is therefore beyond the competence of Congress to prescribe.

*First.* We need not reach the question whether the measure of compensation which Congress wrote into the

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[6] 3 C. F. R. Cum. Supp. 234.

Act is in all of its applications identical with the judicial standard. We are satisfied that on the present facts the two are coterminous.

The Court in its construction of the constitutional provision has been careful not to reduce the concept of "just compensation" to a formula. The political ethics reflected in the Fifth Amendment reject confiscation as a measure of justice. But the Amendment does not contain any definite standards of fairness by which the measure of "just compensation" is to be determined. *United States ex rel. T. V. A.* v. *Powelson,* 319 U. S. 266, 279–280; *United States* v. *Petty Motor Co.,* 327 U. S. 372, 377. The Court in an endeavor to find working rules that will do substantial justice has adopted practical standards, including that of market value. *United States* v. *Miller,* 317 U. S. 369, 374. But it has refused to make a fetish even of market value, since that may not be the best measure of value in some cases. At times some elements included in the criterion of market value have in fairness been excluded, as for example where the property has a special value to the owner because of its adaptability to his needs or where it has a special value to the taker because of its peculiar fitness for the taker's project. See *United States* v. *Miller, supra,* 375 and cases cited. Moreover, where the government lays out a project involving the taking of lands, no increment of value arising by virtue of the fact that a particular tract is clearly or probably within the project may be added. *Id.,* 376–379 and cases cited. Any increase in value due to that fact would reflect speculation as to what the government could be compelled to pay and hence in fairness should be excluded from the determination of what compensation would be just. *Id.,* 377.

The Court of Claims recognized these rules. But it concluded that they represented the only exceptions to the requirement that market value be paid, that they were

inapplicable here, and that therefore there was no enhancement in the value of the vessel that should be excluded from the fair market value in making the award to respondent. We believe, however, that these exceptions are merely illustrations of a principle which excludes enhancement of value resulting from the government's special or extraordinary demand for the property.

The special value to the condemner as distinguished from others who may or may not possess the power to condemn has long been excluded as an element from market value. See *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 76. In time of war or other national emergency the demand of the government for an article or commodity often causes the market to be an unfair indication of value. The special needs of the government create a demand that outruns the supply. The market, sensitive to the bullish pressure, responds with a spiraling of prices. The normal market price for the commodity becomes inflated. And so the market value of the commodity is enhanced by the special need which the government has for it.

That seems to have been the situation in the present case. For, as we have seen, the Court of Claims found that at the time of the requisition there was "a rising market and a strong demand for tugs of all types" in and around the Port of New York, due in part at least to the shortage of tugs resulting from the government's requisitioning program.

It is not fair that the government be required to pay the enhanced price which its demand alone has created. That enhancement reflects elements of the value that was created by the urgency of its need for the article. It does not reflect what "a willing buyer would pay in cash to a willing seller," *United States* v. *Miller, supra,* 374, in a fair market. It represents what can be exacted from the government whose demands in the emergency have cre-

ated a sellers' market. In this situation, as in the case of land included in a proposed project of the government, the enhanced value reflects speculation as to what the government can be compelled to pay. That is a hold-up value, not a fair market value. That is a value which the government itself created and hence in fairness should not be required to pay.

*Second.* What we have said is in accord with our reading of the Report of the Advisory Board. Any enhancement of value must be deducted where it is due (a) "to the Government's need of vessels which has necessitated the taking," (b) "to the previous taking of vessels of similar type," or (c) "to a prospective taking, reasonably probable. . . ."

The government's need of vessels which has necessitated the taking is its need for the precise ship taken, for the type or class of ship taken, or for ships which perform the same or related functions. The government's need for cargo vessels may affect indirectly the price level of many commodities. It may, for example, affect the price of rowboats. But if the government takes a rowboat, the enhancement to be excluded is that which results from the government's activities in the particular market. It is the government's demand in that market that is the measure of the "causes necessitating the taking or use" in this situation.[7]

We also agree with the Advisory Board that the enhancement which is excluded is that which arises before as well as after the declaration of the national emergency of May 27, 1941. Section 902 (a) does not have any limiting factor so far as time is concerned. But we cannot say from this record whether any part of the $15,500 that the Court of Claims found to be the fair

[7] Whether there might be a different measure of those causes in other situations is a question we do not reach.

market value of the tug at the time of the taking includes any deductible enhancement in value. The Court of Claims found, to be sure, that there was no reasonable prospect of the condemnation of the tug and hence no enhancement in value due to that reason. Yet, as we have seen, that is only one source of the enhancement in value which is deductible. There are no findings as to the effect on the market either of the previous taking, if any, of vessels of a similar type, or of the government's need of vessels necessitating the taking, as we have construed it. The only findings at all relevant to these factors are (1) that the increase in market values of "nearly all vessels in and about the Port of New York" between September 8, 1939 and May 27, 1941 was due to "the demand for vessels which followed the outbreak of war in Europe"; and (2) that such increase after May 27, 1941, and particularly after December 7, 1941, was due to "the Government's need for vessels, which necessitated the taking of many vessels, and to the great increase in shipping and in harbor traffic" during the war.[8] These findings, however, are not sufficiently discriminating. They do not show the effect on the market of the government's need for this particular ship, for this type or class of vessel, or for ships which perform the same or related functions. The findings as to the rising market for tugs in and about the Port of New York tell us that some of that enhancement is due to the government's need. But we are left in the dark as to how much it may be.

In sum the findings do not tell us with sufficient particularity what was the effect of the government's activities in the particular market. Nor do we know whether increases in value of the vessel up to March 19, 1942, when the United States sold it to respondent, were re-

[8] See note 2, *supra*.

flected in the sale price. If they were, the United States has received any enhancement in value that resulted from its need up to that date.

Finally, respondent argues that the actual basis for the increase in value of the vessel between March and October, 1942 (the period when respondent owned it) is due to causes other than the government's need. He points out that his total monetary expenditure on the vessel amounted to $8,574.78, of which $5,699.78 represented labor and materials. The latter amount, however, would have been substantially greater had not respondent himself performed part of the labor. Respondent plainly would be entitled to any increase in value due to that factor. Moreover, when respondent repaired and reconditioned the boat it was certificated as a towing steam vessel, a substantially new use for the tug. These two factors alone, plus the general price increase, are said to account for the $5,000 enhancement in value found by the Court of Claims.

We start with findings that tell us that some of the enhancement in market value is due to the government's need. It is sheer speculation to say that there are offsets against that enhancement which so reduce it as to render the construction of the Act an abstract question. Cf. *Ashwander* v. *Valley Authority*, 297 U. S. 288, 324. The inadequacies in the findings are due to the erroneous construction of the Act by the Court of Claims.

*Reversed.*

MR. CHIEF JUSTICE VINSON dissents.

MR. JUSTICE FRANKFURTER, with whom MR. JUSTICE JACKSON and MR. JUSTICE BURTON join, dissenting.

We brought this case here on certiorari to the Court of Claims under 28 U. S. C. § 1255 (1) because it seemed to present constitutional issues important in the award

of compensation for vessels requisitioned by the Government during the recent national emergency under § 902 (a) of the Merchant Marine Act of 1936.[1]

The following facts are the basis of the claim that the scope and validity of that section of the Merchant Marine Act call for adjudication.

The steam tug *Guthrie* was owned by the United States and operated by the Coast Guard continuously from 1895, when she was built, until 1941. In that year a special Board of Survey appointed to determine her condition found her in need of a new boiler and extensive repairs. In view of "the present emergency and the great need of vessels," the Board recommended that the necessary reconditioning be undertaken. The Coast Guard, however, directed that she be sold to the highest bidder. Respondent's was the highest bid received, and on March 19, 1942, the *Guthrie* was sold to him for $2,875. He

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[1] "Whenever the President shall proclaim that the security of the national defense makes it advisable or during any national emergency declared by proclamation of the President, it shall be lawful for the Commission to requisition or purchase any vessel or other watercraft owned by citizens of the United States, or under construction within the United States, or for any period during such emergency, to requisition or charter the use of any such property. The termination of any emergency so declared shall be announced by a further proclamation by the President. When any such property or the use thereof is so requisitioned, the owner thereof shall be paid just compensation for the property taken or for the use of such property, but in no case shall the value of the property taken or used be deemed enhanced by the causes necessitating the taking or use. If any property is taken and used under authority of this section, but the ownership thereof is not required by the United States, such property shall be restored to the owner in a condition at least as good as when taken, less ordinary wear and tear, or the owner shall be paid an amount for reconditioning sufficient to place the property in such condition. The owner shall not be paid for any consequential damages arising from a taking or use of property under authority of this section." 49 Stat. 2011, 2015, as amended, 46 U. S. C. § 1242.

proceeded to carry out the repairs that had been indicated by the Coast Guard survey, doing most of the work himself with the aid of a crew of four; the rest was done by a shipyard at Portland. His total expenditure on labor and materials was $5,699.78 but would have been substantially greater had he not been experienced in this type of work.

On April 20 and 21, the Department of Commerce licensed the *Guthrie* as a "towing steam vessel" permitted to navigate in "bays, sounds, rivers and harbors" and also authorized respondent to employ her in the coasting trade. Respondent then brought her under her own power to New York where she was rechristened the *MacArthur* and where she remained inactive until September, 1942, when the Navy surveyed her for use as a steam-heating plant for heating and pumping fuel oil from barges into combat vessels. On October 15, 1942, the War Shipping Administration requisitioned the *MacArthur* for the Navy and later offered respondent $9,000 as compensation for her. This figure was based upon the Coast Guard survey, the Navy survey, and the rules adopted by the Advisory Board on Just Compensation which had been appointed to clarify the measure of compensation payable by the War Shipping Administration under § 902 (a) of the Merchant Marine Act.[2] Respondent protested against

[2] The Advisory Board on Just Compensation, consisting of Judge Learned Hand, Judge John J. Parker, and Judge Joseph C. Hutcheson, Jr., was appointed under Exec. Order 9387, Oct. 15, 1943, 8 Fed. Reg. 14105, 3 C. F. R. 1943 Supp. 48–49. The following is the most important of the rules adopted by the Board:

"Rule 4. From the value at the time of taking, there should be deducted any enhancement due, to the Government's need of vessels which has necessitated the taking, to the previous taking of vessels of similar type, or to a prospective taking, reasonably probable, whether such need, taking, or prospect, occurred before or after the declaration of the national emergency of May 27, 1941. Enhance-

the award and, as he was entitled to do under § 902 (d) of the Act, accepted 75% of it, and brought suit in the Court of Claims for the difference between the amount he had been offered and the amount he alleged to be due as just compensation.

The Court of Claims found that the market value of the *MacArthur* on the date of taking was $15,500. 110 Ct. Cl. 66. The Government does not dispute that there was a market nor that value on the market was as found, but insists that there should have been deducted from it an amount representing enhancement "by the causes necessitating the taking" under the terms of § 902 (a). It bases this contention on two findings of the Court of Claims. The first is that "At the time of the requisition, there existed in and about the Port of New York a rising market and a strong demand for tugs of all types, including the *MacArthur*. This situation was due to the greatly increased traffic in the harbor during the period of the war, to the fact that the Government had been requisitioning tugs and to the resulting shortage of tugs." 110 Ct. Cl. at 75–76. The second is that the market value of the *MacArthur* had been enhanced between September 8, 1939, when the President proclaimed a

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ment due to a general rise in prices or earnings, whenever occurring, should not be deducted. In the application of this rule neither the proclamation of limited emergency of September 8, 1939, nor the facts existing at that time, are in themselves of significance. The Board does not determine whether any enhancement after May 27, 1941, other than as enumerated above as deductible, should be excluded; since the Board is advised that the value of oceangoing vessels was higher on May 27, 1941, than at the time of taking, and that any enhancement since May 27, 1941, in vessels of other types, not deductible under the foregoing, is attributable to a general rise in prices or earnings, and should therefore not be deducted." House Committee on the Merchant Marine and Fisheries Doc. No. 47, 78th Cong., 1st Sess.

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limited national emergency, and October 15, 1942, when she was requisitioned, by the sum of $5,000, part of which, after proclamation of a general national emergency on May 27, 1941, "was due to the Government's need for vessels, which necessitated the taking of many vessels . . . ." *Id.* at 77. But the Court of Claims concluded that "It is not possible to allocate to the [Government's need] a definite part of the increase in market value, but even if it were possible to do so, we do not think the defendant is entitled to a deduction from market value on this account." *Id.* at 78.

The Government's arguments in support of its claim that all or part of the $5,000 enhancement in market value of the *MacArthur* should be deducted in computing just compensation to respondent ultimately reduce to two. The first is that there should be deducted any speculative increase of value due to the probability of the taking. It is clear that such a deduction must be made where the increase is traceable to the probability that the Government would take the particular property for which compensation is sought. *United States* v. *Miller,* 317 U. S. 369. But the application of this principle is impossible here in the face of the Court of Claims' explicit finding that "prior to the time the defendant requisitioned the *MacArthur* there was no reasonable prospect that she would be requisitioned, and no part of the enhancement in her value was due to such a prospect." 110 Ct. Cl. at 77. It is arguable, however, that the rationale of the *Miller* case should be extended to property of a less unique character than land—property of a class any member of which would fulfill the taker's need more or less equally well. As to such property there may be speculative increase in value because of the dual expectation that some members of the class will be taken and that the taker may be forced to pay,

when the time comes for the award of compensation, something more than what would have been market value had not speculation occurred. See *McGovern* v. *New York,* 229 U. S. 363, 372. And this might be true even though it could not be said that it was probable that a particular member of the class—in this case a particular tug—would be taken.[3]

But this is a question we do not need to pass on now because, in addition to the finding that it was not probable that the *MacArthur* would be taken, the record

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[3] The core of the problem emerged in the following colloquy at the hearing held before the Advisory Board on Just Compensation:

"Judge Hand: It comes to this, that a society which foresees a shortage, a consequent shortage in one kind of supply, must either proceed at once to seize, or must subject itself and society at large to the disadvantage which comes from the shortage. But when the shortage comes, it may not say 'So far, and no farther. We leave the property in your hands for use, but we are helpless to prevent your further exploitation of society by your special interest.'

"Is that your position?

"Mr. McInnis: I think, your Honor, that that is the logical implication of my argument.

"Judge Hand: It does seem to me, if it is all perfectly clearly known in advance, to put a society in a rather helpless position as against a small group that has control of all of one vital commodity. You can imagine cases where that would work a result that no one would support. You can imagine the destruction of a large part of food in a community where there was no immediate relief, and, as I understand your argument, they either have to take it now, or when they would find it more convenient to take it they should have to submit to the increase in value, however clearly the owners were advised at a given point, 'This marks the end of that kind of profit—scarcity profit.'

"Mr. McInnis: I think that is correct, Judge. But I would agree—

"Judge Hand (interposing): It might be that the Constitution protects that kind of profit. I won't say now." 1 Report of Proceedings of the Advisory Board 134–135 (United States Maritime Commission, War Shipping Administration, mimeographed, 1943).

contains evidence of the most conclusive kind that a taking was improbable: the Government had got rid of the tug only seven months before the taking, with complete awareness that she was capable of being adequately reconditioned. Among those whose dealings in tugs established market value, therefore, whatever may have been the tendency of their activities to bring about speculative increase in the value of tugs generally, it must have seemed so unlikely that the Government would reverse itself and take the *MacArthur* back that the market value found by the Court of Claims for this particular tug could hardly have reflected enhancement due to speculation at the expense of the Government's need for her. It may be suggested, to be sure, that the need which prompted this reversal might have been anticipated by one shrewd enough to foresee a growing shortage of tugs more accurately than those responsible for the Government's decisions in these matters. But whatever might conceivably be the effect on the market of the operations of such persons, it would be an effect so far beyond the possibility of measurement that it would be futile in the extreme to remand for a finding on the point, especially when it is remembered that the *MacArthur* was requisitioned not for use as a tug but as a heating plant.

We must reject, therefore, speculation by purchasers of tugs at the expense of the Government's need as a factor contributing to the market value of the *MacArthur* at the time she was requisitioned. The only other way that has been suggested in which her market value could have been increased by the Government's need is as a result of the increase in demand presumably brought about by previous Government seizures of tugs during a period when, as the Court of Claims found, there was a shortage of tugs due to a great "increase in shipping and

harbor traffic." In this indirect way, the Government's need can be regarded as a "cause" of the increase in the *MacArthur's* market value. Because this need could be foreseen at least by the time of the declaration of limited national emergency on September 8, 1939, the Government argues that all enhancement in the value of vessels since that date should therefore be deducted from their market price in determining just compensation. In the alternative, it urges that there should be deducted that proportion of this increase which is allocable to the Government's intervention in the market.

Whether regarded as founded upon § 902 (a) of the Merchant Marine Act or upon judicial principles of just compensation, both these contentions, in my judgment, must be rejected. When the Government first took out of commercial operation some of the tugs which had been thus employed, it could requisition them at a price uninfluenced by its own need. A subsequent increase in the market value, though precipitated by the shortage caused by the earlier taking, could be a direct result only of the tug operators' need for the remaining tugs, not of the Government's for those it had taken. Leaving enhancement attributable to speculation out of account, as the record obliges us to do, the Government could then requisition still more tugs at a market value at most no higher than the level at which the new price had settled. Unlike an increase due to speculation by buyers of tugs that awards for requisitioned tugs would exceed the price likely to be paid by commercial operators purchasing tugs for their own use, an increase due to shortage would affect the price to any purchaser and enhance value to any owner even though no further requisitions were anticipated and even though none were made. Exactly the same increase would result whether the shortage were induced by the expanded business of a commercial oper-

ator or by Government requisition. It simply is not true, therefore, that the enhanced price resulting from shortage is a price which the need necessitating the taking, as opposed to need of the tug operators, created.

The need of the tug operators, moreover, not merely for the tugs that had been taken, but for additional tugs, was in its turn only one factor in the complex which makes up demand in a period of high costs, high wages, shortages, and inflation. We speak, in referring to the interacting forces of such a period, of the "inflationary spiral," and although a requisition by the Government in the midst of this dynamic process undoubtedly has some effect in accelerating it, it is an effect which loses its ascertainable significance by being merged with countless other factors. Whatever may be the proper scope of the declaration in § 902 (a) that the value of vessels taken during the national emergency shall not "be deemed enhanced by the causes necessitating the taking or use," the wartime economy itself cannot be regarded as such a cause. Even assuming that there may be other circumstances than those of gambling on the result of an award in which a connection between the taker's intervention in the market and an enhancement of price might be traced, on this record it would be asking for the impossible to insist on an attempt to trace one. The Government has advanced no basis for the undertaking; it points to no evidence already offered which would justify it and suggests none that it might have offered. Under the circumstances, we should not require the Court of Claims to embark upon so murky a sea of speculation. Cf. *International Harvester Co.* v. *Kentucky,* 234 U. S. 216, 223–24.

If what I have said appeals to common sense, market values which have been increased as the result of the interaction of supply and demand in a wartime economy

cannot be rejected as the applicable measure of just compensation merely because the competition of the Government, regarded from the point of view of an exercise in tracing ultimate causes, may theoretically be deemed to have contributed to the increase. Nor is it to make a fetish of market value to affirm its selection as a standard in a case where no other standard that offers the possibility of observance has been put forward. The record rules out any increase due to speculation, the only other suggested form of enhancement attributable to the Government's need. Since it is our duty to avoid constitutional adjudication, see the concurring opinion of Mr. Justice Brandeis in *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288, 341, 346 *et seq.,* and *Rescue Army* v. *Municipal Court,* 331 U. S. 549, 568 *et seq.,* the decision below should be affirmed without reaching the constitutional issues raised by the Government's construction of § 902 (a).

# UNITED STATES *v.* WITTEK.

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

No. 473. Argued April 20–21, 1949.—Decided June 13, 1949.

The District of Columbia Emergency Rent Act of December 2, 1941, 55 Stat. 788, as amended, is not applicable to the United States as landlord of Government-owned defense housing in the District of Columbia. Pp. 347–368.

1. The Act makes no distinction between the United States as a landlord of defense housing and as a landlord of low-rent housing; and, when the circumstances are appreciated, it is practically inconceivable that Congress would have subjected its Government-owned low-rent housing in the District of Columbia to the control prescribed by the District of Columbia Emergency Rent Act in addition to the control prescribed by existing legislation and that of the presidentially designated administrators of low-rent housing in the District of Columbia. Pp. 351–358.

2. The Act contains no express reference to the United States as a landlord or to its application to Government-owned housing of any kind; rental rates in Government-owned defense housing were under complete governmental control; it appears to have been enacted as a temporary measure supplementing, rather than superseding, the contribution already being made by the permanent federal housing authorities toward meeting the housing crisis; and there was no need to apply to Government-owned defense housing the new rent control that it imposed upon privately owned housing. Pp. 358–363.

3. Both the form and the practical operation of the National Emergency Price Control Act indicate that Congress did not seek by the District of Columbia Emergency Rent Act to place Government-owned housing under a local rent administrator. Pp. 364–367.

4. The conclusion here reached is supported by the fact that the District Administrator of Rent Control has taken no part in this proceeding and there is no evidence that he has sought at any time to exercise jurisdiction over the United States as a landlord of either low-rent housing or defense housing. P. 368.

83 U. S. App. D. C. 377, 171 F. 2d 8, reversed.

The Municipal Court for the District of Columbia found that the District of Columbia Emergency Rent Act was not applicable to the United States and ordered possession of premises owned by it in a defense-housing project in the District of Columbia given to the United States. The Municipal Court of Appeals for the District of Columbia affirmed. 75 Wash. Law Rep. 982, 54 A. 2d 747. The United States Court of Appeals for the District of Columbia Circuit reversed. 83 U. S. App. D. C. 377, 171 F. 2d 8. This Court granted certiorari. 336 U. S. 931. *Reversed,* p. 368.

*Assistant Attorney General Vanech* argued the cause for the United States. With him on the brief were *Solicitor General Perlman, Philip Elman, Roger P. Marquis, Fred W. Smith* and *Floyd L. France.*

*Ward B. McCarthy* argued the cause and filed a brief for respondent.

Mr. Justice Burton delivered the opinion of the Court.

The question presented is whether the United States, as the owner of Bellevue Houses, a defense-housing project in the District of Columbia, is a "landlord" within the meaning of the District of Columbia Emergency Rent Act,[1] with particular reference to rights of occupancy and rates of rental. For the reasons to be stated, we hold that it is not.

[1] The District of Columbia Emergency Rent Act was approved December 2, 1941, 55 Stat. 788, D. C. Code (1940, Supp. VI) §§ 45–1601 to 45–1611. It took effect January 1, 1942, and was to terminate December 31, 1945. *Id.* §§ 2 (1), 1 (b); § 45–1602 (1); and see § 45–1601 (b). Its life, however, was extended to December 31, 1946, 59 Stat. 592; to December 31, 1947, 60 Stat. 340; to March 31, 1948, 61 Stat. 713; to April 30, 1948, 62 Stat. 100; to March 31, 1949, 62 Stat. 205; to April 30, 1949, 63 Stat. 30; to June 30, 1950, 63 Stat. 48. It has been amended in a few other provisions, none of which are material here.

The United States of America, petitioner herein, filed its amended complaint in the Municipal Court for the District of Columbia against Wittek, the respondent, seeking possession of the premises occupied by him in the defense-housing project in the District of Columbia known as Bellevue Houses. The complaint alleged that the premises were owned by the United States and that the housing accommodations had been constructed by the Navy Department under authority of § 201 of the Second Supplemental National Defense Appropriation Act, 1941.[2] This summary proceeding was brought under § 20, 31 Stat. 1193, 41 Stat. 555, D. C. Code (1940) § 11–735. The respondent's tenancy had been terminated by notice to quit, served upon him February 28, 1946, as required by § 1219, 31 Stat. 1382, D. C. Code (1940) § 45–902, and the United States claimed that he no longer had any right to possession.[3] The respondent's defense, now be-

[2] Approved September 9, 1940, 54 Stat. 883–884. The management and administration of Bellevue Houses were transferred by the Navy Department to the National Housing Administration under authorization of this section and also under § 7 of the Lanham Act, approved October 14, 1940, 54 Stat. 1125, 1127, 42 U. S. C. (1946 ed.) § 1544, and Executive Order No. 9070, 3 C. F. R. Cum. Supp. 1095, 50 U. S. C. App. (1946 ed.) § 601 note, p. 5711. The authority to operate and manage Bellevue Houses later was delegated, by lease, to the National Capital Housing Authority, which was responsible for the rental of the premises involved in the instant case at the time of this proceeding. In making this delegation, the United States relied upon the same Acts, together with § 5 of the Act of June 28, 1941, 55 Stat. 363, and amendments made to the Lanham Act by the Act of January 21, 1942, 56 Stat. 11, *et seq.*

[3] The amended complaint, the proceedings and the opinions below refer also to allegations, stipulations and evidence to the effect that the United States had rented the premises in question to the respondent for $38.20 a month, including gas heating and other utility services, but that it had increased such rental to $43 a month, beginning February 1, 1946. The United States claimed that this increase was essential in order for it to meet a substantial rise in operating expenses, due to the necessary substitution of commercial gas to

fore us, is that the United States did not establish any of the additional facts which the District of Columbia Emergency Rent Act required a landlord to establish as a condition of such landlord's recovery of possession of housing accommodations to which the Act applied.[4] The

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be used for space heating purposes in place of surplus sludge gas supplied by the District of Columbia free or at nominal cost. The United States also alleged that the respondent refused to execute a new lease and refused to pay rent at the increased rate, with the result that, on February 28, 1946, it served its 30-day notice terminating the respondent's tenancy. It further alleged that this increase in rent had been made under its previously cited authority to operate the project and without reference to the District of Columbia Emergency Rent Act. This increase in rent presents (under §§ 2 to 4 of that Act, D. C. Code (1940, Supp. VI) §§ 45–1602 to 45–1604) the same issue, based upon the applicability of the Act to the United States as a landlord, as is presented (under § 5 (b), D. C. Code (1940, Supp. VI) § 45–1605 (b)) by the maintenance of this proceeding for possession of the premises in question without making any of the additional allegations called for by that Act. We deal with the issue as presented under § 5 (b) because it is there less involved in factual controversy than it is under §§ 2 to 4.

[4] "SEC. 5. PROHIBITIONS.—. . .

"(b) No action or proceeding to recover possession of housing accommodations shall be maintainable by any landlord against any tenant, notwithstanding that the tenant has no lease or that his lease has expired, so long as the tenant continues to pay the rent to which the landlord is entitled, unless—

"(1) The tenant is (a) violating an obligation of his tenancy (other than an obligation to pay rent higher than rent permitted under this Act or any regulation or order thereunder applicable to the housing accommodations involved or an obligation to surrender possession of such accommodations) or (b) is committing a nuisance or using the housing accommodations for an immoral or illegal purpose or for other than living or dwelling purposes, or

"(2) The landlord seeks in good faith to recover possession of the property for his immediate and personal use and occupancy as a dwelling, or

"(3) The landlord has in good faith contracted in writing to sell the property for immediate and personal use and occu-

parties agreed that the cause be disposed of by the Municipal Court upon the pleadings, pretrial stipulations and certain exhibits. That court found that it had jurisdiction, that the Emergency Rent Act did not apply to the United States as the landlord of the premises in question and it ordered possession of the premises to be given to the United States. The Municipal Court of Appeals for the District of Columbia affirmed the judgment.[5] The United States Court of Appeals for the District of Columbia Circuit allowed an appeal, limited to two questions.[6] It disposed of one by sustaining the juris-

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pancy as a dwelling by the purchaser and that the contract of sale contains a representation by the purchaser that the property is being purchased by him for such immediate and personal use and occupancy, or

"(4) The landlord seeks in good faith to recover possession for the immediate purpose of substantially altering, remodeling, or demolishing the property and replacing it with new construction, the plans for which altered, remodeled, or new construction having been filed with and approved by the Commissioners of the District of Columbia, or

"(5) The housing accommodations are nonhousekeeping, furnished, accommodations located within a single dwelling unit not used as a rooming or boarding house as defined by this Act and the remaining portion of which dwelling unit is occupied by the lessor or his immediate family, or

"(6) The landlord, being a recognized school or an accredited nonprofit university, has a bona fide need for the premises for educational, research, administrative, or dormitory use." 55 Stat. 791, 56 Stat. 759, 61 Stat. 721, D. C. Code (1940, Supp. VI) § 45–1605 (b).

[5] *Wittek* v. *United States*, 54 A. 2d 747. For an earlier proceeding in the same case, see *United States* v. *Wittek*, 48 A. 2d 805.

[6] Appeal was taken under 56 Stat. 196, D. C. Code (1940, Supp. VI) § 11–773. The question now before us was stated as follows: "Whether the conditions imposed by the District of Columbia Emergency Rent Act on suits for possession apply where such a suit is brought by the United States as landlord." *Wittek* v. *United States*, 83 U. S. App. D. C. 377, 378, 171 F. 2d 8, 9.

diction of the Municipal Court. It answered the other by holding that the District of Columbia Emergency Rent Act did apply to the United States as the landlord in this proceeding. It ordered the judgment reversed and the cause remanded to the Municipal Court of Appeals. 83 U. S. App. D. C. 377, 171 F. 2d 8. We granted certiorari because of the substantial importance of the decision to the administration of Government-owned, low-rent housing, as well as to Government-owned, defense housing, in the District of Columbia. 336 U. S. 931.

I. *If the District of Columbia Emergency Rent Act is now applied to Government-owned, defense housing in the District, such as Bellevue Houses, we are warned that we soon may be compelled to hold the same interpretation applicable to Government-owned, low-rent housing in the District.*

When the circumstances are appreciated, it is practically inconceivable that Congress would have subjected its Government-owned, *low-rent housing* program in the District of Columbia to the additional control prescribed by the District of Columbia Emergency Rent Act. Yet the interpretation by which the court below held that Act applicable to the United States as a landlord of *defense housing* might make the Act equally applicable to the United States as a landlord of all other housing accommodations, including its *low-rent housing*. The District of Columbia Emergency Rent Act came before Congress, late in 1941, through and with the support of the Congressional Committees on the District of Columbia in the House of Representatives and the Senate. It was designed as a model, prewar, temporary, emergency measure to forestall the skyrocketing of rentals of housing accommodations for defense workers then concentrating in the District of Columbia. Obviously, it was directed, at least

primarily, at private landlords.[7] It sought to stabilize housing rentals at about the level of January 1, 1941, which it selected as "a level fixed (so far as practicable) by free competition; . . . ." [8]

[7] "SECTION 1. PURPOSES, TIME LIMIT.—(a) It is hereby found that the national emergency and the national-defense program (1) have aggravated the congested situation with regard to housing accommodations existing at the seat of government; (2) *have led or will lead to profiteering and other speculative and manipulative practices by some owners of housing accommodations;* (3) *have rendered or will render ineffective the normal operations of a free market in housing accommodations;* and (4) are making it increasingly difficult for persons whose duties or obligations require them to live or work in the District of Columbia to obtain such accommodations. Whereupon it is the purpose of this Act and the policy of the Congress during the existing emergency to prevent undue rent increases and any other practices relating to housing accommodations in the District of Columbia which may tend to increase the cost of living or otherwise impede the national-defense program.

"(b) The provisions of this Act, and all regulations, orders, and requirements thereunder, shall terminate on December 31, 1945; . . . ." (Emphasis supplied.) 55 Stat. 788, D. C. Code (1940, Supp. VI) § 45–1601.

In seven steps the termination date has been extended to June 30, 1950. See note 1, *supra.*

[8] The Committee Reports refer by implication to private landlords, rather than to the United States—either as the established landlord of the widespread, low-rent housing in the District or as the landlord of the future defense housing then being developed in the District by the United States as an additional means of combating the housing shortage.

"With a population influx at a higher rate than ever before in its history, the Nation's Capital today is faced with a demand for housing accommodations which threatens to create a situation more serious than that existing during the last war. The present demand for living quarters on the part of those whom the defense effort requires to live and work in Washington, *has tempted some owners and managers of rental properties to demand exorbitant rentals.* It is true, and gratifying to note, that a large majority of owners and managers have refrained from taking advantage of the rental situation created by the national emergency as it affects the Nation's

Congress traditionally has relied heavily upon its Committees on the District of Columbia in District matters. Through them it must have seen this measure in the light of its own long-term, low-rent housing program for the District. In appraising the attitude of these Committees and of Congress toward Government-owned, low-rent housing as a substitute for substandard housing in the District, it is impossible to overemphasize either the seriousness of the need or the long-standing concern of Congress about that need. The substandard housing in the District has been a frequent subject of congressional debate, study and legislation since the Civil War. The narrow alleys in the interior of 200 or more of the large downtown city blocks of the District, although unfit for habitation, have been notoriously congested with a

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Capital. *This bill is designed to protect this group as well as present and future tenants in the District of Columbia from the rent-gouging practices of a minority of landlords.*

. . . . . .

*"The most appropriate regulation of rental properties to meet the present emergency situation is regulation designed to stabilize the rent level at a level fixed (so far as practicable) by free competition;* competition before it was seriously affected by an acute housing shortage and by restrictions on new construction caused by shortages in certain building materials required by the military needs of the Nation.

. . . . . .

"It is particularly appropriate that the Congress immediately enact legislation of this type for the Nation's Capital—legislation that may serve as a model for enactments by States which may desire control for those areas within their borders suffering from similar rental housing dislocations caused by the national emergency and the national-defense program." (Emphasis supplied.) H. R. Rep. No. 1317, 77th Cong., 1st Sess. 2, 6 (1941).

And see S. Rep. No. 827, 77th Cong., 1st Sess. 3 (1941). See also, discussion of the bill on the floor of the House of Representatives by Representative Randolph of West Virginia, Chairman of the Committee on the District of Columbia, 87 Cong. Rec., Pt. 8, 8447–8454 (1941).

large population for which adequate housing never has existed. This condition has been widely publicized and only partial success has been attained through the efforts to improve it. Out of this need there has evolved a long-term congressional program to eliminate these substandard dwellings. Due to an obvious lack of suitable private housing, this program has led to the construction of a number of Government-built, owned and operated low-rent housing accommodations. In 1934, Congress enacted the District of Columbia Alley Dwelling Act, 48 Stat. 930, D. C. Code (1940) § 5–103, *et seq.* It authorized the President to acquire land adjacent to the inhabited alleys in the District, erect buildings thereon and rent them "upon such terms and conditions as he may determine: . . . ."[9] Pursuant to this Act, he designated the Chairman (officially entitled the President) of the Board of Commissioners of the District of Columbia, the

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[9] The nature of the need was reflected in the original statement of the purpose of the Act.

". . . to enable the President, *in the interest of public health, comfort, morals, safety, and welfare,* to provide for the discontinuance of the use as dwellings of buildings situated in alleys *and to eliminate the hidden communities in inhabited alleys of the District of Columbia,* and to carry out the policy declared in the Act approved May 16, 1918, as amended, of *caring for the alley population of the District of Columbia,* the President is hereby authorized and empowered, . . . —

"(a) To purchase, or acquire by condemnation or gift, any land, buildings, or structures, or any interest therein, situated in or adjacent to any inhabited alley in the District of Columbia, . . . ;

"(b) . . . to demolish, move, or alter any buildings or structures situated thereon and erect such buildings or structures thereon as deemed advisable: . . . ;

"(c) *To lease, rent, maintain, equip, manage,* exchange, sell, or convey any *such lands, buildings, or structures upon such terms and conditions as he may determine: . . . .*" (Emphasis supplied.) 48 Stat. 930–931.

See also, 52 Stat. 1186, D. C. Code (1940) § 5–103.

Executive Officer (later the Director) of the National Capital Park and Planning Commission and the Director of Housing of the Federal Emergency Administration of Public Works to carry out its purposes. He named the group The Alley Dwelling Authority.[10] In 1938, he substituted the Architect of the Capitol for the third official constituting the Authority,[11] and, in 1943, he changed its name to that of the National Capital Housing Authority.[12] It is this presidentially designated Authority that has operated, for the United States, all of its low-rent housing projects in the District. It is this Authority that has fixed the rentals and passed upon the respective rights of tenants to occupy premises in those projects. Its composition, including two United States officials and the President of the Board of Commissioners of the District, demonstrates the incongruity of an attempt, such as is here suggested, to subject it to the control of the District's Administrator of Rent Control, himself appointed by the Board of Commissioners of the District. The recognized responsibility of this Authority as a federal housing agency further appears from the fact that, in due course, it was chosen by the Government to be the operating lessee of more than 5,000 Government-owned, defense-housing, dwelling units, which were built by the United States in or near the District, including the Bellevue Houses.

The issue before us does not turn upon what particular agency is operating the Bellevue Houses or the other Government-owned housing of the United States. The issue

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[10] Executive Order No. 6868, October 9, 1934 (published in Report of the National Capital Housing Authority for the Ten-Year Period 1934–1944, p. 3), and see Executive Order No. 8033, 3 C. F. R. Cum. Supp. 443. This was pursuant to the authorization contained in 48 Stat. 931, D. C. Code (1940) § 5–104.

[11] Executive Order No. 7784–A, 3 Fed. Reg. 51 (1938).

[12] Executive Order No. 9344, 3 C. F. R. Cum. Supp. 1279.

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is whether the United States, through whatever agency it operates, is to be controlled in its rental policies by the District Administrator of Rent Control. In determining the meaning of the District of Columbia Emergency Rent Act, approved December 2, 1941, which created the District Administrator of Rent Control, it therefore is material to note that the United States, in 1941, already was acting as a landlord of much Government-owned housing in the District and that, in each instance, it had placed those operations in the control of a national or presidentially designated authority or official with authorization fitted to the particular and varied purposes of that housing. This fact is of crucial significance in connection with the low-rent housing in the District which had been in operation for several years. Its distinctly social welfare and relief purposes already were in the hands of The Alley Dwelling Authority.

Beginning in 1934, The Alley Dwelling Authority built and put into operation five Government-owned, low-rent housing projects (including 112 dwelling units) and three commercial properties.[13] In 1938, Title II was added to the District of Columbia Alley Dwelling Act, 52 Stat. 1188, D. C. Code (1940) § 5–112, *et seq.*, and the Authority was designated also as a public housing agency to carry out the purposes of the United States Housing Act of 1937, 50 Stat. 888, *et seq.* See 42 U. S. C. (1940 ed.) § 1401, *et seq.* This enabled it to secure loans to build low-rent housing accommodations and its program promptly expanded. By the end of 1941 it had com-

[13] For this and the other factual material relating to this Authority, see Report of the National Capital Housing Authority for the Ten-Year Period 1934–1944, submitted by it to the President December 28, 1944, and by him to Congress March 1, 1945, 91 Cong. Rec., Pt. 2, 1597 (1945). See also, the Annual Reports of this Authority to the President, all required by § 5 (a) and (b) of the District of Columbia Alley Dwelling Act, 48 Stat. 932, D. C. Code (1940) § 5–107 (a) and (b).

pleted, under Title II, six more low-rent projects, including 1,613 dwelling units, and the Government's brief in the instant case states that it is now managing, under that Title, 3,147 such dwellings. The character of these dwellings is plain from the definition of "low-rent housing" in the Housing Act.[14] This was prewar, poor-relief, low-rent housing, rather than defense housing. These projects were subsidized. The rentals were keyed to the inadequacy of the income of the respective tenants. The rentals did not purport to equal the level of those fixed by free competition for comparable privately owned housing. It was an important feature of the operating policy of these projects that a tenant be dispossessed, or "graduated" as the Authority termed it, whenever that tenant's financial needs no longer entitled him to the subsidized privileges. The inappropriateness of applying to such projects rentals based upon levels fixed by free competition as of January 1, 1941, under the District of Columbia Emergency Rent Act, is evident. That Act's policy of rent control fostered the continuance of tenancies regardless of the financial status of the individual tenant. If applied to low-rent housing it would give vested rights to relief clients once installed, rather than to new clients in greater need. In the absence of an express statement by Congress, it is not conceivable that Congress, with its

[14] "SEC. 2. When used in this Act—

"(1) The term 'low-rent housing' means decent, safe, and sanitary dwellings within the financial reach of families of low income, and developed and administered to promote serviceability, efficiency, economy, and stability, and embraces all necessary appurtenances thereto. *The dwellings in low-rent housing as defined in this Act shall be available solely for families whose net income at the time of admission does not exceed five times the rental* (including the value or cost to them of heat, light, water, and cooking fuel) of the dwellings to be furnished such families, except that in the case of families with three or more minor dependents, such ratio shall not exceed six to one." (Emphasis supplied.) 50 Stat. 888, 42 U. S. C. (1940 ed.) § 1402 (1).

familiarity with these relief operations of the United States as the landlord of such *low-rent, relief housing,* would subject The Alley Dwelling Authority in the rental policy of such housing to the control of a local Administrator of Rent Control under an Act designed to meet the problems of employed war workers rather than the problems of indigent families, already wholly or partially dependent upon public support. Such a subjection, however, apparently would follow from the reasoning of the court below that the use by Congress of the general term "landlord," in the District of Columbia Emergency Rent Act, must subject the United States, as the landlord of Government-owned, *defense-housing accommodations,* to the provisions of that Act. The District of Columbia Emergency Rent Act makes no distinction between the United States as a landlord of low-rent housing and as a landlord of defense housing. If the Act applies to the Bellevue Houses, it apparently may be applied equally to all of the activities of the United States as a landlord. Therefore, while the complaint in the instant case does not seek to dispossess a tenant of a Government-owned, low-rent housing unit, we note the warning of Government counsel that, if we hold that the District of Columbia Emergency Rent Act is applicable in the instant case, we soon may be compelled to hold it applicable also to the United States as the landlord of low-rent housing.

II. *The District of Columbia Emergency Rent Act does not apply to Government-owned, defense housing in the District, such as the Bellevue Houses.*

A. *The Act contains no express reference to the United States as a landlord or to the application of the Act to Government-owned housing of any kind.*[15] A general

[15] This contrasts with the language used by Congress about two months later in the rent control provisions of the National Emergency Price Control Act of 1942, 56 Stat. 24–26, 36–37. Congress there

statute imposing restrictions does not impose them upon the Government itself without a clear expression or implication to that effect.[16] The text, surrounding circumstances and legislative history of this District Act neither express nor imply a change in the authority already

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expressly included the United States in the definition of "person." See p. 365, *infra*.

The court below relies particularly upon the following definitions of "landlord" and "person" in the District of Columbia Emergency Rent Act as being sufficiently broad to include the United States when read in the light of the purposes of the Act:

"SEC. 11. DEFINITIONS.—As used in this Act—

. . . . . .

"(g) The term 'landlord' includes an owner, lessor, sublessor, or other person entitled to receive rent for the use or occupancy of any housing accommodations.

"(h) The term 'person' includes one or more individuals, firms, partnerships, corporations, or associations and any agent, trustee, receiver, assignee, or other representative thereof." 55 Stat. 794–795, D. C. Code (1940, Supp. VI) § 45–1611 (g) and (h).

[16] ". . . 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. It has been stated, in cases in which there were extraneous 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. Though that may be true, the rule has been invoked successfully in cases so closely similar to the present one, and the statement of the rule in those cases has been so explicit, that we are inclined to give it much weight here." *United States* v. *United Mine Workers*, 330 U. S. 258, 272–273.

See also, *United States* v. *Wyoming*, 331 U. S. 440, 449; *United States* v. *Stevenson*, 215 U. S. 190, 197; *United States* v. *American Bell Telephone Co.*, 159 U. S. 548, 554–555; *United States* v. *Herron*, 20 Wall. 251, 263.

"The most general words that can be devised (for example, any person or persons, bodies politic or corporate) affect not him [the King of England] in the least, if they may tend to restrain or diminish any of his rights and interests. . . . The rule thus settled respecting the British Crown is equally applicable to this government, and it has been applied frequently in the different States, and prac-

vested in permanent federal agencies in their management of the Government-owned housing in the District. The District of Columbia Emergency Rent Act thus appears to have been enacted as a temporary measure supplementing, rather than superseding, the contribution already being made by the permanent federal housing authorities toward meeting the housing crisis. We find no evidence that Congress believed that the managers of any of its housing projects in the District would be "tempted . . . to demand exorbitant rentals" or engage in the "rent-gouging practices . . ." against which the new Act was directed.[17] It seems obvious that the need for District rent control was not in the operation of Government-owned housing, where the Federal Government already had complete control over the rentals, but was in the operation of privately owned housing, where neither the Federal nor District Government had any control.

B. *Government-owned, defense housing did not require the new rental control, in the District, that Congress imposed upon privately owned housing by the District of Columbia Emergency Rent Act.* The increasing number of Government-owned, defense-housing units testified to the satisfaction of Congress and of the Administration with such projects. Rental rates in them were under complete governmental control. At the time of the enactment of the District of Columbia Emergency Rent Act, December 2, 1941, defense housing could be constructed in the District, and elsewhere, under § 201 of the Second Supplemental National Defense Appropriation Act,

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tically in the Federal courts. It may be considered as settled that so much of the royal prerogatives as belonged to the King in his capacity of *parens patriæ*, or universal trustee, enters as much into our political state as it does into the principles of the British constitution." *Dollar Savings Bank* v. *United States*, 19 Wall. 227, 239.

[17] See note 8, *supra*.

1941, approved September 9, 1940, 54 Stat. 872, 883, or under the Lanham Act, approved October 14, 1940, 54 Stat. 1125.[18] Bellevue Houses were built by the Navy under the first of those Acts. The rent control of defense housing under that Act was, in the first instance, expressly vested in the discretion of the Secretary of War or of the Navy, and the tenants were restricted to war workers.[19] This provision was amended, June 28, 1941, so as to give to the agencies administering that housing the same powers and duties as had been given to the Federal Works Administrator as to defense housing constructed under the Lanham Act.[20] The rental policy under the Lanham Act,

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[18] Supplemented by the Urgent Deficiency Appropriation Act, 1941, approved March 1, 1941, 55 Stat. 14, and amended by the Acts of April 29, 1941, 55 Stat. 147, and June 28, 1941, 55 Stat. 361, *et seq.*

[19] ". . . in carrying out the purposes of this section the Secretary of War and the Secretary of the Navy may utilize such other agencies of the United States as they may determine upon: *Provided further,* That the Secretary of War and the Secretary of the Navy, at their discretion, are hereby authorized to rent such housing units, upon completion, to enlisted men of the Army, Navy, Marine Corps with families, to field employees of the Military and Naval Establishments with families, and to workers with families who are engaged, or to be engaged, in industries essential to the military and naval national defense programs, including work on ships under the control of the Maritime Commission. . . ." § 201, Second Supplemental National Defense Appropriation Act, 1941, approved September 9, 1940, 54 Stat. 883–884. For comparable classification of eligible tenants under the Lanham Act, see § 2, 54 Stat. 1126, as amended, 56 Stat. 11–12, 42 U. S. C. (1946 ed.) § 1522.

[20] "SEC. 5. The departments, agencies, or instrumentalities administering property acquired or *constructed under section 201 of the Second Supplemental National Defense Appropriation Act, 1941, shall have the same powers and duties with respect to such property and with respect to the management, maintenance, operation, and administration thereof as are granted to the Federal Works Administrator with respect to property acquired or constructed under title I of such Act of October 14, 1940,* and with respect to the management, maintenance, operation, and administration of such property so ac-

at that time, provided: "*That the* [*Federal Works*] *Administrator shall fix fair rentals, on projects developed pursuant to this Act, which shall be within the financial reach of persons engaged in national defense: . . . .*" (Emphasis supplied.) § 7, 54 Stat. 1127, renumbered § 304, 55 Stat. 363. This rental policy was thus expressly fitted to the purposes of the defense housing. Those purposes did not call for its further subordination to the control of a District Administrator of Rent Control under other statutory standards fitted to private landlords. This special defense-housing rental policy was further expressly emphasized by Congress in another amendment made applicable to the Lanham Act defense housing January 21, 1942.[21] Therefore, whether or not these further provisions were also to be applicable to Bellevue Houses, which had been constructed under an earlier Act, they became applicable to the many Government-owned, defense-housing units constructed in the District under the Lanham Act. Congress thus evidenced its purpose to insist upon special standards of rentals for its defense housing. It is significant that it did so by Acts approved June 28, 1941, and January 21, 1942. One was enacted

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quired or constructed under such title." (Emphasis supplied.) 55 Stat. 363.

Title I of the Lanham Act, approved October 14, 1940, consisted of §§ 1–3, and in the Act of June 28, 1941, it was given the title "Defense Housing." 55 Stat. 361.

[21] "SEC. 6. The second proviso of section 304 of such [Lanham] Act, as amended, is amended to read as follows: *'Provided further,* That the [Federal Works] Administrator shall fix fair rentals, on projects developed pursuant to this [Lanham] Act, *which shall be based on the value thereof as determined by him, with power during the emergency, in exceptional cases, to adjust the rent to the income of the persons to be housed, and that rentals to be charged for Army and Navy personnel shall be fixed by the War and Navy Departments:'.*" (Emphasis supplied.) 56 Stat. 12, 42 U. S. C. (1946 ed.) § 1544.

before, and the other after, the enactment of the District of Columbia Emergency Rent Act on December 2, 1941. This emphasis was repeated on April 10, 1942, in a manner which demonstrated still further that Congress, in its consideration of the Lanham Act, had not overlooked the substantial extent to which that Act related to the construction of defense housing in the District of Columbia. On that date Congress amended the Lanham Act with special reference to operations in the District. It added Title IV. This authorized a $30,000,000 appropriation "to provide housing in or near the District of Columbia (including living quarters for single persons and for families) for employees of the United States whose duties are determined by the National Housing Administrator to be essential to national defense and to require them to reside in or near the District of Columbia." 56 Stat. 212, 42 U. S. C. (1946 ed.) § 1561. The rental control provisions amended on January 21, 1942 (see note 21, *supra*), already were applicable to such housing. The very § 304 which contained those amended rental control provisions was further amended so as expressly to include the District of Columbia in the term "local municipalities" to which land could be conveyed for street or other public use incidental to a project. See 54 Stat. 1127, 55 Stat. 363, 56 Stat. 212, 42 U. S. C. (1946 ed.) § 1544.[22]

In the light of the foregoing express provisions for the control of rents in the public interest on Government-owned, defense-housing projects, there is no ground for implication that the District of Columbia Emergency Rent Act conflicts with it.

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[22] As evidencing a purpose that Government-owned, defense housing constructed under the Lanham Act likewise remain under the general civil and criminal jurisdiction of the respective states and of the District of Columbia, wherever such housing might be located, § 307 of the Lanham Act was amended by the Act of April 10, 1942, to include expressly the District of Columbia. See 54 Stat. 1127, 55 Stat. 363, 56 Stat. 212, 42 U. S. C. (1946 ed.) § 1547.

III. *The National Emergency Price Control Act of 1942 emphasizes the conclusion that the District of Columbia Emergency Rent Act does not apply to Government-owned housing in the District.*

Although the National Emergency Price Control Act of 1942, approved January 30, 1942, expressly empowered the National Price Administrator, under certain limitations, to establish maximum rentals in so-called defense-rental areas,[23] he never did so in the District of Columbia. That Act, therefore, does not have a direct application to the issue in this case. However, the language of that Act and its policy toward the rent control of Government-owned, housing accommodations, both inside and outside of the District of Columbia, has a bearing upon the proper construction of the District of Columbia Emergency Rent Act. The National Act is not only consistent with our interpretation of the District Act but it lends support to that interpretation. The National Act left the control over rent to local authorities, except where the National Price Administrator found it necessary to intervene. The decision of the National Price Administrator not to intervene in the District of Columbia was an especial compliment to the existing controls, because the District of Columbia was a typical area calling for competent rent control and, in fact, had been declared by the statute itself to be a "defense-rental area . . . ." § 302 (d), 56 Stat. 36, 50 U. S. C. App. (1946 ed.) § 942 (d). His satisfaction with the conditions in the District indicates that the local practice followed by the District Administrator of Rent Control, in not attempting to fix the rentals in Government-owned housing, had produced no conditions

[23] §§ 2 (b) and 302 (d), 56 Stat. 25–26, and 36, 58 Stat. 633–634, 59 Stat. 306–307, 50 U. S. C. App. (1946 ed.) § 902 (b).

which seemed to the National Price Administrator to call for federal intervention. A still more significant point is that, if he had intervened, under the National Act, he, and not the District Administrator of Rent Control, would have been the one vested with control over the rental policy of the Government-owned, housing accommodations.

In contrast to the omission, in the District of Columbia Emergency Rent Act, of any express reference to the United States as a landlord, the National Act *expressly* included the United States as a "person" to whom it applied.[24] Thus, within two months after the omission of the United States from such a definition in the District of Columbia Emergency Rent Act, Congress demonstrated that, when it sought to include control of Government-owned housing under conditions where the established procedures and local controls might fail to meet the needs

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[24] It was made unlawful for "any person" to violate the Act or a regulation issued pursuant to the Act, § 4, 56 Stat. 28, 50 U. S. C. App. (1946 ed.) § 904, and then "person" was defined as follows:

"SEC. 302. As used in this Act—

. . . . . .

"(h) The term 'person' includes an individual, corporation, partnership, association, or any other organized group of persons, or legal successor or representative of any of the foregoing, and includes the United States or any agency thereof, or any other government, or any of its political subdivisions, or any agency of any of the foregoing: *Provided,* That no punishment provided by this Act shall apply to the United States, or to any such government, political subdivision, or agency." 56 Stat. 36–37, 50 U. S. C. App. (1946 ed.) § 942 (h).

The Act also provided:

"SECTION 1. . . .

"(c) The provisions of this Act shall be applicable to the United States, its Territories and possessions, and the District of Columbia." 56 Stat. 23–24, 50 U. S. C. App. (1946 ed.) § 901 (c).

of the times, it expressly said so. The same section provided that the punishments prescribed for private violators did not apply to the United States.

The National Price Administrator, however, never published any regulations even potentially applicable to the District of Columbia. On the other hand, he did publish regulations stating his general policy as to Government-owned, housing accommodations elsewhere which might come under his control. Such regulations stated that, for housing constructed and owned by the United States, a state or any political subdivision of either, the maximum rents were to be those generally prevailing for comparable housing accommodations on the maximum rent date "as determined by the owner of such accommodations: . . . ." Similarly, for housing accommodations rented to Army or Navy personnel, including civilian employees of the War and Navy Departments, for which rent is fixed by the national rent schedule of the War or Navy Departments, the maximum rents were to be those established by such rent schedule.[25]

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[25] "SEC. 4. *Maximum rents.* Maximum rents . . . shall be:

. . . . . .

"(g) *Housing owned and constructed by the government.* For housing accommodations constructed by the United States or any agency thereof, or by a State of the United States or any of its political subdivisions, or any agency of the State or any of its political subdivisions, and owned by any of the foregoing, the rent generally prevailing in the Defense-Rental Area for comparable housing accommodations on the maximum rent date, as determined by the owner of such accommodations: *Provided, however,* That any corporation formed under the laws of a State shall not be considered an agency of the United States within the meaning of this paragraph. The Administrator may order a decrease in the maximum rent as provided in section 5 (c).

"(h) *Housing subject to rent schedule of War or Navy Department.* For housing accommodations rented to either Army or Navy personnel, including civilian employees of the War and Navy Depart-

Later, when Congress enacted the Housing and Rent Act of 1947, 61 Stat. 193–201, 50 U. S. C. App. (1946 ed., Supp. I) §§ 1881–1901, it expressly excluded the District of Columbia from the Act and struck out the previous express inclusion of the United States as a "person" subject to the Act.[26]

The effect of the National Emergency Price Control Act, therefore, is to emphasize, both in its form and its practical operation, that Congress did not seek by the District of Columbia Emergency Rent Act to place Government-owned housing under a local rent administrator.

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ments, for which the rent is fixed by the national rent schedule of the War or Navy Department, the rents established by such rent schedule." 10 Fed. Reg. 13529–13530.

For the exception of housing accommodations rented to Army or Navy personnel, including civilian employees of the War and Navy Departments, from provisions restricting removal of tenants, see § 6 (c) (2), 10 Fed. Reg. 13534.

[26] The Housing and Rent Act of 1947, 61 Stat. 193, 197, superseded the National Emergency Price Control Act of 1942. It provided:

"SEC. 202. As used in this title [MAXIMUM RENTS]—

"(a) The term 'person' includes an individual, corporation, partnership, association, or any other organized group of persons, or a legal successor or representative of any of the foregoing." 61 Stat. 196, 50 U. S. C. App. (1946 ed., Supp. I) § 1892 (a).

"SEC. 209. . . .

"(b) Notwithstanding any other provision of this Act, the United States or any State or local public agency may maintain an action or proceeding to recover possession of any housing accommodations operated by it where such action or proceeding is authorized by the statute or regulations under which such accommodations are administered: . . . ." 61 Stat. 200–201, 50 U. S. C. App. (1946 ed., Supp. I) § 1899 (b).

"SEC. 211. The provisions of this title [MAXIMUM RENTS] shall be applicable to the several States and to the Territories and possessions of the United States but shall not be applicable to the District of Columbia." 61 Stat. 201, 50 U. S. C. App. (1946 ed., Supp. I) § 1901.

IV. *The District Administrator of Rent Control has not taken part in this proceeding and there is no evidence before us that at any time he has sought to exercise jurisdiction over the United States as a landlord of either low-rent housing or defense housing.*

The District of Columbia Emergency Rent Act has been in effect since 1941 and the United States as landlord has owned and operated several thousand housing units in the District. There is nothing in the Rules and Regulations or the General Orders of the Office of the Administrator of Rent Control suggesting the application of the Act to the United States as a landlord of Government-owned housing. The absence of evidence of asserted control by the District official, coupled with the absence of complaint by the National Price Administrator during the life of the National Emergency Price Control Act, is thoroughly consistent with a widely accepted interpretation of the local Act in accordance with the conclusion which we have found to be fully justified by the language of Congress.

The judgment accordingly is reversed and the cause is remanded to the Court of Appeals for the District of Columbia Circuit for further proceedings consistent with this opinion.

*It is so ordered.*

# COMMISSIONER OF INTERNAL REVENUE *v.* WODEHOUSE.

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

No. 84. Argued December 10, 13, 1948.—Decided June 13, 1949.

Respondent, a nonresident alien not engaged in trade or business within the United States and not having an office or place of business therein, received in 1938 and 1941 from magazine and book publishers in the United States lump sum payments, in advance and in full, for the American serial and book rights to certain literary works of which he was the author and which were ready to be copyrighted. *Held:*

1. Under the Revenue Act of 1938 and the Internal Revenue Code as amended, the sums so received were includible in "gross income from sources within the United States," as "rentals or royalties for the use of or for the privilege of using in the United States . . . copyrights . . . and other like property," and were thus taxable to respondent. Pp. 371–374, 377–392.

(a) Had the sums here involved been received in the taxable year 1934, they unquestionably would have been taxable to respondent under the Revenue Act of 1934; and they were not relieved from taxation by the amendments which were made by the Revenue Act of 1936 and which were still in effect in 1938 and 1941. Pp. 380–392.

(b) The Revenue Act of 1936 preserved the taxability of the several kinds of income of nonresident alien individuals which had been the subject of withholding at their respective sources, including receipts in the nature of royalties for the use of copyrights in the United States. Pp. 386–392.

(c) To have exempted nonresident aliens from these readily collectible taxes derived from sources within the United States would have discriminated in their favor against resident citizens of the United States who would be required to pay their regular income tax on such income, if treated as royalties within the meaning of the gross income provisions, or at least to pay a tax upon them as capital gains, if treated as income from sales of capital within the meaning of the capital gains provisions. No such purpose to discriminate can be implied. P. 391.

(d) None of the provisions of the 1936 Act here involved were changed by the 1938 Act or the Internal Revenue Code, except as to the rates of tax; and the principal changes even in the rates were to provide higher taxes in the higher brackets, rather than to reduce the taxes on nonresident aliens. P. 392.

2. The fact that the amounts received for the use of or for the privilege of using the copyrights were lump sum payments, in advance and in full, did not exempt such income from taxation. Pp. 393–395.

(a) Once it has been determined that the receipts of the respondent would have been required to be included in his gross income for federal income tax purposes if they had been received in annual payments, or from time to time, during the life of the respective copyrights, it is clear that the receipt of those same sums by him in single lump sums as payments in full, in advance, for the same rights to be enjoyed throughout the entire life of the respective copyrights cannot, solely by reason of the consolidation of the payment into one sum, render it tax exempt. P. 393.

(b) The words "annual" and "periodical" in §§ 211 (a) and 143 (b) of the Revenue Act of 1938 and of the Internal Revenue Code, when taken in their context, and in the light of the legislative history of the Act and Code, and the interpretation of them by the Treasury Department and the lower courts, do not require a different result from that here reached. Pp. 393–394.

166 F. 2d 986, reversed.

The Commissioner's determination of deficiencies in a taxpayer's income tax for 1938 and 1941 was sustained by the Tax Court. 8 T. C. 637. The Court of Appeals reversed. 166 F. 2d 986. This Court granted certiorari. 335 U. S. 807. *Reversed and remanded,* p. 395.

*Melva M. Graney* argued the cause for petitioner. With her on the brief were *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack* and *Lee A. Jackson.*

*Watson Washburn* argued the cause and filed a brief for respondent.

MR. JUSTICE BURTON delivered the opinion of the Court.

The question before us is whether certain sums received in 1938 and 1941, by the respondent, as a nonresident alien author not engaged in trade or business within the United States and not having an office or place of business therein, were required by the Revenue Acts of the United States to be included in his gross income for federal tax purposes. Each of these sums had been paid to him in advance and respectively for an exclusive serial or book right throughout the United States in relation to a specified original story written by him and ready to be copyrighted. The answer turns upon the meaning of "gross income from sources within the United States" as that term was used, limited and defined in §§ 212 (a), 211 and 119 of the Revenue Act of 1938, and the Internal Revenue Code, as amended in 1940 and 1941.[1] For the reasons hereinafter stated, we hold that these sums each came within those kinds of gross income from sources within the United States that were referred to in those Acts as "rentals or royalties for the use of or for the privilege of using in the United States . . . copyrights, . . . and other like property," [2] and that, accordingly, each of these sums was taxable under one or the other of those Acts.

The respondent, Pelham G. Wodehouse, at the times material to this case, was a British subject residing in

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[1] The material provisions were identical in the Revenue Act of 1938, enacted May 28, 1938, c. 289, 52 Stat. 447, *et seq.*, and in the Internal Revenue Code, enacted February 10, 1939, 53 Stat. 1, *et seq.* Amendments to these provisions in 1940 and 1941 changed only the rates of the taxes. For text of the material provisions, see Appendix A, *infra*, pp. 395, 397, following this opinion.

[2] § 119 (a) (4), 52 Stat. 504, 53 Stat. 54, 26 U. S. C. § 119 (a) (4). For full text of the material provisions of § 119, see Appendix A, *infra*, p. 397.

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France. He was a nonresident alien of the United States not engaged in trade or business within the United States and not having an office or place of business therein during either the taxable year 1938 or 1941. He was a writer of serials, plays, short stories and other literary works published in the United States in the Saturday Evening Post, Cosmopolitan Magazine and other periodicals.

February 22, 1938, the Curtis Publishing Company (here called Curtis) accepted for publication in the Saturday Evening Post the respondent's unpublished novel "The Silver Cow." The story had been submitted to Curtis by the respondent's literary agent, the Reynolds Agency, and, on that date, Curtis paid the agency $40,000 under an agreement reserving to Curtis the American serial rights in the story, including in such rights those in the United States, Canada and South America. The memorandum quoted in Appendix B, *infra*, p. 398, constituted the agreement. Also in 1938, the respondent received $5,000 from Doubleday, Doran & Company for the book rights in this story. The story was published serially in the Saturday Evening Post, July 9 to September 3, 1939.

Pursuant to a like agreement, the respondent received $40,000 from Curtis, December 13, 1938, for serial rights in and to his story "Uncle Fred in the Springtime." It was published serially in the Saturday Evening Post, April 22 to May 27, 1939.

July 23, 1941, Hearst's International Cosmopolitan Magazine, through the respondent's same agent, paid the respondent $2,000 for "all American and Canadian serial rights (which include all American and Canadian magazine, digest, periodical and newspaper publishing rights)" to the respondent's article entitled "My Years Behind Barbed Wire." The agreement appears in Appendix C,

*infra,* p. 400. Apparently this story was published shortly thereafter.

August 12, 1941, Curtis, through the same agent, paid the respondent $40,000 for the "North American (including Canadian) serial rights" to respondent's novel entitled "Money in the Bank." The agreement was in the form used by Curtis in 1938.[3] The evidence does not state that this story was published but it shows that Curtis, pursuant to its agreements, took out a United States copyright on each of the respective stories named in the foregoing agreements. After each story's serial publication, Curtis reassigned to the respondent, on the latter's demand, all rights in and to the story excepting those rights which the respondent expressly had agreed that Curtis was to retain. The respective sums were thus paid to the respondent, in advance and in full, for the serial or book rights which he had made available. For United States income tax purposes, the respondent's literary agent, or some other withholding agent, withheld from the respondent, or from his wife as his assignee, a part of each payment.

In 1944 the Commissioner of Internal Revenue, petitioner herein, gave the respondent notice of tax deficiencies assessed against him for the taxable years 1923, 1924, 1938, 1940 and 1941. In these assessments, among other items, the Commissioner claimed deficiencies in the respondent's income tax payments based upon his above-described 1938 and 1941 receipts. The respondent, in a petition to the Tax Court for a redetermination of such deficiencies, not only contested the additional taxes assessed against him, which were based upon the full amounts of those receipts, but he asked also for the refund to him of the amounts which had been withheld, for

[3] See Appendix B, *infra,* p. 398.

income tax purposes, from each such payment. The Tax Court entered judgment against him for additional taxes for 1938, 1940 and 1941, in the respective amounts of $11,806.71, $8,080.83 and $1,854.85. In speaking of the taxes for 1940 and 1941, the Tax Court said:

> "The first issue, found also in the year 1938, presents the question of the taxability of lump sum payments for serial rights to literary works. Counsel for the petitioner [Wodehouse, the respondent here] concedes that substantially the same issue was raised and decided in *Sax Rohmer,* 5 T. C. 183; affd., 153 Fed. (2d) 61; certiorari denied, 328 U. S. 862.
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> "In *Sax Rohmer, supra,* we held that the lump sum payments for serial rights were royalties and, as such, were taxable to the recipient. The arguments advanced in the cases at bar follow the same pattern as those appearing in the *Sax Rohmer* case, as presented to this Court and to the Circuit Court of Appeals. The petitioner's contentions were rejected in both courts and for the same reasons stated in the opinions therein, they are rejected here." 8 T. C. 637, 653.

As the respondent's taxes for 1938 and 1941 had been paid to the Collector of Internal Revenue at Baltimore, Maryland, his petition for review of the Tax Court's judgment for those years was filed in the United States Court of Appeals for the Fourth Circuit. The judgment against him was there reversed, 166 F. 2d 986, one judge dissenting on the authority and reasoning of *Rohmer* v. *Commissioner,* 153 F. 2d 61 (C. A. 2d Cir.). Because of the resulting conflict between the Circuits and also because comparable issues as to this respondent's taxes for 1940 were pending before the Court of Appeals for

the Second Circuit, we granted certiorari. 335 U. S. 807.[4]

The petitioner contends that receipts of the type before us long have been recognized as rentals or royalties paid for the use of or for the privilege of using in the United States, patents, copyrights and other like property. Keeping in mind that, before 1936, such receipts were expressly subject to withholding as part of the taxable income of nonresident alien individuals, he contends that those receipts remained taxable and subject to withholding in 1938 and 1941, after the standards for taxation of such aliens had been made expressly coterminous with the standards for subjecting this part of their income to withholding procedures.

In opposition, the respondent argues, first, that each sum he received was a payment made to him in return for his sale of a property interest in a copyright and not a payment to him of a royalty for rights granted by him under the protection of his copyright. Being the proceeds of a sale by him of such a property interest, he concludes that those proceeds were not required to be included in his taxable gross income because the controlling Revenue

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[4] As the court below held that the respondent's 1938 and 1941 receipts were not subject to taxation, it did not reach the subsidiary issues which had been raised as to the proper amount of those taxes if they were sustained. Similarly, the court below did not pass upon the claim that certain of the assessments were subject to the three-year statute of limitations rather than the five-year statute here applied. See § 275 (a) and (c), 52 Stat. 539, 53 Stat. 86, 26 U. S. C. § 275 (a) and (c). This claim turned upon the recognition to be given to certain assignments made by the respondent to his wife. Those assignments, if fully recognized, might have reduced the tax to be assessed against the respondent to an amount less than 25% of the amount originally stated by him in his return and thus rendered the five-year statute inapplicable. However, the effect of those assignments was not passed upon by the court below.

Acts did not attempt to tax nonresident alien individuals, like himself, upon income from sales of property. Secondly, the respondent argues that, even if his receipts were to be treated as royalties, yet each was received in a single lump sum and not "annually" or "periodically," and that, therefore, they did not come within his taxable gross income.

The petitioner replies that, in this case, we do not properly reach the fine questions of title, or of sales or copyright law, thus raised by the respondent as to the divisibility of a copyright or as to the sale of some interest in a copyright. The petitioner states that the issue here is one of statutory interpretation. It is confined primarily to the taxability of the respondent's receipts within the broad, rather than narrow, language of certain Revenue Acts. Attention must be focused on those Revenue Acts. If *their* terms made these receipts taxable because of the general nature of the transactions out of which the receipts arise, namely, payments for the use of or for the privilege of using copyrights, then it is *those* statutory definitions, properly read in the light of *their* context and of *their* legislative history, that must determine the taxability of the receipts. He argues that the language of the Revenue Acts does not condition the right of the United States to its revenue upon any fine point of property law but covers these receipts in any event. Treating the respondent's receipts simply as representing payments for the use of or the privilege of using copyrights the petitioner argues that they constituted income that was subject both to withholding and to taxation in 1938 and 1941. He claims finally that the respondent cannot escape taxation of such receipts merely by showing that each payment was received by him in a lump sum in advance for certain uses of a copyright, instead of in several payments to be made at intermediate dates during the life of the copyright.

I.

*Sums received by a nonresident alien individual for the use of a copyright in the United States constituted gross income taxable to him under the Revenue Act of 1938 and the Internal Revenue Code.*

Under the income tax laws of the United States, sums received by a nonresident alien author not engaged in trade or business within the United States and not having an office or place of business therein long have been required to be included in his gross income for our federal tax purposes. Such receipts have been an appropriate and readily collectible subject of taxation. A review of the statutes, regulations, administrative practices and court decisions discloses this policy and, at least from a revenue standpoint, no reason has appeared for changing it.

Since the early days of our income tax levies, rentals and royalties paid for the use of or for the privilege of using in the United States, patents, copyrights and other like property have been taxed to nonresident aliens and for many years at least a part of the tax has been withheld at the source of the income. To exempt this type of income from taxation in 1938 or 1941, in the face of this long record of its taxation, would require a clearness and positiveness of legislative determination to change the established procedure that is entirely absent here.

The policy of this Court in this general field of statutory interpretation was stated in 1934 in a case which dealt with the taxation of a somewhat comparable form of income of a foreign corporation. In *Helvering* v. *Stockholms Enskilda Bank,* 293 U. S. 84, the question presented was that of the proper interpretation to be given to § 217 (a) (1) of the Revenue Act of 1926, c. 27, 44 Stat. 9, 30 (analogous to § 119 (a) (1) of the Revenue Act of 1938, 52 Stat. 503, now before us). Certain sums

had been received by a foreign corporation from the United States Government in the form of interest upon a refund of an overpayment by that corporation of its income taxes. This Court held that such interest, in turn, constituted taxable gross income derived by the foreign corporation from a source within the United States, because it amounted to interest upon an interest-bearing obligation of a resident of the United States within the meaning of the Act. This interpretation was adopted in opposition to the foreign corporation's argument that the payment should be exempted because it amounted to interest on one of the "obligations of the United States" and that interest on such an obligation was expressly exempted from taxation by § 213 (b) (4) of the Revenue Act of 1926 (analogous to § 22 (b) (4) of the Revenue Act of 1938). This Court distinguished between the meaning of the word "obligations" in the context of the different sections of the Act and stated the applicable general principles of statutory construction as follows:

> "The general object of this act is to put money into the federal treasury; and there is manifest in the reach of its many provisions an intention on the part of Congress to bring about a generous attainment of that object by imposing a tax upon pretty much every sort of income subject to the federal power. Plainly, the payment in question constitutes income derived from a source within the United States; and the natural aim of Congress would be to reach it. In *Irwin* v. *Gavit,* 268 U. S. 161, 166, this court, rejecting the contention that certain payments there involved did not constitute income, said: 'If these payments properly may be called income by the common understanding of that word and the statute has failed to hit them it has missed so much of the general purpose that it expresses at the start. Congress intended to use its power to the full extent.

*Eisner* v. *Macomber,* 252 U. S. 189, 203.' Although Congress intended, as the court held in the *Viscose* case, *supra* [56 F. 2d 1033 (C. A. 3d Cir.)], to include interest on a tax refund made to a *domestic* corporation, we are asked to deny such intention in respect of a competing *foreign* corporation. But we see nothing in the relationship of a foreign corporation to the United States, or in any other circumstance called to our attention, which fairly shows that such a discrimination was within the contemplation of Congress. On the contrary, the natural conclusion is that if any discrimination had been intended it would have been made in favor of, and not against, the domestic corporation, which contributes in a much more substantial degree to the support of the people and government of the United States." *Id.* at pp. 89–90.

And further:

"In the foregoing discussion, we have not been unmindful of the rule, frequently stated by this court, that taxing acts 'are not to be extended by implication beyond the clear import of the language used,' and that doubts are to be resolved against the government and in favor of the taxpayer. The rule is a salutary one, but it does not apply here. The intention of the lawmaker controls in the construction of taxing acts as it does in the construction of other statutes, and that intention is to be ascertained, not by taking the word or clause in question from its setting and viewing it apart, but by considering it in connection with the context, the general purposes of the statute in which it is found, the occasion and circumstances of its use, and other appropriate tests for the ascertainment of the legislative will. Compare *Rein* v. *Lane,* L. R. 2 Q. B. Cases 144, 151. The

intention being thus disclosed, it is enough that the word or clause is reasonably susceptible of a meaning consonant therewith, whatever might be its meaning in another and different connection. We are not at liberty to reject the meaning so established and adopt another lying outside the intention of the legislature, simply because the latter would release the taxpayer or bear less heavily against him. To do so would be not to resolve a doubt in his favor, but to say that the statute does not mean what it means." *Id.* at pp. 93–94.

A. *These receipts unquestionably would have been taxed to a nonresident alien individual if received by him under the Revenue Act of 1934.*

The background and development of the particular provisions before us emphasize the congressional purpose to tax this type of income. They disclose the full familiarity of Congress with this general type of transaction. Throughout the history of our federal income taxes since the Sixteenth Amendment to our Constitution, the Revenue Acts have expressly subjected to taxation the income received by nonresident alien individuals from sources within the United States. For example, there is no doubt that the receipts here in question would have been taxable to the respondent if they had been received by him under the Revenue Act of 1934, c. 277, 48 Stat. 680, *et seq.*, and the present issue resolves itself largely into a determination of whether such receipts were relieved from taxation by the Revenue Act of 1936, c. 690, 49 Stat. 1648, *et seq.*, through certain changes in the income tax laws that were made by that Act and which were still in effect in 1938 and 1941.

Under the Revenue Act of 1934, the income of a nonresident alien individual was taxed at the same rates as was the income of a resident citizen (§§ 11 and 12) but

his taxable gross income was limited wholly to that which he had received "from sources within the United States," § 211 (a).[5] Such sources were described in § 119 of that Act, and the material portions of that Section have remained unchanged ever since. They give their own definition of rentals and royalties. These have been quoted from above and they are set forth in full in Appendix A, *infra,* p. 397. The Act of 1934 thus sought to include as taxable gross income any income which a nonresident alien individual received as royalties for the privilege of using any copyrights in the United States and also sought to tax his income from the sale of any personal property which he had produced (in whole or in part) outside the United States but had sold within the United States. § 119 (a) (4) and (e) (2). As a mechanism of collection, the Act also sought to withhold from nonresident alien individuals, at the source of payment, the entire normal tax of 4% computed upon numerous classifications of their income named in § 143 (b).[6]

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[5] "SUPPLEMENT H—NONRESIDENT ALIEN INDIVIDUALS

"SEC. 211. GROSS INCOME.

"(a) GENERAL RULE.—In the case of a nonresident alien individual gross income includes only the gross income from sources within the United States." § 211 (a), 48 Stat. 735.

[6] "SEC. 143. WITHHOLDING OF TAX AT SOURCE.

"(a) TAX-FREE COVENANT BONDS.— . . .

"(b) NONRESIDENT ALIENS.—All persons, in whatever capacity acting, including lessees or mortgagors of real or personal property, fiduciaries, employers, and all officers and employees of the United States, having the control, receipt, custody, disposal, or payment of *interest* (except interest on deposits with persons carrying on the banking business paid to persons not engaged in business in the United States and not having an office or place of business therein), *rent, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, or other fixed or determinable annual or periodical gains, profits, and income, of any nonresident alien individual,* or of any partnership not engaged in trade or business within the

This language is important in this case. It expressly included certain forms of interest and also "*rent, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, or other fixed or determinable annual or periodical gains, profits, and income, of any nonresident alien individual, . . . .*" (Emphasis added.) While *royalties* were not mentioned specifically in this statutory withholding clause, they had been expressly listed in the Regulations, since long before 1934, so that there was no doubt that they were to be subject to withholding as a matter of interpretation. It was equally clear that *income derived from a sale* in the United States, of either real or personal property, was not included, either expressly or by implication or interpretation, in the income subject to a withholding of the tax on it at the source of the income. The Regulations, since the Act of 1924 (U. S. Treas. Reg. 65, Art. 362 (1924)) to the present time, have contained decisive statements on these points. Such Regulations have been substantially identical with the following which appeared in Treasury Regulations 86, Article 143–2 (1934):

> "Only fixed or determinable annual or periodical income is subject to withholding. The Act specifically includes in such income, interest, rent, salaries, wages, premiums, annuities, compensations, remunerations, and emoluments. *But other kinds of income are included, as, for instance, royalties.*
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> "*. . . The income derived from the sale in the United States of property, whether real or personal, is not fixed or determinable annual or periodical income.*" (Emphasis added.)

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United States and not having any office or place of business therein and composed in whole or in part of nonresident aliens, . . . deduct and withhold *from such annual or periodical gains, profits, and income a tax equal to 4 per centum thereof: . . . .*" (Emphasis added.) 48 Stat. 723–724.

Apart from these provisions requiring the withholding of taxes at the source of the income, the Revenue Acts have contained other provisions, in similar language, calling for the reporting to the Commissioner of Internal Revenue of material information as to certain income which might be taxable. This language has received an interpretation which is related to and consistent with that here given to the provisions as to withholding taxes.[7]

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[7] "SEC. 147. INFORMATION AT SOURCE.

"(a) PAYMENTS OF $1,000 OR MORE.—*All persons, in whatever capacity acting,* including lessees or mortgagors of real or personal property, fiduciaries, and employers, *making payment to another person, of interest, rent, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, or other fixed or determinable gains, profits, and income* . . . of $1,000 or more in any taxable year, . . . shall render a true and accurate return to the Commissioner, *under such regulations* and in such form and manner and to such extent as may be prescribed by him with the approval of the Secretary, . . . ." (Emphasis added.) 48 Stat. 726.

Treasury Regulation 86, under the Act of 1934, showed among other things, that this Section applied generally to fixed or determinable income, *that royalties were included as fixed and determinable income* and that information as to them was not required when such royalties did not exceed the taxpayer's exemptions. Also, such information at the source was not required where the income had been withheld, at the source, from a nonresident alien individual and a report had been made to that effect. See, for example:

"ART. 147–1. . . . Although to make necessary a return of information the income must be fixed or determinable, it need not be annual or periodical. . . ."

"ART. 147–3. Cases where no return of information required.—Payments of the following character, although over $1,000, need not be reported in returns of information . . . :

. . . . . .

"(*h*) Payments of salaries, rents, *royalties,* interest (except bond interest required to be reported on ownership certificates), *and other fixed or determinable income* aggregating less than $2,500 made to a married individual; . . . ."

"ART. 147–5. Return of information as to payments to other than citizens or residents.—In the case of payments of fixed or determi-

These statutes and Regulations show that, under the Act of 1934, Congress sought to tax (and withhold all or part of the tax on) the income of a nonresident alien individual insofar as it was derived from payments for the use of or for the privilege of using copyrights in the United States. It also sought to tax (although it could not generally withhold the tax on) any gain which the taxpayer derived from the sale of personal property produced by him without the United States but sold within the United States. Accordingly, if the receipts now before us had been received by the respondent under the Act of 1934, they would have been taxable whether they were treated as payments in the nature of royalties for the use of the copyrights under § 119 (a) or were treated as payments of a sale's price for certain interests in copyrights under § 119 (e). The Regulations helpfully carried this analysis further. They showed that, while *both forms of income were taxable, yet it was only the royalty payments* (and not the sales' proceeds) *that were subject to the withholding procedure.* A Treasury Decision made in 1933, under the Revenue Acts extending from 1921 to 1928,[8] and a decision of the Court of Ap-

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nable annual or periodical income to nonresident aliens (individual or fiduciary), . . . the returns filed by withholding agents on Form 1042 [required by Art. 143–8] shall constitute and be treated as returns of information. (See sections 143 and 144.)" (Emphasis added.)

[8] This opinion was rendered in response to a request to the Treasury for advice as to whether certain payments received during the years 1921 to 1928 by the taxpayer, a nonresident alien author, were taxable as income from sources within the United States. The payments were received pursuant to contracts granting certain volume, serial and motion picture rights in consideration of stipulated royalties payable in various ways. Some contracts prescribed a royalty on each copy sold, others a total stipulated sum, and, in at least one case, this sum was payable in several parts. The opinion reviewed the practice of many years and gave a positive answer to

peals for the Second Circuit made in 1938, under the Revenue Act of 1928, c. 852, 45 Stat. 791, sustain the above conclusions. The latter case was that of *Sabatini* v. *Commissioner,* 98 F. 2d 753 (C. A. 2d Cir.),[9] later

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guide future practice. The answer was that all these receipts were taxable insofar as they came from sources within the United States. The opinion contained the following significant statements which indicate the administrative practice which had been applied and thereafter was to apply to these Sections:

"The fact that a payment in the nature of a rent or royalty is in a lump sum rather than so much per annum, per unit of property, per performance, per book sold, or a certain percentage of the receipts or profits, does not alter the character of the payment as rent or royalty. (O. D. 1028, C. B. 5, 83; *Appeal of J. M. & M. S. Browning Co.,* 6 B. T. A., 914, acquiescence C. B. VII–1, 5.) Nor is it material whether the royalty is paid in advance. (*Appeal of Bloedel's Jewelry, Inc.,* 2 B. T. A., 611.) It is accordingly the opinion of this office that the payments in question are 'rentals or royalties from . . . [or] for the use of or for the privilege of using . . . copyrights . . . and other like property.' Since the grant by the taxpayer in each instance is so clearly the grant of a particular right in all the rights constituting the taxpayer's literary property and copyright, the conclusion is obvious that the grant is a license and not a sale.

"The applicable Revenue Acts regard royalties from American copyrights (or for the use of or for the privilege of using in the United States copyrights and other like property) as income from sources within the United States, and royalties from foreign copyrights (or for the use of or for the privilege of using without the United States copyrights and other like property) as income from sources without the United States. Substantially all the income here in question constitutes royalties from, or for the use of, or for the privilege of using American copyrights." I. T. 2735, XII–2 Cum. Bull. 131 (1933).

[9] "The fact that one lump sum was received for the privilege of using the property of the author instead of a series of payments does not alter the real character of what the taxpayer received. It was payment for the use of his literary property for the purpose named and in so far as it was in payment for use in the United States was taxable as a royalty paid in advance and received for the granting of that privilege. While there seems to be no direct

discussed and approved in *Rohmer* v. *Commissioner,* 153 F. 2d 61, 63 (C. A. 2d Cir.). Incidentally, these opinions declared not only that the taxes in question were imposed upon the receipts as royalties but that it made no difference whether such royalties were each received in lump sums in full payment in advance, to cover the use of the respective copyrights throughout their statutory lives, or whether the royalties were received from time to time and in lesser sums.

B. *The Revenue Act of 1936 preserved the taxability of the several kinds of income of nonresident alien individuals which had been the subject of withholding at their respective sources, including receipts in the nature of royalties for the use of copyrights in the United States.*

The Revenue Act of 1936 did not change materially the statutory definition of gross income from sources within the United States under § 119. It did, however, amend § 211 (a)[10] materially in its description of the

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authority for this view of the meaning of the statute, we believe it correct in principle and the order of the Board in this respect is reversed." *Id.* at p. 755. This decision effectively supplements the Treasury Bulletin of 1933 and emphasizes the general language of the statute in taxing proceeds of the type of transaction that is before us. It reversed an intermediate holding made by the Board of Tax Appeals in 1935 in *Sabatini* v. *Commissioner,* 32 B. T. A. 705. That intermediate decision, accordingly, was in the process of review when the Revenue Act of 1936 was enacted and, therefore, it cannot be argued that Congress carried its interpretation into the Revenue Act of 1936. If anything, the contrary might be argued as to *Sabatini* v. *Commissioner,* 98 F. 2d 753 (C. A. 2d Cir.), which was decided before the enactment of the Internal Revenue Code.

[10] "SEC. 211. TAX ON NONRESIDENT ALIEN INDIVIDUALS.

"(a) No United States Business or Office.—There shall be levied, collected, and paid for each taxable year, in lieu of the tax imposed by sections 11 and 12, upon the amount received, by every

taxable income of nonresident alien individuals. These amendments (1) substituted a special flat rate of 10% for the general normal tax and surtax rates, (2) required this entire special tax, in the usual case, to be withheld at the source of the taxable income, (3) limited the taxability of the income of each nonresident alien individual to those kinds of income to which the withholding provisions also applied, and (4) (except for the addition of dividends) inserted verbatim, as a new statement of the types of taxable income of a nonresident alien individual (not engaged in trade or business within the United States and not having an office or place of business therein), the language that previously had been used to state the specific types of income to which the withholding procedure was to apply. See its § 143 (b)[11] par-

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nonresident alien individual not engaged in trade or business within the United States and not having an office or place of business therein, from sources within the United States as *interest* (except interest on deposits with persons carrying on the banking business), *dividends, rents, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, or other fixed or determinable annual or periodical gains, profits, and income, a tax of 10 per centum of such amount, . . . .*" (Emphasis added.) 49 Stat. 1714.

[11] "SEC. 143. WITHHOLDING OF TAX AT SOURCE.

. . . . . .

"(b) NONRESIDENT ALIENS.—All persons, in whatever capacity acting, including lessees or mortgagors of real or personal property, fiduciaries, employers, and all officers and employees of the United States, having the control, receipt, custody, disposal, or payment of *interest* (except interest on deposits with persons carrying on the banking business paid to persons not engaged in business in the United States and not having an office or place of business therein), *dividends, rent, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, or other fixed or determinable annual or periodical gains, profits, and income* (*but only to the extent that any of the above items constitutes gross income from sources within the United States*), *of any nonresident alien individual,* or of any

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alleling its amended § 211 (a). By thus restricting the income tax to those specific types of income to which the withholding procedure had previously applied, Congress automatically relieved nonresident alien individuals from the taxation of their income from certain sales of real or personal property, previously taxed. This Amendment, on the other hand, retained and increased the tax on the very kind of income that is before us. It also increased the portion of such income to be withheld at its source to meet the new and higher flat rate of tax.

The legislative history of the Revenue Act of 1936 confirms the special meaning thus apparent on its face. It emphasizes the policy which expressly marked the enactment of this Act, including particularly these Amendments. The practical situation was that it had been difficult for United States tax officials to ascertain the taxable income (in the nature of capital gains) which had been derived from sales of property at a profit by nonresident alien individuals, or by foreign corporations, when the respective taxpayers were not engaged in trade or business within the United States and did not have an office or place of business therein. This difficulty was in contrast to the ease of computing and collecting a tax from certain other kinds of income, including payments for the use of patents and copyrights, from which the United States income taxes were being, wholly or partially, withheld at the source. The Congressional Committee Reports expressed a purpose of Congress to limit future taxes on

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partnership not engaged in trade or business within the United States and not having any office or place of business therein and composed in whole or in part of nonresident aliens, shall . . . *deduct and withhold from such annual or periodical gains, profits, and income a tax equal to 10 per centum thereof, . . . .*" (Emphasis added.) 49 Stat. 1700–1701.

nonresident alien individuals to those readily collectible.[12] With a view evidently to securing substantially as much revenue as before, Congress thereupon applied a new flat rate of 10% to nonresident alien individuals and of 15% to foreign corporations, the entire amount of this flat rate of tax to be withheld and collected at the source of the income. The reports referred also to increases in stock

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[12] "NONRESIDENT ALIENS AND FOREIGN CORPORATIONS

"It has also been necessary to recommend substantial changes in our present system of taxing nonresident aliens and foreign corporations. . . . In section 211, it is proposed that the tax on a nonresident alien not engaged in a trade or business in the United States and not having an office or place of business therein, shall be at the rate of *10 percent on his gross income from interest, dividends, rents, wages, and salaries and other fixed and determinable income. This tax (in the usual case) is collected at the source by withholding as provided for in section 143. Such a nonresident will not be subject to the tax on capital gains, including gains from hedging transactions, as at present, it having been found impossible to effectually collect this latter tax.* It is believed that this exemption from tax will result in additional revenue from the transfer taxes and from the income tax in the case of persons carrying on the brokerage business. . . .

". . . In the case of a foreign corporation not engaged in trade or business within the United States and not having an office or place of business therein, it is proposed to levy a flat rate of tax of 15 percent on the gross income of such corporation from interest, dividends, rents, salaries, wages, and *other fixed and determinable income (not including capital gains)*. This tax is to be collected in the usual case by withholding at the source. . . .

"It is believed that the proposed revision of our system of taxing nonresident aliens and foreign corporations will be productive of substantial amounts of additional revenue, since *it replaces a theoretical system impractical of administration in a great number of cases.*" (Emphasis added.) H. R. Rep. No. 2475, 74th Cong., 2d Sess. 9–10 (1936).

To the same effect, see S. Rep. No. 2156, 74th Cong., 2d Sess. 21, 23 (1936).

transfer taxes which might result from thus removing the income tax from profits of nonresident alien individuals on their stock sales. Congress recognized a value and a convenience in thus turning to the accessible, fixed and determinable income of nonresident aliens. There is no doubt that these steps sought to increase or at least to maintain the existing volume of revenue.[13] No suggestion appears that Congress intended or wished to relieve from taxation the readily accessible and long-established source of revenue to be found in the payments made to

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[13] On the floor of the House, Representative Hill of Washington, of the Committee on Ways and Means, supporting these Amendments, said:

"We have placed a flat tax of 10 percent on nonresident aliens, that is, people not citizens of the United States and not residing in the United States; and this 10-percent tax is withheld at the source. We expect to get considerably more revenue out of both nonresident aliens and foreign corporations having no place of business or not engaged in trade or business in this country, than we have been getting under the present plan, because we are going to withhold it at the source, and not take a chance on their making a report of it, or having to send our representatives to some foreign country to find what their net income is, and seek to induce them to pay their tax." 80 Cong. Rec. 6005 (1936).

On the floor of the Senate, Senator King of Utah, a member of the Finance Committee and in charge of the bill, said, in supporting these Amendments:

"The House bill changes the method of taxing nonresident aliens and foreign corporations. A nonresident alien not engaged in a trade or business in the United States, or not having an office or place of business therein, is taxed at a flat rate of 10 percent on his income from interest, dividends, rents, wages, salaries, and other fixed or determinable income, which are collected at the source. . . . These nonresident aliens are exempted under the House bill from the tax on capital gains, including hedging transactions, it being found administratively almost impossible to collect the capital-gains tax in such cases. This exemption will result in increased revenue from transfer taxes or from the income tax in the case of persons carrying on the brokerage business." 80 Cong. Rec. 8650 (1936).

nonresident aliens for the use of patents or copyrights in the United States. Much less was any suggestion made that lump sum advance payments of rentals or royalties should be exempted from taxation while at the same time smaller repeated payments of rentals or royalties would be taxed and collected at the source of the income. To have exempted these nonresident aliens from these readily collectible taxes derived from sources within the United States would have discriminated in their favor against resident citizens of the United States who would be required to pay their regular income tax on such income, if treated as royalties within the meaning of our gross income provisions, or at least to pay a tax upon them as capital gains, if treated as income from sales of capital within the meaning of our capital gains provisions. No such purpose to discriminate can be implied.

Accordingly, at the time in 1936 when these Amendments were being enacted into § 211 (a), the provisions for taxing the gross income of nonresident alien individuals under the Revenue Act of 1934 already had been long and officially interpreted as covering receipts from royalties as expressly and broadly defined in § 119 (a) and subjected to withholding at the source of income under § 143 (b). The legislative history of the 1936 Amendments is, therefore, a refutation of any claim that Congress, at that time, was seeking to exempt such taxpayers from those appropriate and readily collectible items. On the other hand, that history shows that Congress was seeking to continue to tax, and even to increase the tax upon, those kinds of income which had been found to be readily withholdable at their respective sources. Accordingly, what Congress did was to incorporate the very language of the withholding provisions of § 143 (b) into the language of the taxing § 211 (a). The Regulations under § 143 (b), quoted above substantially as being in effect since 1924, had already settled that *roy-*

*alties were included in § 143 (b). The Treasury Bulletin also showed that lump sum payments made in advance for limited rights under copyrights were included in the "royalties" thus subject to withholding and taxation. The type of transactions and the kind of payments were thus identified. The broad language there used is entitled to be interpreted in accordance with its plain meaning and established usage.* Therefore, after the 1936 Amendments, *it became equally clear that these receipts in the nature of royalties which were previously withheld at their source were included in the sources of income specified in § 211 (a) but that profits from sales of property were not included in the sources of income specified in § 211 (a) any more than they had been under § 143 (a).* The decisions of the Court of Appeals of the Second Circuit in *Sabatini* v. *Commissioner, supra,* in 1938, in relation to the Revenue Act of 1928, and in *Rohmer* v. *Commissioner, supra,* in 1946, in relation to the Internal Revenue Code, as amended in 1940, reflected the same point of view.

None of these provisions of the Act of 1936 were changed by the Revenue Act of 1938, the Internal Revenue Code, or the 1940 or 1941 Amendments to that Code, except in relation to the size of the tax rates. The principal changes even in those rates were to provide higher taxes in the higher brackets, rather than to reduce the taxes on nonresident aliens.[14]

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[14] Particularly in the Revenue Act of 1938, § 211 was amended to provide that, if the aggregate amount of a taxpayer's income of the types included from sources within the United States was more than $21,600 during a taxable year, then the regular rate of tax imposed by §§ 11 and 12 became applicable, subject to the proviso that in no case it be less than 10% of the gross income subject to the tax. § 211 (a) and (c), 52 Stat. 527–528, and see Appendix A, *infra,* p. 395.

## II.

*The receipt of the respective amounts by the respondent in single lump sums as payments in full, in advance, for certain rights under the respective copyrights did not exempt those receipts from taxation.*

Once it has been determined that the receipts of the respondent would have been required to be included in his gross income for federal income tax purposes if they had been received in annual payments, or from time to time, during the life of the respective copyrights, it becomes equally clear that the receipt of those same sums by him in single lump sums as payments in full, in advance, for the same rights to be enjoyed throughout the entire life of the respective copyrights *cannot,* solely by reason of the consolidation of the payment into one sum, render it tax exempt. No Revenue Act can be interpreted to reach such a result in the absence of inescapably clear provisions to that effect. There are none such here.

The argument for the exemption was suggested by the presence in §§ 211 (a) and 143 (b) of the words "annual" and "periodical." If read apart from their text and legislative history and supplemented by the gratuitous insertion after them of the word "payments," they might support the limiting effect here argued for them. However, when taken in their context, and particularly in the light of the legislative history of those Acts, and the interpretation placed upon them by the Treasury Department and the lower courts, they have no such meaning. Those words are merely generally descriptive of the character of the gains, profits and income which arise out of such relationships as those which produce readily withholdable interest, rents, royalties and salaries, consisting wholly of income, especially in contrast to gains, profits

and income in the nature of capital gains from profitable sales of real or personal property.[15]

In the instant case, each copyright which was to be obtained had its full, original life of 28 years to run after the advance payment was received by the author covering the use of or the privilege of using certain rights under it. Fixed and determinable income, from a tax standpoint, may be received either in annual or other payments without altering in the least the need or the reasons for taxing such income or for withholding a part of it at its source. One advance payment to cover the entire 28-year period of a copyright comes within the reason and reach of the Revenue Acts as well as, or even better than, two or more partial payments of the same sum.

Article 143–2 of Treasury Regulations 101, issued under the Revenue Act of 1938, provided:

> "The income need not be paid annually if it is paid periodically; that is to say, from time to time, whether or not at regular intervals. That the length of time during which the payments are to be made may be increased or diminished in accordance with someone's will or with the happening of an event does not make the payments any the less determinable or periodical."

Substantially this liberal language in the Regulations has been used in this connection since 1918. (U. S. Treas. Reg. 45, Art. 362 (1918).) Single lump sum payments of royalties were held to be taxable under the Revenue Acts of 1921, 1924, 1926 and 1928, I. T. 2735,

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[15] ". . . While payment ordinarily is at a certain rate for each article or certain per cent of the gross sale, that in itself is not determinative. The purpose for which the payment is made and not the manner thereof is the determining factor." *Commissioner* v. *Affiliated Enterprises,* 123 F. 2d 665, 668 (C. A. 10th Cir.).

XII–2 Cum. Bull. 131 (1933); under the Revenue Act of 1928, *Sabatini* v. *Commissioner, supra;* and under the Internal Revenue Code, as amended in 1940, *Rohmer* v. *Commissioner, supra.*

For the foregoing reasons, we hold that the receipts in question were required to be included in the gross income of the respondent for federal income tax purposes. The judgment of the Court of Appeals accordingly is reversed and remanded for further proceedings consistent with this opinion.

*Reversed and remanded.*

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

[For dissenting opinion of MR. JUSTICE FRANKFURTER, joined by MR. JUSTICE MURPHY and MR. JUSTICE JACKSON, see *post,* p. 401.]

## APPENDIX A.

Material provisions of §§ 212 (a), 211 and 119 of the Revenue Act of 1938 and the Internal Revenue Code:

"SEC. 212. GROSS INCOME.

"(a) GENERAL RULE.—*In the case of a nonresident alien individual gross income includes only the gross income from sources within the United States.*" (Emphasis added.) 52 Stat. 528, and 53 Stat. 76, 26 U. S. C. § 212 (a).

"SEC. 211. TAX ON NONRESIDENT ALIEN INDIVIDUALS.

"(a) NO UNITED STATES BUSINESS OR OFFICE.—

"(1) GENERAL RULE.—There shall be levied, collected, and paid for each taxable year, in lieu of the tax imposed by sections 11 and 12 [normal tax and surtax imposed generally upon individuals and applicable in the instant case, under paragraphs (a) (2) and (c), because the respondent's gross income for each taxable year exceeded the allowable maximum there specified], upon the amount received, by every nonresident alien individual not engaged in trade or business within the United States and not having an office or place of business therein, *from sources within the United States as interest* (except interest on deposits

with persons carrying on the banking business), *dividends, rents, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, or other fixed or determinable annual or periodical gains, profits, and income,* a tax of 10 per centum of such amount, . . . .

"(2) AGGREGATE MORE THAN $21,600.—The tax imposed by paragraph (1) shall not apply to any individual if the aggregate amount received during the taxable year from the sources therein specified is more than $21,600.

. . . . . .

"(c) NO UNITED STATES BUSINESS OR OFFICE AND GROSS INCOME OF MORE THAN $21,600.—A nonresident alien individual not engaged in trade or business within the United States and not having an office or place of business therein who has a gross income for any taxable year of more than $21,600 *from the sources specified in subsection (a) (1),* shall be taxable without regard to the provisions of subsection (a) (1), except that—

"(1) *The gross income shall include only income from the sources specified in subsection (a) (1);*

"(2) The deductions (other than the so-called 'charitable deduction' provided in section 213 (c)) shall be allowed only if and to the extent that they are properly allocable to the gross income from the sources specified in subsection (a) (1);

"(3) The aggregate of the normal tax and surtax under sections 11 and 12 shall, in no case, be less than 10 per centum of the gross income from the sources specified in subsection (a) (1); and . . . ." (Emphasis added.) 52 Stat. 527–528.

The above provisions of §§ 212 and 211 were reenacted in the Internal Revenue Code, 53 Stat. 76, 75–76. The tax rates were changed by the Revenue Act of 1940, c. 419, 54 Stat. 516–517 as follows: the surtaxes were increased generally in § 12 (b), the flat rates were increased from 10% to 15% and the allowable maximum income subject to the flat rates was raised from $21,600 to $24,000 in § 211 (a) and (c), 54 Stat. 518. The Revenue Act of 1941, c. 412, 55 Stat. 687, 688, again increased the surtaxes in § 12 (b), increased the flat rates from 15% to 27½% and decreased the allowable maximum income subject to the flat rates from $24,000 to $23,000 in § 211 (a) and (c), 55 Stat. 694. Since then, the normal tax and surtax rates have been increased still further, the flat rate applicable to nonresident alien individuals has been increased from 27½% to 30% and the allowable maximum income to which the flat rates apply has been reduced to $15,400. 26 U. S. C. § 211 (a) and (c).

"SEC. 119. INCOME FROM SOURCES WITHIN UNITED STATES.

"(a) GROSS INCOME FROM SOURCES IN UNITED STATES.—The following items of gross income shall be treated as income from sources within the United States:

"(1) INTEREST.— . . .

"(2) DIVIDENDS.— . . .

"(3) PERSONAL SERVICES.— . . .

"(4) RENTALS AND ROYALTIES.—*Rentals or royalties from property located in the United States or from any interest in such property, including rentals or royalties for the use of or for the privilege of using in the United States, patents, copyrights, secret processes and formulas, good will, trade-marks, trade brands, franchises, and other like property;* and

"(5) SALE OF REAL PROPERTY.—Gains, profits, and income from the sale of real property located in the United States.

"(6) SALE OF PERSONAL PROPERTY.—For gains, profits, and income from the sale of personal property, see subsection (e).

"(b) NET INCOME FROM SOURCES IN UNITED STATES.—From the items of gross income specified in subsection (a) of this section there shall be deducted the expenses, losses, and other deductions properly apportioned or allocated thereto and a ratable part of any expenses, losses, or other deductions which can not definitely be allocated to some item or class of gross income. The remainder, if any, shall be included in full as net income from sources within the United States.

"(c) GROSS INCOME FROM SOURCES WITHOUT UNITED STATES.—The following items of gross income shall be treated as income from sources without the United States:

"(1) Interest other than that derived from sources within the United States as provided in subsection (a) (1) of this section;

"(2) Dividends other than those derived from sources within the United States as provided in subsection (a) (2) of this section;

"(3) Compensation for labor or personal services performed without the United States;

"(4) *Rentals or royalties from property located without the United States or from any interest in such property, including rentals or royalties for the use of or for the privilege of using without the United States, patents, copyrights, secret processes and formulas, good will, trade-marks, trade brands, franchises, and other like properties;* and

"(5) Gains, profits, and income from the sale of real property located without the United States.

"(d) NET INCOME FROM SOURCES WITHOUT UNITED STATES.— . . .

"(e) INCOME FROM SOURCES PARTLY WITHIN AND PARTLY WITHOUT UNITED STATES.— . . . Gains, profits, and income from—

"(1) transportation or other services rendered partly within and partly without the United States, or

"(2) *from the sale of personal property* produced (in whole or in part) by the taxpayer within and sold without the United States, or *produced (in whole or in part) by the taxpayer without and sold within the United States,*

shall be treated as derived partly from sources within and partly from sources without the United States. Gains, profits and income derived from the purchase of personal property within and its sale without the United States or from the purchase of personal property without and its sale within the United States, shall be treated as derived entirely from sources within the country in which sold, . . . .

"(f) DEFINITIONS.— . . . ." (Emphasis added.) 52 Stat. 503–506, 53 Stat. 53–55, 26 U. S. C. § 119.

## APPENDIX B.

"THE CURTIS PUBLISHING COMPANY
INDEPENDENCE SQUARE
PHILADELPHIA

February 22, 1938

"Paul R. Reynolds, & Son
599 Fifth Avenue
New York City

We inclose herewith

our check Forty Thousand Dollars

in payment for

Serial: The Silver Cow
By P. G. Wodehouse $40,000.00

"IMPORTANT

"This check is offered and accepted with the understanding that The Curtis Publishing Company buys all rights in and of all stories and special articles appearing in its publications and with the further understanding that every number of these publications in which any portion thereof shall appear shall be copyrighted at its expense. After publication in a Curtis periodical is completed it agrees to reassign to the author on demand all rights, except American (including Canadian and South American) serial rights.

"Motion Picture Rights

"Please note that our reservation of serial rights (which includes publication in one installment) includes new story versions based on motion-picture or dramatic scenarios of short stories and serials that have appeared in Curtis publications, and that we permit the use of such versions only under the following conditions: Such synopsis, scenario, or new story version shall not exceed fifteen hundred (1500) words in length when based on a short story appearing complete in one issue, or five thousand (5000) words when based on a serial appearing in two or more issues, or a series of not less than three connected short stories from which a single picture is to be made. Such synopsis shall appear only in circular matter, press books, press notices, trade journals and in magazines devoted exclusively to dramatic or motion-picture matter, and shall in no event appear as having been written by the author. When selling motion-picture or dramatic rights of matter, you must notify the producer to this effect, so that there may be no misunderstanding on his part and no infringement of our rights

"THE CURTIS PUBLISHING COMPANY"

Respondent's exhibit containing the foregoing memorandum agreement also included the statement rendered and the checks issued by the agent to the respondent and to the respondent's wife for $17,100 each, including the following:

"March 3, 1938

"P. G. Wodehouse

in account with

Paul R. Reynolds & Son

"Received from Saturday Evening Post *for All American, Canadian & South American serial rights to*

| | |
|---|---|
| The Silver Cow | $40,000. |
| Commission 5% | 2,000. |
| | $38,000. |
| U. S. Income Tax 10% | 3,800. |
| | $34,200. |
| Ethel Wodehouse share ½ | 17,100. |
| Draft herewith | $17,100." |

(Emphasis added.)

No issue is before us relating to the computation of the amount withheld or the division of the payments between the respondent and his wife. In the statements rendered by the agent as to the payments received for serial rights to "Uncle Fred in the Springtime," the initial amount withheld was 10% of the full payment without deduction of the agent's commission.

## Appendix C.

"HEARST'S INTERNATIONAL
COSMOPOLITAN

Hearst Magazine Building

Fifty-seventh Street and Eighth Avenue
New York City

July 23, 1941
Jul 24 1941

"Mr. Paul R. Reynolds, Sr.
599 Fifth Avenue
New York City

"Dear Mr. Reynolds:

"This will confirm our purchase of the article entitled My Year Behind Barbed Wire by P. G. Wodehouse for Two Thousand Dollars ($2,000.00). *We are buying all American and Canadian serial rights (which include all American and Canadian magazine, digest, periodical and newspaper publishing rights).*

"It is understood and agreed that the author, and you as his agent, will not use or permit the use of this article or any part or parts thereof (1) in any manner or for any purpose until thirty (30) days after magazine publication and (2) in connection with or as the basis for any motion and/or talking picture(s), radio broadcast(s), television, dramatic production(s) or public performance(s) throughout the world unless the words 'Based on (or taken from) literary material originally published in Cosmopolitan' immediately precede or follow or otherwise accompany the title of any and all such motion and/or talking pictures, radio broadcasts, telecasts, dramatic productions or public performances.

"Your signature hereon will constitute an agreement between us.

"Sincerely yours,

"FRANCES WHITING
Frances Whiting

"ACCEPTED:

.....

DATE:.....

> "I am accepting the above letter on the condition that publication of this article can be released in England simultaneously with publication in Cosmopolitan Magazine (despite the wording of (1) in the second paragraph);

with the further understanding that Cosmopolitan will permit no digest or newspaper publication of this article without the consent of the author or his agent in writing; and with the further condition that we receive payment not later than September 1, 1941." (Emphasis added.)

MR. JUSTICE FRANKFURTER, with whom MR. JUSTICE MURPHY and MR. JUSTICE JACKSON join, dissenting.

In the exercise of its power "To promote the Progress of Science and useful Arts," Congress, by granting copyrights, has created valuable property rights. See *American Tobacco Co.* v. *Werckmeister,* 207 U. S. 284; *White-Smith Music Pub. Co.* v. *Apollo Co.,* 209 U. S. 1, 18, 19. Because of a conflict between two Circuits we must now for the first time pass on the amenability to our revenue law of proceeds derived from the transfer of some of these interests. A ruling of the Treasury and a supporting decision of the Court of Appeals for the Second Circuit have made taxability turn on the notion that a copyright is indivisible. As a corollary it was assumed that a transfer of less than all the rights conferred by § 1 of the Copyright Law [1] makes the transaction, regardless of the intent of the parties, a "mere license." On that ground the Government has here pressed its claim of taxability. The Court of Appeals for the Fourth Circuit has rejected the notion of indivisibility and consequently found lump-sum payments by a purchaser of the exclusive serial publication rights not to be within § 211

[1] 61 Stat. 652; 17 U. S. C. § 1.

(a) (1) (A) of the Internal Revenue Code. By the plain implication of its silence regarding the basis of the Government's claim and of the decisions that have heretofore sustained it, this Court likewise rejects the notion of indivisibility while clinging to a conclusion hitherto entirely derived from it.

The case calls for inquiry into the scheme of taxation of American income of alien copyright holders as well as review of administrative and judicial treatment of such income. To put this discussion in the perspective of concreteness, however, the facts out of which the controversy arises should first be stated. The transaction which produced the income found taxable by the Commissioner for the year 1941 is typical of the other transactions that yielded the proceeds claimed to be covered by § 211 (a) (1) (A) for the various tax years here involved.[2]

Wodehouse, the writer of popular stories and novels, a nonresident alien and "not engaged in trade or business within the United States," transferred, on August 12, 1941, through his American literary agent, to the Curtis Publishing Company for $40,000 "all rights in and of all stories and special articles appearing in its publications" of a certain novel, entitled, "Money in the Bank." The contract provided that, after publication in a Curtis magazine, Curtis was to reassign to Wodehouse "on demand all rights, except North American (including Canadian) serial rights." The documents involved in each of the various transactions make clear beyond question that Curtis, as buyer, intended to secure, if legally possible, an absolute, exclusive, and irrevocable transfer

[2] This particular year was selected because the Internal Revenue Code was then in effect, and this makes reference to the applicable statutory provisions easier. In 1941 Wodehouse also sold publication rights in an article to Hearst's International Cosmopolitan Co. The transaction was, in effect, similar to the one described in the text.

of the serial rights for all of North America, including Canada, and that Wodehouse, as transferor, intended to transfer, with no desire to retain any control whatsoever, all the North American serial rights of the novel. Indeed, to assure Curtis unqualified control, Wodehouse agreed to exercise other rights in a way to assure Curtis full protection and enjoyment in the serial publication rights.[3]

The Tax Court never questioned that these transactions were intended to be absolute transfers. Instead, it relied on *Sax Rohmer,* 5 T. C. 183, aff'd, 153 F. 2d 61 (C. A. 2d Cir.), which had held that an assignment of less than substantially all of the rights conferred by a copyright was necessarily only a license, and therefore that the proceeds received had to be regarded as for the use, rather than the sale, of the copyright. 8 T. C. 637. The Court of Appeals for the Fourth Circuit, upon full consideration of the *Rohmer* case, rejected its notion that there cannot be a sale of less than the whole, and, finding no barrier to the law's recognition of the true nature of the transaction, namely irrevocable transfers of an interest

[3] The memorandum of acceptance provided in part:

"Please note that our reservation of serial rights (which includes publication in one installment) includes new story versions based on motion-picture or dramatic scenarios of short stories and serials that have appeared in Curtis publications, and that we permit the use of such versions only under the following conditions: Such synopsis, scenario, or new story version shall not exceed fifteen hundred (1500) words in length when based on a short story appearing complete in one issue, or five thousand (5000) words when based on a serial appearing in two or more issues, or a series of not less than three connected short stories from which a single picture is to be made. Such synopsis shall appear only in circular matter, press books, press notices, trade journals and in magazines devoted exclusively to dramatic or motion-picture matter, and shall in no event appear as having been written by the author. When selling motion-picture or dramatic rights of matter, you must notify the producer to this effect, so that there may be no misunderstanding on his part and no infringement of our rights."

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in personal property, reversed the Tax Court. 166 F. 2d 986 (C. A. 4th Cir.) (one judge dissenting).

This Court now reverses the Court of Appeals without facing the question which the Treasury, the Tax Court, and the two Courts of Appeals deemed controlling on each occasion when the problem was presented. Instead, the Court appears to be guided, in however low a key that consideration is pitched, in construing the applicable provisions of the Internal Revenue Code by the urgent need for revenue. To let this need determine judicial construction of the Internal Revenue Code would largely dispense with explicitness and technical precision in revenue measures. "Long prior practice" is invoked to support the fiscal considerations. This reliance is illusory. It completely ignores that the practice of which we have been advised is tenuous and, in any event, rests solely on the notion of the indivisibility of copyrights. To derive the existence of a practice from a single pronouncement by the Treasury, constituting not the formulation of a fiscal policy but expressing a metaphysical view of copyright law not adopted by this Court, gives a very loose meaning to the word "practice."

1. The Commissioner here determined a deficiency and the Tax Court sustained the deficiency under § 211 (c) (1).[4] That section deals with gross incomes of more than $24,000 received by nonresident aliens "not engaged

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[4] "SEC. 211. TAX ON NONRESIDENT ALIEN INDIVIDUALS.

. . . . . .

"(c) NO UNITED STATES BUSINESS OR OFFICE AND GROSS INCOME OF MORE THAN $24,000.—A nonresident alien individual not engaged in trade or business within the United States and not having an office or place of business therein who has a gross income for any taxable year of more than $24,000 from the sources specified in subsection (a) (1), shall be taxable without regard to the provisions of subsection (a) (1), except that—

"(1) The gross income shall include only income from the sources specified in subsection (a) (1) . . . ." 53 Stat. 75, 76, 54 Stat. 518.

in trade or business within the United States." 26 U. S. C. § 211 (c) (1) (1941). For the sources of taxable gross income it refers to § 211 (a) (1) (A), which specifically deals with the taxation of nonresident aliens like Wodehouse.[5] The authority under which the tax was here levied provides: "There shall be levied, collected, and paid [a tax on] . . . the amount received . . . from sources within the United States as . . . other fixed or determinable annual or periodical gains, profits, and income . . . ." 26 U. S. C. § 211 (a) (1) (A).

2. The Court draws on § 119 (a) (4) to support the tax.[6] But proceeds within § 119 (a) cannot be considered

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[5] The subsection reads as follows:

"SEC. 211. TAX ON NONRESIDENT ALIEN INDIVIDUALS.

"(a) NO UNITED STATES BUSINESS OR OFFICE.—

"(1) GENERAL RULE.—

"(A) IMPOSITION OF TAX.—There shall be levied, collected, and paid for each taxable year, in lieu of the tax imposed by sections 11 and 12, upon the amount received, by every nonresident alien individual not engaged in trade or business within the United States and not having an office or place of business therein, from sources within the United States as interest (except interest on deposits with persons carrying on the banking business), dividends, rents, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, or other fixed or determinable annual or periodical gains, profits, and income, a tax of 15 per centum of such amount. . . ." 53 Stat. 75, 54 Stat. 518.

[6] "SEC. 119. INCOME FROM SOURCES WITHIN UNITED STATES.

"(a) GROSS INCOME FROM SOURCES IN UNITED STATES.—The following items of gross income shall be treated as income from sources within the United States:

. . . . . .

"(4) RENTALS AND ROYALTIES.—Rentals or royalties from property located in the United States or from any interest in such property, including rentals or royalties for the use of or for the privilege of using in the United States, patents, copyrights, secret processes and formulas, good will, trade-marks, trade brands, franchises, and other like property . . . ." 53 Stat. 53, 54, 26 U. S. C. § 119 (a) (4).

within § 211 (a) (1) (A) unless the definition of § 211 (a) (1) (A) is also satisfied, that is, unless the proceeds are "fixed or determinable annual or periodical income." Cf. U. S. Treas. Reg. 111, § 29.143–2. The subsections of § 119 (a) serve merely to define what proceeds are to be deemed localized in the United States for tax purposes; they settle only the geographic question; § 119 (a) is not a tax-imposing provision; other sections of the Code serve that function.

3. An analysis of the relevant provisions, in light of the changes made in 1936, makes this perfectly clear. Until 1936, the tax-imposing provisions were coterminous with the provisions of § 119 (a) in defining the taxable gross income of a nonresident alien. This was so because taxability was limited only by § 211 (a) of the Revenue Act of 1934 which provided that "In the case of a nonresident alien individual gross income includes only the gross income from sources within the United States." 48 Stat. 735. Supplement H of the Revenue Act of 1934 provided for deductions and credits (§§ 212–215, 48 Stat. 736–737), but there was no other provision further defining or limiting the type of receipts to be included in gross income. See 48 Stat. 735–737, 684. Thus, whatever was gross income from a source within the United States was taxed. By the Revenue Act of 1936, Congress changed the scheme of taxing nonresident aliens. 49 Stat. 1714; see 8 Mertens, The Law of Federal Income Taxation, § 45.16, *et seq.* (1942). For those who have a place of business in the United States it retained the system of taxing all proceeds from sources within the United States. Revenue Act of 1936, § 211 (b), 49 Stat. 1714. As to such aliens the provisions of § 119 continued to determine what receipts were to be included. And that has remained the law. 26 U. S. C. § 211 (b). But as to those who are "not engaged in trade or business within the United States," the only type of proceeds to be taxed were

those which were attributable to sources within the United States but only if there were "fixed or determinable annual or periodical gains, profits, and income." Such has remained the law and controls this case. (Compare 26 U. S. C. § 211 (a) (1) (A), the applicable provision when the nonresident alien is not engaged in trade or business within the United States, with 26 U. S. C. § 211 (b), the section applicable when the nonresident alien has a place of business in the United States.)

The specifically defined receipts—fixed or determinable annual or periodical gains, profits, or income—are not words giving rise to an exemption, and as such to be strictly construed. They are the controlling basis for taxation. To be taxable under § 211 (a) (1) (A) the proceeds must be from sources within the United States, as set forth in § 119 (a), but also of the nature defined in § 211 (a) (1) (A). See 54 Yale L. J. 879, 881–882 (1945); 48 Col. L. Rev. 967 (1948); cf. U. S. Treas. Reg. 111, § 29.143–2. Since the reach of § 211 (a) (1) (A) does not include the proceeds from a sale, receipts from a sale are not taxable even though such proceeds are from a source within the United States and, as such, are listed in § 119 (a) (5)–(6). The Regulations have made this explicit. U. S. Treas. Reg. 111, §§ 29.211–7, 29.143–2; see also S. Rep. No. 2156, 74th Cong., 2d Sess., p. 21 (1936); H. R. Rep. No. 2475, 74th Cong., 2d Sess., pp. 9–10 (1936).

The changes made in 1936 in the method of taxing income of a nonresident alien "not engaged in trade or business within the United States" make the taxing provisions coterminous, not with § 119 (a), but with § 143 (b), the section providing for withholding taxes at the source. Section 143 (b) emphasizes that proceeds within § 119 (a) do not come within the scope of § 143 (b) unless the additional qualification contained in § 143 (b) is also met. Section 143 (b) provides that the tax should be withheld on income which is "fixed or determinable an-

nual or periodical gains, profits, and income (but only to the extent that any of the above items constitutes gross income from sources within the United States) . . . ." 26 U. S. C. § 143 (b). Here again, since "the income derived from the sale in the United States of property, whether real or personal, is not fixed or determinable annual or periodical income," it is not included. U. S. Treas. Reg. 111, § 29.143–2. Only by not observing the requirement that the proceeds must not only be from a source in the United States but also "annual or periodical" to be subject either to withholding under § 143 (b), or to taxation under § 211 (a) (1) (A), can it be said that proceeds which prior to 1936 were held to be under § 119 (a) (4) are *ipso facto* within § 211 (a) (1) (A) after 1936 regardless of the nature of the revenue.

Therefore, inquiry which seeks to discover prior practice as an aid to construction should properly address itself to whether such proceeds were withheld under § 143 (b) before 1936. Inquiry as to § 119 (a) is completely irrelevant because it is clear that before 1936 many items were included in § 119 (a) which were not withheld under § 143 (b). Since 1936 the only proceeds which are taxed to a nonresident alien not engaged in a trade or business in the United States are those which are "fixed or determinable annual or periodical gains, profits, and income," which is the only type of proceeds on which taxes were withheld at the source before as well as after 1936. Therefore Treasury practice regarding the withholding requirement prior to the 1936 legislation would be relevant. There is a total absence of any showing that the Treasury before 1936 regarded such proceeds subject to withholding under § 143 (b). And in the analogous situation of lump-sum payments for the absolute transfer of some but not all of the exclusive rights conferred by the patent law, courts have held such proceeds not subject to withholding under § 143 (b). *Gen-*

*eral Aniline & Film Corp.* v. *Commissioner,* 139 F. 2d 759 (C. A. 2d Cir.); cf. *Commissioner* v. *Celanese Corp.,* 78 U. S. App. D. C. 292, 140 F. 2d 339.

The Regulations, to be sure, give "royalties" as an example of proceeds which are within the phrase "fixed or determinable annual or periodical gains, profits, and income." See U. S. Treas. Reg. 111, § 29.211–7. But proceeds sought to be brought within the term "royalties" must be of a nature which justifies that classification. Royalties are within the section only because they meet the above description. It completely ignores the intrinsic character of "royalties," and therefore the basis of including them in the larger category of "fixed or determinable annual or periodical gains, profits, and income," to infer that proceeds which do not meet that description but result from the use of another method of realizing economic gain from a property right—that of sale rather than a license producing a recurring income—are also "royalties." See 48 Col. L. Rev. 967, 969 (1948). By such reasoning proceeds from the sale of a house would also be within § 211 (a) (1) (A) because another way that the owner could have realized gain on the property would have been to have leased it over its lifetime.[7]

Free judicial rendering of needlessly imprecise legislation is sufficiently undesirable in that it encourages Congress to be indifferent to the duty of giving laws attainable definiteness. Here we are dealing with legislation that is precise. Yet the Court chooses not to give it effect and it does so on the basis of fiscal considerations which Congress, by what it enacted, chose not to write into law.

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[7] Rent is specifically included within § 211 (a) (1) (A); proceeds from the sale of real property, however, are excluded. U. S. Treas. Reg. 111, § 29.211–7.

It must be remembered that the problem here is not to determine what is income in either a constitutional or an economic sense. The proceeds from the sale of a house over and above its cost to the seller are as much income as is a judge's salary. Nor is the problem one of determining whether something which is usually regarded as income is to escape a tax because the parties by agreement act in such a way as to cause the proceeds to be received in a different manner. Cf. *Lyeth* v. *Hoey,* 305 U. S. 188. There is no suggestion that the transaction as it appears on the surface was not the transaction in truth. The fact that the incidences of income taxation may have been taken into account by arranging matters one way rather than another so long as the way chosen was the way the law allows, does not make a transaction something else than it truly is—it does not turn a sale into a license. *Helvering* v. *Gregory,* 69 F. 2d 809, 810 (C. A. 2d Cir.). Therefore, the principle of tax evasion is irrelevant to the disposition of this case, except on the assumption that Congress itself evaded its own tax purposes and that the Court must close what Congress left open. It is taking too much liberty even with tax provisions to read out a defining clause that Congress has written in merely because Congress permitted desirable revenue to escape the tax collector's net. The only judicial problem is whether the proceeds constitute a type of income which Congress has designated as taxable. That type must have the characteristic of being "fixed or determinable annual or periodical gains, profits, and income." A lump-sum payment for an exclusive property right, transferable and transferred by the taxpayer, simply does not meet that qualification. Unless there is something inherent in the copyright law to prevent it, such a transaction is the familiar "sale of personal property." U. S. Treas. Reg. 111, § 29.211–7. Surely it is a sale of a capital asset. See Learned Hand, J., in *Goldsmith* v. *Com-*

*missioner,* 143 F. 2d 466, 467 (C. A. 2d Cir.). As such it is not subject to the tax. The legislative history leaves no doubt on this point.[8]

4. So far it has been assumed that these proceeds would be within § 119 (a) (4). But neither this Court nor Congress has ever said so; indeed no court other than the Court of Appeals for the Second Circuit, and the Tax Court (but only after its contrary determination was reversed by the Court of Appeals for the Second Circuit) has said so. But it is urged that a "long prior practice" of including under § 119 (a) (4) proceeds received as lump-sum payments for the absolute transfer of some but not all of the rights conferred by the copyright law, and therefore taxing them to nonresident aliens under the prior statute, prevents this Court from applying § 211 (a) (1) (A) according to the fair meaning of its own terms. It is suggested that, no matter what Congress has written on the statute books, it is to be assumed that Congress would not give up a source of revenue it had once tapped. This suggestion is made despite the fact that Congress said that it was changing the method of taxing the income of nonresident aliens and that it also said that certain items, previously taxed, would now be exempt. S. Rep. No. 2156, 74th Cong., 2d Sess., p. 21 (1936); H. R. Rep. No. 2475, 74th Cong., 2d Sess., pp. 9–10 (1936). What is this long prior practice that has encrusted the phrase, "royalties for the use of or for the privilege of using in the United States, patents, copyrights . . . and other like property," with a meaning that contradicts its own terms not otherwise defined by

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[8] The Reports in both the House and Senate say specifically that a result of § 211 (a) (1) (A) is that "such a nonresident alien will not be subject to the tax on capital gains . . . ." S. Rep. No. 2156, 74th Cong., 2d Sess., p. 21 (1936); H. R. Rep. No. 2475, 74th Cong., 2d Sess., pp. 9–10 (1936); see Fulda, *Copyright Assignments and the Capital Gains Tax,* 58 Yale L. J. 245, 259, 260–266 (1949).

Congress, yet precludes this Court from construing it according to the obvious purport of familiar words?

Section 119 (a) (4), or a provision with similar phrasing, has been part of the Revenue Laws since 1921. See Revenue Act of 1921, § 217 (a) (4), 42 Stat. 244. Soon after its enactment the Bureau ruled that receipts from the absolute transfer by a nonresident alien of the rights to serial publication in the United States of certain literary works were not derived from a source in the United States. The reason given was that the transaction did not constitute a license for use, but a sale. O. D. 988, 5 Cum. Bull. 117 (1921); see also I. T. 2169, IV–1 Cum. Bull. 13 (1925) (sale of motion-picture right to play deemed a sale of a capital asset). The ruling prevailed through the subsequent reenactment of the phrasing in § 119 (a) (4) in 1924, 1926, 1928, and 1932, see 43 Stat. 273; 44 Stat. 30; 45 Stat. 826, 827; 47 Stat. 208, 209. In 1933 the Bureau made a contrary ruling which expressly revoked the one made in 1921. But the facts on which the Bureau took this action are important.

The taxpayer had received the income in question pursuant to contracts with a number of publishers and producers under which he had granted serial rights in books already written, reserving a "stipulated royalty per copy sold." The Bureau characterized all but one of these contracts as requiring "stipulated sums . . . to be paid to him as royalties." Moreover, in some of these contracts yearly licenses were granted, renewable at the taxpayer's option, with stipulated royalties per copy. In one contract a company was granted first American and Canadian serial rights in the taxpayer's exclusive output of both long and short stories for which the company was to pay a stipulated sum of money, and in another contract the taxpayer granted motion-picture rights throughout the world, the consideration to be paid in installments. The Bureau ruled that these proceeds were within

the phrase ". . . royalties from . . . [or] for the use of or for the privilege of using in the United States . . . copyrights . . . ." 26 U. S. C. § 119 (a) (4).

The reasoning on which this conclusion was based deserves attention.[9] This is the crux of it:

"The taxpayer in these contracts granted the publishers and producers licenses to use in particular

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[9] "In 13 Corpus Juris (1094–1095) it is stated that a copyright is an indivisible thing and can not be split up and partially assigned, either as to time, place, or particular rights or privileges, less than the sum of all the rights comprehended in the copyright; that exclusive rights may, however, be granted, limited as to time, place, or extent of privileges which the grantee may enjoy; and that the better view is that such limited grants operate merely as licenses and not as technical assignments, although often spoken of as assignments. [Citing two lower court cases having to do with procedural questions.]

"It is apparent from the facts in this case that in no instance did the taxpayer assign his literary property in its entirety or his copyright therein, or his indivisible rights therein in granting the serial, the volume, the book, the second serial, the dramatic or motion picture rights to the various contracting parties. The taxpayer in these contracts granted the publishers and producers licenses to use in particular ways his literary property and his copyright therein, and exacted from them certain payments for that use. These were not, and could not be, contracts of sales; they were in fact contracts of license, and the payments for such licenses constituted rentals or royalties subject to tax as such. . . .

". . . Since the grant by the taxpayer in each instance is so clearly the grant of a particular right in all the rights constituting the taxpayer's literary property and copyright, the conclusion is obvious that the grant is a license and not a sale.

. . . . . .

"In Office Decision 988, supra, a grant of all rights of serial publication in the United States in certain literary works was through error said to be a sale. Such a grant could only be a license. Office Decision 988 is accordingly revoked.

"In I. T. 1231, supra, it was stated that there was a sale of serial rights of publication. Since it is held that such a grant could only be a license, I. T. 1231 is modified to accord with the views herein expressed." I. T. 2735, XII–2, Cum. Bull. 131, 134–35 (1933).

ways his literary property and his copyright therein, and exacted from them certain payments for that use. These were not, and could not be, contracts of sales; they were in fact contracts of license, and the payments for such licenses constituted rentals or royalties subject to tax as such. . . .

". . . Since the grant by the taxpayer in each instance is so clearly the grant of a particular right in all the rights constituting the taxpayer's literary property and copyright, the conclusion is obvious that the grant is a license and not a sale.

. . . . . .

"In Office Decision 988, supra, a grant of all rights of serial publication in the United States in certain literary works was through error said to be a sale. Such a grant could only be a license. Office Decision 988 is accordingly revoked." I. T. 2735, XII–2, Cum. Bull. 131, 135 (1933).

Thus it is seen that on the Bureau's earlier construction that the Copyright Law permitted a sale, such proceeds were excluded. O. D. 988, 5 Cum. Bull. 117 (1921). After twelve years the Bureau decided that, as a matter of Copyright Law and not by way of formulating a fiscal policy, there could be no sale of serial rights and that such a transaction had to be treated as a license, periodically producing income. Plainly the Bureau was not interpreting tax law but copyright law. Deference no doubt is due to an administrative body's interpretation of law dealing with its specialty—particularly to interpretations by those whose task it is to administer the Revenue Laws. But the Bureau's expertness does not extend to the Copyright Law. Such matters do not involve the subtleties of tax concepts. The determination rather is like that of a question of common law, and such questions have never been thought to be of a type as to which any degree of finality was given to the ad-

ministrative view. Cf. *Trust of Bingham* v. *Commissioner,* 325 U. S. 365, 377, 381. Under these circumstances the Bureau's determination has little weight, and certainly does not bar this Court from properly construing the Copyright Law, especially where Congress had thoroughly overhauled the tax provisions pertaining to nonresident aliens less than three years after the Bureau ruling was made. As one swallow does not make a summer, this one ruling hardly establishes a practice, and certainly does not disclose a consistency which deserves to be called "long."

Balanced against this one Bureau decision, such as it is, is the significant fact that at the crucial time—in 1936, when Congress devised the present scheme of taxing nonresident aliens—a more authoritative decision was explicitly to the contrary. This was the holding of the Board of Tax Appeals in *Rafael Sabatini,* 32 B. T. A. 705.[10] In the *Sabatini* case the Board held that the lump-sum payments received for exclusive world motion-picture rights were not within § 119 (a) (4). About such proceeds it said:

> "The situation respecting the granting of motion picture rights is quite different from the other rights

[10] In the *Sabatini* case the transfer of the motion-picture rights, as was true of the book rights, took place in England, but the attempt was made to bring the proceeds within § 119 (a) (4) on the ground that the rights were to be exercised in the United States. Since the proceeds from the book rights were tied to use in the United States, they were held to be included within § 119 (a) (4). But the proceeds from the transfer of the motion-picture rights were not included because the proceeds were not tied to a subsequent use in the United States. There, as here, it was urged that the subsequent exploitation of the copyright by the transferee in the United States brought the proceeds within § 119 (a) (4) because it was not possible for the transfer to have been anything other than for the use, rather than the sale, of rights in the copyright. But this contention can rest only on the assumption that a copyright is indivisible.

above discussed. In none of the motion picture contracts did petitioner obtain any income from the reproduction and sale or other use of his writings in the United States as in the case of the Houghton Mifflin Co. and Wagner contracts. Here the granting of rights was made in consideration of a lump sum. The sale of these rights took place in England [citing a case], and there was no subsequent income in the nature of rents or royalties from sources within the United States. We are accordingly of the opinion that the lump sums received by petitioner for the motion picture rights do not come within the statutory definition of income from sources within the United States and are not taxable income." *Rafael Sabatini,* 32 B. T. A. 705, 712–13 (1935), reversed on this point, 98 F. 2d 753, 755 (C. A. 2d Cir. (1938)).[11]

Thus at the time of the adoption of the present § 211 (a) (1) (A) this was the authoritative administrative ruling as to § 119 (a) (4). It is not suggested that knowledge of this ruling must be attributed to Congress, but this ruling refutes the assumption that there was a settled practice the other way. To the extent that it could be considered settled, it was contrary to the Court's account of it. Finally it shows at least that what administrative practice there was could not be considered settled.

After the Board was reversed in the *Sabatini* case, it of course followed the decision of the Court of Appeals.

[11] This reversal of the Board of Tax Appeals did not occur until 1938, two years after Congress had revised the provisions taxing nonresident aliens. In reversing, the Court of Appeals first determined that the transfer of less than all the rights precluded a sale. It then held that the proceeds should be included, admitting however that there "seems to be no direct authority for this view of the meaning of the statute . . . ." *Sabatini* v. *Commissioner,* 98 F. 2d 753, 755 (C. A. 2d Cir.).

The passage of the Internal Revenue Code, including § 211 (a) (1) (A), is hardly a ground for implying legislative adoption of the construction placed on § 119 (a) (4) by the Court of Appeals for the Second Circuit. *Helvering* v. *Hallock,* 309 U. S. 106, 120–21, n. 7. When the entirely distinct problem involved in § 211 (a) (1) (A) came before the Court of Appeals for the Second Circuit, it based its decision on the determination that the proceeds were for the use of the copyright rather than a sale.[12] That decision, like the *Sabatini* case, was based primarily on the doctrine of the indivisibility of a copyright.[13] When that doctrine is rejected, it has been held to follow, as we have seen, that the proceeds are not included. That was the basis of decision in the Fourth Circuit, now under review. Moreover, the Court of Appeals for the Second Circuit has reached a result contrary to its copyright cases when dealing with the proceeds from the transfer of some but not all of the rights conferred by the patent

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[12] This case was not decided until 1946. *Rohmer* v. *Commissioner,* 153 F. 2d 61 (C. A. 2d Cir.). *Molnar* v. *Commissioner,* 156 F. 2d 924 (C. A. 2d Cir.), is not such a case. The court there dealt solely with the apportionment problem involved in computing taxpayer's income when the copyright was to be used in both the United States and other parts of the world.

[13] In *Rohmer* v. *Commissioner,* 153 F. 2d 61 (C. A. 2d Cir.), the court said: "Where a copyright owner transfers to any particular transferee substantially less than the entire 'bundle of rights' conferred by the copyright, then payment therefor, whether in one sum or in several payments, constitutes royalties within the meaning of § 211 (a) (1) (A). For such a transfer is the grant of a license. Payment for the grant of such a license is measured by reference to the future use or expected use of the license by the licensee . . . . It is like interest paid for several years." P. 63. That the doctrine of indivisibility determined decision appears from *Standard Oil Co.* v. *Clark,* 163 F. 2d 917, 936, 939 (C. A. 2d Cir.). The decision in *Sabatini* v. *Commissioner,* 98 F. 2d 753, 755 (C. A. 2d Cir.), also turned on the doctrine of the indivisibility of a copyright.

statute.[14] It did so despite the fact that the term "royalties" includes proceeds for the use of patents, 26 U. S. C. § 119 (a) (4), and that, as will be seen, the theory of the indivisibility of a copyright had its genesis in a doctrine first applied in the patent field.

5. Thus we are brought to the question which the Treasury, the courts and the parties here have regarded as determinative of this controversy: may serial rights under a copyright be sold in law as they constantly are sold in the literary market? Specifically, is there some inherent obstacle of law which precludes the sale of such serial rights from having the usual incidents of a commercial sale? If it were impossible to make a sale, then the proceeds arguably are "royalties" because in that event the transfer can have been only for the use. There would still remain the difficulty of getting the lump-sum payments within the reasonable meaning of § 211 (a) (1) (A). For, it is fair to recall, § 119 (a) (4) would only determine whether the payment is from a source within the United States, not whether it is taxable. There would be the further difficulty of calling a payment a "royalty" when its amount bears only that relation to the future proceeds obtained by the transferee in exploiting the literary product as would be reflected in the purchase price of any income-producing property. If, on the other hand, the valuable right that, commercially speaking, was in fact sold, may as a matter of law also be treated as a sale, the proceeds would not be included. This conclusion, derived from a reading of § 211 (a) (1) (A), is made explicit by the Regulations and the House and Senate Reports. See *ante,* pp. 410–411.

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[14] *General Aniline & Film Corp.* v. *Commissioner,* 139 F. 2d 759 (C. A. 2d Cir.); see also *Commissioner* v. *Celanese Corp.,* 78 U. S. App. D. C. 292, 140 F. 2d 339. Both cases are under § 143 (b), the section with which § 211 (a) (1) (A) was made coterminous.

The notion that the attributes of literary property are by nature indivisible and therefore incapable of being sold separately, is derived from a misapplication by lower courts of two early cases in this Court. These were concerned with the right of the transferee of less than all the rights conferred by a patent to sue an infringer. The inherent nature of the interests in intellectual property and their commercial negotiability were not involved. The Court determined the procedural problem before it so that the infringer would not "be harassed by a multiplicity of suits instead of one," and would be not subjected to "successive recoveries of damages by different persons holding different portions of the patent right in the same place." *Gayler* v. *Wilder,* 10 How. 477, 494–95 (U. S. 1850); *Waterman* v. *Mackenzie,* 138 U. S. 252, 255. But in its bearing on the procedural point, one of these cases recognized the saleability of less than all of the patented rights so long as the transfer consisted of at least one of the three rights separately listed in the patent statute. *Waterman* v. *Mackenzie, supra.*

We thus find scant illumination of the intrinsic and legal nature of property rights in a copyright in the procedural analysis of these cases. Keener insight into such rights has been given by Mr. Justice Holmes in a case involving substantive questions in the law of copyrights:

> "The notion of property starts, I suppose, from confirmed possession of a tangible object and consists in the right to exclude others from interference with the more or less free doing with it as one wills. But in copyright property has reached a more abstract expression. The right to exclude is not directed to an object in possession or owned, but is *in vacuo,* so to speak. It restrains the spontaneity of men where but for it there would be nothing of any kind to hinder their doing as they saw fit. It is a pro-

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> hibition of conduct remote from the persons or tangibles of the party having the right. It may be infringed a thousand miles from the owner and without his ever becoming aware of the wrong. It is a right which could not be recognized or endured for more than a limited time, and therefore, I may remark in passing, it is one which hardly can be conceived except as a product of statute, as the authorities now agree." *White-Smith Music Co.* v. *Apollo Co.*, 209 U. S. 1, 18, 19; see also Learned Hand, J., in *Photo Drama Motion Picture Co.* v. *Social Uplift Film Corp.*, 213 F. 374, 378 (S. D. N. Y.).

The "right to exclude others from interference with the more or less free doing with it as one wills" is precisely the right that Wodehouse transferred to Curtis. To the extent that the Copyright Law gave Wodehouse protection in the United States, he transferred all he had in property of considerable value—the serial rights in his novels—and Curtis acquired all of it. For the duration of the monopoly granted by the Copyright Law, Curtis could assert the monopoly against the whole world, including Wodehouse himself.

Nothing in the law of copyrights bars or limits sale of any one of the numerous exclusive rights conferred by the various subdivisions of § 1. Congress has not disallowed such sales and nothing in the due enforcement of the Copyright Law suggests their disallowance. Quite the contrary. See II Ladas, The International Protection of Literary and Artistic Property, pp. 775–792 (1938). The scheme and details of the Copyright legislation manifest a separate treatment of the various exclusive rights conferred by the statute. 61 Stat. 652, 17 U. S. C. §§ 1 *et seq.* It segregates these rights into sepa-

rately numbered paragraphs.[15] In each paragraph there is listed, in the alternative, a more detailed subdivision of the various rights. Each of these rights is substantial and exists separately from the others,[16] and has of course

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[15] Section one of the Copyright Law provides:

"§ 1. EXCLUSIVE RIGHTS AS TO COPYRIGHTED WORKS.—Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right:

"(a) To print, reprint, publish, copy, and vend the copyrighted work;

"(b) To translate the copyrighted work into other languages or dialects, or make any other version thereof, if it be a literary work; to dramatize it if it be a nondramatic work; to convert it into a novel or other nondramatic work if it be a drama; to arrange or adapt it if it be a musical work; to complete, execute, and finish it if it be a model or design for a work of art;

"(c) To deliver or authorize the delivery of the copyrighted work in public for profit if it be a lecture, sermon, address, or similar production;

"(d) To perform or represent the copyrighted work publicly if it be a drama or, if it be a dramatic work and not reproduced in copies for sale, to vend any manuscript or any record whatsoever thereof; to make or to procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, performed, represented, produced, or reproduced; and to exhibit, perform, represent, produce, or reproduce it in any manner or by any method whatsoever; and

"(e) To perform the copyrighted work publicly for profit if it be a musical composition; and for the purpose of public performance for profit, and for the purposes set forth in subsection (a) hereof, to make any arrangement or setting of it or of the melody of it in any system of notation or any form of record in which the thought of an author may be recorded and from which it may be read or reproduced: . . . ." 61 Stat. 652, 17 U. S. C. § 1.

[16] "A man having general statutory dramatic rights like Kauffman might make a play and perform it under his common-law rights without publication, or he might copyright the play, and he would still not have copyrighted or published his moving picture rights. If he wrote such a scenario and made his film, he could get a separate copyright upon that. Of course, he could sell his statutory or com-

been considered a property right. See *Photo Drama Motion Picture Co.* v. *Social Uplift Film Corp.*, 213 F. 374, 377 (S. D. N. Y.); see Fulda, *Copyright Assignments and the Capital Gains Tax*, 58 Yale L. J. 245, 256 (1949). Moreover, the Copyright Office will record these partial assignments, thus protecting the transferee and thereby increasing the marketability of the separate rights. 61 Stat. 652, 17 U. S. C. § 30; see *Photo Drama Motion Picture Co.* v. *Social Uplift Film Corp.*, 213 F. 374, 376–377; see II Ladas, The International Protection of Literary and Artistic Property, p. 802 (1938).

Only the other day the House of Lords, dealing with a similar copyright law, held that the sums received from the transfer of the motion-picture rights in a novel were proceeds from a sale of property rather than a license and therefore not taxable as "annual profits or gains." *Withers* v. *Nethersole*, [1948] 1 All E. R. 400. There was there, as here, the need to determine if the proceeds were from a sale. The taxpayer had transferred for ten years "the sole and exclusive motion picture rights throughout the world." The House of Lords held that the proceeds were not "annual profits or gains" since the transaction was an outright sale, not a license to

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mon-law copyright of the play and keep the moving picture copyright, or he could sell each.

"It seems to me clear that, if he could do this, he could sell separately the right to dramatize and the right to make a moving picture play, dividing his statutory dramatizing rights, and thus giving each assignee the right when he had exercised those rights to get his own copyright for a drama, or for a moving picture show." Learned Hand, J., in *Photo Drama Motion Picture Co.* v. *Social Uplift Film Corp.*, 213 F. 374, 377 (S. D. N. Y.). See also *Withers* v. *Nethersole*, [1948] 1 All E. R. 400. "The effect of a partial assignment of copyright for a period less than the whole term is not to create any new right, but only to divide the existing right. In the result, there are two separate owners each with a distinct property. Neither holds under the other." At p. 404.

use the copyright. This portion of the late Lord Uthwatt's judgment is especially pertinent:

> "The fact that the same commercial result as that produced by the assignment might equally well have been achieved by an appropriately worded licence is irrelevant. It is irrelevant that the consideration may be assumed to represent the value of the whole copyright so far as it relates to motion pictures for a period of years, but the consideration was paid, not in respect of the temporary use of another's property, but for the purchase of property with a limited life. The taxpayer may have exploited her property, but she did so only by dividing it and selling part of it. . . . The relevant fact is that an owner of an asset, entitled by law to divide it into two distinct assets, has done so by selling one of those assets for an agreed consideration payable in a lump sum. A sale, not in the way of trade, of an asset does not attract tax on the consideration. Whatever else comes within the ambit of annual profits and gains, the consideration received by the taxpayer does not." *Withers* v. *Nethersole,* [1948] 1 All E. R. 400, 405.

I am not suggesting that the decision of the House of Lords requires our concurrence. To pass it over in silence, however, is not to answer it.

Another case likewise deserves attention. In the Second Circuit, interestingly enough, it was held that a transfer of exclusive motion-picture rights was "a sale" of a "capital asset" for the purpose of § 117. *Goldsmith* v. *Commissioner,* 143 F. 2d 466 (C. A. 2d Cir.). But if the transfer was a sale of a capital asset, it could not also have been within § 211 (a) (1) (A). See S. Rep. No. 2156, 74th Cong., 2d Sess., p. 21 (1936); H. R. Rep. No. 2475, 74th Cong., 2d Sess., pp. 9–10 (1936).

To treat the transfer of any one of the various rights conferred by the Copyright Law as a sale would accord not only with analysis of their essential character and the scheme of the Copyright Law, but with the way these rights are treated by authors and purveyors of products of the mind for whose protection the Copyright Law was designed because of the belief that the interests of society would be furthered. The various exclusive rights have different attributes and therefore different significance. For that reason they may be sold separately and form the basis for a new copyright. The author "could sell separately the right to dramatize and the right to make a moving picture play." *Photo Drama Motion Picture Co.* v. *Social Uplift Film Corp.,* 213 F. 374, 377 (S. D. N. Y.), aff'd, 220 F. 448. See as to the commercial practice, Fulda, *Copyright Assignments and the Capital Gains Tax,* 58 Yale L. J. 245, 253–54 (1949); see also Ladas, The International Protection of Literary and Artistic Property, *passim* (1938).

Thus it would seem as a matter of legal doctrine that where a person transfers absolutely to another, under terms of payment which do not depend on future use by the transferee, a distinct right conferred by the Copyright Law granting the transferee a monopoly in all the territory to which the Copyright Law itself extends, legal doctrine should reflect business practice in recognizing that the proceeds are from "the sale of personal property," rather than amounts received as "fixed or determinable annual or periodical gains, profits, and income."

It is argued that Congress doubtless intended to tax an alien author for the proceeds of a sale of serial rights, because such proceeds are taxable to an American author. By this mode of reasoning the Court ought to hold that since an American author is taxed when he sells all his rights, the proceeds derived by an alien author from the

sale of all his rights in this country are also taxable for that is a much larger source of potential revenue. Yet Congress has chosen not to tax the alien author for such larger income than is received from the sale merely of serial rights, although the native author is so taxed. It is for Congress to make differentiations between alien and American authors and we should respect the differentiations Congress has made for the sale both of serial and total rights as between alien and American authors. The need for revenue is no justification for warping the provisions of the 1936 legislation to deny immunity from taxation to a nonresident alien author for the entire transfer of some of the property interests explicitly conferred by § 1, particularly in view of the fact that Congress knowingly chose to leave untouched the more sizeable source of revenue available where the nonresident alien sells all the rights conferred by § 1. Wodehouse made an absolute transfer of some of those rights. He did not receive royalties but instead gave up that chance in return for a lump sum, just as the seller of a house gives up the right to receive rent in return for the purchase price. That transaction can only be regarded as a sale. As the revenue laws now stand, it was nontaxable.

I would affirm the judgment below.

# UNITED STATES *v.* INTERSTATE COMMERCE COMMISSION ET AL.

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

No. 330. Argued March 2, 1949.—Decided June 20, 1949.

The United States, as a shipper, having undertaken to provide wharfage and handling services at certain piers, requested the railroads to make an allowance for expenses thus incurred, since the shipside rates allegedly included charges for wharfage and handling services. The railroads refused to make an allowance and to perform the services. The United States thereupon filed with the Interstate Commerce Commission a complaint alleging that, in refusing to make an allowance for wharfage and handling services, the railroads had exacted payment of rates which were unreasonable, unjustly discriminatory, and otherwise in violation of the Interstate Commerce Act, and asking that the Commission find the charges unlawful and award the Government reparations. The Commission denied reparations and ordered the complaint dismissed. The United States then sued in the District Court to set aside the Commission order. The Interstate Commerce Commission and the United States itself were made defendants. The District Court, composed of three judges, dismissed the suit. On direct appeal to this Court, *held:* The dismissal of the suit was error and the case should have been considered on its merits. Pp. 428–430.

1. Although the case be that of *United States* v. *United States et al.*, the principle that a person may not maintain an action against himself is inapplicable, since there are involved here controversies of a type which are traditionally justiciable. Pp. 430–431.

2. Provisions of law making the United States a statutory defendant in court actions challenging Commission orders do not evidence a congressional purpose to bar the Government from challenging such orders. Pp. 431–432.

(a) Congress did not intend to make it impossible for the Government to press a just claim which could be vindicated only by challenging a Commission order in Court. P. 431.

(b) However anomalous it may be for the Attorney General to appear on both sides of the same controversy, nothing in the

Interstate Commerce Act indicates a congressional purpose to amend prior statutes which imposed primary responsibility on the Attorney General to seek judicial redress for the Government. Pp. 431–432.

(c) The Interstate Commerce Act contains adequate provisions for protection of Commission orders by the Commission and by the railroads when, as here, they are the real parties in interest; and the Commission and the railroads in this case have availed themselves of the statutory authorization. P. 432.

3. The District Court had jurisdiction of the action under 28 U. S. C. § 41 (28) [now § 1336], and that jurisdiction was not barred in this case by § 9 of the Interstate Commerce Act, 49 U. S. C. § 9. Pp. 432–440.

(a) Section 9 does not give complete finality to a Commission order merely because a shipper elected to file a complaint with the Commission. Pp. 433–440.

(b) A Commission order dismissing a shipper's claim for damages under 49 U. S. C. § 9 is an "order" subject to challenge under 28 U. S. C. § 41 (28) [now § 1336]. Pp. 440–441.

4. Judicial review of a Commission order denying reparations does not require a three-judge court. Pp. 441–443.

5. The fact that this case was heard and determined by a District Court of three judges, rather than by one judge, does not require dismissal here; and the cause is remanded to the District Court for determination on the merits of the allegations of the complaint. Pp. 443–444.

78 F. Supp. 580, reversed.

A District Court of three judges dismissed a suit brought by the United States to set aside an order of the Interstate Commerce Commission (269 I. C. C. 141) denying an award of reparations to the Government as a shipper. 78 F. Supp. 580. The United States took a direct appeal to this Court. *Reversed and remanded,* p. 444.

*Stanley M. Silverberg* and *David O. Mathews* argued the cause for the United States. With them on the brief were *Solicitor General Perlman, Assistant Attorney General Bergson* and *Philip Elman.*

*Daniel W. Knowlton* argued the cause and filed a brief for the Interstate Commerce Commission, appellee.

*Windsor F. Cousins* argued the cause for the Pennsylvania Railroad Co. et al., appellees. With him on the brief were *Hugh B. Cox, Robert C. Barnard, Charles P. Reynolds* and *Charles Clark.*

MR. JUSTICE BLACK delivered the opinion of the Court.

It is contended here that the United States as a shipper is barred from challenging in federal courts an Interstate Commerce Commission order which denies the Government a recovery in damages for exaction of an allegedly unlawful railroad rate. Other contentions if sustained would deny federal courts all power to entertain an action by any shipper challenging a Commission order denying damages to the shipper.

During the war, existing tariffs of many railroads embodied wharfage charges to compensate the railroads for moving goods from railroad cars to piers and from piers to railroad cars. When the United States took over certain piers at Norfolk, Virginia, it began to perform these wharfage services for itself and requested the railroads to make the United States an allowance for the expenses incurred in performing the services. The railroads refused to make an allowance. Upon this refusal the Government requested the railroads to perform the services themselves. The railroads refused to perform the services.

The United States filed with the Interstate Commerce Commission a complaint against the railroads charging that exaction of pay for unperformed services was unjust, unreasonable, discriminatory, excessive, and in violation of certain sections of the Interstate Commerce Act.[1] The

[1] 49 U. S. C. §§ 1 (5) (a), 1 (6), 2, 6 (8), 15 (13).

complaint asked the Commission to find the charges unlawful. Further relief asked, under the Interstate Commerce Act,[2] was that the Government be awarded damages (reparations) on account of the alleged unlawful exactions. The Commission found that the charges were not unjustly discriminatory, unreasonable, or otherwise in violation of the Act. Accordingly, the Commission denied reparations and ordered the complaint dismissed. *United States* v. *Aberdeen & Rockfish R. Co.*, 269 I. C. C. 141 (1947).

The United States brought this action in a United States District Court to set aside the Commission order. The complaint charged that the Commission's conclusions were not supported by its findings, that the findings were not supported by any substantial evidence, that the order was based on a misapplication of law and was "otherwise arbitrary, capricious and without support in and contrary to law and the evidence." The Interstate Commerce Commission was made a defendant. The United States was also made a defendant because of a statutory requirement that any action to set aside an order of the Interstate Commerce Commission "shall be brought . . . against the United States." 28 U. S. C. (1946 ed.) § 46, now § 2322. Railroads that collected the wharfage charges intervened as defendants under authority of 28 U. S. C. (1946 ed.) § 45a, now § 2323. The Attorney General appeared for the Government as both plaintiff and defendant. Without reaching the merits of the case, the District Court composed of three judges dismissed the cause on the theory that the Government could not maintain a suit against itself. The court also indicated its belief that a three-judge court was without jurisdiction

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[2] 49 U. S. C. §§ 8, 9. The complaint also sought relief from future exactions, but prior to the Commission's final order the piers were returned to private ownership and this prayer was abandoned.

of the suit. 78 F. Supp. 580. The case is here on direct appeal under 28 U. S. C. (1946 ed.) § 47a, now § 1253.

In this Court the Commission and the railroad intervenor defendants support the District Court's dismissal for the reasons given by that court. Alternative reasons are also urged. We hold that the dismissal was error and that the case should have been considered on its merits.

*First.* There is much argument with citation of many cases to establish the long-recognized general principle that no person may sue himself. Properly understood the general principle is sound, for courts only adjudicate justiciable controversies. They do not engage in the academic pastime of rendering judgments in favor of persons against themselves. Thus a suit filed by John Smith against John Smith might present no case or controversy which courts could determine. But one person named John Smith might have a justiciable controversy with another John Smith. This illustrates that courts must look behind names that symbolize the parties to determine whether a justiciable case or controversy is presented.

While this case is *United States* v. *United States, et al.,* it involves controversies of a type which are traditionally justiciable. The basic question is whether railroads have illegally exacted sums of money from the United States. Unless barred by statute, the Government is not less entitled than any other shipper to invoke administrative and judicial protection. To collect the alleged illegal exactions from the railroads the United States instituted proceedings before the Interstate Commerce Commission. In pursuit of the same objective the Government challenged the legality of the Commission's action. This suit therefore is a step in proceedings to settle who is legally entitled to sums of money, the Government or the railroads. The order if valid would defeat the Government's claim to that

money. But the Government charged that the order was issued arbitrarily and without substantial evidence. This charge alone would be enough to present a justiciable controversy. *Chicago Junction Case,* 264 U. S. 258, 262–266. Consequently, the established principle that a person cannot create a justiciable controversy against himself has no application here.

*Second.* It is contended that the provisions of the Act making the Government a statutory defendant in court actions challenging Commission orders, show a congressional purpose to bar the Government from challenging such orders. Legislative history is cited in support of this contention. If the contention be accepted, Congress by making the Government a statutory defendant in such cases has deprived the United States as a shipper of powers of self-protection accorded all other shippers. We cannot agree that Congress intended to make it impossible for the Government to press a just claim which could be vindicated only by a court challenge of a Commission order. See *United States* v. *San Jacinto Tin Co.,* 125 U. S. 273, 279.

In support of their contention that Congress did not intend for the Government to press its claims as a shipper, the Commission and railroads emphasize the anomaly of having the Attorney General appear on both sides of the same controversy. However anomalous, this situation results from the statutes defining the Attorney General's duties. The Interstate Commerce Act requires the Attorney General to appear for the Government as a statutory defendant in cases challenging Commission orders. 28 U. S. C. (1946 ed.) § 45a, now § 2323. The Attorney General is also under a statutory duty "to determine when the United States shall sue, to decide for what it shall sue, and to be responsible that such suits shall be brought in appropriate cases." *United States* v. *San Jacinto Tin Co.,* 125 U. S. 273, 279. See also *United*

*States* v. *California,* 332 U. S. 19, 26–29. Nothing in the Interstate Commerce Act indicates a congressional purpose to amend prior statutes which had imposed primary responsibility on the Attorney General to seek judicial redress for the Government.

Although the formal appearance of the Attorney General for the Government as statutory defendant does create a surface anomaly, his representation of the Government as a shipper does not in any way prevent a full defense of the Commission's order. The Interstate Commerce Act contains adequate provisions for protection of Commission orders by the Commission and by the railroads when, as here, they are the real parties in interest. For, whether the Attorney General defends or not, the Commission and the railroads are authorized to interpose all defenses to the Government's charges and claims that can be interposed to charges and claims of other shippers. In this case the Commission and the railroads have availed themselves of this statutory authorization. They have vigorously defended the legality of the allowances and the validity of the Commission order at every stage of the litigation.

*Third.* 28 U. S. C. (1946 ed.) § 41 (28)[3] provides that "The district courts shall have original jurisdiction . . . Of cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission." The legal consequences of this order if upheld will finally relieve the railroad of any obligations to the Government on account of the alleged unlawful

[3] The substance of 28 U. S. C. § 41 (28) of the 1946 United States Code now appears as § 1336 of the 1948 Code. The provision for judicial review of Interstate Commerce Commission orders first appeared in 1910 in an Act creating the Commerce Court. 36 Stat. 539. Congress abolished the Commerce Court in 1913 and transferred to district courts the Commerce Court's jurisdiction to review Commission orders. Urgent Deficiencies Act, 38 Stat. 208, 219–220.

charges; the order thus falls squarely within the type made subject to judicial review by § 41 (28). *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125, 131–132, 142–143; *El Dorado Oil Works* v. *United States,* 328 U. S. 12, 18–19.

The Commission and the railroads contend, however, that § 9 of the Interstate Commerce Act, 49 U. S. C. § 9, bars the United States or any other shipper from judicial review of an order denying damages in reparation proceedings initiated before the Commission. Section 9 provides in part:

> "Any person or persons claiming to be damaged by any common carrier . . . may either make complaint to the commission . . . or may bring suit . . . for the recovery of the damages . . . in any district court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt."

The contention of the Commission and the railroads as to § 9 is this. A shipper has an alternative. He may bring his action before the Commission or before the courts. But he must make an election. If he elects to "bring suit" in a court and is unsuccessful, he retains the customary right of appellate review. If he elects to "make complaint to" the Commission, as the Government did, and relief is denied, he is said to be barred by the statutory language of § 9 from seeking any judicial review of the Commission order. Under the contention the order is final and not reviewable by any court even though entered arbitrarily, without substantial supporting evidence, and in defiance of law.

Such a sweeping contention for administrative finality is out of harmony with the general legislative pattern of

administrative and judicial relationships.[4] See, e. g., *Shields* v. *Utah I. C. R. Co.*, 305 U. S. 177, 181–185; *Stark* v. *Wickard*, 321 U. S. 288, 307–310. And this Court has consistently held Commission orders reviewable upon charges that the Commission had exceeded its lawful powers. See, e. g., *Interstate Commerce Commission* v. *Louisville & N. R. Co.*, 227 U. S. 88, 91–93; *Chicago Junction Case*, 264 U. S. 258, 266. The language of § 9 does not suggest an abandonment of these consistent holdings. It does suggest that a shipper who elects either to "make complaint to" the Commission or to "bring suit" in a court is thereafter precluded from initiating a § 9 proceeding in the other. It may therefore be assumed that after a shipper has elected to initiate a Commission proceeding for damages he could not later initiate an original district court action for the same damages. But forfeiture of the right to *initiate* his claim in the court under § 9 is one thing; forfeiture of his right under 28 U. S. C. (1946 ed.) § 41 (28), now § 1336, to obtain judicial review of an unlawful Commission order is another. Section 9's language controls the forum in which reparation claims may be begun and tried to judgment or order; it does not purport to give complete finality to a court judgment or to a Commission order merely because

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[4] The Administrative Procedure Act, 60 Stat. 237, 243, 5 U. S. C. §§ 1001 (d), 1009, provides:

"Sec. 2. . . . (d) Order and Adjudication.—'Order' means the whole or any part of the final disposition (whether affirmative, negative, injunctive, or declaratory in form) of any agency in any matter other than rule making but including licensing. 'Adjudication' means agency process for the formulation of an order."

"Sec. 10. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

"(a) Right of review.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof."

a shipper elected to proceed in one forum rather than the other. So we can find nothing in the language of § 9 that bars a court from reviewing a reparation order upon allegations by a shipper that the order was entered in defiance of standards established by Congress to determine when reparations are due.

Furthermore, the section's careful provision for judicial protection of railroads against improper Commission awards argues against interpretation of the same section to deny to shippers any judicial review whatever. Under the suggested interpretation a shipper could recover nothing if the Commission decided against him. But a Commission award favorable to a shipper is not final or binding upon the railroad. Such an award "only establishes a rebuttable presumption. It cuts off no defense, interposes no obstacle to a full contestation of all the issues, and takes no question of fact from either court or jury. . . . Nor does it in any wise work a denial of due process of law." *Meeker & Co.* v. *Lehigh Valley R. Co.*, 236 U. S. 412, 430. And see *Pennsylvania R. Co.* v. *Weber*, 257 U. S. 85, 90–91. It hardly seems possible to find from the language of § 9 a congressional intent to guarantee railroads complete judicial review of adverse reparation orders while denying shippers any judicial review at all.

What we have said would dispose of the § 9 contention but for the argument of the Commission and the railroads that their suggested interpretation of the section is required by this Court's holding in *Standard Oil Co.* v. *United States*, 283 U. S. 235, and other cases that followed it. In that case the Standard Oil Co., a shipper, was denied the right to judicial review of a Commission order denying reparations. Judicial review was denied on four grounds: (1) The order in the *Standard Oil* case denying reparations was "negative" in form, and was therefore beyond judicial appraisal under the

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"negative order" doctrine. This doctrine was wholly abandoned in *Rochester Tel. Corp.* v. *United States,* 307 U. S. 125. (2) The decision in the *Standard Oil* case held that the Commission order was supported by substantial evidence and was not otherwise in violation of law. The Government's claim here is that this order cannot meet that test. (3) The third ground for denial of judicial review was that having elected to test its damage claim before the Commission, Standard was precluded from judicial review. (4) A three-judge court was an improper tribunal to adjudicate damage claims under § 9.

The *Standard Oil* interpretation of § 9 denying shippers any judicial review was made by a court usually careful to protect against arbitrary or unlawful administrative action. And, as shown, the court there first satisfied itself that the Commission order was not the product of an unlawful exercise of power by the Commission. Furthermore, the "negative order" philosophy, then at its peak, clearly barred review of all orders denying reparations. Consequently, the *Standard Oil* § 9 interpretation barred judicial review of no class of Commission orders except orders already immune from such review under the "negative order" doctrine. The *Standard Oil* holding was thus clearly supported by and rooted in the now rejected "negative order" doctrine.[5]

Another reason for the Court's construction of § 9 in the *Standard Oil* case was that Standard's damage claim

[5] Mr. Justice Cardozo so treated the *Standard Oil* holding in *I. C. C.* v. *United States,* 289 U. S. 385, 388, a case decided prior to this Court's repudiation of the "negative order" doctrine. He there said that in denying reparations "the Commission speaks with finality. Its orders purely negative—negative in form and substance—are not subject to review by this court or any other." Authorities for this statement were "negative order" cases. These same cases were relied on by the court in a later case that referred with approval to the *Standard Oil* § 9 interpretation. *Terminal Warehouse Co.* v. *Pennsylvania R. Co.,* 297 U. S. 500, 507–508.

could have been adjudicated by a district court since it involved no question as to reasonableness of rates that called for exercise of the Commission's primary jurisdiction. The importance of this factor was emphasized by this Court in applying the *Standard Oil* construction of § 9 in *Baltimore & O. R. Co.* v. *Brady,* 288 U. S. 448, 457–459. First pointing out that there was no question in that case "requiring the exercise of the Commission's administrative powers," the Court said:

> "It is to be remembered that, by electing to call on the Commission for the determination of his damages, plaintiff waived his right to maintain an action at law upon his claim. But the carriers made no such election. Undoubtedly it was to the end that they be not denied the right of trial by jury that Congress saved their right to be heard in court upon the merits of claims asserted against them. The right of election given to a claimant reasonably may have been deemed an adequate ground for making the Commission's award final as to him."

And see *Terminal Warehouse Co.* v. *Pennsylvania R. Co.,* 297 U. S. 500, 507–508.

Thus, a crucial support for the Court's holding in the *Standard Oil* and *Brady* cases was that the shippers in those cases could have commenced original § 9 actions in the district court. But it has been established doctrine since this Court's holding in *Texas & P. R. Co.* v. *Abilene Oil Co.,* 204 U. S. 426, that a shipper cannot file a § 9 proceeding in a district court where his claim for damages necessarily involves a question of "reasonableness" calling for exercise of the Commission's primary jurisdiction.[6] The Government's claim here does involve such a question of "reasonableness." For the allowances

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[6] See cases collected in *Rochester Tel. Corp.* v. *United States,* 307 U. S. 125, 139, n. 22, and *Armour & Co.* v. *Alton R. Co.,* 312 U. S. 195; *Skinner & Eddy Corp.* v. *United States,* 249 U. S. 557, 562.

exacted from the Government were authorized in the railroads' published tariffs and were therefore not unlawful unless "unreasonable." Consequently the Government here had no "right of election" between Commission and court that could be "deemed an adequate ground for making the Commission's award final . . . ." *Baltimore & O. R. Co.* v. *Brady, supra,* at 458.[7]

*Ashland Coal Co.* v. *United States,* 325 U. S. 840, is the only case in this Court that relied on the *Standard Oil* decision after we had abandoned the "negative order" doctrine. Cf. *Allison & Co.* v. *United States,* 296 U. S. 546. And it is doubtful if the shipper in the *Ashland Coal Co.* case could have sought reparations in a district court under the "primary jurisdiction" doctrine. In affirming without argument the judgment of a three-judge court in the *Ashland Coal Co.* case, this Court's *per curiam* opinion cited two pages of the *Standard Oil* opinion that support the interpretation of § 9 urged here by the Commission and railroads. It is a fair inference that the pages were cited for that interpretation although other grounds for the Court's decision also appear there. One such ground was that a three-judge court is an improper

[7] The Commission argues that § 9 does authorize a shipper to initiate damage claims in a district court even though the claim necessarily involves questions upon which the Commission's primary jurisdiction must be invoked. The railroads more cautiously say that such suits can be filed upon an initial showing by a shipper that it might work a hardship on a shipper for the court to refuse to entertain the case. Both contentions run counter to this Court's previous cases. Particular circumstances were held sufficient in one case to justify a court in staying further judicial proceedings to await Commission action. *Mitchell Coal Co.* v. *Pennsylvania R. Co.,* 230 U. S. 247, 266–267. The same course was followed in another case, over the Commission's objection, where the action was in assumpsit, and the administrative problem did not emerge until the case was in course of litigation. *Tank Car Corp.* v. *Terminal Co.,* 308 U. S. 422, 432.

tribunal for the review of such Commission orders. Another ground was that there was "nothing to suggest that the Commission acted arbitrarily or without evidence to support its conclusions, or that it transcended its constitutional or statutory powers." The three-judge district court in the *Ashland* case in sustaining the Commission order had also held that a three-judge court was not a proper tribunal and that the Commission order was supported by substantial evidence and was in accordance with law. *Ashland Coal & Ice Co.* v. *United States,* 61 F. Supp. 708, 713.

We cannot accept the *Ashland Coal Co. per curiam* holding nor the *Standard Oil* case on which it rested as requiring the interpretation of § 9 which the railroads and Commission here urge. Our acceptance of that interpretation would mean that a shipper who submitted to the Commission only a question of the reasonableness of rates could have an adverse order reviewed by a court, *Skinner & Eddy Corp.* v. *United States,* 249 U. S. 557, 562–563, while a shipper who asked for that administrative determination plus reparations could get no judicial review at all. *Terminal Warehouse Co.* v. *Pennsylvania R. Co., supra,* at 507–508. On any ground except the now discarded "negative order" doctrine, this would appear to be an unsupportable and totally illogical limitation of the congressional command for judicial review.[8] See *Chicago*

[8] The "negative order" doctrine was first adopted by this Court in *Procter & Gamble* v. *United States,* 225 U. S. 282, decided in 1912. A shipper there brought action in the Commerce Court to set aside a Commission order dismissing the shipper's complaint. The complaint was that the charges were unjust and unreasonable. The Commerce Court was asked to annul the Commission's order of dismissal, to enjoin future collection of the charges, and to require the railroads to repay sums alleged to have been wrongfully collected from the shipper. The Commerce Court reviewed the action of the Commission and on the merits declined to grant the shipper the re-

*Junction Case,* 264 U. S. 258, 269–270; *Southern R. Co.* v. *Tift,* 206 U. S. 428, 440. Accordingly we hold that § 9 does not impair the right of shippers to obtain judicial review of adverse Commission orders under § 41 (28) merely because the order is sought as a basis for reparations.

*Fourth.* For reasons already stated we hold that a Commission order dismissing a shipper's claim for dam-

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quested relief. This Court held that this "negative" order was not reviewable at the instance of the shipper. The Court's ruling brought sharp criticism in Congress. Corrective legislation was proposed, exhaustive committee hearings were held, debate was taken to the floor of Congress. In spite of the strenuous efforts to get Congress to repudiate the "negative order" doctrine, Congress in 1913 declined to act. But in all of the congressional hearings and debates on the subject, the critics of the *Procter & Gamble* "negative order" rule urged without contradiction that repudiation of the "negative order" rule would afford shippers the same judicial review of reparation and other orders then afforded to railroads. Not once do we find the argument suggested that 49 U. S. C. § 9 would bar shippers from judicial review of adverse reparation orders by the Commission, although this section was at the time part of the original Interstate Commerce Act, enacted in 1887, more than a quarter of a century before this congressional consideration.

This Court nevertheless abandoned the "negative order" doctrine in 1938, and in doing so effectively overruled a host of prior decisions. See cases collected in footnote to Mr. Justice Butler's opinion in the *Rochester* case, 307 U. S. 146, 148. The effect of today's decision is merely to recognize that the *Standard Oil* doctrine, barring judicial review to shippers, cannot stand consistently with the *Rochester* case which itself overruled the *Procter & Gamble* and other "negative order" decisions. It was therefore the *Rochester* case, not today's decision, that overruled a line of cases and granted relief where Congress had declined to afford any. H. R. Rep. No. 1012, 62d Cong., 2d Sess. 1–4 (1912); Hearings before the subcommittee of the Senate Committee on Appropriations on H. R. 7898, 63d Cong., 1st Sess. 140–148 (1913); Hearings before the subcommittee of the Senate Committee on Appropriations on H. R. 7898, 63d Cong., 1st Sess. 305–343 (1913); Hearings before the House Committee on Interstate and Foreign Commerce on H. R. 25596 and H. R. 25572, 62d Cong., 2d Sess. 1–298 (1912); 50 Cong. Rec. 4532–4537, 4542–4545 (1913).

ages under 49 U. S. C. § 9 is an "order" subject to challenge under 28 U. S. C. (1946 ed.) § 41 (28). The remaining question is whether a district court entertaining such a challenge shall be composed of one judge or three judges and whether the judgment of a district court in such a case can be appealed directly to this Court.

The Urgent Deficiencies Act from which § 41 (28) was derived contains provisions for a three-judge district court to hear and determine suits brought to set aside a Commission "order," and authorizes judgments rendered in such cases to be appealed directly to this Court.[9] For reasons now stated we hold that judicial review of an order denying reparations does not require a three-judge court.

The provisions of the Urgent Deficiencies Act here considered derive from a 1910 congressional enactment creating the Commerce Court, defining its powers and providing for review of its judgments.[10] That court was given jurisdiction of all actions to enjoin, set aside and modify Commission orders. Section 2 provided for direct appeals from the Commerce Court to the Supreme Court. The purpose of creating the Commerce Court with such direct appeals was expedition of final determination of the validity of certain types of Commission orders. This expedition was sought for orders of national or widespread interest, such, for example, as railroad rate orders. Congress saw the necessity for an accelerated appellate procedure to prevent railroads from nullifying the effect of such orders in prolonged litigation.[11] The Commerce Act itself indicated that the same expedition necessary in cases affecting the public generally was not

[9] 38 Stat. 208, 219, 220; 28 U. S. C. § 2325 (1948). See also 28 U. S. C. (1946 ed.) § 47.

[10] 36 Stat. 539.

[11] See President's Message to Congress, 45 Cong. Rec. 7567–7568 (1910).

necessary in other kinds of cases involving "local and isolated questions which arise in the ordinary courts." [12] The Act's first section excluded from the Commerce Court's jurisdiction power to enforce "any order of the Interstate Commerce Commission . . . for the payment of money." [13]

Provisions of the Urgent Deficiencies Act of 1913 abolished the Commerce Court and transferred its jurisdiction to district courts composed of three judges. In considering this Act Congress was urged to bear in mind the necessity for providing a forum that could expeditiously review Commission orders of widespread importance.[14] But in passing the 1913 Act Congress denied power to three-judge courts to enforce Commission orders for the payment of money.[15] And in a case not involving reparations this Court held that orders relating merely to the payment of money are not likely to be of sufficient public importance to justify use of the three-judge procedure. See *United States* v. *Griffin,* 303 U. S. 226, 233, 234–237. But cf. *El Dorado Oil Works* v. *United States,* 328 U. S. 12, 18–19; *United States* v. *Jones,* 336 U. S. 641, 647. The Urgent Deficiencies Act with 49 U. S. C. § 9, which requires enforcement of Commission reparation awards in one-judge courts, indicates the belief of Congress that such orders are not of sufficient public importance to justify the accelerated judicial review procedure.

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[12] S. Rep. No. 355, 61st Cong., 2d Sess. 1–2 (1910).

[13] See *Procter & Gamble* v. *United States,* 225 U. S. 282; *Texas & P. R. Co.* v. *Abilene Oil Co.,* 204 U. S. 426.

[14] Hearings before the subcommittee of the Senate Committee on Appropriations on H. R. 7898, 63d Cong., 1st Sess. 293–299, 300 (1913).

[15] It is also significant that the new judicial code does not give a three-judge court jurisdiction to adjudicate the validity of commission orders "for the payment of money." 28 U. S. C. § 2321.

While the Government here does not seek enforcement of a Commission order for the payment of money, the root of the controversy concerns the payment of money damages under 49 U. S. C. §§ 8, 9. Had the Commission made an award to the Government it could have filed a civil suit to recover money damages under the provisions of 49 U. S. C. § 16 (2). That section provides that such a suit "shall proceed in all respects like other civil suits for damages . . ."—that is, before one district judge. And an appeal from a judgment in such a case goes to the Court of Appeals. The same one-judge trial and appeal procedure available for enforcement of an award order would appear to be an equally appropriate and adequate tribunal for adjudication of validity of a Commission order denying reparations. For actions to enforce Commission orders awarding reparation, and actions to challenge Commission orders denying reparations, basically involve the same parties, the same disputes, the same claims for money damages, and the same statutes. We think the orders in both instances should be reviewed in the same one-judge tribunal.

We have frequently pointed out the importance of limiting the three-judge court procedure within its expressly stated confines.[16] We are confident that in holding that one judge rather than three should entertain cases challenging Commission reparation orders we interpret the congressional expediting procedure and the Interstate Commerce Act in accordance with their basic purpose.

*Fifth.* There remains the question of the proper disposition of this case. Three judges heard it. This, however, is no reason for dismissal of the cause. See *Stain-*

[16] *United States* v. *Griffin, supra,* 234–237; *Ayrshire Corp.* v. *United States,* 331 U. S. 132, 136–137; *Stainback* v. *Mo Hock Ke Lok Po,* 336 U. S. 368, 378, n. 19; *Phillips* v. *United States,* 312 U. S. 246, 250.

*back* v. *Mo Hock Ke Lok Po,* 336 U. S. 368, 381. If the allegations of the bill are true, the Commission's order cannot stand. *Chicago Junction Case,* 264 U. S. 258, 264–266. Since the District Court did not pass on the merits of the allegations of the complaint, the cause is remanded to it for that purpose.

*Reversed and remanded.*

MR. JUSTICE FRANKFURTER, with whom MR. JUSTICE JACKSON and MR. JUSTICE BURTON join, dissenting.

Four times shippers have asked this Court to recognize the right to review orders of the Interstate Commerce Commission denying claims for reparations against carriers; four times the United States resisted the right to such judicial review; four times this Court sustained the United States and held that the courts were without jurisdiction to review orders of the Commission denying reparations. Twice the decisions followed full argument: *Standard Oil Co.* v. *United States,* 283 U. S. 235, in which the bar of the Interstate Commerce Act to such review was expounded, and *Brady* v. *United States,* 283 U. S. 804, which relied on the *Standard Oil* case decided only a few weeks before. Twice thereafter the dismissal by district courts, for want of jurisdiction, of attempts to review such reparation orders was summarily affirmed without argument, so definitively had the *Standard Oil* case settled the matter. *Allison & Co.* v. *United States,* 296 U. S. 546, affirming 12 F. Supp. 862; *Ashland Coal & Ice Co.* v. *United States,* 325 U. S. 840, affirming 61 F. Supp. 708, decided less than four years ago. In order to recover a money claim of its own, the Government in this case has suddenly shifted a position consistently maintained by it for nearly twenty years against all other shippers and urges the right to review an order denying reparations. Indeed, at the very same time that the Govern-

ment was arguing before the District Court for the District of Columbia for the right to review an order denying it reparations, the Government successfully resisted precisely the same argument by a private shipper in a suit in the District Court for the Eastern District of Michigan. *Great Lakes Steel Corp.* v. *United States,* 81 F. Supp. 450. And the Government did so on the basis of the controlling series of cases in this Court decided on grounds which we are now asked to disregard.[1]

We are vouchsafed no explanation for the fact that the United States should have urged four times upon this Court, and contemporaneously with these proceedings in another district court, that an order resulting from a reparation proceeding before the Interstate Commerce Commission is not reviewable, and yet seeks review in this instance. The only explanation that lies on the surface is that in all the other cases the United States was resisting the claims of private shippers, while in this case the Government itself is the shipper. No doubt enlightenment sometimes comes through self-interest. But this Court's construction of the Interstate Commerce Act, long matured in a series of cases, ought not to shift with a shift in the Government's interest. The Interstate Commerce Commission rightly protests against it. To yield to the Government's new contention is not only to reverse a settled course of decision. To do so is to mutilate the whole scheme of the Interstate Commerce

[1] Compare Brief for United States and Interstate Commerce Commission, pp. 7–22, *Great Lakes Steel Corp.* v. *United States,* 81 F. Supp. 450, with Brief for United States, pp. 14–39, *United States* v. *Interstate Commerce Commission,* 78 F. Supp. 780. Since the argument of this case the *Great Lakes Steel* case has been brought here on appeal, No. 749, this Term, and the Government has acknowledged the conflict. See Motion to Defer Consideration of the Statement of Jurisdiction, *Great Lakes Steel Corp.* v. *United States,* No. 749, this Term.

Act by disregarding the distribution of authority Congress saw fit to make between the Commission and the courts for the enforcement of that Act.

One would suppose that four uniform decisions of this Court, rendered after thorough consideration of a statutory scheme, constitute such a body of law as not to be overruled, wholly apart from any argument that this Court's construction of legislation is confirmed by Congress by reenactment without change. The Transportation Act of 1940 [2] reenacted the relevant provisions of the Interstate Commerce Act after this Court had ruled three times that a shipper who has unsuccessfully asked the Commission for damages is bound by its determination and cannot thereafter have another go at it in the courts. The construction which these decisions have made should be adhered to not only because the precise issue has already been decided by this Court but because the Interstate Commerce Act requires it. "When judicial review is available and under what circumstances, are questions (apart from whatever requirements the Constitution may make in certain situations) that depend on the particular Congressional enactment under which judicial review is authorized." *Labor Board* v. *Cheney California Lumber Co.*, 327 U. S. 385, 388. It will hardly be suggested that the Constitution requires judicial review of a reparation order by the Commission. Such a notion is precluded by *Cary* v. *Curtis*, 3 How. 236, and the whole unfolding of administrative law during the hundred years since that decision. This is not one of those exceptional cases where "the sanction afforded by judicial proceedings" is implied in the guaranty of due process of law. *Ng Fung Ho* v. *White*, 259 U. S. 276, 284–5. Therefore, it is as true of the Interstate Commerce Act as it is of the National Labor Relations Act, that "Congress was entitled to determine what remedy it would provide, the way

[2] 54 Stat. 899, 49 U. S. C. § 1 *et seq.*

that remedy should be sought, the extent to which it should be afforded, and the means by which it should be made effective." Mr. Chief Justice Hughes, speaking for the Court in *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U. S. 261, 264.

In the reticulated scheme for enforcement of the new rights and obligations created by the Interstate Commerce Act, Congress clearly indicated where the judiciary comes in and where the judiciary is to keep out. More particularly, Congress has provided in detail for judicial review in certain aspects of reparation claims that come before the Commission; it has afforded an alternative procedure as between Commission and courts in some instances; it has specifically precluded resort to judicial review where the shipper has chosen resort to the Commission. If the scheme of legislation that Congress has devised is to be respected, judicial review of the Commission's order denying it reparations is not open to the Government.

A summary of what this case involves should precede a detailed analysis of the Act, so far as relevant to its disposition.

At the time this controversy arose it had long been the practice for railroads reaching Atlantic ports to absorb the cost of wharfage and handling services furnished by them for goods destined for shipment overseas. This applied only to services rendered on so-called public wharves, excluding, that is, services so required on wharves operated by a shipper himself. The wharves in question were piers owned by the Government, but leased by it for commercial peacetime operations as public terminal facilities of the railroads. Up to June 15, 1942, these piers were operated by the Transport Trading and Terminal Corporation, as agent of the defendant railroads. War conditions made it necessary for the Government to cancel its leases with the Terminal Corporation and, on June 15, 1942, it took over the operation of these piers for the movement of

military freight, almost entirely outbound. The railroads refused allowances for the cost of services which they had theretofore absorbed, and declined a later request of the Army to perform the handling services because the Army, not the railroads, controlled the piers.

Claiming to be damaged by the refusal of the railroads to grant allowances for the Government's handling of its goods on its own piers, when it excluded the Terminal Corporation and took over the piers, the Government initiated these proceedings before the Commission for reparations under § 8 of the Interstate Commerce Act.[3] It filed its complaint under §§ 9 and 13 of that Act.[4] Claiming that the rates under the existing tariffs were unjust and unreasonable, and that it was discriminated against because other shippers were furnished wharfage and handling services which it performed at its own expense, the Government sought relief against continuance of alleged violations of §§ 1 (5) (a), 1 (6), and 15 (13) of the Interstate Commerce Act. The complaint was sustained by Division 2, with one Commissioner dissenting. *United States* v. *Aberdeen & Rockfish R. Co.*, 263 I. C. C. 303. The full Commission reversed the findings of Division 2 and ordered the complaint dismissed, four Commissioners dissenting. 264 I. C. C. 683. On reargument the full Commission adhered to its findings, five Commissioners dissenting.[5]

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[3] 24 Stat. 382, as amended, 49 U. S. C. § 8.

[4] 24 Stat. 382, as amended, 49 U. S. C. § 9, 24 Stat. 383, as amended, 49 U. S. C. § 13.

[5] It held that the rates for export applied only when the wharves were public, which these wharves were not. The Commission also pointed out that the railroads had made other concessions to the Government; that the rates charged, together with a reasonable allowance for the services not provided, were still below the upper limits of reasonableness; that the wharfage charges had been absorbed because of competitive conditions. 264 I. C. C. 683, 269 I. C. C. 141.

269 I. C. C. 141. At the time of its final report, it was assumed that the operation of the piers reverted to the situation existing prior to June 15, 1942, so that the purpose of the proceeding before the Commission was deemed to be for reparations only. 269 I. C. C. at 147.

Invoking the procedure of the Urgent Deficiencies Act of 1913, the Government then sought to set aside the order of the Commission dismissing the Government's complaint. (Act of October 22, 1913, 38 Stat. 219–21, now 28 U. S. C. §§ 1253, 1336, 2101, 2284, 2321–2325.) A duly constituted district court, with three judges sitting, found itself without jurisdiction to review the Commission's order. 78 F. Supp. 580. This judgment should be affirmed, insofar as it held that an order of the Commission denying damages by way of reparations in proceedings brought before the Commission is not reviewable in the courts.

To ascertain whether an order of the Interstate Commerce Commission is open to judicial review, it should rigorously be borne in mind that jurisdiction to review such an order must have been conferred by Congress. To assume that an order of the Commission for which reviewing power is not conferred, is presumably reviewable by the courts is to start with the answer of the problem to be solved. Unless Congress has chosen to give the courts oversight of a determination by the Commission, the courts have not the power of oversight where, as here, the Constitution does not require it. If Congress has made no grant of power to courts to review the Commission's order denying a claim for reparation, and, in fact, has explicitly withheld resort to the courts after such denial by the Commission, it is wholly immaterial that as to other types of orders the right to review has been given to the courts, or that a determination by the Commission closely related to reparations, but not in fact a claim for damages, does not bar access to the courts.

When dealing with the Interstate Commerce Act we are dealing not with an episodic bit of legislation to which the general jurisdiction of the federal courts presumably applies. We are dealing with the oldest regulatory scheme which, by successive amendments and enlargements, established a comprehensive, self-contained regime both of administration and adjudication. The scheme as a whole ought not to be dislocated to meet the exigencies of a particular situation.

*First.* Judicial review of an order by the Commission dismissing a complaint for reparations has heretofore been urged exclusively on the basis of the Urgent Deficiencies Act. The jurisdiction of the district court in this case was invoked under that Act. This is the sole basis of jurisdiction urged by the Government here in its comprehensive brief and argument, and the Court rejects it. It rightly rejects it. But the compelling considerations for this rejection demand a further analysis of the structure and details of the jurisdictional provisions relating to orders of the Interstate Commerce Commission. Such analysis is essential to lay bare the equally compelling considerations against jurisdiction under the general equity powers of the district courts.

Section 8 of the Interstate Commerce Act created a civil liability of carriers for damages caused by violation of the new obligations imposed by that Act. In the absence of specific remedies, it would be fair to assume that these new rights were enforceable in the district courts under their general jurisdiction over suits "arising under any Act of Congress regulating commerce." 28 U. S. C. § 1337. But the Interstate Commerce Act did not stop with a mere declaration of liability. It defined a specific course of procedure; it particularized the remedies available to those to whom new rights were given and the way in which they were to be pursued. "In such a case the specification of one remedy normally excludes

another." *Switchmen's Union of North America* v. *National Mediation Board,* 320 U. S. 297, 301. For charging more than the tariff rate or charging a discriminatory rate, the Act provides alternative procedures set forth in detail in § 9. These are the relevant provisions: "any person or persons claiming to be damaged by any common carrier . . . may either make complaint to the Commission as hereinafter provided for, or may bring suit . . . in any district . . . court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt." 24 Stat. 379, 382, as amended, 49 U. S. C. § 9. With qualifications shortly to be noted, a suit begun in a district court follows the course of any other action there. On the other hand, if the shipper prefers to pursue the alternative course—the administrative route—to obtain damages for a violation of the Act, he files his complaint with the Commission.

As to a proceeding before the Commission, whether for damages or for a rate adjustment, § 13 defines the procedure;[6] the role of the courts in relation to the Commission's orders is defined by §§ 16[7] and 17 (9).[8] Section 16 fixes the time for filing a complaint either in the courts or before the Commission; it also provides for the enforcement of an order awarding damages, limiting the time within which such an action must be brought, and stating the effect to be given to the Commission's award. Since 1940, the provisions of the Urgent Deficiencies Act of 1913 (38 Stat. 219–21), conferring on the district courts the jurisdiction in suits on orders of the Commission theretofore vested in the abolished Commerce Court, were

[6] 24 Stat. 383, as amended, 49 U. S. C. § 13.

[7] 24 Stat. 384, as amended, 49 U. S. C. § 16.

[8] 54 Stat. 916, 49 U. S. C. § 17 (9).

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incorporated in § 17 (9). A few years previous the procedural provisions of the Urgent Deficiencies Act of 1913 became part of Title 28 of the United States Code.

By this scheme of law enforcement, carefully apportioned between Commission and courts, Congress has provided that insofar as any order, provided it is not one for money damages, can be enjoined, set aside and enforced it must be under the provisions dealing with suits to enforce, enjoin, or set aside orders of the Commission, "but not otherwise." 54 Stat. 916, 49 U. S. C. § 17 (9). By this limitation Congress has made it as clear as language can that if an order is not within § 16, because not one for money damages, if review is available, it must be under § 17. If the Commission action does not fall within § 16 or § 17, it is not reviewable at all. Orders under § 17 are reviewable only as provided for in the Urgent Deficiencies Act. But the Urgent Deficiencies Act furnishes only procedural details; it merely defines the method of review and not the kinds of cases for which review is available. It did not make reviewable actions previously unreviewable. 50 Cong. Rec. 4536, 4542. Cf. *Standard Oil Co.* v. *United States,* 283 U. S. 235, 241; *United States* v. *Jones,* 336 U. S. 641, 647–8. It is the body of law constituting the Interstate Commerce Act which determines whether and under what circumstances review may be had. A long course of judicial application in a field of law, fairly to be called technical, has gradually ascertained from the context of the comprehensive scheme of legislation the kind and the characteristics of orders that are reviewable.

If the dismissal of a reparation complaint is not within the phrase "any order" in § 17 (9) of the Interstate Commerce Act, it is also not within the "any order" phrase of the sections of Title 28 (§ 41 (28) and § 46 of the 1946 ed., and §§ 1336 and 2324 of the present Title 28), which embody the review provisions formerly in

the Urgent Deficiencies Act of 1913, which provisions in turn were taken from the Commerce Court Act. 36 Stat. 539. Although § 2321 of Title 28 of the Revised Code requires that "any order" of the Interstate Commerce Commission other than one "for the payment of money" should be reviewed according to the procedure under the provisions providing for a three-judge court, it is clear that "there are many orders of the Commission which are not judicially reviewable under the provision now incorporated in the Urgent Deficiencies Act." *United States* v. *Los Angeles & S. L. R. Co.*, 273 U. S. 299, 309.

In the *Los Angeles & S. L. R. Co.* case it was held that the district court had no jurisdiction to review a final valuation order—neither by virtue of the Urgent Deficiencies Act, nor under its general equity powers. This result was reached partly because of want of equity, but also because it was found, upon full consideration, that not every order of the Commission is "any order" within the jurisdictional authorization of the Interstate Commerce Act and the applicable provisions of the Urgent Deficiencies Act. So, also, an order refusing to increase the allowance for railroad mail compensation is not reviewable under the Urgent Deficiencies Act. *United States* v. *Griffin*, 303 U. S. 226; see also *Great Northern R. Co.* v. *United States*, 277 U. S. 172. The ground given in the *Griffin* case was that, although there was a case or controversy and final action, this type of order was not within the Urgent Deficiencies Act—and this, as we reaffirmed the other day, quite apart from the obsolete "negative order" doctrine. *United States* v. *Jones*, 336 U. S. 641, 647. Finally—and it ought to be decisive—on four occasions this Court has held that the Commission's refusal to award reparations, when the shipper, as here, proceeded under § 13 of the Act, is not reviewable. *Standard Oil Co.* v. *United States*, 283 U. S. 235; *Brady* v. *Interstate Commerce Comm'n*, 43 F. 2d 847, *affirmed per curiam*

*after argument, Brady* v. *United States,* 283 U. S. 804; *Allison & Co.* v. *United States,* 12 F. Supp. 862, *affirmed per curiam,* 296 U. S. 546; *Ashland Coal & Ice Co.* v. *United States,* 61 F. Supp. 708, *affirmed per curiam,* 325 U. S. 840. These decisions were based upon the fact that the Interstate Commerce Act precludes review by the courts when the shipper had first sought damages before the Commission.

The extraordinary consequences of jurisdiction under the Urgent Deficiencies Act—direct appeal to this Court, a district court of three judges, precedence over other cases on both trial and appeal—were to come into play in strictly limited situations. These can be fairly summarized as covering only the kinds of administrative orders which generally are "of public importance because of the widespread effect of the decisions" rendered by the Commission. *United States* v. *Griffin, supra,* 303 U. S. at 233. The reparation orders here involved, as is true of all reparation orders, since the shipper must show actual damages, concern only the shipper and the common carrier which charged the rate. An underlying legal issue which may be of wider public importance can, of course, be adjudicated in a way which permits judicial review. Thus, an order dealing with future rates is reviewable under the provisions for a three-judge court.

But there is another reason why reparation orders are not reviewable under the three-judge court provisions. Section 17, incorporating the Urgent Deficiencies' mode of review, is not concerned with reparation claims but with a wholly different matter. Reparation claims have been specifically dealt with in other sections of the Act, and, to the extent that review was intended, it is specifically provided for. By the original Act, orders for the payment of money were enforceable in equity. Interstate Commerce Act of 1887, § 16, 24 Stat. 379, 384–385.

On the suggestion that this was a denial of the common carrier's right to trial by jury guaranteed by the Seventh Amendment, see 19 Cong. Rec. 5149–50, Congress promptly provided that a successful shipper before the Commission had to sue at law on his award. 25 Stat. 855, 859–60, as amended, 49 U. S. C. § 16 (2). But there was no occasion for court review of a rate order because the original Interstate Commerce Act, while giving the shipper a right to damage for past violations, did not give the Commission rate-making authority. *Interstate Commerce Commission* v. *Cincinnati, N. O. & T. Pac. R. Co.*, 167 U. S. 479. The rate-making power was first conferred by the Hepburn Act of 1906. 34 Stat. 584, 586–587. For the review of such rate orders Congress enacted what is now § 17 (9). Then, for the first time, the courts were given jurisdiction over a suit "to enjoin, set aside, annul, or suspend any order or requirement of the Commission," and "jurisdiction to hear and determine such suits" was thereby vested in the circuit court of the district in which the common carrier was located. 34 Stat. 592; see H. R. Rep. No. 591, 59th Cong., 1st Sess. 4–5 (1906); H. R. Rep. No. 4093, 58th Cong., 3d Sess. 2, 5 (1905); *United States* v. *Los Angeles & S. L. R. Co.*, 273 U. S. 299, 309.

In 1910, this identical jurisdiction was transferred from the circuit courts and conferred upon the newly created Commerce Court, but it was expressly provided: "Nothing contained in this Act shall be construed as enlarging the jurisdiction now possessed by the circuit courts of the United States . . . ." 36 Stat. 539. This provision was inserted in the legislation so "that the creation of this court shall not be construed as giving to the Commerce Court any greater jurisdiction than is now possessed by the circuit courts of the United States over similar matters." H. R. Rep. No. 923, 61st Cong., 2d Sess. 7 (1910); see S. Rep. No. 355, 61st Cong., 2d Sess.

4, Pt. 2, 4–5 (1910); see S. Doc. No. 606, Vol. 54, 61st Cong., 2d Sess. 2 (1910). By this legislation of 1910, Congress merely provided for a shift of jurisdiction, from the old circuit courts to the new centralized Commerce Court, and not an enlargement of jurisdiction. When in 1913 the Commerce Court was abolished the same jurisdiction was revested in the district courts, the circuit courts having been abolished in the meantime: "the jurisdiction vested in said Commerce Court . . . [was] transferred to and vested in the several district courts of the United States." 38 Stat. 219. Indisputably Congress did not make reviewable orders which could not have been reviewed by the Commerce Court.[9]

Therefore, even putting to one side § 9, the dismissal of the reparation complaint was clearly not within the words "any order" in § 17 (9): (1) if it were within § 17 (9) it would be reviewable only by a three-judge court,

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[9] There was no Committee Report on this legislation; it was added to an appropriation bill. See 50 Cong. Rec. 4527–8. Mr. Fitzgerald, the sponsor of the amendment, said that its sole purpose was to abolish the Commerce Court and make provision for the litigation over which that court had jurisdiction. "It does not give any new right to any parties." 50 Cong. Rec. 4532, 4536, 4542. There was an attempt to enlarge the review provision so as to give shippers review where previously it did not exist, but this amendment was defeated after debate. 50 Cong. Rec. 4532, 4543–44. It was said: "The legislation contained in this bill simply abolishes a court that ought never to have been created and vests the jurisdiction which it now exercises in the district courts of the United States. That is all of it, and that is all there ought to be of it. There ought not to be any attempt to enact substantive law in this bill. There ought not to be any attempt to have an increase or decrease of the powers of the commission, and there ought not to be any attempt to increase or decrease the jurisdiction of the district courts over that of the Commerce Court. The only reason why the district courts are designated instead of the circuit courts is that the circuit courts have been abolished since the Commerce Court was created." 50 Cong. Rec. 4536.

but that reviewing device is not applicable to reparation claims; (2) reparation claims are not within § 17 (9) because they have been treated by a different scheme throughout the history of the Act. If review is to be found within the Act, it must be because of provisions other than those in § 17 (9).

*Second.* The only other provision in the Interstate Commerce Act which affords judicial review of an order is § 16. That section, however, comes into force only when an award for damages is made. Rejection by the Commission of a money claim is outside the express terms of that section and not within what can fairly be implied from any language in it. A general argument of fairness is made that since this section provides for court review when an award is made where the carrier loses, the shipper is entitled to review when the carrier wins. Leaving aside, temporarily, the fact that what Congress has written in § 9 forecloses court review, to yield to such an inference in favor of a shipper whose claim is denied raises insuperable difficulties once we leave the text and scheme of the Act and go at large as to court review. Thus there would be no limit on the time in which review of the Commission's dismissal of the reparation claim could be brought, whereas § 16 fixes a time limit for suits against the carrier on awards by the Commission. 43 Stat. 633, as amended, 49 U. S. C. § 16 (3) (f). This is just one of the obstructions if we are to imply court review of orders disallowing reparation claims because Congress has seen fit to allow suits on orders granting an award. In other respects the Court would have to legislate for Congress. What effect is to be given to the Commission's finding? If the shipper receives an award of damages and sues the carrier thereon, § 16 (2) provides that the Commission's findings are *prima facie* evidence. 41 Stat. 491, as amended, 49 U. S. C. § 16 (2). Are we to create the same rule judicially, though Congress

has not done so, when the shipper fails before the Commission? May the shipper introduce new evidence in the district court? When the shipper sues the common carrier, the Commission's action in making an award "cuts off no defense, interposes no obstacle to a full contestation of all the issues, and takes no question of fact from either court or jury." *Meeker & Co.* v. *Lehigh Valley R. Co.*, 236 U. S. 412, 430. But if the unsuccessful shipper can save up evidence until he gets in court, the advantages of a Commission hearing are destroyed. What will be the scope of the Court's jurisdiction? Would the district court determine only liability, or also the amount to be recovered, or only that the Commission acted without justification in fact or contrary to law? The answer to none of these questions can be found in § 16. Yet, one would suppose, if review in this situation is to be derived from § 16, some guides for its exercise should also be found in that section, considering the particularities with which it defines review in the instances authorizing court action. Therefore, this Court has held: "Section 16 (2) does not permit suit in the absence of an award, and if the Commission denies him relief, a claimant is remediless." *Baltimore & Ohio R. Co.* v. *Brady*, 288 U. S. 448, 458.

Money damages are part of the regulatory scheme. *Mitchell Coal & Coke Co.* v. *Pennsylvania R. Co.*, 230 U. S. 247, 258. But while the Commission may determine that rates for the future be reduced, it is not required to award damages for the higher rates in the past. Thus it is not at all strange that its action be not subject to court review where the shipper has failed to persuade the Commission to award damages. *Baltimore & Ohio R. Co.* v. *Brady*, 288 U. S. 448, 458. Especially is this true when Congress has provided for an alternative procedure whereby the shipper would have been able to go to court. Therefore, even without any explicit provision it would be a reasonable inference that Congress did not intend

to grant a review where the shipper has decided to seek his damages before the Commission.

Even though Congress provided alternate methods of securing damages, and authorized court review when the Commission sustained a money claim, but not when it denied such a claim, Congress did not leave merely to rational inference that upon denial of a money award by the Commission, the shipper could not again try his luck in court. By § 9 Congress gave the shipper his choice of forum: he could ask for damages either from the Commission or a court, but could "not have the right to pursue both of said remedies"; he "must in each case elect which one of the two methods of procedure herein provided for he . . . will adopt." 24 Stat. 382, as amended, 49 U. S. C. § 9. If the shipper asks the Commission to award him damages and it goes against him, Congress has barred review of the denial or revision of the amount of the award. *Baltimore & O. R. Co.* v. *Brady,* 288 U. S. 448, 458–59. Since Congress gave the shipper the alternative of administrative or judicial relief, there can be no question but that Congress was constitutionally free to make final the administrative choice.

*Third.* Since access to court review of an order denying reparations was barred by the Interstate Commerce Act, such review is not available under the general jurisdiction of the district courts. 28 U. S. C. § 1337. It has never been suggested, during some sixty years of active litigation over this problem, that for review of such an order resort may be had to a court of equity outside the framework of the Interstate Commerce Act. Even the Government does not now suggest it, and naturally so. Due regard for the explicit provisions of the Act precludes it. And for these reasons:

(1) The specific terms of § 17 (9) which alone give reviewing power to the courts, save in cases where the carrier has been held to owe money, do so "under those pro-

visions of law applicable in the case of suits to enforce, enjoin, suspend, or set aside orders of the Commission, but not otherwise." 54 Stat. 916, 49 U. S. C. § 17 (9). It is obvious that review would be "otherwise" if the unsuccessful shipper be permitted to bring an action under 28 U. S. C. § 1337. This reason exists independently of the fact that § 9 also prohibits court action after an attempt to recover damages is made before the Commission. It is also independent of the fact that provisions of Title 28 do not make reviewable orders for which the Interstate Commerce Act does not provide review.

(2) Because of these provisions, review of reparation claims differs from the situation in *Shields* v. *Utah I. C. R. Co.,* 305 U. S. 177. There the Court was not confronted with an enactment which said that if a person sought the Commission's aid he could not thereafter go to court. The *Shields* case is inapposite on another ground. By determining that a certain railroad was subject to the Interstate Commerce Act, the Commission placed the railroad under the active hazards of criminal sanctions. Equity was invoked for one of its ancient functions of staying a multiplicity of criminal prosecutions to avoid irreparable harm. See 305 U. S. at 183, and *Switchmen's Union of North America* v. *National Mediation Board,* 320 U. S. 297, 306. Here there is not the remotest ground for appeal to equity. It is merely a matter of dollars and cents—not the hazards of criminal prosecution—and an insistence on having two modes of recovering money damages when Congress has given shippers the choice of one or the other. There is a total absence of any of the traditional grounds for equitable relief. Cf. *United States* v. *Los Angeles & S. L. R. Co.,* 273 U. S. 299, 314–5.

Nor is review permitted under § 1336 of Title 28 (1948), if it is determined that the type of order involved is not of the nature calling for a three-judge court. The

Government relied on the special scheme of the Urgent Deficiencies Act as incorporated in the Interstate Commerce Act conferring jurisdiction to review orders of the Commission. This scheme requires review by a three-judge court. The Court rejects that claim on the ground that a reparation order is not the type of order so reviewable. Instead the Court finds jurisdiction in the district court to entertain a petition to review an order of the Commission denying reparation in § 41 (28) of Title 28 (1946 ed.), now § 1336. But jurisdiction under § 41 (28) carries also the requirement of a three-judge court. See §§ 41–47, now c. 157 of Title 28 of the Revised Code. No jurisdiction can be derived from § 41 (28) of Title 28 unless the order is of the type that is reviewable by a three-judge court. To reject the latter is necessarily to hold that no jurisdiction of the district court is derivable from § 41 (28) of Title 28, now § 1336.[10]

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[10] In *United States* v. *Griffin*, 303 U. S. 226, it was held that because the type of order there involved was not the type reviewable by a three-judge court, the phrase the "district courts shall have jurisdiction 'of cases brought to enjoin, set aside, annul or suspend in whole or in part any order of the Interstate Commerce Commission'," did not confer jurisdiction on the district court. 303 U. S. at 227–228. The quoted words are the provision in the Urgent Deficiencies Act and are precisely the same provision that was carried over to § 41 (28). When we had this general problem here the other day in *United States* v. *Jones*, 336 U. S. 641, it was not suggested that there was jurisdiction to review an order of the Commission under § 41 (28), now § 1336 of Title 28. Instead, the Court agreed with the *Griffin* case that the order there involved was not of a type calling for a three-judge court and therefore that the jurisdictional provisions of § 41 (28), now § 1336 of Title 28, were not applicable. The Court significantly referred to the provisions of § 41 (6), now § 1339 of Title 28, the section giving general jurisdiction over suits arising under the postal laws, as the only possible source of jurisdiction. In the context of this case the comparable provision is § 41 (8), now § 1337. The only reason why the Court now seeks to warp the whole structure of Title 28 rather than to rely on the only section

Moreover, a suit filed under the jurisdiction of § 41 (28) of Title 28 is one against the United States with the Interstate Commerce Commission as a party only if it chooses to intervene. 28 U. S. C. §§ 2322, 2323. Congressional consent is required to authorize such a suit and congressional consent has been authorized only under the conditions requisite for a three-judge court proceeding for which this Court finds no jurisdiction, 28 U. S. C. §§ 2321–2325. On the basis of the result in this case the decision below in the *Great Lakes Steel* case, No. 749 this Term, must of course be reversed. And so this Court would direct the allowance of a suit against the United States, although Congress has not given consent thereto. The only possible escape from this conclusion is that jurisdiction is to be denied when a private shipper seeks to go into court after the Commission has dismissed his complaint for damages, as in the *Great Lakes Steel* case, but jurisdiction somehow or other should be acknowledged when the Government is the shipper. The defense of sovereign immunity, moreover, cannot be avoided by directing that the suit proceed only against the Interstate Commerce Commission. There is no claim that the Commission acted unconstitutionally, or that it proceeded under an unconstitutional statute, or that it acted beyond the authority conferred by a valid statute. It merely acted within the scope of its authority and made a determination, as it was legally bound to do, based upon the law and the facts. The difficulty of

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which conceivably gives jurisdiction to a one-judge court is in order to escape the embarrassing fact that such a suit would be squarely in the face of § 9 of the Interstate Commerce Act. Of course even the procedure adopted is in the face of § 9 of the Interstate Commerce Act as interpreted in four previous decisions of the Court. But reliance on § 41 (8), now § 1337, would at least have the virtue of only mutilating one Act—that is, the Interstate Commerce Act—rather than both that Act and § 41 (28) of Title 28 (1946 ed.), now § 1336 and c. 157 of Title 28 of the Revised Code.

sovereign immunity forcibly demonstrates again why a method of court review cannot be found outside the provisions of the Interstate Commerce Act.

*Fourth.* We now turn to § 9. The language leaves no room for doubt. But it is now urged (though the Government has not so argued in the four decisions that went against private shippers) that where the damage claim was based on other than a mere arithmetical overcharge, the election afforded by § 9 is illusory. This is so, it is argued, because when complaint is made that rates were unfair, prejudicial or unreasonable, the doctrine of *Texas & Pac. R. Co.* v. *Abilene Cotton Oil Co.,* 204 U. S. 426, is brought into operation. It is said that the Government never had an opportunity to go into court until the Commission dismissed its complaint. Sufficient respect is given to § 9, so the argument runs, by reading it to bar "initiating" another action in the court after it has failed before the Commission, not to reviewing the Commission's action. So to argue is to rewrite what Congress has written. Congress did not bar "initiating"; it barred "the right to pursue." The Court concedes that § 9 is a bar when a shipper could have gone in the first instance to the courts. This was so ruled in *Baltimore & O. R. Co.* v. *Brady,* 288 U. S. 448. But what language affords a basis for a distinction when a determination of a transportation issue must be made by the Commission before the case can proceed to judgment? Moreover, the result of the Court's decision is to make the Commission's decision final in those instances where the Commission is acting purely judicially—merely a matter of applying the law to the facts—but not final when the Commission, acting in the realm of its administrative expertness, found a practice legal, and therefore denied damages. Adjudication and settled practice before the Commission likewise disprove this discovery that the choice given by Congress in § 9 is a sham.

The Commission must often pass on the legality of a particular practice of a carrier; such proceedings may serve as the basis for reparations. Under Part I of the Transportation Act, relating to rail carriers, the shipper may ask the Commission for a declaration that a practice has been illegal and base a claim of damages on such illegality under § 8 of the Act. His other course is to secure a Commission determination only as to the illegality of the practice and not ask for an award, reserving the claim of damages for court action. This may be done in one of two ways. He may begin by filing his suit in court and ask the court to hold the case until he has obtained an administrative determination from the Commission.[11] There is no jurisdictional bar to such a procedure. In *Texas & Pac. R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, the Court said the case should be dismissed, but preoccupation was with the necessity for prior administrative determination, not with whether there was jurisdiction in the sense of power to hold the case until there had been a Commission determination. Cases—decided after the *Abilene* case—have clearly rec-

[11] For the period since April 28, 1948, although there have been no instances in which the shipper has asked for a determination of the legality of a practice under Part I of the Act, in a complaint which also stated that a court action was being held in abeyance, there have been thirteen instances where complaints were filed before the Commission asking only for a determination of the legality of a practice because the complainant there was the defendant in a civil action in the courts. Since January, 1948, there have been five proceedings under Part II of the Act in which the shipper first instituted suit in the courts and then asked that the suit be held in abeyance until the Commission made a determination as to the legality of a particular practice. It should be pointed out that under Part II of the Act the Commission has no power to award damages; the doctrine of primary jurisdiction, however, is nevertheless applicable. *Bell Potato Chip Co.* v. *Aberdeen Truck Line*, 43 M. C. C. 337, 342–343.

ognized that there is jurisdiction to hold the case, and this procedure has been suggested in a number of them.[12] *Mitchell Coal & Coke Co.* v. *Pennsylvania R. Co.*, 230 U. S. 247, 267; *Morrisdale Coal Co.* v. *Pennsylvania R. Co.*, 230 U. S. 304, 314–5; see *Smith* v. *Hoboken R. Co.*, 328 U. S. 123, 133; *Thompson* v. *Texas Mexican R. Co.*,

[12] The *El Dorado Terminal Co.* litigation did not involve a claim by a shipper for recovery of an overcharge by a carrier. Therefore, the decisions in *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U. S. 422, and *El Dorado Oil Works* v. *United States*, 328 U. S. 12, did not involve the statutory scheme relating to reparations. The cases have no bearing on the problem here—namely the jurisdictional requirements of § 9 in the context of the Interstate Commerce Act. The *El Dorado* litigation was an ordinary action on a contract. Entangled, however, in the proper construction of that contract was the ascertainment of a transportation fact, which, with due regard to the *Abilene* doctrine, made prior determination by the Interstate Commerce Commission appropriate. To that end it was ruled, in the first *El Dorado* case, that the action in the District Court should be held for such administrative determination. *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U. S. 422. That ruling does establish that simply because a prior determination by the Interstate Commerce Commission is required before a litigation can proceed to judgment does not deprive a district court of jurisdiction. This circumstance merely calls for the suspension of the exercise of jurisdiction until the appropriate fact is established by the Interstate Commerce Commission and then introduced in evidence in the pending court case, instead of being established independently in court, as is usually the case. "While we rejected the Commission's contention that the District Court had no jurisdiction to hear the case, we accepted its contention that determination of the validity of the challenged past practices was for the Commission." *El Dorado Oil Works* v. *United States*, 328 U. S. 12, 17. The order made by the Interstate Commerce Commission in response to the requirement of the first *El Dorado* case was not an order of dismissal in a reparation suit. Procedurally it did not make very much difference, therefore, whether this order of the Interstate Commerce Commission should have been entered in the pending litigation or was allowed to be considered in a new proceeding before the District Court. As a matter of procedural elegance it was more appropriate

328 U. S. 134, 151; see also *Bell Potato Chip Co.* v. *Aberdeen Truck Line,* 43 M. C. C. 337, 343.

The other method open to a shipper who desires to avail himself of the court remedy given by § 9 is to initiate proceedings before the Commission and to ask merely for a declaration regarding the legality of a past practice, but not for damages. This course is manifested by the complaints before the Commission, asking merely for a declaration without any *ad damnum.* For the period between July, 1947, and February, 1949, 46 such cases were filed under Part I of the Act. Under Part II, 22 complaints have been filed since January 1, 1948, requesting such a declaration as to the legality of a practice.[13]

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for it to have formed part of the then pending litigation which was suspended precisely for the purpose of obtaining such an order.

In *Armour & Co.* v. *Alton R. Co.,* 312 U. S. 195, the essential question was whether a particular issue could be determined by the court or, in conformity with the *Abilene* doctrine, required Commission determination. The preoccupation of the case was with that issue. After holding that the doctrine of the *Abilene* case was applicable, the Court affirmed the judgment below requiring a ruling from the Interstate Commerce Commission, without considering whether there was jurisdiction in the sense of power to entertain but hold the case.

[13] These figures are not given to imply that in every instance, or even in most instances, Commission action is followed by a suit in the court for damages. Their sole purpose is to show that, by not seeking damages from the Commission, a complainant leaves himself free, under § 9, to go to the courts.

The Commission prefers that the shipper first file a suit in the court before asking the Commission for a declaration. This procedure has the advantage of preventing the statute of limitations from running on the shipper while awaiting Commission decision. Also, "In circumstances such as described, it is apparent that precautions should be taken to prevent the filing of frivolous or moot complaints. Without attempting at this time to devise a precise rule, we think it pertinent to point out that, generally speaking, adversary proceedings involving past unreasonableness, unjust discrimination,

The Government thus had a real choice. *Terminal Warehouse Co.* v. *Pennsylvania R. Co.,* 297 U. S. 500, 507–8. But, having first sought the advantages of a Commission award, it foreclosed itself from pursuing a judicial remedy when its expectations failed. A double remedy which Congress denied, this Court ought not to grant. The Government "had a choice . . . between a remedy at the hands of the Commission and a remedy by suit, but by express provision of the statute it could not have them both." *Terminal Warehouse Co.* v. *Pennsylvania R. Co., supra,* p. 508.

The conclusion reached by a reading of the statute is reenforced by the adjudicated cases. In *Standard Oil Co.* v. *United States,* 283 U. S. 235, three distinct grounds were given for affirming the district court's dismissal for want of jurisdiction of a suit to review an order of the Commission dismissing a claim for damages. One reason was that the order was "a negative order"; that reason has been displaced by *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125. But the *Standard Oil* decision was left intact by the *Rochester* decision, for the opinion in that case explicitly pointed out that "the main basis" of the *Standard Oil* decision "was not the 'negative order' doctrine but [that] the statutory scheme dealing with reparations" precluded review of an order denying money damages. 307 U. S. at p. 140, n. 23. The "stat-

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or undue prejudice under part II should not be brought before us prior to the institution of a suit in court in which damages are sought predicated upon the unlawfulness alleged in the complaint. The complaint should show that such suit has been brought within the period allowed by the applicable statute of limitations. There may be other situations in which we should exercise this jurisdiction. In this connection, it may be noted that it is a recognized practice to hold in abeyance court proceedings pending the determination by the Commission of administrative questions." *Bell Potato Chip Co.* v. *Aberdeen Truck Line,* 43 M. C. C. 337, 343.

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utory scheme" was thus defined in the *Standard Oil* case: "Having elected to proceed and having proceeded to a determination before the Commission, appellant was, by force of this provision [§ 9], precluded from seeking reparation upon the same claims by the alternative method of procedure." 283 U. S. at 241; see also Mr. Justice Cardozo for the Court in *Terminal Warehouse Co.* v. *Pennsylvania R. Co.*, 297 U. S. 500, 507–8. The Standard Oil Company as a shipper was precisely in the same situation as the United States in this case; the United States pursued the same course in this case as did the Standard Oil Company. The Standard Oil Company was not "initiating" an action in the district court but was seeking judicial review of the Commission's action, and this is precisely what the United States is doing in this case. The only difference between the *Standard Oil* case and this case is that in the earlier case the Standard Oil Company was the plaintiff, and in this case it is the Government. What the Court said in the *Standard Oil* case is equally applicable here. "It is of no importance that the adjudication sought is to take the form of a direction to the Commission to grant the prayer of the complaints filed before that body, etc., instead of a plenary judgment to the same end, for the prayer in that form is nothing less than an attempt to avoid the statute by indirection." 283 U. S. at p. 241.

In view of the fact that the *Rochester* case expressly saved that phase of the *Standard Oil* decision which is decisive of the problem before us now—"the statutory scheme dealing with reparations"—the Court's holding that the *Rochester* case impliedly overruled the *Standard Oil* case means of course that to this extent the Court today overrules the *Rochester* case, not that the *Rochester* case had overruled the *Standard Oil* case, wholly apart from the fact that the *Standard Oil* decision was the

basis of a decision long after the *Rochester* case.[14] *Ashland Coal & Ice Co.* v. *United States,* 325 U. S. 840.

And to what end these dislocations of so many decisions? We have been vouchsafed no considerations of policy, no revealed injustice flowing from the construction thus far placed upon the reparations provision of the Interstate Commerce Act, no difficulties in its ad-

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[14] No decision of this Court has ever expressly or impliedly overruled the decision in the *Standard Oil* case. Least of all can it be said that *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125, overruled the case, for the opinion with great care stated that the *Standard Oil* case was not overruled in its holding that orders dismissing a claim for reparations were not reviewable because of § 9 of the Interstate Commerce Act. See 307 U. S. at p. 140, n. 23. The Court there did only what the Court the other day did in *United States* v. *Jones,* 336 U. S. 641, 647–8, that is, it decided that for reasons wholly unrelated to the "negative order" doctrine an order of the Commission was not reviewable. If anything, the conclusion in the *Standard Oil* case was reinforced by the *Rochester* decision in that it was reaffirmed by the very decision that put the "negative order" doctrine and decisions dealing with it under the strictest scrutiny. That examination revealed that only one case out of the whole series of cases examined was really determined by the "negative order" doctrine. That was the only case the Court overruled. And even Mr. Justice Butler, who filed a separate opinion, did not say that other cases were being overruled. He objected, essentially, to their reexamination. He said: "The case presents no debatable question as to the jurisdiction of the district court. A statement of the facts alleged conclusively shows that in purpose, terms and effect the final order constitutes not mere determination or declaration but affirmative commands. There is no occasion to review earlier decisions dealing with affirmative and negative administrative orders and obviously none to overrule any of them or to repudiate or impair the doctrine they establish." *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125, 146, 147–48. That the *Rochester* case did not overrule *Standard Oil* is conclusively proved by the fact that this Court relied on that case less than four years ago to affirm a judgment dismissing a petition to review an order dismissing a claim for reparation. *Ashland Coal & Ice Co.* v. *United States,* 325 U. S. 840.

ministration, no disclosure of new materials for the proper construction of an old statute. And the current of settled judicial construction as well as administrative practice is now reversed against the vigorous protest of the agency charged with the administration of the law although only a week ago we greatly relied on administrative practice as the basis of judicial interpretation.

The result reached in the *Standard Oil* case was not limited to controversies which did not involve the "primary jurisdiction" doctrine. The district court in that case did assume *arguendo* that the issue involved nothing which required administrative determination before it addressed itself to the basic jurisdictional question. See *Standard Oil Co.* v. *United States,* 41 F. 2d 836. On appeal, however, this Court did not confine in any way the bar imposed by § 9 to resort to a district court after an unsuccessful resort to the Commission for reparations. It read § 9 as it was written, as a provision for a choice of tribunals so that, if damages are sought from the Commission and denied by it, the courts are closed to a further consideration of such a claim.

The suggestion at this late date that the election so specifically defined by § 9 applies only to those instances in which no need for Commission determination of transportation issues may be required is completely dispelled by *Brady* v. *United States,* 283 U. S. 804. In the *Brady* case, damages were based on the claim that the carrier's practices were unjust, unreasonable and unduly prejudicial—the exact grounds urged in this case. The Commission refused to award reparations in the amount claimed by Brady and the shipper brought precisely the same kind of suit that the United States as shipper brought here. Brady argued that since the controversy was within the Commission's so-called "primary jurisdiction," he never had the choice of proceeding in court rather than

going to the Commission. The district court dismissed his suit for want of jurisdiction to review the action of the Commission and this Court sustained that denial of jurisdiction. It did so on the basis of the *Standard Oil* decision which had been rendered a month before, for the *Standard Oil* case, as did the *Brady* case, and as does this case, involved questions which, as such, required preliminary Commission determination.

The scope of the *Standard Oil* and *Brady* cases is made unambiguously clear by reliance on them for the decision in *Allison & Co.* v. *United States,* 296 U. S. 546, 664, and *Ashland Coal & Ice Co.* v. *United States,* 325 U. S. 840. In each case issues were involved which indubitably fell under the requirement of the "primary jurisdiction" doctrine. In each of these cases the shipper relied on the claim that his case was distinguishable from the *Standard Oil* and the *Brady* cases. The same distinctions which are now advanced by the Government were then advanced by the shipper but resisted by the Government. The Government then rightly insisted that the *Standard Oil* and the *Brady* cases could not be restricted to situations where the "primary jurisdiction" doctrine was inoperative and that the decision in those cases—that § 9 is unqualified in precluding resort to judicial review in all cases where damages had first been denied by the Commission—was compelled by a proper construction of § 9. This position of the Government was considered so incontestable that the Court deemed oral argument needless and granted the Government's motion to affirm. The Government's interest has changed, but not the force of its position when it was without self-interest.

I would affirm.

# PROPPER, RECEIVER, *v.* CLARK, ATTORNEY GENERAL, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, ET AL.

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

No. 390. Argued March 28–29, 1949.—Decided June 20, 1949.

Pursuant to § 5 (b) of the Trading with the Enemy Act, as amended, the President promulgated Executive Order No. 8389 prohibiting certain transactions in property of nationals of certain foreign countries except when licensed by the Secretary of the Treasury. Two days before this was made applicable to Austria by Executive Order No. 8785, petitioner was designated by a New York court as temporary receiver of the assets of an Austrian national (AKM). The asset was a debt owed by the American Society of Composers, Authors and Publishers (ASCAP), and no license permitting its transfer was issued. After issuance of Executive Order No. 8785, petitioner was designated permanent receiver. Subsequently, the Alien Property Custodian issued an order vesting in himself title to the claim of AKM against ASCAP. *Held:* In a suit by the Custodian against petitioner and ASCAP, judgments were properly entered declaring that petitioner had no right, title or interest in the claim and directing ASCAP to pay it to the Custodian. Pp. 474–493.

1. The Joint Resolution of May 7, 1940, amending § 5 (b) of the Trading with the Enemy Act, and Executive Order No. 8389, issued April 10, 1940, put into effect a valid plan for control of the property covered by the Executive Order that prohibited any change of title to the property here involved by reason of the subsequent appointment of petitioner as permanent receiver. Pp. 476–486.

(a) The Joint Resolution of May 7, 1940, ratified Executive Order No. 8389, issued April 10, 1940, including the broad definition of "banking institution" as including "any person holding credits for others as a direct or incidental part of his business." Pp. 478–479.

(b) Not being defined, the term "credit," as used in the Trading with the Enemy Act, the Executive Orders and the regulations thereunder, is given its ordinary meaning of the obligation due on accounting between parties to transactions. P. 480.

(c) Petitioner and ASCAP are "banking institutions" within the meaning of the definitions of that term in the Executive Orders and the prohibition against "transfers of credit between any banking institutions." Pp. 480–482.

(d) A transfer of the credit here involved from a liability owed by ASCAP to AKM to a liability owed by ASCAP to petitioner would violate the prohibition against "transfers of credit." P. 482.

(e) Although title to the claim in question had not been vested in the Custodian when petitioner was appointed permanent receiver, the Executive Orders prevented title from being transferred to petitioner, even by judicial action. Pp. 482–485.

(f) A different result is not required by the administrative interpretation of the Executive Orders. Pp. 485–486.

2. Under § 977–b of the New York Civil Practice Act, title to the claim did not pass to petitioner by virtue of his appointment as temporary receiver before issuance of Executive Order No. 8785. Pp. 486–492.

(a) Although the state statute is susceptible of varying interpretations and the point has not been ruled upon by the state courts, this Court accepts the reasonable interpretation given to it by the Federal District Court and Court of Appeals, which are skilled in the laws of New York. Pp. 486–489.

(b) This Court rejects petitioner's suggestion that a decision in the federal courts should be delayed until the courts of New York have settled the issue of state law. Pp. 489–492.

3. The federal courts were not precluded from adjudging the rights of the respective parties in this case on the ground that the property was in the hands of the state court by virtue of a state receivership. Pp. 492–493.

169 F. 2d 324, affirmed.

In a suit by the Alien Property Custodian under § 17 of the Trading with the Enemy Act, a Federal District Court entered judgments declaring that a receiver appointed by a state court had no right, title or interest in a debt owed to an Austrian national and directing the debtor to pay the debt to the Custodian. 70 F. Supp. 202. The Court of Appeals affirmed. 169 F. 2d 324. This Court granted certiorari, limited to two issues. 335 U. S. 902. *Affirmed*, p. 493.

*A. Walter Socolow* and *Joseph M. Cohen* argued the cause and filed a brief for petitioner.

*David Schwartz* argued the cause for Clark, Attorney General, respondent. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Bazelon, James L. Morrisson* and *Joseph Laufer.*

*Louis D. Frohlich* argued the cause and filed a brief for Deems Taylor, as President of the American Society of Composers, Authors and Publishers.

MR. JUSTICE REED delivered the opinion of the Court.

The Alien Property Custodian [1] on April 22, 1946, began this action under § 17 of the Trading with the Enemy Act in the United States District Court for the Southern District of New York to obtain the payment, and a declaration of title in him as against the petitioner as receiver, of certain royalties owed by the American Society of Composers, Authors and Publishers (ASCAP) to Staatlich Genehmigte Gesellschaft der Autoren, Komponisten und Musikverleger (AKM), an Austrian association, pursuant to the provisions of Vesting Order No. 2097, Office of Alien Property Custodian, September 4, 1943, 8 Fed. Reg. 16463, whereby the Custodian had vested in himself title to certain property of AKM, specifically claims for royalties under copyrights for the performance of musical compositions. By contract ASCAP had been authorized by AKM to license on royalty the use in this country of musical copyrights belonging to AKM. ASCAP and the petitioner, who is the state-appointed receiver of the royalties involved, were made defendants. The District Court, on motion for summary judgment or judgment on the pleadings, entered a judgment declaring

[1] Tom C. Clark, Attorney General, was duly substituted as Successor to the Alien Property Custodian.

that the petitioner had no right, title or interest in the claim in question, *Markham* v. *Taylor,* 70 F. Supp. 202, and later, a second judgment directing ASCAP to pay the debt to the Custodian. The United States Court of Appeals for the Second Circuit, on appeal by the petitioner,[2] affirmed. *Clark* v. *Propper,* 169 F. 2d 324.

The pertinent facts underlying this controversy are as follows: On June 12, 1941, on an *ex parte* application by a creditor of AKM, the New York Supreme Court appointed petitioner temporary receiver of that association, pursuant to § 977–b of the New York Civil Practice Act, which provides for the liquidation of the local assets of a foreign corporation when it has ceased to do business for one reason or another not here important. Proceedings under this Act are to enable claimants against the foreign corporation to secure payment of their claims by an equitable apportionment of the available assets. The order of appointment directed him "to take, receive and reduce to his possession any and all assets . . . tangible and intangible, within the State of New York, of the defendant [AKM], and hold the same until the further order of this Court." On June 14, 1941, pursuant to § 5 (b) of the Trading with the Enemy Act of 1917, 40 Stat. 411, 415, as amended,[3] the President promulgated Executive Order No. 8785,[4] a so-called "freezing order," which prohibited certain transactions involving Austrian property except as they were specifically licensed by the Secretary of the Treasury. On July 29, 1941, petitioner, as receiver, began an action in the courts of New

[2] ASCAP, having stipulated to the entry of a judgment against it, did not appeal. It filed a motion here to be made a party. It was permitted to argue and there is now no occasion to grant the motion. It is denied.

[3] By the Joint Resolution of May 7, 1940, 54 Stat. 179.

[4] 6 Fed. Reg. 2897.

York against ASCAP to recover the royalties which it owed AKM.[5] Its disposition is awaiting the outcome of this case. On September 29, 1941, petitioner, upon the default of AKM, was appointed permanent receiver of that association's assets. Thereafter followed the vesting order, September 4, 1943, and this suit, April 22, 1946.

Upon the limited grant of the petition for certiorari, 335 U. S. 902, the issues argued before this Court and now to be decided are whether the appointment of petitioner as temporary receiver on June 12, 1941, or his appointment as permanent receiver on September 29, 1941, by relation back, passed title to him of the claim for royalties as of June 12, 1941. Furthermore, since, as will subsequently appear, we conclude these issues against petitioner, we must consider whether the freezing order barred a subsequent unlicensed judicial transfer by the order appointing the petitioner permanent receiver.[6]

*First.* The appointment as permanent receiver on September 29, 1941, concededly would have vested in petitioner as permanent receiver all right, title and interest of AKM in its claim against ASCAP if the freezing order of June 14, 1941, had not intervened after petitioner's appointment as temporary receiver on June 12, 1941.

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[5] For opinions of the New York courts relating to the petitioner's action against ASCAP, see *Propper* v. *Buck,* 106 N. Y. Law Journal, No. 101, October 29, 1941, p. 1268, col. 5; *Propper* v. *Buck,* 263 App. Div. 807, 32 N. Y. S. 2d 103 (1st Dept.); *Propper* v. *Buck,* 178 Misc. 76, 33 N. Y. S. 2d 11 (Sup. Ct. N. Y. Co.), affirmed, 263 App. Div. 948, 34 N. Y. S. 2d 134; *Propper* v. *Taylor,* 186 Misc. 70, 58 N. Y. S. 2d 829 (Sup. Ct. N. Y. Co.), affirmed, 270 App. Div. 890, 62 N. Y. S. 2d 602 (1st Dept.); *Propper* v. *Taylor,* 186 Misc. 72, 58 N. Y. S. 2d 831 (Sup. Ct. N. Y. Co.), modified, 270 App. Div. 890, 62 N. Y. S. 2d 601 (1st Dept.).

[6] This latter issue was brought forward by the petition for certiorari, Question Presented No. 3, and before argument its discussion by brief and at the bar was formally requested by this Court, although no order to that effect was entered.

Accepting that position, the question of whether the appointment as permanent receiver related back to the date of the temporary receivership, so as to place title to the claim in the permanent receiver as of June 12, 1941, and the question as to whether the appointment as permanent receiver itself vested title in the petitioner, notwithstanding the prior freezing order, depend alike upon a determination as to whether the freezing order made invalid any subsequent transfer of title by judicial action.

The vesting order here in question, Vesting Order No. 2097, 8 Fed. Reg. 16463, was executed on September 4, 1943, a date subsequent to the appointment of petitioner as permanent receiver. So far as the parties to this litigation are concerned, by its specific terms it vested in the Custodian title to the property of AKM only.[7] Nothing presented in this case calls our attention to any effort made by the Custodian to vest in himself any title to the claim that might be in the permanent receiver for the benefit of creditors and ultimately for AKM or those entitled to its assets on distribution,[8] nor do we adjudicate

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[7] See Trading with the Enemy Act, 50 U. S. C. App. §§ 7 (c) and 616:

"§ 616. . . . and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes; . . . ."

See *Clark* v. *Uebersee Finanz-Korp.*, 332 U. S. 480.

[8] Compare *Great Northern R. Co.* v. *Sutherland*, 273 U. S. 182, where the Custodian vested in himself by order on a corporation the shares of stock appearing on the corporation's books in the name of an alien enemy.

It may be that all property subject to blocking may not be sub-

his right to do so. The order, so far as pertinent, vested in the Custodian "All . . . claim [of AKM to] all right to receive monies . . . by way of royalty, share of profits or other emolument," together with "all causes of action . . . with respect to" the aforesaid copyrights. This claim was a debt of ASCAP to AKM, property of AKM, as defined in the regulations of April 10, 1940, 5 Fed. Reg. 1401 (c), and June 14, 1941, 6 Fed. Reg. 2905. The latter citation refers to the regulation defining property, under the Trading with the Enemy Act, effective at the time of the vesting order.[9]

Prior to petitioner's appointment as permanent receiver and the later vesting order, the President, on June 14, 1941, had prescribed by Executive Order No. 8785, 6 Fed. Reg. 2897, that certain transactions by or on behalf of Austrian associations such as AKM were prohibited unless licensed. No license for the judicial order appointing petitioner as permanent receiver was asked for or obtained.

Order No. 8785 was issued pursuant to the authority granted the President by § 5 (b) of the Act of October 6, 1917, as amended, particularly by the Joint Resolution of May 7, 1940.[10] The order forbade, § 1A, "All transfers of credit between any banking institutions within the United States; . . . ." Authority during war

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ject to vesting. Trading with the Enemy Act, as amended by First War Powers Act, 55 Stat. 838, 839, Title III (1) (B). Compare Bishop, Judicial Construction of the Trading with the Enemy Act, 62 Harv. L. Rev. 721, 723.

[9] 55 Stat. 838, 840, 50 U. S. C. App. § 617.

[10] 54 Stat. 179:

"During time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, investigate, regulate, or prohibit, under such rules and regulations as he may prescribe, by means of licenses or otherwise, any transactions in foreign exchange, transfers of credit between or payments by or to banking institutions as defined by the President, . . . ."

or any other period of national emergency to prohibit such transfers was given the President by the Joint Resolution. Order No. 8785 declared "the existence of a period of unlimited national emergency."

The same Resolution authorized the President to issue rules and regulations and specifically to define "banking institutions." The President had on April 10, 1940, issued a similar order prohibiting similar transfers applicable to nationals of Norway and Denmark to guard against such transfers brought about by the German invasion of those countries. Executive Order No. 8389, 5 Fed. Reg. 1400. It contained to all intents and purposes the same definition of "banking institutions." See § 11 C thereof. The order and regulations thereunder, and therefore the definition, were approved by the Joint Resolution.[11] The definition applicable to transactions of this Austrian national, AKM, under the freezing order of June 14, 1941, is set out below.[12] We accept this definition as authorized by the Resolution.

By the order appointing a permanent receiver, the claim of AKM against ASCAP was directed to be transferred from AKM to the petitioner. From ASCAP's point of view it was a debt; from AKM's a claim. The shift of obligation contemplated by the order for a per-

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[11] 54 Stat. 179:

"SEC. 2. Executive Order Numbered 8389 of April 10, 1940, and the regulations and general rulings issued thereunder by the Secretary of the Treasury are hereby approved and confirmed."

[12] 6 Fed. Reg. 2898, § 5:

"F. The term 'banking institution' as used in this Order shall include any person engaged primarily or incidentally in the business of banking, of granting or transferring credits, or of purchasing or selling foreign exchange or procuring purchasers and sellers thereof, as principal or agent, or any person holding credits for others as a direct or incidental part of his business, or brokers; and, each principal, agent, home office, branch or correspondent of any person so engaged shall be regarded as a separate 'banking institution.'"

manent receiver was a transaction that involved "property in which" there was an "interest of any nature whatsoever, direct or indirect," in aliens of designated countries, including Austria.[13] But the Executive Order of June 14, 1941, did not prohibit all transactions without license involving Austrian-owned property. It specified the prohibited transactions, however, by categories so all-inclusive as to make it clear that the purpose was to require transactions involving property of nationals of designated foreign countries to be carried out under regulations of this Government, except certain transactions such as are provided for in General Ruling No. 12, April 21, 1942, 7 Fed. Reg. 2991. The Executive Order forbids transfers of credit. As "credit" is not defined by the Order or regulation, we, in considering credits as property subject to vesting under the Trading with the Enemy Act, give it its ordinary meaning of the obligation due on accounting between parties to transactions. This credit, owed by ASCAP to AKM, was in effect directed to be transferred by the permanent receiver order from AKM to the petitioner as receiver. There is, we think, no doubt that a voluntary transfer by a bank of a credit in the transferring bank from the account of a known Austrian to the account of another banking institution would violate Executive Order No. 8785 as a transfer of credit between banking institutions.

It remains, then, to determine whether ASCAP and petitioner are banking institutions of such a character as to be subject to the prohibition of Executive Order No. 8785, § 1 A against "transfers of credit between any banking institutions." A reading of the President's definition, note 12 *supra,* shows that they do fall within the words "any person holding credits for others as a direct or incidental part of his business . . . ." It is true that

[13] Executive Order No. 8785, *supra.*

to make ASCAP or the petitioner a banking institution by definition is a departure from the ordinary conception of the meaning of "banking institution." Petitioner says to so construe the definition is "utter fantasy." The definition, however, as we have pointed out, has had congressional ratification. Furthermore, the obvious intention of Congress to allow flexibility in the term "banking institution" by leaving its definition to the President sheds light on its purpose. The phrase "banking institution" used and defined in the Bank Holiday Proclamation of March 6, 1933, 48 Stat. 1689, 1690, was adopted by the Emergency Banking Relief Act of March 9, 1933, 48 Stat. 1, with a delegation to the President of the power of definition. Evidently the delegation was to permit him to bring atypical forms of financial institutions within the reach of the emergency act. The Act of March 9 was grafted on to the Trading with the Enemy Act of 1917 and, when that Act was again extended to meet the foreign assets problem, the President's wide power to define "banking institution" was a ready instrument to cope with the myriad circumstances arising in the control of shifts of foreign assets. The power in peace and in war must be given generous scope to accomplish its purpose. Through the Trading with the Enemy Act, in its various forms, the nation sought to deprive enemies, actual or potential, of the opportunity to secure advantages to themselves or to perpetrate wrongs against the United States or its citizens through the use of assets that happened to be in this country.[14] To do so has necessitated some inconvenience to our citizens and others who, as here, are not involved in any actions adverse to the nation's interest. That fact, however, cannot lead

[14] See United States Treasury Department, *Administration of the Wartime Financial & Property Controls of the United States Government* (1942), pp. 1–4.

us to narrow the broad coverage of the Executive Order. Our prior decisions have made that clear.[15] ASCAP and petitioner, the receiver, each hold credits for others as an "incidental part of [their] business," and are therefore "banking institutions." ASCAP held a credit for AKM and, after the permanent receivership order, would hold that credit for the receiver, who in turn would hold it for AKM's creditors and AKM.

We hold that a transfer of this credit from a liability owed by ASCAP to AKM, to a liability owed by ASCAP to the receiver, would violate the prohibition against transfers of credit.

We turn now to an examination of the effect of the federal Executive Order No. 8785 of June 14, 1941, the so-called "freezing order," on the subsequent state court order of September 29, 1941, appointing the petitioner permanent receiver. That examination is to be made with recognition of the fact that, at the time of the state order, title to the AKM claim against ASCAP had not been vested in the Custodian. That development did not take place until the vesting order of September 4, 1943.

It is petitioner's contention that a mere freezing order does not prohibit a subsequent judicial order transferring title to blocked assets covered by the previous freezing order. We will deal subsequently in this opinion with the question of whether the title to the claim passed to the temporary receiver, under New York law, on his appointment. At this point, we assume this did not happen and examine only the question of the effect of a freezing order on the subsequent judicial order. Petitioner's argument is that such a construction would immobilize frozen property until it suits the Custodian's convenience

[15] *Central Trust Co.* v. *Garvan,* 254 U. S. 554; *United States* v. *Chemical Foundation,* 272 U. S. 1; *Great Northern R. Co.* v. *Sutherland,* 273 U. S. 182; *Markham* v. *Allen,* 326 U. S. 490; *Clark* v. *Uebersee Finanz-Korp.,* 332 U. S. 480.

to vest, contrary to the need for protection against transfers of foreign funds. These needs, petitioner says, will be served by the provision against payments to claimants from frozen funds without a license. E. O. 8785, § 1B.[16] He further argues that by the Joint Resolution Congress did not empower the President to deprive New York of all power to deal with the ASCAP debt in a proceeding under Civil Practice Act § 977–b, covering actions of receivers to liquidate local assets of defunct foreign corporations.

It is true that state litigation between local claimants and foreign owners or those in possession of blocked or frozen assets could proceed to a determination of rights between the claimant and the foreign national without the blocked property passing into hands that might use it to the detriment of the welfare of this nation, so long as payment could not be made without a license. Nothing in the Trading with the Enemy Act or regulations specifically forbids *eo nomine* litigation in state courts. The plan for prohibition of unlicensed transactions by foreign nationals comprehends blocking of transfers of credits and vesting of local assets of such nationals under the Trading with the Enemy Act and regulations thereunder. If transactions are blocked, vesting may or may not follow. When the Custodian vests blocked property, title passes to the Custodian and his authority to vest

[16] There is a suggestion that Congress could not, because of the Tenth Amendment, constitutionally abrogate the power of New York through its courts, in peacetime, to deal with the local assets of defunct foreign corporations. The chief reliance is placed upon *Clark* v. *Williard*, 294 U. S. 211, a case that held that, as between states, the state of the location of corporate assets had control of their distribution in liquidation. It cannot be seriously doubted that the danger of war was sufficiently grave at the time of the freezing order, June 14, 1941, to justify the President's action respecting Austrian property. Cf. *Silesian-American Corp.* v. *Clark*, 332 U. S. 469, 474–477.

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and hold cannot be questioned except as provided in the Trading with the Enemy Act.[17] The freezing order of June 14, 1941, immobilized the assets covered by its terms so that title to them might not shift from person to person, except by license, until the Government could determine whether those assets were needed for prosecution of the threatened war or to compensate our citizens or ourselves for the damages done by the governments of the nationals affected. *United States* v. *Chemical Foundation,* 272 U. S. 1, 11; *Silesian-American Corp.* v. *Clark,* 332 U. S. 469, 476.

We assume that the Court of Appeals of New York held in *Singer* v. *Yokohama Specie Bank* that title to blocked assets could pass without license from a statutory receiver to a creditor.[18] As the Trading with the Enemy Act is federal legislation founded on federal constitutional provisions, however, the United States has authority to make all laws necessary and proper for carrying the power into execution. The power to enact carries with it final authority to declare the meaning of the legislation. *Prudence Corp.* v. *Geist,* 316 U. S. 89, 95. Federal

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[17] 50 U. S. C. App. §§ 7 (c), 9 (a). Cf. *Clark* v. *Uebersee Finanz-Korp.,* 332 U. S. 480, 487; *Central Trust Co.* v. *Garvan,* 254 U. S. 554, 567–68; *Great Northern R. Co.* v. *Sutherland,* 273 U. S. 182, 194; *Becker Co.* v. *Cummings,* 296 U. S. 74, 79; *Josephberg* v. *Markham,* 152 F. 2d 644, 649.

[18] 293 N. Y. 542, 550, 58 N. E. 2d 726, 728:

"The fact that Federal regulations governing transactions in foreign exchange prevent the payment to Standard until a license under Executive Order No. 8389, as amended, is procured does not make conditional the obligation of the New York Agency to pay. (See United States Treasury Department, General Ruling No. 12 (4) under Executive Order No. 8389 as amended; also *Feuchtwanger* v. *Central Hanover Bank,* 288 N. Y. 342.)"

Cf. *id.,* 121 N. Y. L. J., No. 95, May 16, 1949, p. 1735. Compare *Polish Relief Comm'n* v. *Banca N. A. Rumanici,* 288 N. Y. 332, 43 N. E. 2d 345.

courts have so held as to this issue in this case, 169 F. 2d 324, 327, and in *Bernstein* v. *N. V. Nederlandsche-Amerikaansche etc.,* 173 F. 2d 71, 73. The Trading with the Enemy Act is national in range. The effect of a federal freezing order should be the same on subsequent transfers of title in all states. State law determines the effect of the appointment of a receiver on title to the property administered, but federal law determines whether the event of appointment can free the property from the prior control. Cf. *Lyeth* v. *Hoey,* 305 U. S. 188, 191, *et seq.*

Petitioner contends also that the administrative interpretation of the Executive Order of June 14, 1941, has been to permit litigation as to rights in the frozen assets. That is borne out by General Ruling No. 12 of April 21, 1942, 7 Fed. Reg. 2991, promulgated after petitioner had begun his suit against ASCAP and referring to Executive Order No. 8389, as amended June 14, 1941. The applicable section is set out in the margin.[19] It is to be observed, however, that the proviso of § (d) limits the rights a litigant may obtain to such right as the owner of blocked property could confer by voluntary act. General Ruling No. 12, as it came after the suit by the receiver against ASCAP was started and after the order appointing petitioner as permanent receiver, is not treated by us as

[19] "(d) Any transfer affected by the Order and/or this general ruling and involved in, or arising out of, any action or proceeding in any Court within the United States shall, so far as affected by the Order and/or this general ruling, be valid and enforceable for the purpose of determining for the parties to the action or proceeding the rights and liabilities therein litigated; *Provided, however,* That no attachment, judgment, decree, lien, execution, garnishment, or other judicial process shall confer or create a greater right, power, or privilege with respect to, or interest in, any property in a blocked account than the owner of such property could create or confer by voluntary act prior to the issuance of an appropriate license."

See also Public Circular No. 31, August 2, 1946, 11 Fed. Reg. 8351.

decisive in this case. It is useful only as a statement of the administrative determination as to the effect of litigation without a license.

It is our conclusion that the Joint Resolution of May 7, 1940, and the Executive Order of April 10, 1940, put into effect a valid plan for control of the property covered by the regulation that prohibited any change of title to that property by reason of the subsequent appointment of petitioner as permanent receiver. We do not now undertake to say whether every determination of rights concerning blocked property in unlicensed litigation is voidable. We base our determination on the purpose of Congress to prevent shifts in title to blocked assets and the prohibition of the Executive Order against transfers of such a credit as this. The language of the order prohibits more than payment. It prohibits transfers of credit. We do not think the administrative rulings are to the contrary.

*Second.* The petitioner advances the contention, however, that title to AKM's claim against ASCAP had passed to him by his appointment as temporary receiver on June 12, 1941, prior to the freezing or blocking order of June 14, 1941. Therefore, petitioner argues, AKM had nothing that could be frozen by the immobilization order or taken by the vesting order.

The precise issue of state law involved, *i. e.*, whether the temporary receiver under § 977–b of the New York Civil Practice Act is vested with title by virtue of his appointment, is one which has not been decided by the New York courts. Both the District Court and the Court of Appeals faced this question and answered it in the negative. In dealing with issues of state law that enter into judgments of federal courts, we are hesitant to overrule decisions by federal courts skilled in the law of particular states unless their conclusions are shown

to be unreasonable. *Estate of Spiegel* v. *Commissioner,* 335 U. S. 701, 707–708; *Helvering* v. *Stuart,* 317 U. S. 154; *MacGregor* v. *State Mutual Co.,* 315 U. S. 280. We shall examine the problem from that point of view.

Having no state case on the precise statute before it, the Court of Appeals turned to cases dealing with temporary receiverships in equity proceedings and under analogous statutes. These cases seem to hold that temporary receivers of neither the equity [20] nor statutory [21] class obtain title, but, on the contrary, merely a right to possession. The courts below found nothing in § 977–b which evidenced an intent that the result under that section should be otherwise. Admittedly there is no express declaration of such an intent.

The statutory language is easily susceptible of varying interpretations. See subsections 4, 10, 11, 12 and 19. These sections are not clear as to the title taken by the temporary receiver or the authority granted to him for the holding or handling of claims against debtors. The Court of Appeals concluded, however, that where in subsection 12 the statute said that "any receiver appointed . . . shall have all the powers and duties . . .

[20] E. g., *Decker* v. *Gardner,* 124 N. Y. 334, 26 N. E. 814; see *Keeney* v. *Home Insurance Co.,* 71 N. Y. 396, 401.

[21] E. g., *Mutual Brewing Co.* v. *N. Y. & C. P. F. Co.,* 16 App. Div. 149, 45 N. Y. S. 101; *Metropolitan Life Ins. Co.* v. *Sanborn,* 34 Misc. 531, 69 N. Y. S. 1009; see N. Y. General Corporation Law §§ 162, 163, 168, and annotations thereto. Petitioner calls our attention to *Nealis* v. *American Tube & Iron Co.,* 150 N. Y. 42, 45, 44 N. E. 944, 945, a case not cited to the Court of Appeals. This case says that a temporary receiver under a different statute "is vested with title and represents the corporation and its creditors as fully as a permanent receiver after final judgment of dissolution." P. 45. This case, however, involved the right of a temporary receiver to sue and the opinion deals with that problem rather than the distinction between a right to obtain possession and title. See *In re Warren E. Smith Co.,* 31 App. Div. 39, 52 N. Y. S. 877, 884.

possessed by and conferred upon receivers and trustees by the laws of the state of New York," the meaning was "that a temporary receiver under this provision takes the usual powers of other temporary receivers in New York." 169 F. 2d 324, 327. It was pointed out that otherwise the specific and restricted grant of powers to a temporary receiver by subsection 4 would be purposeless.

Petitioner contends here for the first time that a vesting of title in the temporary receiver is an essential prerequisite to the exercise of jurisdiction *in rem* over the assets within the state of a nonresident association which is served by publication. The contention is that an affirmance of the court below on the issue of state law will render proceedings under § 977–b subject to an attack on constitutional grounds under the doctrine of *Pennoyer* v. *Neff,* 95 U. S. 714. In our opinion the argument is without merit. *Pennoyer* v. *Neff* merely holds that a personal judgment cannot be obtained against a nonresident on service by publication. It recognizes at p. 733 that for an *in rem* action it is sufficient that the property be within the state, subject to the control of the court, and that there be some form of service which is reasonably calculated to give notice to parties whose interests may be affected by the judgment. Cf. *Milliken* v. *Meyer,* 311 U. S. 457, 463. The first requirement can be met in other ways than seizure of title, *e. g.,* by an injunction against transfer of the property, *Pennington* v. *Fourth National Bank,* 243 U. S. 269; by an attachment, *Herbert* v. *Bicknell,* 233 U. S. 70; or by personal service on the party holding the property within the state, *Security Savings Bank* v. *California,* 263 U. S. 282. We have no doubt that where property is in a state and comes under the control of a court, as here by appointment of the temporary receiver, it is fair to permit substituted service. *Anderson Nat. Bank* v. *Luckett,* 321

U. S. 233, 240, *et seq.;* see *McDonald* v. *Mabee,* 243 U. S. 90.

Since the determination of the state law issue concerning the title of the temporary receiver by the courts below is not unreasonable, we accept it as correct for the purposes of this case.

A suggestion appears in petitioner's briefs, but not in the questions presented by the petition for certiorari, that the judgments below should be vacated and the case remanded to the District Court to be held until the parties can secure from the courts of New York a decision as to whether the temporary receiver took title to the claim against ASCAP. Waiving the failure to raise the issue by the petition for certiorari,[22] we consider the contention in deference to the earnestness with which the point is pressed in the dissent.[23] If the state law is that title passed to the temporary receiver on his appointment prior to the freezing order, the Custodian, by the assumption of the opinion, would obtain nothing by his order vesting AKM property. Such a ruling would make unnecessary consideration of any other issue.

This suggested procedure has been followed in order to avoid a decision on a federal constitutional issue—*Spector Motor Co.* v. *McLaughlin,* 323 U. S. 101; *Chicago* v. *Fieldcrest Dairies,* 316 U. S. 168; *Railroad Comm'n* v. *Pullman Co.,* 312 U. S. 496; but cf. *Public Utilities Comm'n* v. *United Fuel Gas Co.,* 317 U. S. 456, 462–63—and where the only issue in the case was one of state law, although federal jurisdiction was based on the Bankruptcy Act. *Thompson* v. *Magnolia Petroleum Co.,* 309 U. S. 478. We have refused in a diversity of citizenship case to allow the difficulty of an issue of state law to deter us

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[22] *Connecticut R. & L. Co.* v. *Palmer,* 305 U. S. 493.

[23] Cf. *West* v. *Rutledge Timber Co.,* 244 U. S. 90, 100.

from exercising our jurisdiction when federal determination was subject to equitable discretion and the state issue was the only one in the case. *Meredith* v. *Winter Haven,* 320 U. S. 228.[24] To refrain from deciding it, we there said, would be to enervate diversity jurisdiction.

Where a case involves a nonconstitutional federal issue, however, the necessity for deciding which depends upon the decision on an underlying issue of state law, the practice in federal courts has been, when necessary, to decide both issues. This was the course we followed in *Markham* v. *Allen,* 326 U. S. 490, 495–6, a case arising under the Trading with the Enemy Act, where an issue was the construction of a state statute. The state law question in *Estate of Spiegel* v. *Commissioner, supra,* was concededly difficult and unsettled; its decision admittedly controlled the existence of a federal question, since a finding that there was no possibility of reverter under Illinois law would have finally determined the issue on which the case was decided. And yet, although a method may have existed for obtaining an adjudication on the issue from the Illinois courts, 335 U. S. 632, 673–4, this Court followed the procedure which we adopt here of depending upon the determination of state law by the Court of Appeals. 335 U. S. 701, 707–8. In so doing, it followed the decision in *Helvering* v. *Stuart,* 317 U. S. 154, 161, *et seq.* *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, a common-law case, is itself a precedent against any general ruling that cases properly in the federal courts that depend upon

[24] Where there is no suggestion to hold and send to a state court for the resolution of a state issue, we decide issues of state law. See cases in federal courts under diversity jurisdiction. *Wichita Royalty Co.* v. *City National Bank,* 306 U. S. 103; *West* v. *A. T. & T. Co.,* 311 U. S. 223; *Fidelity Trust Co.* v. *Field,* 311 U. S. 169; *Six Companies* v. *Highway Dist.,* 311 U. S. 180; *Stoner* v. *New York Life Ins. Co.,* 311 U. S. 464; *Palmer* v. *Hoffman,* 318 U. S. 109, 117.

state law should have that issue submitted to state courts for decision. See the later decision in the same case, *Tompkins* v. *Erie R. Co.*, 98 F. 2d 49.

The cases mentioned above where this Court required submission of single issues, excised from the controversy, to state courts were cases in equity. The discretion of equity as to the terms upon which it would grant its remedies, in the light of our rule to avoid an interpretation of the Federal Constitution unless necessary, was relied upon to justify a departure from normal procedure. In the *Magnolia* case, we directed that the trustee file plenary proceedings to determine title in a state court litigation necessarily complete in itself. The complaint here in a single count seeks recovery of the debt from ASCAP and determination of the Custodian's title to the claim *vis-à-vis* the receiver. Assuming that quieting title to a chattel is an equitable proceeding and that the District Court can, by cutting out the title issue and by refusing to proceed in the controversy unless obeyed, compel the Custodian by whatever proceedings New York may provide to litigate only the narrow issue of title in the temporary receiver, there would remain the problem of control of the receiver, by threats of contempt action, to keep him from raising in such proceedings federal issues such as the right to secure title as permanent receiver through state judicial action after the freezing or immobilization order. This federal issue we decided above. Furthermore, as the state court could reasonably require complete adjudication of the controversy, the District Court would perhaps be compelled to stay proceedings in the state court to protect its own jurisdiction. 28 U. S. C. § 2283. Otherwise, in sending a fragment of the litigation to a state court, the federal court might find itself blocked by *res judicata,* with the result that the entire federal controversy would be ousted from the

federal courts, where it was placed by Congress. See note 17, *supra.*

The submission of special issues is a useful device in judicial administration in such circumstances as existed in the *Magnolia, Spector, Fieldcrest* and *Pullman* cases, *supra,* but in the absence of special circumstances, 320 U. S. at 236, 237, it is not to be used to impede the normal course of action where federal courts have been granted jurisdiction of the controversy.

We reject the suggestion that a decision in this case in the federal courts should be delayed until the courts of New York have settled the issue of state law.

*Third.* The petitioner makes the further point that the judgment below determining that he had no right, title or interest to the claim of AKM against ASCAP is beyond the competence of the federal district court because that property was in the hands of the state court by virtue of the receivership. Even if title did not pass, he argues, he, and through him the state court, had possession of the claim by virtue of his appointment as temporary receiver before the promulgation of the freezing order. Reliance is placed on the rulings of cases like *Kline* v. *Burke Construction Co.,* 260 U. S. 226, 229, 231; *Princess Lida* v. *Thompson,* 305 U. S. 456, 466; and *Farmers' Loan Co.* v. *Lake St. R. Co.,* 177 U. S. 51, 61. The rule declared by these cases is that when one court has taken possession and control of a *res,* a second court is disabled from exercising a power over that *res.* The circumstances of this controversy do not present such an interference with state control of a *res.* We are dealing with a situation more closely resembling determinations of rights to participate in *res* in the hands of state courts.[25] What

[25] See *Markham* v. *Allen,* 326 U. S. 490; *Commonwealth Trust Co.* v. *Bradford,* 297 U. S. 613; *Clark* v. *Tibbetts,* 167 F. 2d 397, 401.

the state court had, at most, was a claim against a debtor, ASCAP. The judgment enabled the Custodian to collect the debt that ASCAP owed AKM. Although this judgment determined title to AKM's claim against ASCAP when the adverse claimant was a state receiver, those facts did not prevent the federal court from giving a judicial declaration of the right to the claim. The scheme of the Trading with the Enemy Act contemplates that federal courts may provide such determinations. § 17; cf. *Markham* v. *Allen,* 326 U. S. 490, 495. The congressional purpose to put control of foreign assets in the hands of the President through the Custodian, so that there might be a unified national policy in the administration of the Act, argues strongly for federal determination of issues of rights in the blocked assets. Comity does not require abnegation to the extent that a federal court cannot adjudicate rights to the claim involved.

*Affirmed.*

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

MR. JUSTICE JACKSON dissents on the ground that ASCAP is not a banking institution under the definition in Executive Order No. 8785.

MR. JUSTICE FRANKFURTER, dissenting in part.

The Court recognizes that central to determining the effect of the Alien Property Custodian's freezing and vesting orders is the effect under New York law of petitioner's appointment as temporary receiver on June 13, 1941. It observes that "The precise issue of state law involved, *i. e.,* whether the temporary receiver under § 977–b of the New York Civil Practice Act is vested with title by virtue of his appointment, is one which has not been

decided by the New York courts." And it concedes that the language of the relevant New York statutes "is easily susceptible of varying interpretations." Yet it puts its own interpretation on those statutes though that interpretation may be displaced tomorrow by the only courts which have power to render an authoritative interpretation of New York law—the courts of the State of New York.

In other cases that have come before us in which decision of a federal issue or the necessity for its decision depended on a seriously doubtful question of State law, we have directed that application should first be made to the courts of the State for final disposition of the State question. *Thompson* v. *Magnolia Petroleum Co.,* 309 U. S. 478; *Railroad Comm'n of Texas* v. *Pullman Co.,* 312 U. S. 496; *Chicago* v. *Fieldcrest Dairies,* 316 U. S. 168; *Spector Motor Service, Inc.* v. *McLaughlin,* 323 U. S. 101; *A. F. of L.* v. *Watson,* 327 U. S. 582. In each of these cases the discretion of a federal court of equity could practicably be exercised in a way which retained ultimate jurisdiction of the case while permitting adjudication of the State question in the State courts. In each there were available State procedures capable of providing a prompt decision, and the litigation had not already consumed such an unconscionable amount of time as to make recourse to them inexpedient. Cf. *Public Utilities Comm'n* v. *United Fuel Gas Co.,* 317 U. S. 456. The present case meets all those conditions, see N. Y. Civ. Prac. Act § 473, and should receive the same disposition.

It is true that in all but one of these cases recourse to the State courts also served the purpose of avoiding what might have proved to be unnecessary decision of a constitutional issue. But see *Thompson* v. *Magnolia Petroleum Co.,* 309 U. S. 478. Even more fundamental, however, was recognition of the importance of maintain-

ing harmonious relations between parallel systems of State and federal courts in a situation where, because State law controlled, the State courts had the last word and so a federal court at best could make only an informed guess. That this was a dominant consideration in the mind of the Court appears plainly in the language of its opinions. The following passages are illustrative:

1. "The last word on the meaning of Article 6445 of the Texas Civil Statutes, and therefore the last word on the statutory authority of the Railroad Commission in this case, belongs neither to us nor to the district court but to the supreme court of Texas. In this situation a federal court of equity is asked to decide an issue by making a tentative answer which may be displaced tomorrow by a state adjudication. . . . The reign of law is hardly promoted if an unnecessary ruling of a federal court is thus supplanted by a controlling decision of a state court. . . .

"Few public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies, whether the policy relates to the enforcement of the criminal law, *Fenner* v. *Boykin,* 271 U. S. 240; *Spielman Motor Co.* v. *Dodge,* 295 U. S. 89; or the administration of a specialized scheme for liquidating embarrassed business enterprises, *Pennsylvania* v. *Williams,* 294 U. S. 176; or the final authority of a state court to interpret doubtful regulatory laws of the state, *Gilchrist* v. *Interborough Co.,* 279 U. S. 159; cf. *Hawks* v. *Hamill,* 288 U. S. 52, 61. These cases reflect a doctrine of abstention appropriate to our federal system whereby the federal courts, 'exercising a wise discretion,' restrain their authority because of 'scrupulous regard for the rightful independence of the state governments' and for the smooth working of the federal judiciary. See *Cavanaugh* v. *Looney,* 248 U. S. 453, 457; *Di Gio-*

*vanni* v. *Camden Ins. Assn.*, 296 U. S. 64, 73." *Railroad Comm'n of Texas* v. *Pullman Co.*, 312 U. S. 496, 499–501.

2. "We are of the opinion that the procedure which we followed in the *Pullman* case should be followed here. Illinois has the final say as to the meaning of the ordinance in question. It also has the final word on the alleged conflict between the ordinance and the state Act. The determination which the District Court, the Circuit Court of Appeals, or we, might make could not be anything more than a forecast—a prediction as to the ultimate decision of the Supreme Court of Illinois. . . . As we said in the *Pullman* case, 'The resources of equity are equal to an adjustment that will avoid the waste of a tentative decision' and any 'needless friction with state policies.' . . . It is an exercise of a 'sound discretion, which guides the determination of courts of equity.' *Beal* v. *Missouri Pacific R. Co.*, [312 U. S. 45, 50]. In this case, that discretion calls for a remission of the parties to the state courts, which alone can give a definitive answer to the major questions posed. Plainly, they constitute the more appropriate forum for the trial of those issues. See 54 Harv. L. Rev. 1379. Considerations of delay, inconvenience, and cost to the parties, which have been urged upon us, do not call for a different result. For we are here concerned with the much larger issue as to the appropriate relationship between federal and state authorities functioning as a harmonious whole." *Chicago* v. *Fieldcrest Dairies*, 316 U. S. 168, 171–73.

3. ". . . if, as the District Court thought, this Florida law is not self-executing, suits seeking to raise the due process question or any other constitutional question would be premature until Florida supplied sanctions for its enforcement. A decision today on the merits might, therefore, amount to no more than an advisory opinion. . . . The resources of equity are not inadequate

to deal with the problem so as to avoid unnecessary friction with state policies, while selective cases go forward in the state courts for an orderly and expeditious adjudication of the state law questions." *A. F. of L.* v. *Watson,* 327 U. S. 582, 598–99.

So here, though no constitutional issue is present, regard for the respective orbits of State and federal tribunals is the best of reasons, as a matter of judicial administration, for requiring a definitive adjudication by the New York courts rather than proceeding on the basis of our own tentative guess as to the meaning of the New York statutes. That federal issues may remain is no justification for refusing to submit to the New York courts a separable issue of New York law. We have no occasion to assume that they will go on to decide these federal questions when a federal court has expressly retained jurisdiction to decide them. Cf. *Federal Power Comm'n* v. *Pacific Power & L. Co.,* 307 U. S. 156, 160.

We should remand the case to the District Court with instructions to retain jurisdiction pending submission to the courts of New York by appropriate proceedings of the question whether title to AKM's claim against ASCAP passed to petitioner upon his appointment as temporary receiver.

# FEDERAL POWER COMMISSION *v.* PANHANDLE EASTERN PIPE LINE CO. ET AL.

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

No. 558. Argued April 22, 1949.—Decided June 20, 1949.

A natural-gas company which is subject to the Natural Gas Act may sell the leases covering an estimated 12% of its total gas reserves without the approval and contrary to an order of the Federal Power Commission. Pp. 499–507.

1. Section 1 (b) of the Natural Gas Act, excluding "the production or gathering of natural gas" from the Commission's jurisdiction, left the transfer of gas leases to state regulation and outside the scope of the Commission's regulatory powers. Pp. 502–505.

2. Sections 5 (b), 6 (a) and (b), 8 (a), 9 (a), 10 (a) and 14 (b), empowering the Commission to make investigations, to prescribe rules for the keeping of accounts and records by natural-gas companies, and to require them to file such reports as are deemed necessary by the Commission in the proper administration of the Act, do not require a different result. Pp. 505–507.

3. Nor is a different result required by §§ 7 (c), 4, 5 and 16, authorizing the Commission to issue certificates of convenience and necessity for the interstate transportation and sale of natural gas, to determine reasonable rates for such transportation and sale, and to do the things appropriate to carry out the provisions of the Act—even when the leases involved were used to justify the issuance of certificates of convenience and necessity. Pp. 507–508.

4. Nor is a different result required by § 7 (b), which forbids any natural-gas company to abandon any of its facilities subject to the jurisdiction of the Commission without the prior approval of the Commission. Pp. 508–513.

5. The conclusion here reached is supported by the undisputed finding by the District Court that it has been the practice for natural-gas companies to trade freely in gas leases and that the Commission has never before asserted the right to regulate the transfer of such leases. Pp. 513–514.

6. Since the Commission could not stop the transfer of a gas lease, it was not entitled to an injunction delaying such a transfer until it could complete an investigation and determine its own power and the necessity for using it. Pp. 514–516.

172 F. 2d 57, affirmed.

A Federal District Court denied an injunction sought by the Federal Power Commission to bar the sale of certain gas leases by a natural-gas company subject to the Natural Gas Act. The Court of Appeals affirmed. 172 F. 2d 57. This Court granted certiorari. 336 U. S. 935. *Affirmed,* p. 516.

*Bradford Ross* argued the cause for petitioner. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Morison, Philip Elman, Paul A. Sweeney, Melvin Richter, Morton Hollander, Bernard A. Foster, Jr.* and *Howell Purdue.*

*Robert P. Patterson* and *Jeff A. Robertson* argued the cause for respondents. With *Mr. Patterson* on the brief for the Panhandle Eastern Pipe Line Co. were *E. Ennalls Berl, John S. L. Yost* and *Francis J. Sypher.* With *Mr. Robertson* on the brief for the State Corporation Commission of Kansas were *Jay Kyle* and *Douglas Gleason.*

*Arthur G. Connolly, Kevin McInerney, Gerard C. Smith* and *Peter H. Kaminer* filed a brief for certain stockholders, respondents. *Charles S. Layton* was also of counsel.

Mr. Justice Reed delivered the opinion of the Court.

Stated broadly this certiorari brings before us for review a problem involving the scope of the power over the gas reserves of a natural-gas company given to the Federal Power Commission by the Natural Gas Act. 52 Stat. 821, as amended, 56 Stat. 83. Specifically the question to be decided is whether a natural-gas company, subject to the Act, may sell the leases covering an estimated twelve per cent of its total gas reserves without the approval and contrary to an order of the Commission.

The issue is made very sharply because the District Court and the Court of Appeals have refused an injunction, sought by the Commission, to hold the consumma-

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tion of the sale in abeyance until the Commission, through an admittedly permissible investigation, can determine whether the disposal of these reserves will impair the ability of Panhandle to supply its present and prospective customers in the area which it has undertaken to serve as a public utility. The Commission may find that public interest will best be served by requiring Panhandle to retain these reserves. The public interest has strong appeal to a court of equity for its remedies once a legal right is fairly in controversy.[1]

Respondent, Panhandle Eastern Pipe Line Company (herein called Panhandle), a Delaware corporation, transports and markets natural gas in interstate commerce by means of its pipe-line system which runs from Texas into Michigan. In addition it owns or controls gas-producing properties in Kansas, Oklahoma, and Texas.

In September, 1948, Panhandle organized Hugoton Production Company (hereinafter called Hugoton), also a Delaware corporation. On October 11, 1948, pursuant to a written agreement between the two companies, Panhandle transferred to Hugoton gas leases on approximately 97,000 acres of land in Kansas and $675,000 in cash. In return Panhandle received all the outstanding capital stock of Hugoton and the option to purchase on or after January 1, 1965, all or part of the gas produced from this land, which is at present undeveloped and not connected with any pipe-line system. The gas reserves under this acreage are estimated at approximately 700 billion cubic feet. Hugoton thereafter contracted to sell to the Kansas Power and Light Company for a period of fifteen years from November 1, 1949, to November 1, 1964, the gas produced from these leases, which, according

[1] *Porter* v. *Warner Co.*, 328 U. S. 395, 398; *Yakus* v. *United States*, 321 U. S. 414, 440; *Hecht Co.* v. *Bowles*, 321 U. S. 321, 331; *Virginian R. Co.* v. *System Federation*, 300 U. S. 515, 552; *Harrisonville* v. *Dickey Clay Co.*, 289 U. S. 334, 338.

to the contract, was to be consumed wholly within the State of Kansas.

On the same date as the transaction between Panhandle and Hugoton, Panhandle declared a dividend of the Hugoton stock to the holders of its common stock at the rate of one-half share of Hugoton stock for each share of common stock of Panhandle. The dividend was to be paid November 17, 1948, to Panhandle's stockholders of record on October 29, 1948. Nothing called to our attention indicates any control retained by Panhandle over the Hugoton stock.

On October 26, 1948, the Federal Power Commission (hereinafter called the Commission) ordered an investigation "pursuant to the provisions of Section 14 of the Natural Gas Act, of the facts and circumstances involved in the formation and proposed operation of the Hugoton Production Company and the transfer to said company by Panhandle Eastern of the natural-gas reserves . . . ." By a supplementary order of November 10, 1948, Hugoton was joined as a party, a date for a public hearing was fixed, and Hugoton and Panhandle ordered to show cause why they should not be directed to cancel the contract, and why Panhandle should not be prohibited from transferring the leases without the consent of the Commission and from distributing the Hugoton stock to its stockholders. Pending a final determination, the Commission ordered that the *status quo* be maintained by Panhandle and Hugoton.

Upon the apparent refusal of Panhandle to comply with this order, the Commission on November 13, 1948, instituted the instant suit in the United States District Court for the District of Delaware, seeking a preliminary injunction and a temporary restraining order to compel Panhandle to proceed no further with the stock distribution and to maintain the *status quo* pending the final determination of the questions for which the hearing

before the Commission had been set. The District Court issued the temporary restraining order which has been kept in effect by successive orders and which enjoined Panhandle from issuing to its stockholders the dividend of Hugoton stock. Panhandle was ordered to cause Hugoton to refrain from transferring any of the gas leases and from issuing or transferring any of its capital stock. After a hearing, the District Court refused to grant the preliminary injunction, on the ground that there had not been shown any basis for the relief sought by the Commission.

On appeal, the Court of Appeals for the Third Circuit affirmed the judgment of the District Court on the ground that § 1 (b) of the Natural Gas Act, excluding "the production or gathering of natural gas" from the Commission's jurisdiction, left the transfer of gas leases to state regulation and outside the scope of the Commission's regulatory powers. 172 F. 2d 57. The State Corporation Commission of Kansas had been granted leave to intervene in the Court of Appeals in opposition to the Federal Power Commission.

To consider the important question of the applicability of the Natural Gas Act to this transaction, we granted certiorari. 336 U. S. 935.

Without entering upon another review of its legislative history,[2] suffice it to say that the Natural Gas Act did not envisage federal regulation of the entire natural-gas field to the limit of constitutional power. Rather it con-

[2] The legislative history has been discussed by our prior opinions in *Panhandle Eastern Pipe Line Co.* v. *Public Service Comm'n of Indiana*, 332 U. S. 507, 514–521; *Interstate Natural Gas Co.* v. *Federal Power Comm'n*, 331 U. S. 682, 689–690; *Colorado Interstate Gas Co.* v. *Federal Power Comm'n*, 324 U. S. 581, 601–603; *Federal Power Comm'n* v. *Hope Natural Gas Co.*, 320 U. S. 591, 609–613; *Illinois Natural Gas Co.* v. *Central Illinois Pub. Serv. Co.*, 314 U. S. 498, 506–508.

templated the exercise of federal power as specified in the Act, particularly in that interstate segment which the states were powerless to regulate because of the Commerce Clause of the Federal Constitution.[3] The jurisdiction of the Federal Power Commission was to complement that of the state regulatory bodies.[4] Accordingly, Congress in § 1 (b) of the Act not only prescribed the intended reach of the Commission's power, but also specified the areas into which this power was not to extend.

Section 1 (b) provides as follows:

> "(b) The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas."

"This section determines the Act's coverage and does so in the light of the situation existing at the time. Three things and three only Congress drew within its own regulatory power, delegated by the Act to its agent, the Federal Power Commission. These were: (1) the transportation of natural gas in interstate commerce; (2) its sale in interstate commerce for resale; and (3) natural gas companies engaged in such transportation or sale." *Panhandle Eastern Pipe Line Co.* v. *Public Service Com-*

[3] See H. R. Rep. No. 2651, 74th Cong., 2d Sess., pp. 1–3; H. R. Rep. No. 709, 75th Cong., 1st Sess., pp. 1–4; S. Rep. No. 1162, 75th Cong., 1st Sess., pp. 1–3.

[4] See *Public Utilities Comm'n* v. *United Fuel Gas Co.*, 317 U. S. 456, 467; *Panhandle Eastern Pipe Line Co.* v. *Public Service Comm'n*, 332 U. S. 507, 517–518.

*mission of Indiana,* 332 U. S. 507, 516. The Act, moreover, expressly exempts from its coverage [5] (1) any other transportation or sale of natural gas; (2) the local distribution of natural gas; (3) the facilities used for local distribution; and (4) the production and gathering of natural gas.

The Commission seeks to distinguish between the activities of production and gathering, such as drilling, spacing wells, or collecting gas, and the facilities, such as reserves and gas leases, used therefor and argues that only the former were excluded from the coverage of the Act. In support of this position it is pointed out that the section specifically exempts both the local distribution and the facilities used therefor, while it makes no mention of the facilities used for production or gathering.[6] In the face of the unambiguous language of the Act and its legislative background, we cannot ascribe such a narrow meaning to the words, "the production or gathering of natural gas." In *Colorado Interstate Gas Co.* v. *Federal Power Commission,* 324 U. S. 581, 603, we said

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[5] The House report on the Act, after quoting the exemption provisions of § 1 (b), says: "The quoted words are not actually necessary, as the matters specified therein could not be said fairly to be covered by the language affirmatively stating the jurisdiction of the Commission, but similar language was in previous bills, and, rather than invite the contention, however unfounded, that the elimination of the negative language would broaden the scope of the act, the committee has included it in this bill." H. R. Rep. No. 709, 75th Cong., 1st Sess., p. 3.

[6] Actually, in the words of the House report, "That part of the negative declaration stating that the act shall not apply to 'the local distribution of natural gas' is surplusage by reason of the fact that distribution is made only to consumers in connection with sales, and since no jurisdiction is given to the Commission to regulate sales to consumers the Commission would have no authority over distribution, whether or not local in character." H. R. Rep. No. 709, 75th Cong., 1st Sess., p. 3.

that this phrase comprehended the producing properties and gathering facilities of a natural-gas company. We now adhere to this natural and clear meaning of the words and their obvious expression of congressional intent.[7] Of course leases are an essential part of production.

The Commission cites §§ 5 (b), 6 (a) and (b), 8 (a), 9 (a), 10 (a), and 14 (b) to show that Congress intended "to confer a certain measure of authority upon the Commission" over the production and gathering of gas. These sections empower the Commission to make investigations, to prescribe rules for the keeping of accounts and records by the natural-gas companies, and to require that the companies file such reports as are deemed necessary by the Commission in the proper administration of the Act. These powers are inquisitorial in nature and were designed to aid the Commission in exercising its powers and "to serve as a basis for recommending further legislation to the Congress." Section 14 (b), quoted below, comes closest to supporting the Commission's argu-

[7] In a brief prepared by the Solicitor of the Federal Power Commission for the House Committee on Interstate and Foreign Commerce on the constitutionality of H. R. 11662, an earlier bill substantially similar to the Natural Gas Act, the following appears as part of the analysis of the bill: "The bill makes no attempt to regulate the production or gathering facilities of a natural-gas company, this function being purely local in character, nor is any attempt made to exercise control over distribution facilities." Hearings before a subcommittee of the House Committee on Interstate and Foreign Commerce on H. R. 11662, 74th Cong., 2d Sess., p. 17.

The Solicitor of the Federal Power Commission in testifying at the same hearing also answered the following question:

"Mr. COLE [Member of Committee]. Does this bill give anywhere the Commission power over the source of natural gas in the different fields in a manner which we might call comparable to that which your Commission now has over hydroelectric generating plants?

"Mr. DEVANE [Solicitor of the F. P. C.]. It does not; no. It does not attempt to regulate the gathering rates or the gathering business. Section 11, I believe it is, of the bill deals with that." P. 34.

ment but that confers only power to obtain information.[8] Although these sections bear evidence of congressional consideration of the relationship of production properties to other elements of the natural-gas business, they do not even by implication suggest to us an extension of the regulatory provisions of the Act to cover incidents connected with the production or gathering of gas.

In *Colorado Interstate Gas Co.* v. *Federal Power Commission, supra,* at 602, the Court in considering the more important of these sections said that they described powers which were aids to the "normal conventions" of rate making. We held that the Commission in exercising its rate-making authority could include the fair value of the producing and gathering facilities in the rate base of a natural-gas company. The primary duty of the Commission is to fix just and reasonable rates for the transportation and sale of natural gas in interstate commerce for resale. For this purpose the Court permitted the Commission to examine and consider the cost of production and gathering. The use of such data for rate making is not a precedent for regulation of any part of production or marketing. Before the *Colorado Interstate* decision, it was apparent that the value of producing facilities and the cost of gas bought by a

[8] "(b) The Commission may, after hearing, determine the adequacy or inadequacy of the gas reserves held or controlled by any natural-gas company, or by anyone on its behalf, including its owned or leased properties or royalty contracts; and may also, after hearing, determine the propriety and reasonableness of the inclusion in operating expenses, capital, or surplus of all delay rentals or other forms of rental or compensation for unoperated lands and leases. For the purpose of such determinations, the Commission may require any natural-gas company to file with the Commission true copies of all its lease and royalty agreements with respect to such gas reserves."

See H. R. Rep. No. 709, 75th Cong., 1st Sess., p. 7.

natural-gas company from producers would be weighty factors in rate making whether a rate-base method or other method for fixing rates was used. Low valuation by the Commission of producing properties or low-cost allowance for purchased gas discourages exploration for gas or its sale in interstate commerce.[9] Congress knew this necessary relationship between production and distribution but excluded the Commission from exercising any direct control or regulation over the actual production and gathering of natural gas.

The Commission urges it has jurisdiction over the transaction between Panhandle and Hugoton from the powers granted to it by § 7 (c) of the Act which authorizes it to issue certificates of convenience and necessity for the interstate transportation and sale of natural gas and those granted to it by §§ 4 and 5 to determine reasonable rates for such transportation and sale. It is pointed out that Panhandle in three applications for certificates of convenience and necessity to construct additional pipeline facilities had included the acreage here involved as part of its gas reserves, and certificates were issued upon the finding by the Commission that Panhandle had adequate reserves to warrant its expansion.[10] Moreover Panhandle had been permitted to include these reserves in its rate base as "used and useful property." The Commission, therefore, argues that these gas leases which Panhandle proposes to grant to Hugoton have been dedicated to the discharge of Panhandle's public-utility obligation to render adequate service at reasonable and nondiscriminatory rates. From these circumstances, the

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[9] *Colorado Interstate Gas Co.* v. *Federal Power Comm'n,* 324 U. S. 581, 603; *Federal Power Comm'n* v. *Hope Natural Gas Co.,* 320 U. S. 591, 610, 612.

[10] 5 F. P. C. 544, 546, 949, 952; F. P. C. Docket G–876, Order of June 10, 1948.

Commission concludes that these leases cannot be relinquished by Panhandle without the consent of the Commission, which has the implied power to protect its rate-making function and to insure the maintenance of adequate service by a natural-gas company. Sections 4, 5 and 7 do not concern the producing or gathering of natural gas; rather they have reference to the interstate sale and transportation of gas and are so limited by their express terms. Thus §§ 4 (a), (b), (c), 5 (a) and 7 (c) speak of "transportation or sale of natural gas subject to the jurisdiction of the Commission" while § 7 (a) and (b) refer respectively to "transportation facilities" and "facilities subject to the jurisdiction of the Commission." [11] Nothing in the sections indicates that the power given to the Commission over natural-gas companies by § 1 (b) could have been intended to swallow all the exceptions of the same section and thus extend the power of the Commission to the constitutional limit of congressional authority over commerce. The repetition of the words "subject to the jurisdiction" makes clear to us the intent to keep the Commission's hands out of the excepted local matters. The same answer applies to petitioner's argument that § 16 gives it authority to stop sales of leases.[12] The power to do the things appropriate to carry out the provisions of the Act can hardly be taken to rescind a prohibition against certain actions.

The Federal Power Commission leans heavily upon § 7 (b), which provides that no natural-gas company may abandon any of its facilities subject to the jurisdiction

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[11] *Colorado Interstate Gas Co.* v. *Federal Power Comm'n*, 324 U. S. 581, 598.

[12] "Sec. 16. The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this Act. . . ."

of the Commission without the prior approval of the Commission.[13] The argument here is that since natural gas is the "lifeblood" of a pipe-line system, a company by disposing of its gas reserves, unhampered by Commission control, may render itself unable to continue service; consequently abandonment of facilities and service without the consent of the Commission will result. The argument begs the question. The section, like those above, covers only "facilities subject to the jurisdiction of the Commission."

To accept these arguments springing from power to allow interstate service, fix rates, and control abandonment would establish wide control by the Federal Power Commission over the production and gathering of gas. It would invite expansion of power into other phases of the forbidden area.[14] It would be an assumption of powers specifically denied the Commission by the words of the Act as explained in the report and on the floor of both Houses of Congress.[15] The legislative history

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[13] "(b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment."

[14] Would it soon be contended that statutory power to require extension of service, § 7 (a), included power to require exploration or acquisition of leases or allocation of production to interstate pipe lines in order to serve the public interest?

[15] The report of the House Committee on Interstate and Foreign Commerce on H. R. 6586, 75th Cong., 1st Sess., which became the Natural Gas Act, was adopted without change by the Senate Committee on Interstate Commerce as its report on the same bill. See note 3, *supra*. The following excerpts are taken from the report as particularly pertinent:

"The bill is substantially identical with H. R. 12680 which, as

Footnote 15—Continued.

amended, was reported by the Committee on Interstate and Foreign Commerce of the Seventy-fourth Congress, second session, with a recommendation that it pass. If enacted, the present bill would for the first time provide for the regulation of natural-gas companies transporting and selling natural gas in interstate commerce. It confers jurisdiction upon the Federal Power Commission over the transportation of natural gas in interstate commerce, and the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use. The States have, of course, for many years regulated sales of natural gas to consumers in intrastate transactions. The States have also been able to regulate sales to consumers even though such sales are in interstate commerce, such sales being considered local in character and in the absence of congressional prohibition subject to State regulation. (See *Pennsylvania Gas Co.* v. *Public Service Commission* (1920), 252 U. S. 23.) There is no intention in enacting the present legislation to disturb the States in their exercise of such jurisdiction. However, in the case of sales for resale, or so-called wholesale sales, in interstate commerce (for example, sales by producing companies to distributing companies) the legal situation is different. Such transactions have been considered to be not local in character and, even in the absence of Congressional action, not subject to State regulation. (See *Missouri* v. *Kansas Gas Co.* (1924), 265 U. S. 298, and *Public Utilities Commission* v. *Attleboro Steam & Electric Co.* (1927), 273 U. S. 83.) The basic purpose of the present legislation is to occupy this field in which the Supreme Court has held that the States may not act.

. . . . . .

". . . The bill takes no authority from State commissions, and is so drawn as to complement and in no manner usurp State regulatory authority, and contains provisions for cooperative action with State regulatory bodies. . . .

. . . . . .

"Your committee believes that this legislation is highly desirable to fill the gap in regulation that now exists by reason of the lack of authority of the State commissions." H. R. Rep. No. 709, 75th Cong., 1st Sess., pp. 1–3.

During the debate on the bill in the House, its sponsor, Chairman Lea of the Committee on Interstate and Foreign Commerce, made the following explanatory statements:

Footnote 15—Continued.

"The primary purpose of the pending bill is to provide Federal regulation, in those cases where the State commissions lack authority, under the interstate-commerce law. This bill takes nothing from the State commissions; they retain all the State power they have at the present time. This bill would apply to the transportation of natural gas in interstate commerce and to the sale of natural gas in interstate commerce for resale or public consumption.

. . . . . .

"The bill does not apply to the production and gathering of gas." 81 Cong. Rec. 6721.

Likewise on the floor of the Senate, Chairman Wheeler of the Committee on Interstate Commerce gave a similar interpretation to the Act:

"Mr. AUSTIN. Mr. President, may I ask the Senator from Montana [Mr. Wheeler] a question concerning this bill? Does the bill undertake to regulate the production of natural gas, or does it undertake to regulate the producers of natural gas?

"Mr. WHEELER. It does not attempt to regulate the producers of natural gas or the distributors of natural gas; only those who sell it wholesale in interstate commerce. . . .

"Mr. AUSTIN. Mr. President, will the Senator yield for one other inquiry?

"Mr. WHEELER. Yes.

"Mr. AUSTIN. Is the bill limited in its scope to the regulation of transportation?

"Mr. WHEELER. Yes; it is limited to transportation in interstate commerce, and it affects only those who sell gas wholesale.

. . . . . .

"Mr. KING. Mr. President, I should like to obtain information from the Senator as to the implications that arise from the bill, and what States it would affect. As an illustration, if gas is produced in Wyoming and is transported for consumption into the Senator's State or my State, would the Federal Power Commission have to do with such an activity?

"Mr. WHEELER. No; and let me say to the Senator that, as a matter of fact, the bill does not interfere with the State regulation, in any way, shape, or form." 81 Cong. Rec. 9312.

"Mr. CONNALLY. Is it not also true, even though the utility commissioners advocate it, that whenever a Federal agency takes over an activity such as this the State authorities begin to shift or lose

of this Act is replete with evidence of the care taken by Congress to keep the power over the production and gathering of gas within the states.[16] This probably occurred because the state legislatures, in the interests of conservation, had delegated broad and elaborate power to their

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their responsibility? If we turn this over to the Interstate Commerce Commission, essentially what they do will be reflected all over the country, because the interstate rates will be superimposed on the State commissions and they must necessarily be governed by them. Did not that happen to the railroads?

"Mr. WHEELER. There is no doubt about that, but this is an entirely different situation.

"Mr. CONNALLY. Yes; one involves the railroads and the other involves gas.

"Mr. WHEELER. No. There is no attempt and can be no attempt under the provisions of the bill to regulate anything in the field except where it is not regulated at the present time. It applies only as to interstate commerce and only to the wholesale price of gas." 81 Cong. Rec. 9313.

"Mr. AUSTIN. Then, it would leave to the future the right to meet any effort on the part of the central government to acquire the natural resources of the State of Montana, or the State of Vermont, or any other State?

"Mr. WHEELER. Oh, yes. It does not touch it in any way, shape, or form, except to require the furnishing of information.

"Mr. AUSTIN. I have great fear of these occult methods of acquiring the natural resources of our several States." 81 Cong. Rec. 9314.

[16] While Congress was considering the passage of the Natural Gas Act, a bill (H. R. 5711 and S. 1919, 75th Cong., 1st Sess.) was introduced in both houses of Congress on March 17, 1937, which provided that "this Act shall apply to the procurement of natural gas for the purpose of its transmission through pipe lines and its sale, exchange, transmission, or distribution in interstate commerce . . . ." The jurisdiction of the Federal Power Commission was defined as follows:

"The [Federal Power] Commission shall have jurisdiction over all facilities for the procurement of natural gas for its transmission through pipe lines and its sale, or for exchange, or distribution in interstate commerce, and over the transmission of natural gas in pipe lines in interstate commerce and over the sale, or exchange of natural gas in interstate commerce, and over all facilities connected

regulatory bodies over all aspects of producing gas.[17] The Natural Gas Act was designed to supplement state power and to produce a harmonious and comprehensive regulation of the industry.[18] Neither state nor federal regulatory body was to encroach upon the jurisdiction of the other.[19] Congress enacted this Act after full consideration of the problems of production and distribution. It considered the state interests as well as the national interest. It had both producers and consumers in mind. Legislative adjustments were made to reconcile the conflicting views.

The District Court found as a fact, and the finding is undisputed by the Commission, that, "It has been the practice in the natural gas industry for companies to trade freely in gas leases, and the Commission has never heretofore asserted the right to regulate transfers of such leases." Thus for over ten years the Commission has never claimed the right to regulate dealings in gas acreage. Failure to use such an important power for so long a time indicates to us that the Commission did not believe the power existed.[20] In the light of that history we should

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therewith as parts of a system of natural-gas transmission operated in more than one State."

The provisions of this bill, however, failed of adoption; instead Congress enacted § 1 (b) with its specific exemptions from the coverage of the Act.

[17] See, for example, Kansas Gen. Stat., §§ 55–701 to 55–713 (1947 Supp.); Mich. Stat. Ann., c. 97, §§ 13.138 (1)–13.140 (10) (Supp. 1947); Okla. Stat. Ann., tit. 52, c. 3, §§ 81–247; Texas Rev. Civ. Stat., tit. 102, Art. 6008 *et seq.* (Vernon, 1925, with Supp. 1948); La. Gen. Stat. §§ 4766–4826.2.

[18] *Public Utilities Comm'n* v. *United Fuel Gas Co.*, 317 U. S. 456, 467.

[19] *Interstate Natural Gas Co.* v. *Federal Power Comm'n*, 331 U. S. 682, 690.

[20] *Federal Trade Comm'n* v. *Bunte Brothers*, 312 U. S. 349, 352; *Norwegian Nitrogen Prod. Co.* v. *United States*, 288 U. S. 294, 315.

not by an extravagant, even if abstractly possible, mode of interpretation push powers granted over transportation and rates so as to include production. If possible, all sections of the Act must be reconciled so as to produce a symmetrical whole.[21] We cannot attribute to Congress the intent to grant such far-reaching powers as implicit in the Act when that body has endeavored to be precise and explicit in defining the limits to the exercise of federal power.[22]

The Commission sought by injunction to enforce its order halting the transaction between Panhandle and

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[21] *Colorado Interstate Gas Co.* v. *Federal Power Comm'n,* 324 U. S. 581, 602.

[22] Section 5 (b) reads:

"(b) The Commission upon its own motion, or upon the request of any State commission, whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transportation of natural gas *by a natural-gas company* in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas."

When the provisions of the bill which became the Natural Gas Act were being read for amendment on the floor of the House, § 5 (b) was amended by inserting the italicized words. Mr. Boren, a member of the House Committee on Interstate and Foreign Commerce, who submitted this amendment, explained the purpose of it as follows:

"Mr. BOREN. Mr. Chairman, my amendment has been agreed to by the committee. I offer the amendment in order to keep the jurisdiction of the Federal Government as clearly defined as possible from the jurisdiction of the State government in cases arising under the provisions of this bill.

"During the hearings I offered this amendment and made the following statement:

" 'Mr. Chairman, I would like to make this observation for the record and as a challenge to the proponents of this bill: That subsection B of section 5 provides for a growth and for the extension of the influence of a Federal bureau, or commission, in a realm

Hugoton pending the outcome of its investigation. The Commission argues that, at any rate, the transfer should be enjoined until it can determine its own power and the necessity of using it. Injunctive aid was requested under § 20 (a)[23] of the Act and the general equity power of the District Court. To be entitled to judicial assistance, however, the order issued by the Commission must be valid and based on a statutory grant of power to the Commission. As we have held above that the transfer of undeveloped gas leases is an activity related to the production and gathering of natural gas and beyond the coverage of the Act, the authority of the Commission cannot reach the sales. A proposed transfer cannot be stopped by the Commission. It should not be permitted to delay what it cannot prevent.[24] If the Commission is of the opinion that it should have power to control the

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wherein this proposal submits on its own acknowledgment that the Federal authority and responsibility does not rightfully exist.'

"Mr. Chairman, this amendment clarifies the jurisdiction as between the Federal and State governments, and assures us that the Federal Government will not go into a realm where the State government already has proper authority to handle the problem.

"The committee has approved the amendment, and I have nothing further to say." 81 Cong. Rec. 6728.

[23] "SEC. 20. (a) Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this Act, or of any rule, regulation, or order thereunder, it may in its discretion bring an action in the proper district court of the United States, the District Court of the United States for the District of Columbia, or the United States courts of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices and to enforce compliance with this Act or any rule, regulation, or order thereunder, . . . ."

[24] Cf. *Public Utilities Comm'n* v. *United Fuel Gas Co.*, 317 U. S. 456, 468.

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disposition of leases by natural-gas companies, it is authorized to call the attention of Congress to that fact.[25]

The judgment of the Court of Appeals is accordingly

*Affirmed.*

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

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE RUTLEDGE concur, dissenting.

The Court's judgment and opinion in this case go far toward scuttling the Natural Gas Act. 52 Stat. 821, as amended, 56 Stat. 83. In that Act Congress declared it "necessary in the public interest" for the Federal Government to regulate natural-gas companies engaged in

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[25] In an analogous situation before the institution of this litigation, there had been uncertainty of opinion in the Commission as to the reach of the Act toward sales by independent producers and gatherers to natural-gas companies for transportation in interstate commerce. See reports of the Federal Power Commission on its Natural Gas Investigation (Docket No. G–580), transmitted to Congress on April 28, 1948. In Part IV of the report subscribed to by Commissioners Smith and Wimberly, it is concluded at pp. 38 and 40:

"No reasonable basis is found in the Act or its legislative history for a conclusion that, although the 'activities' of production and gathering are exempt under Section 1 (b), sales of natural gas which are made at arm's length by producers and gatherers who do not thereafter transport it in interstate commerce may be regulated. Unless such a distinction is specifically disclaimed, doubts and uncertainties will continue to be felt and expressed regarding the possible jurisdiction under the Natural Gas Act of those who only produce and gather natural gas and then sell it to others transporting such gas in interstate commerce." Pp. 38–39.

"In view of the present unsettled state of this matter, it is desirable, as the Commission has heretofore recommended, that the Congress should adopt appropriate amendatory legislation to make it clear that independent producers or gatherers of natural gas, and their sales thereof to interstate pipe lines, are not subject to the provisions of the Natural Gas Act. Such action will confirm what clearly ap-

the interstate transportation and sale of natural gas. Many sections of the Act detailed the authority granted the Federal Power Commission to regulate such companies and in addition § 16 granted broad congressional authority to the Commission "to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as . . . necessary or appropriate to carry out the provisions" of the Act. Today's opinion interprets this Act as denying the Commission all authority to perform any action or issue any order to regulate an interstate company's interest in natural-gas properties. This interpretation deprives the Commission of the power to discharge its congressionally imposed duty to protect the public interest.

The Court's sterilizing interpretation rests on an exception to Commission authority appearing in § 1 (b) of the Act.[1] That exception provides that the Act shall not

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pears to have been the original intent of Congress when it enacted the Natural Gas Act in 1938." Pp. 40–41.

See also the report subscribed to by Commissioners Olds and Draper, pp. 12–14.

Congress is now giving consideration to this problem. See H. R. 79, H. R. 1758, H. R. 982, S. 1498, and S. 1831, 81st Cong., 1st Sess., and committee hearings thereon.

[1] Today's opinion also relies on a "finding of fact" by the District Court that the Commission had never heretofore "asserted the right to regulate transfers of such leases." The majority opinion views this "finding" as an evidence that for ten years "the Commission did not believe the power existed." But this "finding" of fact rests only on affidavits offered in respect to a motion for a preliminary injunction and should not be utilized as a prop to support the Court's interpretation of the Act. Moreover, the Commission points out that until the present time no such trading as is involved here had taken place. The Commission states in its brief that the finding of fact "does not reflect the full picture. Until this time, such trading has taken place with the view of blocking in reserves and improving service, and so far as the Commission is presently aware, not to achieve results which would derogate from the Commission's jurisdiction."

apply to "the production or gathering of natural gas." I agree with the Court that this language is "unambiguous" and that this Court should give the language its "natural and clear meaning." "Production" of gas would thus mean the act of bringing forth gas from the earth, and "gathering" would mean the act of collecting gas after it has been brought forth. Such are the "natural and clear" meanings we had heretofore attributed to these word symbols. *Colorado Interstate Gas Co.* v. *Comm'n,* 324 U. S. 581, 597–604; *Interstate Gas Co.* v. *Power Comm'n,* 331 U. S. 682, 689–691. It was the physical acts incident to the "production and gathering" of gas—local activities—that our prior decisions emphasized Congress intended to leave states free to regulate. Today the Court reads this congressionally granted privilege of states to regulate the act of "production" as an absolute bar to the Federal Power Commission's regulation of the ownership of gas-reserve properties. Gas reserves are indispensable to proper service of interstate customers of an interstate natural-gas company. And in thus limiting the Commission's jurisdiction the Court leaves the Commission impotent to protect the public's interest in having interstate companies maintain adequate gas reserves. This disabling interpretation reads the Federal Act as though it contemplated "ineffective regulation," an interpretation directly opposed to that we gave the Act in *Panhandle Eastern Pipe Line Co.* v. *Public Service Comm'n,* 332 U. S. 507, 520.

Section 7 (e) of the Act requires the Commission to issue certificates of convenience and necessity only if an interstate company is "able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder . . . ." As authorized by § 7 (d), the Commission requires appli-

cants for certificates to show "the gas reserves which are to supply the market which is proposed to be served." [2] And § 7 (b) denies a company power to "abandon all or any portion of its facilities subject to the jurisdiction of the Commission . . . ." If evidence were needed to show the importance Congress attributed to the gas reserve facilities of a company, that evidence appears in §§ 7 (b), 7 (c) and 7 (e). Jurisdiction to regulate a natural-gas company without jurisdiction to regulate its gas reserves would be like granting jurisdiction to regulate railroads without power to regulate the tracks, routes, rights-of-way, etc. And we have held that the Commission has jurisdiction under the Natural Gas Act to consider the gas-producing properties in fixing rates. *Colorado Interstate Co.* v. *Federal Power Commission,* 324 U. S. 581; *Panhandle Co.* v. *Power Comm'n,* 324 U. S. 635, 648–649.

The respondent company had its rate base fixed and its ability to serve the public determined on its claim to ownership of the very gas reserve properties the Court now permits it to sell to an affiliate over the protest of the Commission. According to allegations in the Commission's complaint the respondent gas company has already received from its customers large sums of money from rates which reflected expenses incurred in maintaining these reserves and for exploration and development costs in relation to them. But under the Court's holding today, these properties, increased in value by consumer contributions, can be given away by the respondent company to its newly formed affiliate. Congress could not have intended to render the Commission powerless to protect gas reserves necessary to continued consumer service and paid for by rates fixed to allow development of the reserves.

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[2] § 57.5 (f) of the Commission's Order No. 99 (7 Fed. Reg. 6844).

Furthermore the reserves, costing only $160,000, have now apparently been capitalized by the respondent's affiliated "purchaser" at $10,000,000. If the gas reserves continue to be held by the respondent company the rates will be fixed on the basis of the original $160,000 cost. *Panhandle Co.* v. *Power Comm'n*, 324 U. S. 635, 648. It is at least doubtful whether after today's holding the company can be prevented from hereafter charging rates based on the $10,000,000 inflated valuation. Thus the unwholesome practices that the Natural Gas Act was primarily designed to prevent are given a new lease on life. For a purpose of the Act was to protect consumers and one of the evils it was aimed to prevent was the holding company technique of transfers and retransfers between parent corporations, their offsprings and affiliates. *Federal Power Comm'n* v. *Hope Gas Co.*, 320 U. S. 591, 610.

It seems inconceivable that Congress would have passed an Act to regulate natural-gas companies with a wholly neutralizing exception to bar regulation of the gas reserves upon which the whole gas business depended. I cannot attribute such a meaningless and deceptive action to the Congress. While the Act itself grants broad Commission powers effectively to regulate gas companies, the Court's interpretation deprives the Commission of power essential to fixing fair rates and to protecting continued services during the life of a company's gas reserves.

Today's opinion regards Congress' action like that of a parent who ordered his offspring to go swimming with a stern admonition not to go near the water.

I would reverse.

# AERONAUTICAL INDUSTRIAL DISTRICT LODGE 727 *v.* CAMPBELL ET AL.

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

No. 333. Argued January 31, 1949.—Decided June 20, 1949.

After his discharge from military service in World War II, a veteran was reemployed by his former private employer, in accordance with § 8 of the Selective Training and Service Act of 1940. During his military service, the collective bargaining agreement between his union and the employer had been modified so as to give union chairmen top seniority in the event of layoffs. Within one year after his reemployment, the veteran was laid off temporarily, although union chairmen who had less time with the company were retained. The employer refused to compensate the veteran for the period of the layoff. *Held:* The veteran's rights under § 8 of the Act were not infringed. Pp. 522–529.

169 F. 2d 252, reversed.

Three veterans sued for compensation for the period of a layoff, alleged to have been in violation of their rights under the Selective Training and Service Act of 1940. The District Court gave judgment for the veterans. A labor union, which had been allowed to intervene to protect its labor contract, appealed to the Court of Appeals, which affirmed the judgment. 169 F. 2d 252. This Court granted certiorari. 335 U. S. 869. *Reversed,* p. 529.

*Maurice J. Hindin* argued the cause and filed a brief for petitioner.

*Assistant Attorney General Morison* argued the cause for Campbell et al., individual respondents. With him on the brief were *Solicitor General Perlman, Paul A. Sweeney* and *Morton Hollander.*

*Robert H. Canan* submitted on brief for the Lockheed Aircraft Corporation, respondent.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

We brought this case here, 335 U. S. 869, to resolve a conflict of views between two Courts of Appeals in their interpretation of the rights given to veterans of World War II by § 8 of the Selective Training and Service Act of 1940, as amended, 54 Stat. 885, 890, 58 Stat. 798, 50 U. S. C. App. § 308. Three veterans brought this suit for compensation for the period of a layoff while employed at Lockheed Aircraft Corporation, a respondent here. The facts controlling the legal claims of all three may be represented by the circumstances attending Kirk's employment and layoff.[1]

The petitioner, Aeronautical Industrial District Lodge No. 727, was the duly recognized collective bargaining agent of the employees at Lockheed Aircraft Corporation. In September, 1941, the Union had negotiated an agreement with Lockheed covering the range of subjects touching conditions of employment typical of such agreements in the aircraft industry. This agreement was in effect when Kirk was employed in August, 1942, by Vega Aircraft Corporation, which afterwards was merged with Lockheed. He joined the Union and has remained a member throughout this controversy. He left Lockheed two years later to enter the Army, from which he was honorably discharged in January, 1946, and was restored to his job at Lockheed in accordance with § 8 (a) of the Selective Service Act. 54 Stat. 885, 890, as amended, 50 U. S. C. App. § 308 (a). While Kirk was in military service his Union made a new agreement with Lockheed modi-

[1] One of the three veterans, James L. Campbell, withdrew from the Union on the first day of March, 1946, but this did not affect his status as an employee with the company. There is no contention that his withdrawal from the Union affects in any manner his rights under § 8 of the Act, or that withdrawal from the Union should cause a different result.

fying the terms of the 1941 agreement in various particulars. Crucial to the issue here was a change in the seniority provisions of the former agreement. The change provided that "Union Chairmen who have acquired seniority shall be deemed to have top seniority so long as they remain Chairmen." [2] In plain English this means that thereafter employees who served as

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[2] The collective bargaining agreement signed in 1941, so far as seniority was concerned, provided:

"In case of a slack in production, layoffs are to be made primarily on the basis of the principle of seniority. Due consideration will be given, however, to (a) knowledge, training, ability, skill and efficiency, and (b) deportment record and other factors. If it becomes necessary to reduce the working force in any plant or department, a plan of layoff procedure will be prepared by the management and submitted to the Union for approval. If such plan is not acceptable to the Union the Company agrees to enter negotiations with the Union and to attempt to arrive at a mutually agreeable plan. If, however, at the end of one working week from the date the Company submitted its original plan of layoff procedure to the Union no new plan has been mutually agreed to, the Company may proceed according to its proposed plan of layoff subject to Article II, Section 6." 1941 Agreement, Art. III, § 5.

The later agreement provided:

"(A) General Layoff Procedure. Layoffs shall be made in order of Company-wide seniority applied by occupation where ability, skill and efficiency are substantially equal. However, in the case of employees with four years' or more seniority, the Company may, in its discretion, retain them in order of their Company-wide seniority, regardless of occupation, where ability, skill and efficiency are substantially equal. Any claim of unjust discrimination in the exercise of such discretion may be taken up as a grievance. Employees who have not acquired seniority rights may be laid off without regard to relative length of service.

. . . . . .

"(D) Top Seniority for Union Chairmen for Purpose of Layoffs. For the purpose of applying the Temporary and General Layoff Procedures, Union Chairmen who have acquired seniority shall be deemed to have top seniority so long as they remain Chairmen. . . ." 1945 Agreement, Art. IV, § 3 (A), (D).

union chairmen were entitled to be retained in case of layoffs regardless of their length of service in the plant.

In the latter part of June, 1946, and within a year after Kirk's reemployment, it was necessary to lay off employees in Kirk's industrial unit. These layoffs followed the conventional sequence of seniority, time for military service being duly credited, with the exception that union chairmen were retained in accordance with the 1945 agreement, even though they had less time with the company than those who were laid off, veterans or not. Kirk was among those laid off, and the retention as union chairmen of men who were junior to him is the basis of his claim that § 8 of the Act had been infringed.[3] Kirk

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[3] These are the relevant statutory provisions:

"(a) Any person inducted into the land or naval forces under this Act for training and service, who, in the judgment of those in authority over him, satisfactorily completes his period of training and service under section 3 (b) shall be entitled to a certificate to that effect upon the completion of such period of training and service, which shall include a record of any special proficiency or merit attained. . . .

. . . . . .

"(b) In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any employer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for reemployment within ninety days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year—

. . . . . .

"(B) if such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;

. . . . . .

"(c) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be

was brought back to work within a month, but Lockheed refused to pay him for the time he was laid off. For this sum he brought this suit. Petitioner Union was allowed to intervene in order to protect its labor contract. Judgment went for Kirk, and the Union alone took the case to the Court of Appeals for the Ninth Circuit. That court affirmed the judgment,[4] 169 F. 2d 252, holding that § 8 of the Act forbade disregard of length of employment, so far as veterans are affected, in enforcing provisions in a collective agreement for the retention of union chairmen in the event of layoffs, regardless of their length of service. In so holding it ran counter to a series of decisions in the Court of Appeals for the Third Circuit. *Gauweiler* v. *Elastic Stop Nut Corp.*, 162 F. 2d 448; *Koury* v. *Elastic Stop Nut Corp.*, 162 F. 2d 544; *Di Maggio* v. *Elastic Stop Nut Corp.*, 162 F. 2d 546, and *Payne* v. *Wright Aeronautical Corp.*, 162 F. 2d 549.

It is of the essence of collective bargaining that it is a continuous process. Neither the conditions to which it addresses itself nor the benefits to be secured by it remain static. They are not frozen even by war. Thus, under the Act the veteran accumulates time toward his seniority while in the service; he also becomes the beneficiary of

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considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration." 54 Stat. 885, 890, as amended, 50 U. S. C. App. § 308.

[4] Lockheed, the respondent in the District Court, did not appeal. But since the judgment was not merely for money damages but also involved the construction of the collective agreement, the Union had the right to appeal. *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U. S. 275, 281–84.

those gains the achievement of which is the constant thrust of collective bargaining. In other words, the Act gives him the status of one who has been "on furlough or leave of absence" but uninterruptedly a member of the working force on whose behalf successive collective agreements are made. In this way the Act protects the furloughed employee from being prejudiced by any change in the terms of a collective agreement because he is "on furlough," but he is not to be favored as a furloughed employee as against his fellows. This is the essence of our decision in *Fishgold* v. *Sullivan Drydock & Repair Corp.,* 328 U. S. 275.

In providing that a veteran shall be restored to the position he had before he entered the military service "without loss of seniority," § 8 of the Act uses the term "seniority" without definition. It is thus apparent that Congress was not creating a system of seniority but recognizing its operation as part of the process of collective bargaining. We must therefore look to the conventional uses of the seniority system in the process of collective bargaining in order to determine the rights of seniority which the Selective Service Act guaranteed the veteran.

Barring legislation not here involved, seniority rights derive their scope and significance from union contracts, confined as they almost exclusively are to unionized industry. See *Trailmobile Co.* v. *Whirls,* 331 U. S. 40, 53, n. 21. There are great variations in the use of the seniority principle through collective bargaining bearing on the time when seniority begins, determination of the units subject to the same seniority, and the consequences which flow from seniority. All these variations disclose limitations upon the dogmatic use of the principle of seniority in the interest of the ultimate aims of collective bargaining. Thus, probationary conditions must often be met before seniority begins to operate; sometimes it becomes retroactive to the date of employment; in other

instances it is effective only as from the qualifying date; in some industries it is determined on a company basis, in others the occupation or the plant is taken as the unit for seniority determination; sometimes special provisions are made for workers in key positions; and then again these factors are found in varying combinations. See Williamson & Harris, Trends in Collective Bargaining, 100–102 (1945); Harbison, Seniority Policies and Procedures as Developed through Collective Bargaining 1–10 (1941).

To draw from the Selective Service Act an implication that date of employment is the inflexible basis for determining seniority rights as reflected in layoffs is to ignore a vast body of long-established controlling practices in the process of collective bargaining of which the seniority system to which that Act refers is a part. One of the safeguards insisted upon by unions for the effective functioning of collective bargaining is continuity in office for its shop stewards or union chairmen. To that end provision is made, as it was made here, against laying them off merely on the basis of temporal seniority. Because they are union chairmen they are not regarded as merely individual members of the union; they are in a special position in relation to collective bargaining for the benefit of the whole union. To retain them as such is not an encroachment on the seniority system but a due regard of union interests which embrace the system of seniority rights.

These considerations are decisive of the case. The agreements made by the Union with Lockheed represent familiar developments in the process of collective bargaining which the Selective Service Act presupposes and in the context of which it must be placed. Kirk's rights, including seniority, before he entered the service were derived from the agreement of 1941. So, likewise, were his rights, including seniority, as an employee on fur-

lough defined by the agreement of 1945, inasmuch as that agreement in no wise disadvantaged his position because he was in the military service.

In the ordinary and orderly course of formulating the terms of employment, the 1945 agreement between the Union and Lockheed in some directions modified the provisions of the 1941 agreement. A labor agreement is a code for the government of an industrial enterprise and, like all government, ultimately depends for its effectiveness on the quality of enforcement of its code. Because a labor agreement assumes the proper adjustment of grievances at their source, the union chairmen play a very important role in the whole process of collective bargaining. Therefore it is deemed highly desirable that union chairmen have the authority and skill which are derived from continuity in office. A provision for the retention of union chairmen beyond the routine requirements of seniority is not at all uncommon and surely ought not to be deemed arbitrary or discriminatory.[5] The fact that it may involve, as in Kirk's case, the temporary layoff of a

[5] See Greenman, Getting Along With Unions 26 (1948); Union Agreements in the Cotton-Textile Industry, U. S. Dept. of Labor, Bull. No. 885, p. 28 (1946); Thomas, Automobile Unionism 56 (1941); Collective Bargaining Provisions, Seniority Provisions, U. S. Dept. of Labor 28–29 (1948); Collective Bargaining in the Office, American Management Assn., Research Rep. No. 12, p. 72. The advantage of this modification in seniority according to length of service in the plant is "the mutual interest of union and management in preserving the continuity of the bargaining and grievance adjustment personnel." Seniority Provisions in Union Agreements, U. S. Dept. of Labor, Serial No. R. 1308, p. 7 (1941). While there is not complete agreement on the advantage of seniority for union chairmen, it is certainly within the area of collective bargaining. See Williamson and Harris, Trends in Collective Bargaining 101–103 (1945); see Greenman, Getting Along With Unions 85–86 (1948). The National War Labor Board recognized "that the functions of

veteran while a nonveteran chairman with less time at the plant is retained, is wholly unrelated to the veteran's absence in the service. Under the 1945 agreement chairmen were to be elected once a year, and unless the election occurred on the day before a veteran returned to the plant, his chance of election would be the same as that of persons who had been continuously at work in the plant.

Of course, the Selective Service Act restricts a readjustment of seniority rights during the veteran's absence to the disadvantage of the veteran. But it would be an undue restriction of the process of collective bargaining (without compensating gain to the veteran) to forbid changes in collective bargaining arrangements which secure a fixed tenure for union chairmen, whereby veterans as well as nonveterans are benefited by promoting greater protection of their rights and smoother operation of labor-management relations.

All this presupposes, obviously, that an agreement containing the 1945 provisions expresses honest desires for the protection of the interests of all members of the Union and is not a skillful device of hostility to veterans. There is not the remotest suggestion that the 1945 agreement was other than what it purported to be—the means for securing both to veterans and to nonveterans better working conditions through elected leaders not subject to the contingencies of a labor turnover.

*Reversed.*

MR. JUSTICE DOUGLAS concurs in the result.

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shop stewards and other local union officials were of value to a company as well as to its employees in settling and preventing labor grievances. For this reason, it usually directed seniority preference for union officials in disputes over the issue." The Termination Report of the National War Labor Board, U. S. Dept. of Labor, Vol. I, p. 148.

# RAGAN *v.* MERCHANTS TRANSFER & WAREHOUSE CO.

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

No. 522. Argued April 20, 1949.—Decided June 20, 1949.

Solely on grounds of diversity of citizenship, petitioner sued in the Federal District Court for Kansas to recover damages for injuries sustained in a highway accident which occurred less than two years before his complaint was filed; but the summons was not served until more than two years after the date of the accident. The complaint was filed and the summons issued in accordance with the Federal Rules of Civil Procedure; but Kansas has a two-year statute of limitations applicable to such tort claims which the Court of Appeals held is not tolled until service of a summons. *Held:* The suit was barred by the state statute of limitations. Pp. 531–534.

(a) This result necessarily follows from *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, since otherwise the plaintiff's rights under local law would be different in the federal courts from what they would be in the state courts. Pp. 532–533.

(b) A different result is not required by the fact that the Federal Rules of Civil Procedure govern the manner in which an action is commenced in a federal court. Pp. 532–533.

(c) Nor is a different result required by the fact that local law brought the cause of action to an end after, rather than before, suit was started in the federal court. Pp. 533–534.

(d) In accordance with its usual practice of accepting the determination of local law by the Court of Appeals, this Court accepts the holding of the Court of Appeals that a Kansas statute providing that an action is commenced when summons is served on the defendant is an integral part of the Kansas statute of limitations. P. 534.

170 F. 2d 987, affirmed.

Having jurisdiction solely on grounds of diversity of citizenship, a Federal District Court granted petitioner a judgment for damages sustained in a highway accident. The Court of Appeals reversed. 170 F. 2d 987. This Court granted certiorari. 336 U. S. 917. *Affirmed,* p. 534.

*Cornelius Roach* argued the cause for petitioner. With him on the brief was *Daniel L. Brenner.*

*Douglas Hudson* argued the cause and filed a brief for respondent.

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

This case, involving a highway accident which occurred on October 1, 1943, came to the District Court for Kansas by reason of diversity of citizenship. Petitioner instituted it there on September 4, 1945, by filing the complaint with the court—the procedure specified by the Federal Rules of Civil Procedure.[1] As prescribed by those Rules, a summons was issued.[2] Service was had on December 28, 1945. Kansas has a two-year statute of limitations applicable to such tort claims.[3] Respondent pleaded it and moved for summary judgment. Petitioner claimed that the filing of the complaint tolled the statute. Respondent argued that by reason of a Kansas statute [4] the statute of limitations was not tolled until service of the summons.

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[1] Rule 3 provides, "A civil action is commenced by filing a complaint with the court."

[2] Rule 4 (a) provides:

"Upon the filing of the complaint the clerk shall forthwith issue a summons and deliver it for service to the marshal or to a person specially appointed to serve it. Upon request of the plaintiff separate or additional summons shall issue against any defendants."

An earlier summons issued on September 7, 1945, and thereafter served had been quashed.

[3] Kan. Gen. Stats. 1935, § 60–306.

[4] *Id.*, § 60–308 provides,

"An action shall be deemed commenced within the meaning of this article, as to each defendant, at the date of the summons which is served on him, or on a codefendant who is a joint contractor, or otherwise united in interest with him. Where service by publication

The District Court struck the defense and denied respondent's motion. A trial was had and a verdict rendered for petitioner. The Court of Appeals reversed. 170 F. 2d 987. It ruled, after a review of Kansas authorities, that the requirement of service of summons within the statutory period was an integral part of that state's statute of limitations. It accordingly held that *Guaranty Trust Co.* v. *York,* 326 U. S. 99, governed and that respondent's motion for summary judgment should have been sustained. The case is here on a petition for certiorari which we granted because of the importance of the question presented. 336 U. S. 917.

*Erie R. Co.* v. *Tompkins,* 304 U. S. 64, was premised on the theory that in diversity cases the rights enjoyed under local law should not vary because enforcement of those rights was sought in the federal court rather than in the state court. If recovery could not be had in the state court, it should be denied in the federal court. Otherwise, those authorized to invoke the diversity jurisdiction would gain advantages over those confined to state courts. *Guaranty Trust Co.* v. *York* applied that principle to statutes of limitations on the theory that, where one is barred from recovery in the state court, he should likewise be barred in the federal court.

It is conceded that if the present case were in a Kansas court it would be barred. The theory of *Guaranty Trust Co.* v. *York* would therefore seem to bar it in the federal court, as the Court of Appeals held. The force of that reasoning is sought to be avoided by the argument that

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is proper, the action shall be deemed commenced at the date of the first publication. An attempt to commence an action shall be deemed equivalent to the commencement thereof within the meaning of this article when the party faithfully, properly and diligently endeavors to procure a service; but such attempt must be followed by the first publication or service of the summons within sixty days."

the Federal Rules of Civil Procedure determine the manner in which an action is commenced in the federal courts—a matter of procedure which the principle of *Erie R. Co.* v. *Tompkins* does not control. It is accordingly argued that since the suit was properly commenced in the federal court before the Kansas statute of limitations ran, it tolled the statute.

That was the reasoning and result in *Bomar* v. *Keyes,* 162 F. 2d 136, 141. But that case was a suit to enforce rights under a federal statute.[5] Here, as in that case, there can be no doubt that the suit was properly commenced in the federal court. But in the present case we look to local law to find the cause of action on which suit is brought. Since that cause of action is created by local law, the measure of it is to be found only in local law. It carries the same burden and is subject to the same defenses in the federal court as in the state court. See *Cities Service Co.* v. *Dunlap,* 308 U. S. 208; *Palmer* v. *Hoffman,* 318 U. S. 109, 117. It accrues and comes to an end when local law so declares. *West* v. *American Tel. & T. Co.,* 311 U. S. 223; *Guaranty Trust Co.* v. *York, supra.* Where local law qualifies or abridges it, the federal court must follow suit. Otherwise there is a different measure of the cause of action in one court than in the other, and the principle of *Erie R. Co.* v. *Tompkins* is transgressed.

We can draw no distinction in this case because local law brought the cause of action to an end after, rather than before, suit was started in the federal court. In both cases local law created the right which the federal court was asked to enforce. In both cases local law undertook to determine the life of the cause of action. We cannot give it longer life in the federal court than it

[5] Civil Rights Act, 8 U. S. C. § 43.

would have had in the state court without adding something to the cause of action. We may not do that consistently with *Erie R. Co.* v. *Tompkins.*

It is argued that the Kansas statute in question [6] is not an integral part of the Kansas statute of limitations. But the Court of Appeals on a careful canvass of Kansas law in an opinion written by Judge Huxman, a distinguished member of the Kansas bar, has held to the contrary. We ordinarily accept the determination of local law by the Court of Appeals (see *Huddleston* v. *Dwyer,* 322 U. S. 232, 237), and we will not disturb it here.

*Affirmed.*

Mr. Justice Rutledge dissents. See his dissenting opinion in Nos. 442 and 512, *Cohen* v. *Beneficial Industrial Loan Corp., post,* p. 557.

[6] Note 4, *supra.*

# WOODS *v.* INTERSTATE REALTY CO.

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

No. 465. Argued March 30–31, 1949.—Decided June 20, 1949.

In an action brought by a foreign corporation in a Federal District Court solely on grounds of diversity of citizenship to recover a broker's commission for the sale of real estate in the State, defendant moved for summary judgment on the ground that plaintiff had not qualified to do business in the State under a state statute which the Court of Appeals construed as not making the contract void but only unenforcible in the state courts. *Held:* The motion for summary judgment was properly granted. *Erie R. Co.* v. *Tompkins,* 304 U. S. 64. Pp. 535–538.

170 F. 2d 694, reversed.

Having jurisdiction solely on grounds of diversity of citizenship, a Federal District Court granted a defendant's motion for summary judgment in a suit to recover a broker's commission, on the ground that the plaintiff, a foreign corporation, had not qualified to do business in the State as required by state law. The Court of Appeals reversed, 168 F. 2d 701; granted rehearing, 170 F. 2d 74; and reaffirmed its reversal, 170 F. 2d 694. This Court granted certiorari. 336 U. S. 909. *Reversed,* p. 538.

*P. H. Eager, Jr.* argued the cause for petitioner. With him on the brief were *William H. Watkins* and *Thomas H. Watkins.*

*John A. Osoinach* and *Phil Stone* argued the cause for respondent. *Mr. Osoinach* also filed a brief.

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

This case was brought in the District Court for Mississippi on the grounds of diversity of citizenship. Respondent, a Tennessee corporation, sued petitioner, a

resident of Mississippi, for a broker's commission alleged to be due for the sale of real estate of petitioner in Mississippi. The District Court found on motion for summary judgment that the contract was void under Mississippi law, since respondent was doing business in Mississippi without qualifying under a Mississippi statute.[1] It therefore dismissed the complaint with prejudice.

The Court of Appeals reversed. It reviewed the Mississippi decisions under the Mississippi statute and concluded that the contract was not void but only unenforcible in the Mississippi courts. It held in reliance on *David Lupton's Sons Co.* v. *Automobile Club,* 225 U. S. 489, that the fact that respondent could not sue in the Mississippi courts did not close the doors of the federal court sitting in that State. Accordingly it reversed the judgment of the District Court. 168 F. 2d 701. It granted rehearing, 170 F. 2d 74, and reaffirmed its reversal, 170 F. 2d 694.

The case is here on a petition for writ of certiorari which we granted because of the seeming conflict of that holding with our recent ruling in *Angel* v. *Bullington,* 330 U. S. 183.

If the *Lupton's Sons* case controls, it is clear that the Court of Appeals was right in allowing the action to be maintained in the federal court. In that case a New York statute provided that no foreign corporation could "maintain any action in this state" without a certificate that it had qualified to do business there. The Court held that a contract on which the corporation could not

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[1] Miss. Code 1942, § 5319, requires a foreign corporation doing business in the State to file a written power of attorney designating an agent on whom service of process may be had. It also provides, "Any foreign corporation failing to comply with the above provisions shall not be permitted to bring or maintain any action or suit in any of the courts of this state."

sue in the courts of New York by reason of that statute nevertheless could be enforced in the federal court in a diversity suit. The Court said, 225 U. S. 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."

We said in *Angel* v. *Bullington* that the case of *Lupton's Sons* had become "obsolete" insofar as it was "based on a view of diversity jurisdiction which came to an end with *Erie Railroad* v. *Tompkins,* 304 U. S. 64." 330 U. S. p. 192. Bullington had sued Angel in a North Carolina court for a deficiency judgment on the sale of realty under a deed of trust. The Supreme Court of North Carolina dismissed the action because of a North Carolina statute which disallowed a deficiency judgment in such a case and which the North Carolina Supreme Court construed to be "a limitation of the jurisdiction of the courts of this State." 220 N. C. 18, 20, 16 S. E. 2d 411, 412. Thereafter Bullington sued in the federal court of North Carolina by reason of diversity of citizenship. We held that that suit could not be maintained because (1) the prior suit was *res judicata;* and (2) the policy of *Erie R. Co.* v. *Tompkins* precluded maintenance in the federal court in diversity cases of suits to which the State had closed its courts.

The Court of Appeals concluded that the latter reason was argumentatory, the real basis of the decision being that Bullington was denied recovery on the doctrine of *res judicata.* But where a decision rests on two or more grounds, none can be relegated to the category of *obiter dictum. United States* v. *Title Ins. Co.,* 265 U. S. 472, 486; *Massachusetts* v. *United States,* 333 U. S. 611, 623.

*Angel* v. *Bullington* in its alternative ground followed the view of *Guaranty Trust Co.* v. *York,* 326 U. S. 99, 108, that for purposes of diversity jurisdiction a federal court is, "in effect, only another court of the State . . . ." In that case we required the federal court in a diversity case to apply the statute of limitations of the State in equity actions and thus to follow local law, as had previously been done in cases involving burden of proof (*Cities Service Co.* v. *Dunlap,* 308 U. S. 208; cf. *Stoner* v. *New York Life Ins. Co.,* 311 U. S. 464); contributory negligence (*Palmer* v. *Hoffman,* 318 U. S. 109, 117); conflict of laws (*Klaxon Co.* v. *Stentor Co.,* 313 U. S. 487; *Griffin* v. *McCoach,* 313 U. S. 498); and accrual of the cause of action (*West* v. *American Tel. & T. Co.,* 311 U. S. 223). The *York* case was premised on the theory that a right which local law creates but which it does not supply with a remedy is no right at all for purposes of enforcement in a federal court in a diversity case; that where in such cases one is barred from recovery in the state court, he should likewise be barred in the federal court. The contrary result would create discriminations against citizens of the State in favor of those authorized to invoke the diversity jurisdiction of the federal courts. It was that element of discrimination that *Erie R. Co.* v. *Tompkins* was designed to eliminate.

*Reversed.*

MR. JUSTICE RUTLEDGE dissents. See his dissenting opinion in Nos. 442 and 512, *Cohen* v. *Beneficial Industrial Loan Corp., post,* p. 557.

MR. JUSTICE JACKSON, dissenting.

*Erie R. Co.* v. *Tompkins,* 304 U. S. 64, required federal courts in diversity cases to apply state decisional law as the Rules of Decision Act required them to apply state statutes.

That is what the Court of Appeals tried to do in this case. The State of Mississippi has a statute which says that if a corporation does not qualify to do business within the State it "shall not be permitted to bring or maintain any action or suit *in any of the courts of this state.*" (Emphasis supplied.) The Court of Appeals reviewed state court decisions, some of which are not free from ambiguity, and found that the law of Mississippi intends to go no farther than to withhold the aid of state-maintained courts from a noncomplying corporation and that the state law does not deprive contracts of their validity or intend to foreclose foreign corporations from resort to federal courts or to any self-enforcing remedies they may have.

This Court refuses to give the statute that limited effect. I understand it to rule that Mississippi cannot enact a law closing its own courts to such foreign corporations without also closing the federal courts. In this we seem to be doing the very thing we profess to avoid; that is, giving the state law a different meaning in federal court than the state courts have given it.

The Mississippi statute follows a pattern general among the states in requiring qualification and payment of fees by foreign corporations. State courts have generally held such Acts to do no more than to withhold state help from the noncomplying corporation but to leave their rights otherwise unimpaired. This interpretation left such corporations a basis on which to get the help of any other court—federal or state—that could otherwise take jurisdiction, and free to resort to pledged property, offset and various other methods of self-help.

The state statute as now interpreted by this Court is a harsh, capricious and vindictive measure. It either refuses to entertain a cause of action, not impaired by state law, or it holds it invalid with unknown effects on

amounts already collected. In either case the amount of this punishment bears no relation to the amount of wrong done the State in failure to qualify and pay its taxes. The penalty thus suffered does not go to the State, which sustained the injury, but results in unjust enrichment of the debtor, who has suffered no injury from the creditors' default in qualification. If the state court had held its statute to have this effect, I should agree that federal courts should so apply it; but the whole basis of our decision is contrary to that of the state courts.

I think the Court's action in refusing to accept the state court's determination of the effect of its own statute is a perversion of the *Erie R. Co.* v. *Tompkins* doctrine.

I would affirm the court below.

MR. JUSTICE RUTLEDGE and MR. JUSTICE BURTON join in this opinion.

Syllabus.

# COHEN, EXECUTRIX, ET AL. *v.* BENEFICIAL INDUSTRIAL LOAN CORP. ET AL.

NO. 442. CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.*

Argued April 18, 1949.—Decided June 20, 1949.

1. Under 28 U. S. C. § 1291, appeal may be taken from an order of a Federal District Court denying a corporation's motion that the plaintiff in a stockholder's derivative action be required, pursuant to a state statute, to give security for reasonable expenses of the defendants, in connection with the action. Pp. 545–547.

   (a) The matters embraced in such an order are not of such an interlocutory nature as to affect, or to be affected by, a decision on the merits. P. 546.

   (b) The order is appealable because it is a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it. Pp. 546–547.

2. A state statute providing that, in any stockholder's derivative action pending at the time of its enactment or thereafter brought, in which the plaintiff's interest as a shareholder is less than 5% of the value of all outstanding shares and has a market value of less than $50,000, he may be required at any stage of the proceeding to give security for the reasonable expenses, including counsel fees, which the corporation may incur or for which it may become liable, does not violate the Federal Constitution. Pp. 547–555.

   (a) The Federal Constitution does not oblige a state to place its litigating and adjudicating processes at the disposal of a plaintiff in a stockholder's derivative suit, at least without imposing standards of responsibility, liability and accountability which it considers will protect the interests he elects himself to represent. Pp. 547–551.

   (b) The statute here involved does not violate the Contract Clause of the Constitution. P. 551.

   (c) For a state to close its courts to this type of litigation if the condition of reasonable security is not met does not violate the Due Process Clause. Pp. 551–552.

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*Together with No. 512, *Beneficial Industrial Loan Corp.* v. *Smith, United States District Judge, et al.*, also on certiorari to the same Court.

(d) The limitation of the requirement of the statute to stockholders whose interest is less than 5% and has a market value of less than $50,000, does not violate the Equal Protection Clause of the Constitution. Pp. 552–553.

(e) Assuming that the statute will not be construed as imposing liability for expenses incurred before its enactment, or perhaps before the granting of security in a particular case, the provision making it applicable to actions pending at the time of its enactment does not give it such a retroactive effect as to render it unconstitutional under the Due Process Clause. Pp. 553–554.

3. That a corporation which was the subject of a stockholder's derivative action in New Jersey was organized under the laws of Delaware does not make inapplicable a New Jersey statute providing that the plaintiff may be required to give security for reasonable expenses of the corporation. Pp. 554–555.

4. A federal court, having jurisdiction of a stockholder's derivative action only because of diversity of citizenship, must apply a statute of the forum State which makes the plaintiff, if unsuccessful, liable for reasonable expenses, including attorney's fees, of the defense and provides that the corporation may require the plaintiff to give security for their payment as a condition of prosecuting the action. Pp. 543–545, 555–557.

(a) A statute which so conditions the stockholder's action cannot be disregarded by the federal court as a mere procedural device. Pp. 555–556.

(b) A different result is not required by Rule 23 of the Federal Rules of Civil Procedure, since there is no conflict between that rule and the state statute. P. 556.

170 F. 2d 44, affirmed.

A Federal District Court, having jurisdiction of a stockholder's derivative action solely because of diversity of citizenship, denied a motion to require the plaintiff to post security for reasonable expenses incurred by the defense, as required by a statute of the forum State. 7 F. R. D. 352. The Court of Appeals reversed. 170 F. 2d 44. This Court granted certiorari. 336 U. S. 917. *Affirmed*, p. 556.

*Charles Hershenstein* and *Philip B. Kurland* argued the cause for petitioners in No. 442 and respondents in

No. 512. With them on the brief were *Edward J. O'Mara, Samuel Dreskin* and *David F. Cohen.*

*John M. Harlan* argued the cause for the Beneficial Industrial Loan Corp., respondent in No. 442 and petitioner in No. 512. With him on the brief were *Charles Danzig* and *Walter Pond.*

Briefs of *amici curiae* in support of petitioners in No. 442 and respondents in No. 512 were filed by *Julius Levy* for Weinberger; and by *Lewis M. Dabney, Jr.*

MR. JUSTICE JACKSON delivered the opinion of the Court.

The ultimate question here is whether a federal court, having jurisdiction of a stockholder's derivative action only because the parties are of diverse citizenship, must apply a statute of the forum state which makes the plaintiff, if unsuccessful, liable for the reasonable expenses, including attorney's fees, of the defense and entitles the corporation to require security for their payment.

Petitioners' decedent, as plaintiff, brought in the United States District Court for New Jersey an action in the right of the Beneficial Industrial Loan Corporation, a Delaware corporation doing business in New Jersey. The defendants were the corporation and certain of its managers and directors. The complaint alleged generally that since 1929 the individual defendants engaged in a continuing and successful conspiracy to enrich themselves at the expense of the corporation. Specific charges of mismanagement and fraud extended over a period of eighteen years and the assets allegedly wasted or diverted thereby were said to exceed $100,000,000. The stockholder had demanded that the corporation institute proceedings for its recovery but, by their control of the corporation, the individual defendants prevented it from doing so. This stockholder, therefore, sought to assert

the right of the corporation. One of 16,000 stockholders, he owned 100 of its more than two million shares, so that his holdings, together with 150 shares held by the intervenor, approximated 0.0125% of the outstanding stock and had a market value that had never exceeded $9,000.

The action was brought in 1943, and various proceedings had been taken therein when, in 1945, New Jersey enacted the statute which is here involved.[1] Its general effect is to make a plaintiff having so small an interest liable for the reasonable expenses and attorney's fees of

[1] Chapter 131, New Jersey Laws of 1945, provides in pertinent part as follows:

"1. In any action instituted or maintained in the right of any domestic or foreign corporation by the holder or holders of shares, or of voting trust certificates representing shares, of such corporation having a total par value or stated capital value of less than five per centum (5%) of the aggregate par value or stated capital value of all the outstanding shares of such corporation's stock of every class . . . unless the shares or voting trust certificates held by such holder or holders have a market value in excess of fifty thousand dollars ($50,000.00), the corporation in whose right such action is brought shall be entitled, at any stage of the proceeding before final judgment, to require the complainant or complainants to give security for the reasonable expenses, including counsel fees, which may be incurred by it in connection with such action and by the other parties defendant in connection therewith for which it may become subject pursuant to law, its certificate of incorporation, its by-laws or under equitable principles, to which the corporation shall have recourse in such amount as the court having jurisdiction shall determine upon the termination of such action. The amount of such security may thereafter, from time to time, be increased or decreased in the discretion of the court having jurisdiction of such action upon showing that the security provided has or may become inadequate or is excessive.

"2. In any action, suit or proceeding brought or maintained in the right of a domestic or foreign corporation by the holder or holders of shares, or of voting trust certificates representing shares, of such corporation, it must be made to appear that the complainant was a shareholder or the holder of a voting trust certificate at the time

the defense if he fails to make good his complaint and to entitle the corporation to indemnity before the case can be prosecuted. These conditions are made applicable to pending actions. The corporate defendant therefore moved to require security, pointed to its by-laws by which it might be required to indemnify the individual defendants, and averred that a bond of $125,000 would be appropriate.

The District Court was of the opinion that the state enactment is not applicable to such an action when pending in a federal court, 7 F. R. D. 352. The Court of Appeals was of a contrary opinion and reversed, 170 F. 2d 44, and we granted certiorari. 336 U. S. 917.

### Appealability.

At the threshold we are met with the question whether the District Court's order refusing to apply the statute was an appealable one. Title 28 U. S. C. § 1291 provides, as did its predecessors, for appeal only "from all final decisions of the district courts," except when direct appeal to this Court is provided. Section 1292 allows appeals also from certain interlocutory orders, decrees and judgments, not material to this case except as they indicate the purpose to allow appeals from orders other than final judgments when they have a final and irreparable effect on the rights of the parties. It is obvious that, if Congress had allowed appeals only from those final judgments which terminate an action, this order would not be appealable.

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of the transaction of which he complains or that his share or voting trust certificate thereafter devolved upon him by operation of law.

"3. This act shall take effect immediately and shall apply to all such actions, suits or proceedings now pending in which no final judgment has been entered, and to all future actions, suits and proceedings."

The effect of the statute is to disallow appeal from any decision which is tentative, informal or incomplete. Appeal gives the upper court a power of review, not one of intervention. So long as the matter remains open, unfinished or inconclusive, there may be no intrusion by appeal. But the District Court's action upon this application was concluded and closed and its decision final in that sense before the appeal was taken.

Nor does the statute permit appeals, even from fully consummated decisions, where they are but steps towards final judgment in which they will merge. The purpose is to combine in one review all stages of the proceeding that effectively may be reviewed and corrected if and when final judgment results. But this order of the District Court did not make any step toward final disposition of the merits of the case and will not be merged in final judgment. When that time comes, it will be too late effectively to review the present order, and the rights conferred by the statute, if it is applicable, will have been lost, probably irreparably. We conclude that the matters embraced in the decision appealed from are not of such an interlocutory nature as to affect, or to be affected by, decision of the merits of this case.

This decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. The Court has long given this provision of the statute this practical rather than a technical construction. *Bank of Columbia* v. *Sweeny,* 1 Pet. 567, 569; *United States* v. *River Rouge Co.,* 269 U. S. 411, 414; *Cobbledick* v. *United States,* 309 U. S. 323, 328.

We hold this order appealable because it is a final disposition of a claimed right which is not an ingredient

of the cause of action and does not require consideration with it. But we do not mean that every order fixing security is subject to appeal. Here it is the right to security that presents a serious and unsettled question. If the right were admitted or clear and the order involved only an exercise of discretion as to the amount of security, a matter the statute makes subject to reconsideration from time to time, appealability would present a different question.

Since this order may be reviewed on appeal, the petition in No. 512, whereby the corporation asserts the right to compel security by mandamus, is dismissed.

### Constitutionality.

Petitioners deny the validity of the statute under the Federal Constitution and the New Jersey Constitution. The latter question is ultimately for the state courts, and since they have made no contrary determination, we shall presume in the circumstances of this case that the statute conforms with the state constitution.

Federal constitutional questions we must consider, because a federal court would not give effect, in either a diversity or nondiversity case, to a state statute that violates the Constitution of the United States.

The background of stockholder litigation with which this statute deals requires no more than general notice. As business enterprise increasingly sought the advantages of incorporation, management became vested with almost uncontrolled discretion in handling other people's money. The vast aggregate of funds committed to corporate control came to be drawn to a considerable extent from numerous and scattered holders of small interests. The director was not subject to an effective accountability. That created strong temptation for managers to profit personally at expense of their trust. The business code became all too tolerant of such practices. Corporate laws

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were lax and were not self-enforcing, and stockholders, in face of gravest abuses, were singularly impotent in obtaining redress of abuses of trust.

Equity came to the relief of the stockholder, who had no standing to bring civil action at law against faithless directors and managers. Equity, however, allowed him to step into the corporation's shoes and to seek in its right the restitution he could not demand in his own. It required him first to demand that the corporation vindicate its own rights, but when, as was usual, those who perpetrated the wrongs also were able to obstruct any remedy, equity would hear and adjudge the corporation's cause through its stockholder with the corporation as a defendant, albeit a rather nominal one. This remedy, born of stockholder helplessness, was long the chief regulator of corporate management and has afforded no small incentive to avoid at least grosser forms of betrayal of stockholders' interests. It is argued, and not without reason, that without it there would be little practical check on such abuses.

Unfortunately, the remedy itself provided opportunity for abuse, which was not neglected. Suits sometimes were brought not to redress real wrongs, but to realize upon their nuisance value. They were bought off by secret settlements in which any wrongs to the general body of share owners were compounded by the suing stockholder, who was mollified by payments from corporate assets. These litigations were aptly characterized in professional slang as "strike suits." And it was said that these suits were more commonly brought by small and irresponsible than by large stockholders, because the former put less to risk and a small interest was more often within the capacity and readiness of management to compromise than a large one.

We need not determine the measure of these abuses or the evils they produced on the one hand or prevented

and redressed on the other. The Legislature of New Jersey, like that of other states,[2] considered them sufficient to warrant some remedial measures.

The very nature of the stockholder's derivative action makes it one in the regulation of which the legislature of a state has wide powers. Whatever theory one may hold as to the nature of the corporate entity, it remains a wholly artificial creation whose internal relations between management and stockholders are dependent upon state law and may be subject to most complete and penetrating regulation, either by public authority or by some form of stockholder action. Directors and managers, if not technically trustees, occupy positions of a fiduciary nature, and nothing in the Federal Constitution prohibits a state from imposing on them the strictest measure of responsibility, liability and accountability, either as a condition of assuming office or as a consequence of holding it.

Likewise, a stockholder who brings suit on a cause of action derived from the corporation assumes a position, not technically as a trustee perhaps, but one of a fiduciary character. He sues, not for himself alone, but as representative of a class comprising all who are similarly situated. The interests of all in the redress of the wrongs are taken into his hands, dependent upon his diligence, wisdom and integrity. And while the stockholders have chosen the corporate director or manager, they have no such election as to a plaintiff who steps forward to represent them. He is a self-chosen representative and a volunteer champion. The Federal Constitution does not oblige the state to place its litigating and adjudicating processes at the disposal of such a

[2] See New York General Corporation Law, § 61–b; 12 Pa. Stat. Ann. § 1322; Laws of Maryland, 1945, c. 989; Wisconsin Stat. § 180.13 (1945).

representative, at least without imposing standards of responsibility, liability and accountability which it considers will protect the interests he elects himself to represent. It is not without significance that this Court has found it necessary long ago in the Equity Rules [3] and now in the Federal Rules of Civil Procedure [4] to impose procedural regulations of the class action not applicable to any other. We conclude that the state has plenary power over this type of litigation.

In considering specific objections to the way in which the state has exercised its power in this particular statute, it should be unnecessary to say that we are concerned only with objections which go to constitutionality. The wisdom and the policy of this and similar statutes are involved in controversies amply debated in legal literature [5] but not for us to judge, and hence not for us to remark upon. The Federal Constitution does not invalidate state legislation because it fails to embody the

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[3] Old Equity Rule 94, 104 U. S. ix; Equity Rule 27, 226 U. S. 649, 656.

[4] Rule 23 (b).

[5] See Hornstein, *Problems of Procedure in Stockholder's Derivative Suits,* 42 Col. L. R. 574; Hornstein, *Directors' Expenses in Stockholders' Suits,* 43 *id.* 301; Koessler, *The Stockholder's Suit: A Comparative View,* 46 *id.* 238; Hornstein, *New Aspects of Stockholders' Derivative Suits,* 47 *id.* 1; Carson, *Current Phases of Derivative Actions Against Directors,* 40 Mich. L. R. 1125; P. E. Jackson, *Reorganization of the Corporate Concept And the Effect of Section 61–b of the New York General Corporation Law,* A5 Am. Bankr. Rev. 323; Carson, *Further Phases of Derivative Actions Against Directors,* 29 Cornell L. Q. 431; House, *Stockholders' Suits And the Coudert-Mitchell Laws,* 20 N. Y. U. L. Q. Rev. 377; Hornstein, *The Death Knell of Stockholders' Derivative Suits in New York,* 32 California L. R. 123; Zlinkoff, *The American Investor And the Constitutionality of Section 61–b of the New York General Corporation Law,* 54 Yale L. J. 352. See Douglas, *Directors Who Do Not Direct,* 47 Harv. L. R. 1305.

highest wisdom or provide the best conceivable remedies. Nor can legislation be set aside by courts because of the fact, if it be such, that it has been sponsored and promoted by those who advantage from it.[6] In dealing with such difficult and controversial subjects, only experience will verify or disclose weaknesses and defects of any policy and teach lessons which may be applied by amendment. Within the area of constitutionality, the states should not be restrained from devising experiments, even those we might think dubious, in the effort to preserve the maximum good which equity sought in creating the derivative stockholder's action and at the same time to eliminate as much as possible its defects and evils.

It is said that this statute transgresses the Due Process Clause by being "arbitrary, capricious and unreasonable"; the Equal Protection Clause by singling out small stockholders to burden most heavily; that it violates the Contract Clause; and that its application to pending litigation renders it unconstitutionally retroactive.

The contention that this statute violates the Contract Clause of the Constitution is one in which we see not the slightest merit. Plaintiff's suit is entertained by equity largely because he had no contract rights on which to base an action at law, and hence none which is impaired by this legislation.

In considering whether the statute offends the Due Process Clause we can judge it only by its own terms, for it has had no interpretation or application as yet. It imposes liability and requires security for "the *reasonable* expenses, including counsel fees, which may be incurred" (emphasis supplied) by the corporation and by other parties defendant. The amount of security is subject to increase if the progress of the litigation reveals

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[6] *Daniel* v. *Family Insurance Co.*, 336 U. S. 220.

that it is inadequate, or to decrease if it is proved to be excessive. A state may set the terms on which it will permit litigations in its courts. No type of litigation is more susceptible of regulation than that of a fiduciary nature. And it cannot seriously be said that a state makes such *unreasonable* use of its power as to violate the Constitution when it provides liability and security for payment of *reasonable* expenses if a litigation of this character is adjudged to be unsustainable. It is urged that such a requirement will foreclose resort by most stockholders to the only available judicial remedy for the protection of their rights. Of course, to require security for the payment of any kind of costs, or the necessity for bearing any kind of expense of litigation, has a deterring effect. But we deal with power, not wisdom; and we think, notwithstanding this tendency, it is within the power of a state to close its courts to this type of litigation if the condition of reasonable security is not met.

The contention that the statute denies equal protection of the laws is based upon the fact that it enables a stockholder who owns 5% of a corporation's outstanding shares, or $50,000 in market value, to proceed without either security or liability and imposes both upon those who elect to proceed with a smaller interest. We do not think the state is forbidden to use the amount of one's financial interest, which measures his individual injury from the misconduct to be redressed, as some measure of the good faith and responsibility of one who seeks at his own election to act as custodian of the interests of all stockholders, and as an indication that he volunteers for the large burdens of the litigation from a real sense of grievance and is not putting forward a claim to capitalize personally on its harassment value. These may not be the best ways of precluding "strike lawsuits," but we are unable to say that a classification for these pur-

poses, based upon the percentage or market value of the stock alleged to be injured by the wrongs, is an unconstitutional one. Where any classification is based on a percentage or an amount, it is necessarily somewhat arbitrary. It is difficult to say of many lines drawn by legislation that they give those just above and those just below the line a perfectly equal protection. A taxpayer with $10,000.01 of income does not think it is equality to tax him at a different rate than one who has $9,999.99, or to require returns from one just above and not from one just below a certain figure. It is difficult to say that a stockholder who has 49.99% of a company's stock should be unable to elect any representative to its Board of Directors while one who owns 50.01% may name the entire Board. If there is power, as we think there is, to draw a line based on considerations of proportion or amount, it is a rare case, of which this is not one, that a constitutional objection may be made to the particular point which the legislature has chosen.

The contention also is made that the provision which applies this statute to actions pending upon its enactment, in which no final judgment has been entered, renders it void under the Due Process Clause for retroactivity. While by its terms the statute applies to pending cases, it does not provide the manner of application; nor do the New Jersey courts appear to have settled what its effect is to be. Its terms do not appear to require an interpretation that it creates new liability against the plaintiff for expenses incurred by the defense previous to its enactment. The statute would admit of a construction that plaintiff's liability begins only from the time when the Act was passed or perhaps when the corporation's application for security is granted and that security for expenses and counsel fees which "may be incurred" does not include those which have been in-

curred before one or the other of these periods. We would not, for the purpose of considering constitutionality, construe the statute in absence of a state decision as imposing liability for events before its enactment. On this basis its alleged retroactivity amounts only to a stay of further proceedings unless and until security is furnished for expense incurred in the future, and does not extend either to destruction of an existing cause of action or to creation of a new liability for past events.

The mere fact that a statute applies to a civil action retrospectively does not render it unconstitutional. *Blount* v. *Windley,* 95 U. S. 173, 180; *Western Union Telegraph Co.* v. *L. & N. R. Co.,* 258 U. S. 13; *Chase Securities Corp.* v. *Donaldson,* 325 U. S. 304. Looking upon the statute as we have indicated, its retroactive effect, if any, is certainly less drastic and prejudicial than that held not to be unconstitutional in these decisions. We do not find in the bare statute any such retroactive effect as renders it unconstitutional under the Due Process Clause, and of course we express no opinion as to the effect of an application other than we have indicated.

It is also contended that this statute may not be applied in this case because the cause of action derives from a Delaware corporation and hence Delaware law governs it. But it is the plaintiff who has brought the case in New Jersey. The trial will very likely involve questions of conflict of laws as to which the law of New Jersey will apply, *Klaxon Co.* v. *Stentor Co.,* 313 U. S. 487; *Griffin* v. *McCoach,* 313 U. S. 498, and perhaps questions of full faith and credit. These are not before us now. A plaintiff cannot avail himself of the New Jersey forum and at the same time escape the terms on which it is made available, if the law is applicable to a federal court sitting in that State, which we later consider.

We conclude, therefore, that, so far as the Federal Constitution is concerned, New Jersey's security statute is

a valid law of that State and the question remains as to whether it must be applied by federal courts in that State to suits brought therein on diversity grounds.

### Applicability in Federal Court.

The Rules of Decision Act, in effect since the First Congress of the United States and now found at 28 U. S. C. § 1652, provides: "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." This Court in *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, held that judicial decisions are laws of the states within its meaning. But *Erie R. Co.* v. *Tompkins* and its progeny have wrought a more far-reaching change in the relation of state and federal courts and the application of state law in the latter whereby in diversity cases the federal court administers the state system of law in all except details related to its own conduct of business. *Guaranty Trust Co.* v. *York,* 326 U. S. 99. The only substantial argument that this New Jersey statute is not applicable here is that its provisions are mere rules of procedure rather than rules of substantive law.

Even if we were to agree that the New Jersey statute is procedural, it would not determine that it is not applicable. Rules which lawyers call procedural do not always exhaust their effect by regulating procedure. But this statute is not merely a regulation of procedure. With it or without it the main action takes the same course. However, it creates a new liability where none existed before, for it makes a stockholder who institutes a derivative action liable for the expense to which he puts the corporation and other defendants, if he does not make good his claims. Such liability is not usual and it goes beyond payment of what we know as "costs." If all

the Act did was to create this liability, it would clearly be substantive. But this new liability would be without meaning and value in many cases if it resulted in nothing but a judgment for expenses at or after the end of the case. Therefore, a procedure is prescribed by which the liability is insured by entitling the corporate defendant to a bond of indemnity before the outlay is incurred. We do not think a statute which so conditions the stockholder's action can be disregarded by the federal court as a mere procedural device.

It is urged, however, that Federal Rule of Civil Procedure No. 23 deals with plaintiff's right to maintain such an action in federal court and that therefore the subject is recognized as procedural and the federal rule alone prevails. Rule 23 requires the stockholder's complaint to be verified by oath and to show that the plaintiff was a stockholder at the time of the transaction of which he complains or that his share thereafter devolved upon him by operation of law. In other words, the federal court will not permit itself to be used to litigate a purchased grievance or become a party to speculation in wrongs done to corporations. It also requires a showing that an action is not a collusive one to confer jurisdiction and to set forth the facts showing that the plaintiff has endeavored to obtain his remedy through the corporation itself. It further provides that the class action shall not be dismissed or compromised without approval of the court, with notice to the members of the class. These provisions neither create nor exempt from liabilities, but require complete disclosure to the court and notice to the parties in interest. None conflict with the statute in question and all may be observed by a federal court, even if not applicable in state court.

We see no reason why the policy stated in *Guaranty Trust Co.* v. *York,* 326 U. S. 99, should not apply.

We hold that the New Jersey statute applies in federal courts and that the District Court erred in declining to fix the amount of indemnity reasonably to be exacted as a condition of further prosecution of the suit.

The judgment of the Court of Appeals is

*Affirmed.*

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE FRANKFURTER concurs, dissenting in part.

The cause of action on which this suit is brought is a derivative one. Though it belongs to the corporation, the stockholders are entitled under state law to enforce it. The measure of the cause of action is the claim which the corporation has against the alleged wrongdoers. This New Jersey statute does not add one iota to nor subtract one iota from that cause of action. It merely prescribes the method by which stockholders may enforce it. Each state has numerous regulations governing the institution of suits in its courts. They may favor the litigation or they may affect it adversely. But they do not fall under the principle of *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, unless they define, qualify or delimit the cause of action or otherwise relate to it.

This New Jersey statute, like statutes governing security for costs, regulates only the procedure for instituting a particular cause of action and hence need not be applied in this diversity suit in the federal court. Rule 23 of the Federal Rules of Civil Procedure defines that procedure for the federal courts.

MR. JUSTICE RUTLEDGE, dissenting.

I am in accord with the dissenting opinion of MR. JUSTICE DOUGLAS in this case. I also agree with the dissenting views of MR. JUSTICE JACKSON in No. 465, *Woods* v.

*Interstate Realty Co., ante,* p. 538, decided today. And I have noted my dissent in No. 522, *Ragan* v. *Merchants Transfer & Warehouse Co., ante,* p. 530, also decided today.

Without undertaking to discuss each case in detail, I think the three decisions taken together demonstrate the extreme extent to which the Court is going in submitting the control of diversity litigation in the federal courts to the states rather than to Congress, where it properly belongs. This is done in the guise of applying the rule of *Erie R. Co.* v. *Tompkins,* 304 U. S. 64. But in my opinion it was never the purpose of that decision to put such matters as those involved here outside the power of Congress to regulate and to confer that authority exclusively upon the states.

What is being applied is a gloss on the *Erie* rule, not the rule itself. That case held that federal courts in diversity cases must apply state law, decisional as well as statutory, in determining matters of substantive law, in particular and apart from procedural limitations upon its assertion—whether a cause of action exists. I accept that view generally and insofar as it involves a wise rule of administration for the federal courts, though I have grave doubt that it has any solid constitutional foundation.

But the *Erie* case made no ruling that in so deciding diversity cases a federal court is "merely another court of the state in which it sits," and hence that in every situation in which the doors of state courts are closed to a suitor, so must be also those of the federal courts. Not only is this not true when the state bar is raised by a purely procedural obstacle. There is sound historical reason for believing that one of the purposes of the diversity clause was to afford a federal court remedy when, for at least some reasons of state policy, none would be available in the state courts. It is the gloss which has

been put upon the *Erie* ruling by later decisions, *e. g., Guaranty Trust Co.* v. *York,* 326 U. S. 99, which in my opinion is being applied to extend the *Erie* ruling far beyond its original purpose or intent and, in my judgment, with consequences and implications seriously impairing Congress' power, within its proper sphere of action, to control this type of litigation in the federal courts.

The accepted dichotomy is the familiar "procedural-substantive" one. This of course is a subject of endless discussion, which hardly needs to be repeated here. Suffice it to say that actually in many situations procedure and substance are so interwoven that rational separation becomes well-nigh impossible. But, even so, this fact cannot dispense with the necessity of making a distinction. For, as the matter stands, it is Congress which has the power to govern the procedure of the federal courts in diversity cases, and the states which have that power over matters clearly substantive in nature. Judges therefore cannot escape making the division. And they must make it where the two constituent elements are Siamese twins as well as where they are not twins or even blood brothers. The real question is not whether the separation shall be made, but how it shall be made: whether mechanically by reference to whether the state courts' doors are open or closed, or by a consideration of the policies which close them and their relation to accommodating the policy of the *Erie* rule with Congress' power to govern the incidents of litigation in diversity suits.

It is in these close cases, this borderland area, that I think we are going too far. It is one thing to decide that Pennsylvania does or does not create a cause of action in tort for injuries inflicted by specified conduct and to have that determination govern the outcome of

a diversity suit in Pennsylvania or New York.[1] It is another, in my view, to require a bond for costs or for payment of the opposing party's expenses and attorney's fees in the event the claimant is unsuccessful. Whether or not the latter is conceived as creating a new substantive right, it is too close to controlling the incidents of the litigation rather than its outcome to be identified with the former. It is a matter which in my opinion lies within Congress' control for diversity cases, not one for state control or to be governed by the fact that the state shuts the doors of its courts unless the state requirements concerning such incidents of litigation are complied with.

In my view Rule 23 of the Federal Rules of Civil Procedure, derived from the former Equity Rules and now having the sanction of Congress, is valid and governs in the *Cohen* case. If, however, the State of New Jersey has the power to govern federal diversity suits within its

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[1] It may be noted that the disposition of the local law problem apparently presented in *Erie* was not consistent, either here or on remand, with the current view that a federal district court is required to treat a diversity case exactly as would a state court of the state in which the district court is sitting: The *Erie* case arose out of an alleged *Pennsylvania* tort, and this Court stated that the court of appeals had erred when it "declined to decide the issue of state law," 304 U. S. at 80—*i. e.*, "the Pennsylvania law." *Ibid.* But the *Erie* case was initiated by Tompkins, "a citizen of Pennsylvania . . . in the federal court *for southern New York*, which had jurisdiction because the company is a corporation of that State." 304 U. S. at 69 (emphasis added). Accordingly, as *Erie* is now construed, the issue on remand should have been what law *a New York state court would have applied to the Pennsylvania tort.* But the sole issue determined on remand was the applicable *Pennsylvania* law, without mention of the probable attitude of the New York courts. *Tompkins* v. *Erie R. Co.*, 98 F. 2d 49. It was not until after Justice Brandeis had retired that this Court held that federal district courts were required to follow local conflict of laws doctrine in the resolution of diversity cases. *Klaxon Co.* v. *Stentor Co.*, 313 U. S. 487.

borders as to all matters having a substantive tinge or aspect, then it may be questioned whether, in the event of conflict with some local policy, a federal court sitting in that state could give effect to the Rule's requirement that the complaint aver "that the plaintiff was a shareholder at the time of the transaction of which he complains or that his share thereafter devolved on him by operation of law . . . ." For in any strict and abstract sense that provision would seem to be as much a "substantive" one as the New Jersey requirements for bond, etc. And, if so, then it would seem highly doubtful, on any automatic or mechanical application of the substantive-procedural dichotomy, that either Congress or this Court could create such a limitation on diversity litigation, since as a substantive matter this would be for the states to control. See 3 Moore, Federal Practice (2d ed., 1948) 3493–3506.

For myself I have no doubt of the validity of Rule 23 or of the power of Congress to enact such a rule, even though it has a substantive aspect. Notwithstanding that aspect, the rule is too closely related to procedural and other matters affecting litigation in the federal courts for me to conceive of its invalidity. So also in the present cases I think the state regulations, though each may be regarded as having a substantive aspect, are too closely related to the modes and methods of conducting litigation in the federal courts to be capable of displacing Congress' power of regulation in those respects or the federal courts' power to hear and determine the respective controversies.

Accordingly I would reverse the judgments in the *Cohen* and *Ragan* cases and affirm that in the *Woods* case.

# WHEELING STEEL CORP. *v.* GLANDER, TAX COMMISSIONER OF OHIO.

NO. 447. APPEAL FROM THE SUPREME COURT OF OHIO.*

Argued March 29, 1949.—Decided June 20, 1949.

Certain foreign corporations which had been authorized to do business in Ohio and which operated manufacturing plants there had their principal places of business in other states, where all orders were accepted, credits extended, books kept and where all accounts receivable were payable. The corporations had paid all franchise taxes and all taxes on real and personal property located within Ohio. In addition, the State levied an *ad valorem* tax on their accounts receivable derived from sales of goods manufactured within the State. The accounts receivable were not used in the conduct of the business of the corporations in Ohio, but in their general business. Accounts receivable of identical nature which were owned by residents and domestic corporations were exempt from the tax. *Held:*

1. The tax denied the foreign corporations the equal protection of the laws, in violation of the Fourteenth Amendment of the Federal Constitution. Pp. 563–574.

(a) After a state has chosen to admit foreign corporations to do business within it, they are entitled to equal protection with domestic corporations, at least to the extent that their property is entitled to an equally favorable *ad valorem* tax basis. Pp. 571–572.

(b) The inequality to which the foreign corporations are subjected is not based on Ohio's relation to the decisive transaction, but solely on difference in residence of the owner of the accounts receivable. P. 572.

2. The tax was not saved from constitutional invalidity by the "reciprocity" provisions of the statute imposing it, since the plan of reciprocity is not one which by credits or otherwise protects the nonresident or foreign corporation against the discriminations apparent in the Ohio statute. Pp. 572–574.

150 Ohio St. 229, 80 N. E. 2d 863, reversed.

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*Together with No. 448, *National Distillers Products Corp.* v. *Glander, Tax Commissioner of Ohio,* on appeal from the same Court, argued March 30, 1949.

An Ohio *ad valorem* tax on foreign corporations, challenged as violating the Federal Constitution, was sustained by the State Supreme Court. 150 Ohio St. 229, 80 N. E. 2d 863. On appeals to this Court, *reversed,* p. 574.

*John M. Caren* argued the cause for appellant in No. 447. With him on the brief were *Carlton S. Dargusch, Wright Hugus* and *J. E. Bruce.*

*Charles H. Tuttle* argued the cause for appellant in No. 448. With him on the brief were *Isadore Topper, R. Brooke Alloway* and *Paul L. Peyton.*

*W. H. Annat,* Assistant Attorney General of Ohio, argued the cause for appellee. With him on the briefs was *Herbert S. Duffy,* Attorney General.

Mr. Justice Jackson delivered the opinion of the Court.

The State of Ohio has laid an *ad valorem* tax against certain intangible property, consisting of notes, accounts receivable and prepaid insurance, owned by foreign corporations. As applied to appellants in these two cases, the tax is challenged as violating the Federal Constitution on several grounds which may conveniently be considered in a single opinion. Facts are not in dispute.

Appellant Wheeling Steel Corporation is organized under the laws of Delaware, where it maintains a statutory office. Ohio has authorized it to do business in that State and four of its eight manufacturing plants are located there. General offices, from which its entire business is controlled and conducted, are in Wheeling, West Virginia. Its officers there have custody of its money, notes and books of account. In twelve other states, including Ohio, it maintains sales offices which solicit and receive orders for its products subject to acceptance or rejection at the Wheeling office, to which all are for-

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warded. From this office only may credit be extended to purchasers. Accounts are billed and collected from the Wheeling office and the sales offices have no powers or duties with respect to collection. All accounts or notes receivable are payable at Wheeling, where the written evidences thereof are kept. Proceeds from receivables are taken into appellant's treasury at Wheeling and there applied to general purposes of the business.

Appellant National Distillers Products Corporation is organized under the laws of Virginia, where it has a statutory office and holds annual stockholders meetings. It is admitted to do business in Ohio, where it maintains a distillery, or rectifying plant, and warehouse, as it does also in six other states. Pay roll checks for plant employees are drawn on funds deposited in banks in the locality of the plant. Appellant also is licensed to do business in New York, where it maintains its principal business office and conducts its fiscal affairs and from which all business activities are directed and controlled. The corporation maintains regional sales offices in various of those states which permit private distribution of liquor. In such states customers are solicited and orders taken, subject to acceptance or rejection at New York. It maintains no sales office in Ohio, where dispensing liquor is a state monopoly. Orders from Ohio state authorities are forwarded directly to the offices in New York and are subject to acceptance or rejection there. When the New York office accepts an order from any source, it sends shipping orders to various plants, none of which makes any shipments except upon such orders. Only in New York can any credits be approved and all books, records and evidences of accounts receivable are kept there. Collections are managed from New York, which is the place of payment of all receivables. During the tax year in question, the corporation solicited and took orders through agents in states other than Ohio

for a large quantity of liquor shipped from its plants and warehouses in Ohio to customers elsewhere.

It is stipulated that appellants each paid all franchise or other taxes required by Ohio for admission to do business in the State and paid all taxes assessed upon real and personal property located in said State.

The Wheeling Company also paid to the State of West Virginia, for the year in question, *ad valorem* taxes on all of its receivables, including those sought to be taxed by Ohio, pursuant to this Court's decision in *Wheeling Steel Corp.* v. *Fox,* 298 U. S. 193. Neither Virginia nor New York has sought to tax the accounts receivable of National Distillers involved herein.

The Ohio Tax Commissioner, applying §§ 5328–1 and 5328–2 of the General Code of Ohio,[1] assessed for taxa-

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[1] Pertinent parts of the Ohio law read as follows:

"Sec. 5328–1. . . . Property of the kinds and classes mentioned in section 5328–2 of the General Code, used in and arising out of business transacted in this state by, for or on behalf of a non-resident person . . . shall be subject to taxation; and all such property of persons residing in this state used in and arising out of business transacted outside of this state by, for or on behalf of such persons . . . shall not be subject to taxation. . . .

. . . . . .

"Sec. 5328–2. . . . Property of the kinds and classes herein mentioned, when used in business, shall be considered to arise out of business transacted in a state other than that in which the owner thereof resides in the cases and under the circumstances following:

"In the case of accounts receivable, when resulting from the sale of property sold by an agent having an office in such other state or from a stock of goods maintained therein, or from services performed by an officer, agent or employe connected with, sent from, or reporting to any officer or at any office located in such other state.

. . . . . .

"The provisions of this section shall be reciprocally applied, to the end that all property of the kinds and classes mentioned in this section having a business situs in this state shall be taxed herein

tion in Ohio a large amount of notes and accounts receivable which each appellant derived from shipments originating at Ohio manufacturing plants. The specific ground stated for assessment was that such receivables "result from the sale of property from a stock of goods maintained within this state."

The Board of Tax Appeals affirmed both assessments and in the Distiller's case set forth the above-mentioned statutes and pointed out wherein its own views and practices as to their application to accounts receivable had been modified by decisions of the Ohio Supreme Court, whose interpretations, for our purposes, become a part of the statutes. The Board said:

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and no property of such kinds and classes belonging to a person residing in this state and having a business situs outside of this state shall be taxed. It is hereby declared that the assignment of a business situs outside of this state to property of a person residing in this state in any case and under any circumstances mentioned in this section is inseparable from the assignment of such situs in this state to property of a person residing outside of this state in a like case and under similar circumstances. . . ."

"SEC. 5325–1. . . . Moneys, deposits, investments, accounts receivable and prepaid items, and other taxable intangibles shall be considered to be 'used' when they or the avails thereof are being applied, or are intended to be applied in the conduct of the business, whether in this state or elsewhere. . . .

. . . . . .

"SEC. 5638. . . . Annual taxes are hereby levied on the kinds and classes of intangible property, hereinafter enumerated, on the classified tax list in the offices of the county auditors and duplicates thereof in the offices of the county treasurers at the following rates, to wit:

". . . moneys, credits and all other taxable intangibles so listed, three mills on the dollar. . . ."

"SEC. 5327. . . . The term 'credits' as so used, means the excess of the sum of all current accounts receivable and prepaid items [used] in business when added together estimating every such account and item at its true value in money, over and above the sum of current accounts payable of the business, other than taxes and assessments. . . ." Ohio Gen. Code Ann. (1945).

". . . On a consideration of the statutory provisions above noted, the Board of Tax Appeals was of the view that before a business situs of accounts receivable and other intangible property, for purposes of taxation, could be given to a state other than the state of the domicile of the taxpayer, it must appear that such receivables or other intangible property not only arose in the conduct of the business of the taxpayer in such other state, but were therein so used as to become an integral part of the business carried on in such other state; and that it was not sufficient that such accounts receivable and other intangible property be used in business generally by the taxpayer. And on this view the Board held that the accounts receivable there in question, although they arose in the conduct of taxpayer's business in the States of Indiana and Michigan, did not have a business situs in such states, and that such accounts receivable were taxable in Ohio.

"On the appeal of the decision of the Board of Tax Appeals in The Ransom & Randolph Co. case to the Supreme Court of Ohio, that Court reversed the decision of the Board of Tax Appeals upon the point above indicated. 142 O. S. 398, 404. That Court, upon consideration of the applicable provisions of section 5328–2 and related sections of the General Code above noted, held that the accounts receivable of a taxpayer which arose in the conduct of its business in a state or states other than the state in which it had its domicile or place of residence, had a business situs in such other state or states if such accounts receivable or the avails thereof are being applied or are intended to be applied in the conduct of the taxpayer's business, whether in this State or elsewhere. This view of the Supreme

Court as to the construction to be placed upon the statutory provisions here in question was later followed by that Court in its decisions in the cases of The Haverfield Company v. Evatt, Tax Commr., 143 O. S. 58, and National Cash Register Company v. Evatt, Tax Commr., 145 O. S. 597.

". . . In this situation, and applying the statutory provisions here in question as the same have been construed by the Supreme Court of this State, it follows that since the accounts receivable of the appellant corporation involved in this case arose—as this Board hereby find—, in the conduct of its business in the State of Ohio by the sale of its products from a stock of goods located in this State, and since, further, such accounts receivable or the avails thereof were used or were intended to be used by the appellant in its business, whether in this State or elsewhere, such accounts receivable have a business and taxable situs in the State of Ohio, as found and determined by the tax commissioner.

"With respect to a question such as that here presented, to wit, that as to the taxation of the accounts receivable of a foreign corporation arising in the conduct of its business in this State, the application of the above noted provisions of sections 5328–1, 5328–2 and other related sections of the General Code, as the same have been construed by the Supreme Court, presents, to our mind, a serious question as to the constitutionality of said statutory provisions as so construed under the Due Process of Law clause of the Federal Constitution. . . ."

The Ohio Supreme Court affirmed in both cases,[2] which were brought here by appeals.[3]

[2] 150 Ohio St. 229, 80 N. E. 2d 863.

[3] 28 U. S. C. § 1257 (2).

Appellants urge that the question which the Board of Tax Appeals regarded as serious should be resolved against the State on the ground that these intangibles had no situs in Ohio to sustain its power under the Due Process Clause so to tax them and also that to do so imposes an undue burden on interstate commerce in violation of the Commerce Clause. They point out that the credits sought to be taxed here were not created in Ohio, not payable there, and neither the payor nor payee, debtor nor creditor, was resident there. Moreover, the receivables arose from a contract for sale of goods, but the contracts were not made in Ohio nor performed in Ohio, and neither buyer nor seller resided there. On the assumption that Ohio could not follow tangible goods into a foreign state and tax them, either in the hands of the vendor before delivery or in the hands of a vendee after delivery, it is argued that she has no greater power to tax intangibles substituted in a foreign state for them and has no right to tax intangible proceeds of the sale of tangible goods that had passed beyond her taxing power.

In their original application of the statutory scheme the taxing authorities sought to overcome this hurdle by requiring an additional and more substantial connection between the taxed intangibles and the state taxing power. For purpose of an Ohio tax the Board of Tax Appeals held intangibles to have a situs in that State only when and to the extent "so used as to become an integral part of the business carried on" in Ohio. It was this requirement which the Supreme Court of the State eliminated by *Ransom & Randolph Co.* v. *Evatt,* 142 Ohio St. 398, 52 N. E. 2d 738, when it held that any use of the intangibles in the general business was sufficient to make them taxable. Thus was cut the connection which the Board of Tax Appeals originally invoked to confer juris-

diction to tax, and thus was raised the question of constitutionality regarded by the Board as serious.

However, we find it inappropriate to decide the Due Process question. The state action, which is reviewable under the Fourteenth Amendment, is the composite result of both legislation and its judicial interpretation. Ohio does not attempt and has not asserted power to tax all such intangibles, but only those owned by nonresidents and foreign corporations. It has given no indication that it intends to or would reach out to tax such intangibles as we have here unless it may at the same time exempt identical ones owned by its residents and domestic corporations. The contrary is indicated by § 5328–2, which makes the two inseparable. We deal with the taxing plan as an entirety as we find it in operation and pass only on the constitutionality of that which the State has asserted power and purpose to do.

The state action and policy resulting from statute and decisions is certified to us by the appellee, the Tax Commissioner of Ohio, to be as follows:

> ". . . since the decision of the Supreme Court of Ohio in Ransom & Randolph v. Evatt, 142 Ohio State 398 (January 12, 1944), and in obedience thereto, it has been the policy and practice of the Department of Taxation of Ohio to construe and apply sections 5328–1 and 5328–2 of the General Code of Ohio
>
> > "(A) so as to exempt from taxation in Ohio accounts receivable of Ohio residents, including domestic corporations, which arise
> >
> > > "(1) from a sale of goods by an agent having an office in another state, even though such goods be shipped from Ohio, or
> > >
> > > "(2) from a sale of goods shipped from another state, even though such goods be sold by an agent having an office in Ohio:

"(B) so as to tax in Ohio accounts receivable of non-residents of Ohio, including foreign corporations, which arise either

"(1) from a sale of goods shipped from Ohio, even though such goods be sold by an agent having an office in another state, or

"(2) from a sale of goods by an agent having an office in Ohio, even though such goods be shipped from another state:

"That the foregoing have been in effect as the only tests of taxability of accounts receivable in Ohio since the decision of the Supreme Court of Ohio in the case of Ransom & Randolph v. Evatt, 142 Ohio State 398, and that said tests have been applied without deviation both by affiant and by his predecessor in office, William S. Evatt, as the result of the holding in that case."

Under long-settled principles of our Federation, Ohio was not required to admit these foreign corporations to carry on intrastate business within its borders. The State may arbitrarily exclude them or may license them upon any terms it sees fit, apart from exacting surrender of rights derived from the Constitution of the United States. *Hanover Insurance Co.* v. *Harding,* 272 U. S. 494, 507; *Connecticut General Co.* v. *Johnson,* 303 U. S. 77, 79–80. Ohio elected, however, to admit these corporations to transact businesses and operate manufacturing plants in the State. For that privilege they have paid all that the State required by way of franchise or privilege tax, which includes in its measure the value of all property owned and business done in Ohio. §§ 5495, 5497, 5498 and 5499 of the Ohio General Code. See *International Harvester Co.* v. *Evatt,* 329 U. S. 416. After a state has chosen to domesticate foreign corporations, the adopted corporations are entitled to equal protection with the state's own corporate progeny, at least to the extent that

their property is entitled to an equally favorable *ad valorem* tax basis. *Hanover Insurance Co.* v. *Harding,* 272 U. S. 494, 510–511; *Power Co.* v. *Saunders,* 274 U. S. 490, 493, 497. Ohio holds this tax on intangibles to be an *ad valorem* property tax, *Bennett* v. *Evatt,* 145 Ohio St. 587, 62 N. E. 2d 345, and in no sense a franchise, privilege, occupation or income tax.

The Ohio statutory scheme assimilates its own corporate creations to natural residents and all others to nonresidents. While this classification is a permissible basis for some different rights and liabilities, we have held, as to taxation of intangibles, that the federal right of a nonresident "is the right to equal treatment." *Hillsborough* v. *Cromwell,* 326 U. S. 620, 623.

The certificate of the Tax Commissioner discloses how fundamentally discriminatory is the application of this *ad valorem* tax to intangibles when owned by a resident or a domestic corporation as contrasted with its application when those are owned by a domesticated corporation or a nonresident. If on the taxing date one of these petitioners and an Ohio competitor each owns an account receivable of the same amount from the same out-of-state customer for the same kind of commodity, both shipped from a manufacturing plant in Ohio and both sold out of Ohio by an agent having an office out of the State, appellant's account receivable would be subject to Ohio's *ad valorem* tax and the one held by the competing domestic corporation would not. It seems obvious that appellants are not accorded equal treatment, and the inequality is not because of the slightest difference in Ohio's relation to the decisive transaction, but solely because of the different residence of the owner.

The State does not seriously deny this unequal application of its own tax but claims that reciprocity provisions of the statute reestablish equality. Those provisions therefore require scrutiny.

This entire taxing plan rests on a statutory formula for fixing situs of intangible property both within and without the State. This is provided by § 5328–2 of the Code. These intangibles "shall be considered to arise out of business transacted *in a state other than that in which the owner thereof resides*" under certain circumstances. (Emphasis supplied.) This basic rule separates the situs of intangibles from the residence of their owner whereas it has traditionally been at such residence, though with some exceptions. The effect is that intangibles of nonresident owners are assigned a situs within the taxing reach of Ohio while those of its residents are assigned a situs without. The plan may be said to be logically consistent in that, while it draws all such intangibles of nonresidents within the taxing power of Ohio, it by the same formula excludes those of residents. The exempted intangibles of residents are offered up to the taxing power of other states which may embrace this doctrine of a tax situs separate from residence. This is what is meant here by reciprocity, and the two provisions are declared inseparable; so that if the formula by which Ohio takes unto itself the accounts of nonresidents is held invalid, "such decision shall be deemed also to affect such provision as applied to property of a resident."

It is hard to see that this offer of reciprocity restores to appellants any of the equality which the application of the Ohio tax, considered alone, so obviously denies. There is no indication of a readiness by other states to copy Ohio's situs scheme so as to tax that which Ohio exempts. The proffered exchange of residents for intangible tax purposes may not commend itself as an even bargain between states. Ohio, being large, populous and highly industrialized, with heavy and basic industries, may well have much more to gain from a plan the effect of which is to tax credit exports to other states, than most states would have from a privilege to tax its own

exports into Ohio. In the several years that the Ohio statute has been on the books, no other state has sought to take advantage of the "reciprocity" proffer. And if it did, the equality of rates which would also be necessary to equalize the burden between nonresidents and their resident competitors could be hardly expected nor is it provided for. Far from acceding to the situs doctrine which allocates these receivables to Ohio, the State of West Virginia stands on the very different situs doctrine approved by this Court in *Wheeling Steel Corp.* v. *Fox,* 298 U. S. 193, and under its authority has for the year in question taxed *all* of the receivables of the Wheeling Company, including those Ohio seeks to claim as having situs in Ohio. It is clear that this plan of "reciprocity" is not one which by credits or otherwise protects the nonresident or foreign corporation against the discriminations apparent in the Ohio statute. We think these discriminations deny appellants equal protection of Ohio law.

The judgments are reversed and the causes remanded for proceedings not inconsistent herewith.

*Reversed.*

By MR. JUSTICE JACKSON.

The writer of the Court's opinion deems it necessary to complete the record by pointing out why, in writing by assignment for the Court, he assumed without discussion that the protections of the Fourteenth Amendment are available to a corporation. It was not questioned by the State in this case, nor was it considered by the courts below. It has consistently been held by this Court that the Fourteenth Amendment assures corporations equal protection of the laws, at least since 1886, *Santa Clara County* v. *Southern Pacific R. Co.,* 118 U. S. 394, 396, and that it entitles them to due process of law, at least since 1889, *Minneapolis & St. L. R. Co.* v. *Beckwith,* 129 U. S. 26, 28.

It is true that this proposition was once challenged by one Justice. *Connecticut General Co.* v. *Johnson,* 303 U. S. 77, 83 (dissenting opinion). But the challenge did not commend itself, even to such consistent liberals as Mr. Justice Brandeis and Mr. Justice Stone, and I had supposed it was no longer pressed. See the same Justice's separate opinion in *International Shoe Co.* v. *Washington,* 326 U. S. 310, 322, making no mention of this issue.

Without pretending to a complete analysis, I find that in at least two cases during this current term the same question was appropriate for consideration, as here. In *Railway Express Agency* v. *New York,* 336 U. S. 106, a corporation claimed to be deprived of both due process and equal protection of the law, and in *Ott* v. *Mississippi Barge Line,* 336 U. S. 169, a corporation claimed to be denied due process of law. At prior terms, in many cases the question was also inherent, for corporations made similar claims under the Fourteenth Amendment. See, e. g., *Illinois Central R. Co.* v. *Minnesota,* 309 U. S. 157; *Lincoln Life Insurance Co.* v. *Read,* 325 U. S. 673; *Queenside Hills Co.* v. *Saxl,* 328 U. S. 80. Although the author of the present dissent was the writer of each of the cited Court's opinions, it was not intimated therein that there was even doubt whether the corporations had standing to raise the questions or were entitled to protection of the Amendment. Instead, in each case the author, as I have done in this case, proceeded to discuss and dispose of the corporation's contentions on their merits, a quite improper procedure, I should think, if the corporation had no standing to raise the constitutional questions. Indeed, if the corporation had no such right, it is difficult to see how this Court would have jurisdiction to consider the case at all.

It may be said that in the foregoing cases other grounds might have been found upon which to defeat the corporations' claims, while in the present case apparently there is none.

However, in at least two cases this Court, joined by both Justices now asserting that corporations have no rights under the Fourteenth Amendment, recently has granted relief to corporations by striking down state action as conflicting with corporate rights under that Amendment. In *Times-Mirror Co.* v. *Superior Court,* companion case to *Bridges* v. *California,* 314 U. S. 252, a newspaper corporation persuaded this Court that a $500 fine assessed against it violated its rights under the Fourteenth Amendment. In *Pennekamp* v. *Florida,* 328 U. S. 331, a newspaper corporation was convicted along with an individual defendant, and this Court set aside the conviction upon the ground that the Fourteenth Amendment prohibited such state action. In neither of these cases was the corporation's right to raise the issue questioned and the result in each case was irreconcilable with the position now asserted in dissent.

It cannot be suggested that in cases where the author is the mere instrument of the Court he must forego expression of his own convictions. Mr. Justice Cardozo taught us how Justices may write for the Court and still reserve their own positions, though overruled. *Helvering* v. *Davis,* 301 U. S. 619, 639.

In view of this record I did not, and still do not, consider it necessary for the Court opinion to review the considerations which justify the assumption that these corporations have standing to raise the issues decided.

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

It has been implicit in all of our decisions since 1886 that a corporation is a "person" within the meaning of the Equal Protection Clause of the Fourteenth Amendment. *Santa Clara County* v. *Southern Pac. R. Co.,* 118 U. S. 394, 396, so held. The Court was cryptic in its decision. It was so sure of its ground that it wrote no

opinion on the point, Chief Justice Waite announcing from the bench:

> "The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of opinion that it does."

There was no history, logic, or reason given to support that view. Nor was the result so obvious that exposition was unnecessary.

The Fourteenth Amendment became a part of the Constitution in 1868. In 1871 a corporation claimed that Louisiana had imposed on it a tax that violated the Equal Protection Clause of the new Amendment. Mr. Justice Woods (then Circuit Judge) held that "person" as there used did not include a corporation and added, "This construction of the section is strengthened by the history of the submission by congress, and the adoption by the states of the 14th amendment, so fresh in all minds as to need no rehearsal." *Insurance Co.* v. *New Orleans,* 1 Woods 85, 88.

What was obvious to Mr. Justice Woods in 1871 was still plain to the Court in 1873. Mr. Justice Miller in the *Slaughter-House Cases,* 16 Wall. 36, 71, adverted to events "almost too recent to be called history" to show that the purpose of the Amendment was to protect human rights—primarily the rights of a race which had just won its freedom. And as respects the Equal Protection Clause he stated, "The existence of laws in the States where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by this clause, and by it such laws are forbidden." P. 81.

Moreover what was clear to these earlier judges was apparently plain to the people who voted to make the

Fourteenth Amendment a part of our Constitution. For as MR. JUSTICE BLACK pointed out in his dissent in *Connecticut General Co.* v. *Johnson,* 303 U. S. 77, 87, the submission of the Amendment to the people was on the basis that it protected human beings. There was no suggestion in its submission that it was designed to put negroes and corporations into one class and so dilute the police power of the States over corporate affairs. Arthur Twining Hadley once wrote that "The Fourteenth Amendment was framed to protect the negroes from oppression by the whites, not to protect corporations from oppression by the legislature. It is doubtful whether a single one of the members of Congress who voted for it had any idea that it would touch the question of corporate regulation at all." [1]

Both Mr. Justice Woods in *Insurance Co.* v. *New Orleans, supra,* p. 88, and MR. JUSTICE BLACK in his dissent in *Connecticut General Co.* v. *Johnson, supra,* pp. 88–89, have shown how strained a construction it is of the Fourteenth Amendment so to hold. Section 1 of the Amendment provides:

> "All *persons* born or naturalized in the United States, and subject to the jurisdiction thereof, are *citizens* of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of *citizens* of the United States; nor shall any State deprive any *person* of life, liberty, or property, without

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[1] The Constitutional Position of Property in America, 64 Independent 834, 836 (1908). He went on to say that the *Dartmouth College* case (4 Wheat. 518) and the construction given the Fourteenth Amendment in the *Santa Clara* case "have had the effect of placing the modern industrial corporation in an almost impregnable constitutional position." *Id.,* p. 836.

As to whether the framers of the Amendment may have had such an undisclosed purpose, see Graham, The "Conspiracy Theory" of the Fourteenth Amendment, 47 Yale L. J. 371.

due process of law; nor deny to any *person* within its jurisdiction the equal protection of the laws." (Italics added.)

"Persons" in the first sentence plainly includes only human beings, for corporations are not "born or naturalized."

Corporations are not "citizens" within the meaning of the first clause of the second sentence. *Western Turf Assn.* v. *Greenberg,* 204 U. S. 359, 363; *Selover, Bates & Co.* v. *Walsh,* 226 U. S. 112, 126.[2]

It has never been held that they are persons whom a State may not deprive of "life" within the meaning of the second clause of the second sentence.

"Liberty" in that clause is "the liberty of natural, not artificial, persons." *Western Turf Assn.* v. *Greenberg, supra,* p. 363.

But "property" as used in that clause has been held to include that of a corporation since 1889 when *Minneapolis & St. L. R. Co.* v. *Beckwith,* 129 U. S. 26, was decided.

It requires distortion to read "person" as meaning one thing, then another within the same clause and from clause to clause. It means, in my opinion, a substantial revision of the Fourteenth Amendment. As to the matter of construction, the sense seems to me to be with Mr. Justice Woods in *Insurance Co.* v. *New Orleans, supra,* p. 88, where he said, "The plain and evident meaning of the section is, that the persons to whom the equal protection of the law is secured are persons born or naturalized or endowed with life and liberty, and consequently natural and not artificial persons."

History has gone the other way. Since 1886 the Court has repeatedly struck down state legislation as applied

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[2] Cf. McGovney, A Supreme Court Fiction, 56 Harv. L. Rev. 853, 1090, 1225, dealing with corporations in the diverse citizenship jurisdiction of the federal courts.

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to corporations on the ground that it violated the Equal Protection Clause.[3] Every one of our decisions upholding legislation as applied to corporations over the objection that it violated the Equal Protection Clause has assumed that they are entitled to the constitutional protection. But in those cases it was not necessary to meet the issue since the state law was not found to contain the elements of discrimination which the Equal Protection Clause condemns. But now that the question is squarely presented I can only conclude that the *Santa Clara* case was wrong and should be overruled.

One hesitates to overrule cases even in the constitutional field that are of an old vintage. But that has never been a deterrent heretofore[4] and should not be now.

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[3] See *Chicago, M. & St. P. R. Co.* v. *Minnesota,* 134 U. S. 418; *Gulf, Colorado & Santa Fé R. Co.* v. *Ellis,* 165 U. S. 150; *Cotting* v. *Kansas City Stockyards Co.,* 183 U. S. 79; *Connolly* v. *Union Sewer Pipe Co.,* 184 U. S. 540; *Southern R. Co.* v. *Greene,* 216 U. S. 400; *Herndon* v. *Chicago, Rock Island & Pac. R. Co.,* 218 U. S. 135; *Roach* v. *Atchison, T. & Santa Fe R. Co.,* 218 U. S. 159; *Atchison, T. & S. F. R. Co.* v. *Vosburg,* 238 U. S. 56; *Gast Realty Co.* v. *Schneider Granite Co.,* 240 U. S. 55; *McFarland* v. *American Sugar Co.,* 241 U. S. 79; *Royster Guano Co.* v. *Virginia,* 253 U. S. 412; *Bethlehem Motors Corp.* v. *Flynt,* 256 U. S. 421; *Kansas City So. R. Co.* v. *Road Imp. Dist. No. 6,* 256 U. S. 658; *C. & N. W. R. Co.* v. *Nye Co.,* 260 U. S. 35; *Sioux City Bridge Co.* v. *Dakota County,* 260 U. S. 441; *Thomas* v. *Kansas City So. R. Co.,* 261 U. S. 481; *Kentucky Co.* v. *Paramount Exch.,* 262 U. S. 544; *Air-Way Corp.* v. *Day,* 266 U. S. 71; *Hanover Ins. Co.* v. *Harding,* 272 U. S. 494; *Power Co.* v. *Saunders,* 274 U. S. 490; *Louisville Gas Co.* v. *Coleman,* 277 U. S. 32; *Quaker City Cab Co.* v. *Penna.,* 277 U. S. 389; *Cumberland Coal Co.* v. *Board,* 284 U. S. 23; *Liggett Co.* v. *Lee,* 288 U. S. 517; *Concordia Ins. Co.* v. *Illinois,* 292 U. S. 535; *Stewart Dry Goods Co.* v. *Lewis,* 294 U. S. 550; *Mayflower Farms* v. *Ten Eyck,* 297 U. S. 266; *Hartford Co.* v. *Harrison,* 301 U. S. 459.

[4] *In re Ayers,* 123 U. S. 443, overruled in part *Osborn* v. *United States Bank,* 9 Wheat. 738, a decision 63 years old; *Leisy* v. *Hardin,* 135 U. S. 100, overruled *Peirce* v. *New Hampshire,* 5 How. 504, a decision 42 years old. *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, over-

We are dealing with a question of vital concern to the people of the nation. It may be most desirable to give corporations this protection from the operation of the legislative process. But that question is not for us. It is for the people. If they want corporations to be treated as humans are treated, if they want to grant corporations this large degree of emancipation from state regulation,[5] they should say so. The Constitution provides a method by which they may do so. We should not do it for them through the guise of interpretation.

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ruled *Swift* v. *Tyson,* 16 Pet. 1, a decision 95 years old; *Graves* v. *N. Y. ex rel. O'Keefe,* 306 U. S. 466, overruled *Collector* v. *Day,* 11 Wall. 113, a decision 68 years old. *United States* v. *Underwriters Assn.,* 322 U. S. 533, overruled in part *Paul* v. *Virginia,* 8 Wall. 168, a decision 75 years old.

[5] The restrictions on state power which are contained in the Commerce Clause and which may prevent the States from burdening interstate commerce (see *Southern Pacific Co.* v. *Arizona,* 325 U. S. 761; *Morgan* v. *Virginia,* 328 U. S. 373) or discriminating against it (see *Nippert* v. *Richmond,* 327 U. S. 416) rise from a different source and are not relevant here.

# NATIONAL MUTUAL INSURANCE CO. *v.* TIDEWATER TRANSFER CO., INC.

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

No. 29. Argued November 8, 1948.—Decided June 20, 1949.

The Act of April 20, 1940, c. 117, 54 Stat. 143 (now 28 U. S. C. § 1332), conferred on the federal district courts jurisdiction of civil actions (involving no federal question) between citizens of the District of Columbia and citizens of a State. A District of Columbia corporation instituted in the Federal District Court for Maryland an action against a Virginia corporation, wherein the jurisdiction depended solely on diversity of citizenship. The District Court held the Act unconstitutional and dismissed the complaint. The Court of Appeals affirmed. *Held:* The Act is constitutional and the judgment is reversed. Pp. 583–585, 604.

165 F. 2d 531, reversed.

A District of Columbia corporation sued a Virginia corporation in the Federal District Court for Maryland, the jurisdiction depending solely on diversity of citizenship. The District Court dismissed the complaint. The Court of Appeals affirmed. 165 F. 2d 531. This Court granted certiorari. 333 U. S. 860. *Reversed,* p. 604.

*David G. Bress* argued the cause for petitioner. With him on the brief were *Alvin L. Newmyer* and *Sheldon E. Bernstein.*

By special leave of Court, *Solicitor General Perlman* argued the cause for the United States, as *amicus curiae,* urging reversal. With him on the brief were *Assistant Attorney General Morison, Arnold Raum, Paul A. Sweeney* and *Harry I. Rand.*

*Wendell D. Allen* and *Francis B. Burch* argued the cause and filed a brief for respondent.

MR. JUSTICE JACKSON announced the judgment of the Court and an opinion in which MR. JUSTICE BLACK and MR. JUSTICE BURTON join.

This case calls up for review a holding that it is unconstitutional for Congress to open federal courts in the several states to action by a citizen of the District of Columbia against a citizen of one of the states. The petitioner, as plaintiff, commenced in the United States District Court for Maryland an action for a money judgment on a claim arising out of an insurance contract. No cause of action under the laws or Constitution of the United States was pleaded, jurisdiction being predicated only upon an allegation of diverse citizenship. The diversity set forth was that plaintiff is a corporation created by District of Columbia law, while the defendant is a corporation chartered by Virginia, amenable to suit in Maryland by virtue of a license to do business there. The learned District Judge concluded that, while this diversity met jurisdictional requirements under the Act of Congress,[1] it did not comply with diversity requirements of the Constitution as to federal jurisdiction, and so dismissed.[2] The Court of Appeals, by a divided court, affirmed.[3] Of twelve district courts that had considered the question up to the time review in this Court was sought, all except three had held the enabling Act unconstitutional,[4] and the two Courts of Appeals which had

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[1] Act of April 20, 1940, c. 117, 54 Stat. 143. For terms of the statute see note 10.

[2] No opinion was filed by the District Court, which in dismissing the complaint for lack of jurisdiction relied upon its former decision and opinion in *Feely* v. *Sidney S. Schupper Interstate Hauling System, Inc.*, 72 F. Supp. 663.

[3] 165 F. 2d 531.

[4] The Act had been upheld in *Winkler* v. *Daniels*, 43 F. Supp. 265; *Glaeser* v. *Acacia Mutual Life Association*, 55 F. Supp. 925; and in *Duze* v. *Woolley*, 72 F. Supp. 422 (with respect to Hawaii). It

spoken on the subject agreed with that conclusion.[5] The controversy obviously was an appropriate one for review here and writ of certiorari issued in the case.[6]

The history of the controversy begins with that of the Republic. In defining the cases and controversies to which the judicial power of the United States could extend, the Constitution included those "between Citizens of different States." [7] In the Judiciary Act of 1789, Congress created a system of federal courts of first instance and gave them jurisdiction of suits "between a citizen of the State where the suit is brought, and a citizen of another State." [8] In 1804, the Supreme Court, through Chief Justice Marshall, held that a citizen of the District of Columbia was not a citizen of a State within the meaning and intendment of this Act.[9] This decision closed federal courts in the states to citizens of the District of Columbia in diversity cases, and for 136 years they remained closed. In 1940 Congress enacted the statute challenged here. It confers on such courts jurisdiction if the action "Is between citizens of different States, or

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had been held unconstitutional in the District Court in the instant case; in *Central States Co-operatives* v. *Watson Bros. Transportation Co.*, affirmed 165 F. 2d 392, and in *McGarry* v. *City of Bethlehem*, 45 F. Supp. 385; *Behlert* v. *James Foundation*, 60 F. Supp. 706; *Ostrow* v. *Samuel Brilliant Co.*, 66 F. Supp. 593; *Wilson* v. *Guggenheim*, 70 F. Supp. 417; *Feely* v. *Sidney S. Schupper Interstate Hauling System*, 72 F. Supp. 663; *Willis* v. *Dennis*, 72 F. Supp. 853; and in *Mutual Ben. Health & Acc. Assn.* v. *Dailey*, 75 F. Supp. 832.

[5] The Act had been held invalid by the Court of Appeals for the Fourth Circuit in the instant case, 165 F. 2d 531, with Judge Parker dissenting; and by the Court of Appeals for the Seventh Circuit in *Central States Co-operatives* v. *Watson Bros. Transportation Co.*, 165 F. 2d 392, with Judge Evans dissenting.

[6] 333 U. S. 860.

[7] U. S. Const. Art. III, § 2, cl. 1.

[8] § 11 of the Act of Sept. 24, 1789, c. 20, 1 Stat. 73, 78.

[9] *Hepburn & Dundas* v. *Ellzey*, 2 Cranch 445.

citizens of the District of Columbia, the Territory of Hawaii, or Alaska, and any State or Territory." [10] The issue here depends upon the validity of this Act, which, in substance, was reenacted by a later Congress [11] as part of the Judicial Code.[12]

Before concentrating on detail, it may be well to place the general issue in a larger perspective. This constitutional issue affects only the mechanics of administering justice in our federation. It does not involve an extension or a denial of any fundamental right or immunity which goes to make up our freedoms. Those rights and freedoms do not include immunity from suit by a citizen of Columbia or exemption from process of the federal courts. Defendant concedes that it can presently be sued in some court of law, if not this one, and it grants that Congress may make it suable at plaintiff's complaint in some, if not this, federal court. Defendant's contention only amounts to this: that it cannot be made to answer this plaintiff in the particular court which Congress has decided is the just and convenient forum.

The considerations which bid us strictly to apply the Constitution to congressional enactments which invade fundamental freedoms or which reach for powers that would substantially disturb the balance between the Union and its component states, are not present here. In mere mechanics of government and administration we

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[10] The effect of the Act was to amend 28 U. S. C. (1946 ed.) § 41 (1) so that it read in pertinent part: "The district courts shall have original jurisdiction as follows: . . . Of all suits of a civil nature, at common law or in equity . . . where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000, and . . . (b) Is between citizens of different States, or citizens of the District of Columbia, the Territory of Hawaii, or Alaska, and any State or Territory . . . ."

[11] Act of June 25, 1948, 62 Stat. 869.

[12] 28 U. S. C. § 1332.

should, so far as the language of the great Charter fairly will permit, give Congress freedom to adapt its machinery to the needs of changing times. In no case could the admonition of the great Chief Justice be more appropriately heeded—". . . we must never forget, that it is *a constitution* we are expounding." [13]

Our first inquiry is whether, under the third, or Judiciary, Article of the Constitution,[14] extending the judicial power of the United States to cases or controversies "between Citizens of different States," a citizen of the District of Columbia has the standing of a citizen of one of the states of the Union. This is the question which the opinion of Chief Justice Marshall answered in the negative, by way of dicta if not of actual decision. *Hepburn & Dundas* v. *Ellzey,* 2 Cranch 445. To be sure, nothing was before that Court except interpretation of a statute [15] which conferred jurisdiction substantially in the words of the Constitution with nothing in the text or context to show that Congress intended to regard the District as a state. But Marshall resolved the statutory question by invoking the analogy of the constitutional provisions of the same tenor and reasoned that the District was not a state for purposes of the Constitution and, hence, was not for purposes of the Act. The opinion summarily disposed of arguments to the contrary, including the one repeated here that other provisions of the Constitution indicate that "the term state is sometimes used in its more enlarged sense." Here, as there, "on examining the passages quoted, they do not prove what was to be shown by them." 2 Cranch 445, 453. Among his contemporaries at least, Chief Justice Marshall was not generally censured for undue literalness in interpreting the lan-

[13] *McCulloch* v. *Maryland,* 4 Wheat. 316, 407.

[14] U. S. Const. Art. III, § 2, cl. 1.

[15] See note 8.

guage of the Constitution to deny federal power and he wrote from close personal knowledge of the Founders and the foundation of our constitutional structure. Nor did he underestimate the equitable claims which his decision denied to residents of the District, for he said that "It is true that as citizens of the United States, and of that particular district which is subject to the jurisdiction of congress, it is extraordinary that the courts of the United States, which are open to aliens, and to the citizens of every state in the union, should be closed upon *them*.— But this is a subject for legislative not for judicial consideration." [16]

The latter sentence, to which much importance is attached, is somewhat ambiguous, because constitutional amendment as well as statutory revision is for legislative, not judicial, consideration. But the opinion as a whole leaves no doubt that the Court did not then regard the District as a state for diversity purposes.

To now overrule this early decision of the Court on this point and hold that the District of Columbia is a state would, as that opinion pointed out, give to the word "state" a meaning in the Article which sets up the judicial establishment quite different from that which it carries in those Articles which set up the political departments and in other Articles of the instrument. While the word is one which can contain many meanings, such inconsistency in a single instrument is to be implied only where the context clearly requires it. There is no evidence that the Founders, pressed by more general and immediate anxieties, thought of the special problems of the District of Columbia in connection with the judiciary. This is not strange, for the District was then only a contemplated entity. But, had they thought of it, there is nothing to indicate that it would have been referred to as a state and

[16] *Hepburn & Dundas* v. *Ellzey*, 2 Cranch 445, 453.

much to indicate that it would have required special provisions to fit its anomalous relationship into the new judicial system, just as it did to fit it into the new political system.

In referring to the "States" in the fateful instrument which amalgamated them into the "United States," the Founders obviously were not speaking of states in the abstract. They referred to those concrete organized societies which were thereby contributing to the federation by delegating some part of their sovereign powers and to those that should later be organized and admitted to the partnership in the method prescribed. They obviously did not contemplate unorganized and dependent spaces as states. The District of Columbia being nonexistent in any form, much less as a state, at the time of the compact, certainly was not taken into the Union of states by it, nor has it since been admitted as a new state is required to be admitted.

We therefore decline to overrule the opinion of Chief Justice Marshall, and we hold that the District of Columbia is not a state within Article III of the Constitution. In other words, cases between citizens of the District and those of the states were not included in the catalogue of controversies over which the Congress could give jurisdiction to the federal courts by virtue of Art. III.

This conclusion does not, however, determine that Congress lacks power under other provisions of the Constitution to enact this legislation. Congress, by the Act in question, sought not to challenge or disagree with the decision of Chief Justice Marshall that the District of Columbia is not a state for such purposes. It was careful to avoid conflict with that decision by basing the new legislation on powers that had not been relied upon by the First Congress in passing the Act of 1789.

The Judiciary Committee of the House of Representatives recommended the Act of April 20, 1940, as "a rea-

sonable exercise of the constitutional power of Congress to legislate for the District of Columbia and for the Territories." [17] This power the Constitution confers in broad terms. By Art. I, Congress is empowered "to exercise exclusive Legislation in all Cases whatsoever, over such District." [18] And of course it was also authorized "To make all Laws which shall be necessary and proper for carrying into Execution" such powers.[19] These provisions were not relevant in Chief Justice Marshall's interpretation of the Act of 1789 because it did not refer in terms to the District but only to states. It is therefore significant that, having decided that District citizens' cases were not brought within federal jurisdiction by Art. III and the statute enacted pursuant to it, the Chief Justice added, as we have seen, that it was extraordinary that the federal courts should be closed to the citizens of "that particular district which is subject to the jurisdiction of congress." Such language clearly refers to Congress' Art. I power of "exclusive Legislation in all Cases whatsoever, over such District." And mention of that power seems particularly significant in the context of Marshall's further statement that the matter is a subject for "legislative not for judicial consideration." Even if it be considered speculation to say that this was an expression by the Chief Justice that Congress had the requisite power under Art. I, it would be in the teeth of his language to say that it is a denial of such power. The Congress has acted on the belief that it possesses that power. We believe their conclusion is well founded.

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[17] H. R. Rep. No. 1756, 76th Cong., 3d Sess., p. 3. The Senate Judiciary Committee's report consists only of a recommendation that the bill (H. R. 8822) be passed. Senate Report No. 1399, 76th Cong., 3d Sess. Passage in each House was without discussion. 86 Cong. Rec., Pt. 3, p. 3015; 86 Cong. Rec., Pt. 4, p. 4286.

[18] U. S. Const. Art. I, § 8, cl. 17.

[19] U. S. Const. Art. I, § 8, cl. 18.

It is elementary that the exclusive responsibility of Congress for the welfare of the District includes both power and duty to provide its inhabitants and citizens with courts adequate to adjudge not only controversies among themselves but also their claims against, as well as suits brought by, citizens of the various states. It long has been held that Congress may clothe District of Columbia courts not only with the jurisdiction and powers of federal courts in the several states but with such authority as a state may confer on her courts. *Kendall* v. *United States,* 12 Pet. 524, 619; *Capital Traction Co.* v. *Hof,* 174 U. S. 1; *O'Donoghue* v. *United States,* 289 U. S. 516. The defendant here does not challenge the power of Congress to assure justice to the citizens of the District by means of federal instrumentalities, or to empower a federal court within the District to run its process to summon defendants here from any part of the country. And no reason has been advanced why a special statutory court for cases of District citizens could not be authorized to proceed elsewhere in the United States to sit, where necessary or proper, to discharge the duties of Congress toward District citizens.

However, it is contended that Congress may not combine this function, under Art. I, with those under Art. III, in district courts of the United States. Two objections are urged to this. One is that no jurisdiction other than specified in Art. III can be imposed on courts that exercise the judicial power of the United States thereunder. The other is that Art. I powers over the District of Columbia must be exercised solely within that geographic area.

Of course there are limits to the nature of duties which Congress may impose on the constitutional courts vested with the federal judicial power. The doctrine of separation of powers is fundamental in our system. It arises,

however, not from Art. III nor any other single provision of the Constitution, but because "behind the words of the constitutional provisions are postulates which limit and control." Chief Justice Hughes in *Monaco* v. *Mississippi,* 292 U. S. 313, 323. The permeative nature of this doctrine was early recognized during the Constitutional Convention. Objection that the present provision giving federal courts jurisdiction of cases arising "under this Constitution" would permit usurpation of nonjudicial functions by the federal courts was overruled as unwarranted since it was "generally supposed that the jurisdiction given was constructively limited to cases of a Judiciary nature." 2 Farrand, Records of the Federal Convention, 430. And this statute reflects that doctrine. It does not authorize or require either the district courts or this Court to participate in any legislative, administrative, political or other nonjudicial function or to render any advisory opinion. The jurisdiction conferred is limited to controversies of a justiciable nature, the sole feature distinguishing them from countless other controversies handled by the same courts being the fact that one party is a District citizen. Nor has the Congress by this statute attempted to usurp any judicial power. It has deliberately chosen the district courts as the appropriate instrumentality through which to exercise part of the judicial functions incidental to exertion of sovereignty over the District and its citizens.

Unless we are to deny to Congress the same choice of means through which to govern the District of Columbia that we have held it to have in exercising other legislative powers enumerated in the same Article, we cannot hold that Congress lacked the power it sought to exercise in the Act before us.

It is too late to hold that judicial functions incidental to Art. I powers of Congress cannot be conferred on

courts existing under Art. III, for it has been done with this Court's approval. *O'Donoghue* v. *United States,* 289 U. S. 516. In that case it was held that, although District of Columbia courts are Art. III courts, they can also exercise judicial power conferred by Congress pursuant to Art. I. The fact that District of Columbia courts, as local courts, can also be given administrative or legislative functions which other Art. III courts cannot exercise, does but emphasize the fact that, although the latter are limited to the exercise of judicial power, it may constitutionally be received from either Art. III or Art. I, and that congressional power over the District, flowing from Art. I, is plenary in every respect.

It is likewise too late to say that we should reach this result by overruling Chief Justice Marshall's view, unless we are prepared also to overrule much more, including some of our own very recent utterances. Many powers of Congress other than its power to govern Columbia require for their intelligent and discriminating exercise determination of controversies of a justiciable character. In no instance has this Court yet held that jurisdiction of such cases could not be placed in the regular federal courts that Congress has been authorized to ordain and establish. We turn to some analogous situations in which we have approved the very course that Congress has taken here.

Congress is given power by Art. I to pay debts of the United States. That involves as an incident the determination of disputed claims. We have held unanimously that congressional authority under Art. I, not the Art. III jurisdiction over suits to which the United States is a party, is the sole source of power to establish the Court of Claims and of the judicial power which that court exercises. *Williams* v. *United States,* 289 U. S. 553. In that decision we also noted that it is this same Art. I power that is conferred on district courts by the

Tucker Act [20] which authorizes them to hear and determine such claims in limited amounts. Since a legislative court such as the Court of Claims is "incapable of receiving" Art. III judicial power, *American Insurance Co.* v. *Canter,* 1 Pet. 511, 546, it is clear that the power thus exercised by that court and concurrently by the district courts flows from Art. I, not Art. III. Indeed, more recently and again unanimously, this Court has said that by the Tucker Act the Congress authorized the district courts to sit as a court of claims [21] exercising the same but no more judicial power. *United States* v. *Sherwood,* 312 U. S. 584, 591. And but a few terms ago, in considering an Act by which Congress directed rehearing of a rejected claim and its redetermination in conformity with directions given in the Act, Chief Justice Stone, with the concurrence of all sitting colleagues, reasoned that "The problem presented here is no different than if Congress had given a like direction to any district court to be followed as in other Tucker Act cases." *Pope* v. *United States,* 323 U. S. 1, 14. Congress has taken us at our word and recently conferred on the district courts exclusive jurisdiction of tort claims cognizable under the Federal Tort Claims Act, 60 Stat. 842, 843, also enacted

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[20] Act of March 3, 1887, c. 359, 24 Stat. 505.

[21] This concurrent jurisdiction of the district courts has frequently been referred to in opinions of this Court with no indication that it presented any constitutional problem with respect to the jurisdiction of either the district courts or this Court. See, for example, *Pope* v. *United States,* 323 U. S. 1; *United States* v. *Sherwood,* 312 U. S. 584; *United States* v. *Shaw,* 309 U. S. 495; *Williams* v. *United States,* 289 U. S. 553; *Nassau Smelting Works* v. *United States,* 266 U. S. 101; *United States* v. *Pfitsch,* 256 U. S. 547; *Tempel* v. *United States,* 248 U. S. 121; *United States* v. *Greathouse,* 166 U. S. 601; *United States* v. *Jones,* 131 U. S. 1. The legislative basis for the grant of jurisdiction to the district courts is delineated in *Bates Mfg. Co.* v. *United States,* 303 U. S. 567.

pursuant to Art. I powers.[22] See *Brooks* v. *United States, ante,* p. 49.

Congress also is given power in Art. I to make uniform laws on the subject of bankruptcies. That this, and not the judicial power under Art. III, is the source of our system of reorganizations and bankruptcy is obvious, *Continental Bank* v. *Chicago, R. I. & P. R. Co.,* 294 U. S. 648. Not only may the district courts be required to handle these proceedings, but Congress may add to their jurisdiction cases between the trustee and others that, but for the bankruptcy powers, would be beyond their jurisdiction because of lack of diversity required under Art. III. *Schumacher* v. *Beeler,* 293 U. S. 367. In that case, Chief Justice Hughes for a unanimous court wrote that, by virtue of its Art. I authority over bankruptcies, the Congress could confer on the regular district courts jurisdiction of "all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants" to the extent specified in § 23b of the Bankruptcy Act as amended. Such jurisdiction was there upheld in a plenary suit, in a district court, by which the trustee sought equitable relief rely-

[22] The suggestion here that claims against the United States, adjudicated by the Court of Claims and by the district courts solely by virtue of the waiver of sovereign immunity and the jurisdiction granted under the Tucker Act, may be cases arising "under the laws of the United States" is both erroneous and self-defeating. The unanimous decision in the *Williams* case, 289 U. S. 553, holds clearly to the contrary, stating, at 289 U. S. 577, that controversies to which the United States may by statute be made a party defendant "lie wholly outside the scope of the judicial power vested by Art. III . . . ." And see *Monaco* v. *Mississippi,* 292 U. S. 313, 321. Moreover, the Tucker Act simply opens those courts to plaintiffs already possessed of a cause of action. If that is sufficient to make the case one arising under the laws of the United States, the same is true of this suit and all others like it. No one urges that view of the present statute, nor could they. See note 23 and text.

ing on allegations raising only questions of Ohio law concerning the validity under that law of a sheriff's levy and execution. Possession by the trustee not being shown, and there being no diversity, jurisdiction in the district court could flow only from the statute. Chief Justice Hughes noted that the distinction between proceedings in bankruptcy and suits at law and in equity was recognized by the terms of the statute itself, but held that "Congress, by virtue of its constitutional authority over bankruptcies, could confer or withhold jurisdiction to entertain such suits and could prescribe the conditions upon which the federal courts should have jurisdiction. . . . Exercising that power, the Congress prescribed in § 23b the condition of consent on the part of the defendant sued by the trustee. Section 23b was thus in effect a grant of jurisdiction subject to that condition." 293 U. S. 367, 374. He concluded that the statute granted jurisdiction to the district court "although the bankrupt could not have brought suit there if proceedings in bankruptcy had not been instituted . . . ." 293 U. S. 367, 377. And he stated the correct view to be that § 23 conferred substantive jurisdiction, 293 U. S. 367, 371, disapproving statements in an earlier case that Congress lacked power to confer such jurisdiction. *Id.* at 377. Thus, the Court held that Congress had power to authorize an Art. III court to entertain a non-Art. III suit because such judicial power was conferred under Art. I. Indeed, the present Court has assumed, without even discussion, that Congress has such power. In *Williams* v. *Austrian,* 331 U. S. 642, 657, the CHIEF JUSTICE, speaking for the Court, said that ". . . Congress intended by the elimination of § 23 [from Chapter X of the Bankruptcy Act] to establish the jurisdiction of federal courts to hear plenary suits brought by a reorganization trustee, *even though diversity or other usual ground for federal jurisdiction is lacking.*" (Em-

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phasis supplied.) There was vigorous dissent as to the meaning of the statute, but the dissenting Justices referred to the Court's holding that "a Chapter X trustee may bring this plenary suit *in personam* in a federal district court not the reorganization court, although neither diversity of citizenship nor other ground of federal jurisdiction exists." 331 U. S. 642, 664. And the dissent continued: "No doubt Congress could authorize such a suit. See *Schumacher* v. *Beeler,* 293 U. S. 367, 374." *Ibid.*

This assumption by the Court in the *Beeler* and *Austrian* cases, that the Congress had power to confer on the district courts jurisdiction of nondiversity suits involving only state law questions, made unnecessary any discussion of the source of the assumed power. In view of Congress' plenary control over bankruptcies, the Court may have grounded such assumption on Art. I. Or it might have considered that the jurisdiction was based on Art. III, and statutes enacted pursuant to it, giving the district courts jurisdiction over suits arising under the Constitution and laws of the United States. Had the Court held such a view, this latter might have commended itself as the most obvious answer. Consequently, silence in this respect, in the decision of each case, seems significant, particularly in contrast with repeated reference to Art. I power in the *Beeler* case, and sweeping language in the *Austrian* case that such jurisdiction existed despite lack of diversity "or other usual ground for federal jurisdiction." Nevertheless, it is now asserted, in retrospect, that those cases did arise under the laws of the United States. No justification is offered for that conclusion and there is no effort to say just why or how the cases did so arise. This would indeed be difficult if we still adhere to the doctrine of Mr. Justice Holmes that "a suit arises under the law that creates the cause

of action," *American Well Works Co.* v. *Layne Co.*, 241 U. S. 257, 260, for the cause of action in each case rested solely on state law.

But the matter does not rest on inference alone. Other decisions of this Court demonstrate conclusively that jurisdiction over the *Beeler* and *Austrian* suits was not and could not have been conferred under Art. III and statutes concerning suits arising under the laws of the United States. A most thoroughly-considered utterance of this Court on that subject was given by Mr. Justice Cardozo, in *Gully* v. *First National Bank*, 299 U. S. 109, where he said, without dissent, "How and when a case arises 'under the Constitution or laws of the United States' has been much considered in the books. Some tests are well established. To bring a case within the statute, a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's *cause of action*. . . . [Emphasis added.] The right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another. . . . A genuine and present controversy, not merely a possible or conjectural one, must exist with reference thereto . . . and the controversy must be disclosed upon the face of the complaint . . . ." 299 U. S. 109, 112–113. After reviewing previous cases, Mr. Justice Cardozo referred to a then recent opinion by Mr. Justice Stone in which he said, for a unanimous court, that federal jurisdiction "may not be invoked where the right asserted is non-federal, merely because the plaintiff's right to sue is derived from federal law, or because the property involved was obtained under federal statute. *The federal nature of the right to be established is decisive—not the source of the authority to establish it.*" *Puerto Rico* v. *Russell & Co.*, 288 U. S.

476, 483. (Emphasis added.)[23] See also *Switchmen's Union* v. *Board,* 320 U. S. 297; *General Committee* v. *M.-K.-T. R. Co.,* 320 U. S. 323.

Neither the *Austrian* nor the *Beeler* case meets these tests, required before a case can be said to arise under the laws of the United States, any more than does the case before us. Austrian, as trustee, sued in equity for an accounting based on a charge that affairs of a state-created corporation had been conducted by the officers in violation of state law. Beeler, as trustee, sued on a contention that a levy on property by an Ohio sheriff was void under state law. Both controversies, like the one before

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[23] The books are replete with authority on this point. For example, in *Shoshone Mining Co.* v. *Rutter,* 177 U. S. 505, it was said, at p. 507: "The suit must, in part at least, arise out of a controversy between the parties in regard to the operation and effect of the Constitution or laws upon the facts involved. . . ." And at p. 513: ". . . the mere fact that a suit is an adverse suit authorized by the statutes of Congress is not in and of itself sufficient to vest jurisdiction in the Federal courts." And again at p. 507 it is considered "well settled that a suit to enforce a right which takes its origin in the laws of the United States is not necessarily one arising under the Constitution or laws of the United States . . . ." In *Bankers Casualty Co.* v. *Minneapolis, St. P. & S. S. M. R. Co.,* 192 U. S. 371, at p. 384: ". . . suits though involving the Constitution or laws of the United States are not suits arising under the Constitution or laws where they do not turn on a controversy between the parties in regard to the operation of the Constitution or laws, on the facts. . . ." And at p. 385: "We repeat that the rule is settled that a case does not arise under the Constitution or laws of the United States unless it appears from plaintiff's own statement, in the outset, that some title, right, privilege or immunity on which recovery depends will be defeated by one construction of the Constitution or laws of the United States, or sustained by the opposite construction." In *Louisville & Nashville R. Co.* v. *Mottley,* 211 U. S. 149, 152, allegations designed to establish that the case arises under the Constitution are said to be insufficient if they do not show that "the suit, that is, the plaintiff's original cause of action," does so arise.

us, called for a determination of no law question except those arising under state laws. The only way in which any law of the United States contributed to the case was in opening the district courts to the trustee, under Art. I powers of Congress, just as the present statute, under the same Article, opens those courts to residents of the District of Columbia. In each case, in the words of Chief Justice Stone, the federal law provided, not the right sought to be established, but only the authority of the trustee to establish it. The fact that the congressional power over bankruptcy granted by Art. I could open the court to the trustee does not mean that such suits arise under the laws of the United States; but it does mean that Art. I can supply a source of judicial power for their adjudication. The distinction is important and it is decisive on this issue.

Neither the *Beeler* nor the *Austrian* case was one arising under the laws of the United States within the clear language of recent holdings by this Court. Unless we are to deny the jurisdiction in such cases which has consistently been upheld, we must rely on the Art. I powers of the Congress. We have been cited to no holding that such jurisdiction cannot spring from that Article. Under Art. I the Congress has given the district courts not only jurisdiction over cases arising under the bankruptcy law but also judicial power over nondiversity cases which do not arise under that or any other federal law. And this Court has upheld the latter grant.

Consequently, we can deny validity to this present Act of Congress, only by saying that the power over the District given by Art. I is somehow less ample than that over bankruptcy given by the same Article. If Congress could require this district court to decide this very case if it were brought by a trustee, it is hard to see why it may not require its decision for a solvent claimant when done in pursuance of other Art. I powers.

We conclude that where Congress in the exercise of its powers under Art. I finds it necessary to provide those on whom its power is exerted with access to some kind of court or tribunal for determination of controversies that are within the traditional concept of the justiciable, it may open the regular federal courts to them regardless of lack of diversity of citizenship. The basis of the holdings we have discussed is that, when Congress deems that for such purposes it owes a forum to claimants and trustees, it may execute its power in this manner. The Congress, with equal justification, apparently considers that it also owes such a forum to the residents of the District of Columbia in execution of its power and duty under the same Article. We do not see how the one could be sustained and the other denied.

We therefore hold that Congress may exert its power to govern the District of Columbia by imposing the judicial function of adjudicating justiciable controversies on the regular federal courts [24] which under the Constitution it has the power to ordain and establish and which it may invest with jurisdiction and from which it may withhold jurisdiction "in the exact degrees and character which to Congress may seem proper for the public good." *Lockerty* v. *Phillips,* 319 U. S. 182, 187.

The argument that congressional powers over the District are not to be exercised outside of its territorial limits also is pressed upon us. But this same contention has long been held by this Court to be untenable. In *Cohens*

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[24] No question has been raised here as to the source of this Court's appellate jurisdiction over such cases. Nor do we see how that issue could be raised without challenging our past and present exercise of jurisdiction over cases adjudicated in the district courts and in the Court of Claims, solely under the Tucker Act, see *Pope* v. *United States,* 323 U. S. 1, 13–14, and see notes 21, 22; and under the Federal Tort Claims Act, see *Brooks* v. *United States, ante,* p. 49.

v. *Virginia,* 6 Wheat. 264, 425, 429, Chief Justice Marshall, answering the argument that Congress, when legislating for the District, "was reduced to a mere local legislature, whose laws could possess no obligation out of the ten miles square," said "Congress is not a local legislature, but exercises this particular power, like all its other powers, in its high character, as the legislature of the Union. The American people thought it a necessary power, and they conferred it for their own benefit. Being so conferred, it carries with it all those incidental powers which are necessary to its complete and effectual execution." In *O'Donoghue* v. *United States,* 289 U. S. 516, 539, this Court approved a statement made by Circuit Judge Taft, later Chief Justice of this Court, speaking for himself and Judge (later Mr. Justice) Lurton, that "The object of the grant of exclusive legislation over the district was, therefore, national in the highest sense, and the city organized under the grant became the city, not of a state, not of a district, but of a nation. In the same article which granted the powers of exclusive legislation over its seat of government are conferred all the other great powers which make the nation, including the power to borrow money on the credit of the United States. He would be a strict constructionist, indeed, who should deny to congress the exercise of this latter power in furtherance of that of organizing and maintaining a proper local government at the seat of government. Each is for a national purpose, and the one may be used in aid of the other. . . ." And, just prior to enactment of the statute now challenged on this ground, the Court of Appeals for the District itself, sitting *en banc,* and relying on the foregoing authorities, had said that Congress "possesses full and unlimited jurisdiction to provide for the general welfare" of District citizens "by any and every act of legislation which it may deem conducive to that end . . .

when it legislates for the District, Congress acts as a legislature of national character, exercising complete legislative control as contrasted with the limited power of a state legislature, on the one hand, and as contrasted with the limited sovereignty which Congress exercises within the boundaries of the states, on the other." *Neild* v. *District of Columbia,* 71 App. D. C. 306, 310, 110 F. 2d 246, 250.

We could not of course countenance any exercise of this plenary power either within or without the District if it were such as to draw into congressional control subjects over which there has been no delegation of power to the Federal Government. But, as we have pointed out, the power to make this defendant suable by a District citizen is not claimed to be outside of federal competence. If Congress has power to bring the defendant from his home all the way to a forum within the District, there seems little basis for denying it power to require him to meet the plaintiff part way in another forum. The practical issue here is whether, if defendant is to be suable at all by District citizens, he must be compelled to come to the courts of the District of Columbia or perhaps to a special statutory court sitting outside of it, or whether Congress may authorize the regular federal courts to entertain the suit. We see no justification for holding that Congress in accomplishing an end admittedly within its power is restricted to those means which are most cumbersome and burdensome to a defendant. Since it may provide the District citizen with a federal forum in which to sue the citizens of one of the states, it is hard to imagine a fairer or less prejudiced one than the regular federal courts sitting in the defendant's own state. To vest the jurisdiction in them rather than in courts sitting in the District of Columbia would seem less harsh to defendants and more consistent with the principles of venue that prevail in our system

under which defendants are generally suable in their home forums.

The Act before us, as we see it, is not a resort by Congress to these means to reach forbidden ends. Rather, Congress is reaching permissible ends by a choice of means which certainly are not expressly forbidden by the Constitution. No good reason is advanced for the Court to deny them by implication. In no matter should we pay more deference to the opinions of Congress than in its choice of instrumentalities to perform a function that is within its power.[25] To put federally administered justice within the reach of District citizens, in claims against citizens of another state, is an object which Congress has a right to accomplish. Its own carefully considered view that it has the power and that it is necessary and proper to utilize United States District Courts as means to this end, is entitled to great respect. Our own ideas as to the wisdom or desirability of such a statute or the constitutional provision authorizing it are totally irrelevant. Such a law of Congress should be stricken down

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[25] Chief Justice Marshall, in *McCulloch* v. *Maryland,* 4 Wheat. 316, 420–421, said: "The result of the most careful and attentive consideration bestowed upon this [the 'necessary and proper'] clause is, that if it does not enlarge, it cannot be construed to restrain the powers of Congress, or to impair the right of the legislature to exercise its best judgment in the selection of measures to carry into execution the constitutional powers of the government. . . . We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."

only on a clear showing that it transgresses constitutional limitations. We think no such showing has been made.[26] The Act is valid.

The judgment is

*Reversed.*

MR. JUSTICE RUTLEDGE, with whom MR. JUSTICE MURPHY agrees, concurring.

I join in the Court's judgment. But I strongly dissent from the reasons assigned to support it in the opinion of MR. JUSTICE JACKSON.

While giving lip service to the venerable decision in *Hepburn & Dundas* v. *Ellzey,* 2 Cranch 445, and purporting to distinguish it, that opinion ignores nearly a century and a half of subsequent consistent construction.[1] In all practical consequence, it would overrule that decision with its later reaffirmations. Pertinently it may be asked, how and where are those decisions to operate, if not just in the situation presented by this case? And, if there is no other, would they not be effectively overruled?

What is far worse and more important, the manner in which this reversal would be made, if adhered to by a majority of the Court, would entangle every district court of the United States for the first time in all of the contradictions, complexities and subtleties which have

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[26] It would not be profitable to review the numerous cases in which, during the consideration of other problems, this Court has made statements concerning the nature and extent of Congress' power to legislate for the District of Columbia and its control over the jurisdiction of both constitutional and legislative courts. The issue now presented squarely for decision was not decided in any of them. We adhere to Chief Justice Marshall's admonition in *Cohens* v. *Virginia,* 6 Wheat. 264, 399, that such expressions "ought not to control the judgment in a subsequent suit when the very point is presented for decision."

[1] See notes 3 and 4 and text *infra.*

surrounded the courts of the District of Columbia in the maze woven by the "legislative court—constitutional court" controversy running through this Court's decisions concerning them.[2]

In my opinion it would be better to continue following what I conceive to be the original error of the *Hepburn* decision and its progeny than thus to ensnarl the general system of federal courts. Jurisdictional and doctrinal troubles enough we have concerning them without adding others by ruling now that they have the origin and jurisdiction of "legislative" courts in addition to that of "constitutional" courts created under Article III, with which alone they heretofore have been held endowed.

Moreover, however this case may be decided, there is no real escape from deciding what the word "State" as used in Article III, § 2 of the Constitution means. For if it is a limitation on Congress' power as to courts created under that Article, it is hard to see how it becomes no limitation when Congress decides to cast it off under some other Article, even one relating to its authority over the District of Columbia. If this may be done in the name of practical convenience and dual authority, or because Congress might find some other constitutional way to make citizens of the District suable elsewhere or to bring here for suit citizens from any part of the country, then what is a limitation imposed on the federal courts generally is none when Congress decides to disregard it by purporting to act under some other authorization.

The Constitution is not so self-contradictory. Nor are its limitations to be so easily evaded. The very essence of the problem is whether the Constitution meant to cut out from the diversity jurisdiction of courts created under Article III suits brought by or against citizens of the

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[2] See text *infra* and authorities cited at notes 7–9.

District of Columbia. That question is not answered by saying in one breath that it did and in the next that it did not.

I.

Prior to enactment of the 1940 statute today considered, federal courts of the District of Columbia were the only federal courts which had jurisdiction to try nonfederal civil actions between citizens of the District and citizens of the several states. The doors of federal courts in every state, open to suits between parties of diverse state citizenship by virtue of Article III, § 2 (as implemented by continuous congressional enactment), were closed to citizens of the District of Columbia. The 1940 statute was Congress' first express attempt to remedy the inequality which has obtained ever since Chief Justice Marshall, in *Hepburn & Dundas* v. *Ellzey, supra,* construed the first Judiciary Act to exclude citizens of the District of Columbia. Marshall's construction of the 1789 statute was founded on his conclusion that the comparable language of the diversity clause in Article III, § 2—"Citizens of different States"—did not embrace citizens of the District.

Marshall's view of the 1789 Act, iterated in his later dictum, *New Orleans* v. *Winter,* 1 Wheat. 91, 94; cf. *Sere* v. *Pitot,* 6 Cranch 332, 336, has been consistently adhered to in judicial interpretation of later congressional grants of jurisdiction.[3] And, by accretion, the rule of the *Hepburn* case has acquired the force of a considered determination that, within the meaning of Article III, § 2, "the District of Columbia is not a State" [4] and its citizens are therefore not citizens of any state within that Article's meaning.

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[3] *Barney* v. *Baltimore,* 6 Wall. 280; *Hooe* v. *Jamieson,* 166 U. S. 395; *Hooe* v. *Werner,* 166 U. S. 399.

[4] *Hooe* v. *Jamieson,* 166 U. S. 395, 397; cf. *Downes* v. *Bidwell,* 182 U. S. 244, 270.

The opinion of MR. JUSTICE JACKSON in words "reaffirms" this view of the diversity clause. Nevertheless, faced with an explicit congressional command to extend jurisdiction in nonfederal cases to the citizens of the District of Columbia, it finds that Congress has power to add to the Article III jurisdiction of federal district courts such further jurisdiction as Congress may think "necessary and proper," Const., Art. I, § 8, cl. 18, to implement its power of "exclusive Legislation," Const., Art. I, § 8, cl. 17, over the District of Columbia; and thereby to escape from the limitations of Article III.

From this reasoning I dissent. For I think that the Article III courts in the several states cannot be vested, by virtue of other provisions of the Constitution, with powers specifically denied them by the terms of Article III. If we accept the elementary doctrine that the words of Article III are not self-exercising grants of jurisdiction to the inferior federal courts,[5] then I think those words must mark the limits of the power Congress may confer on the district courts in the several states. And I do not think we or Congress can override those limits through invocation of Article I without making the Constitution a self-contradicting instrument. If Marshall correctly read Article III as preventing Congress from unlocking

[5] "Of all the Courts which the United States may, under their general powers, constitute, one only, the Supreme Court, possesses jurisdiction derived immediately from the constitution, and of which the legislative power cannot deprive it." *United States* v. *Hudson*, 7 Cranch 32, 33. And see Justice Chase's remarks in *Turner* v. *Bank of North America*, 4 Dall. 8, 10, n. 1. But cf. *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 328–331. For recent reaffirmation of the prevailing view see *Kline* v. *Burke Construction Co.*, 260 U. S. 226, 233–234. And see the comprehensive survey of congressional power over the jurisdiction of federal courts prepared for the Judiciary Committee of the House of Representatives by MR. JUSTICE FRANKFURTER before his accession to this bench. H. R. Rep. No. 669, 72d Cong., 1st Sess. 12–14.

the courthouse door to citizens of the District, it seems past belief that Article I was designed to enable Congress to pick the lock. For the diversity jurisdiction here thus sustained is identical in all respects with the diversity jurisdiction thought to be closed to District citizens by Article III: It is justice administered in the same courtroom and under the supervision of the same judge; it is, presumptively, justice fashioned by the Federal Rules of Civil Procedure and, now, under the aegis of *Erie R. Co.* v. *Tompkins.*[6] The jurisdiction today thus upheld is not simply an expurgated version of a banned original; it is the real thing.

To circumvent the limits of Article III, it is said, after finding a contrary and overriding intent in Article I, that Article III district courts in the several states can also be vested with jurisdiction springing from Article I. The only express holding which conceivably could lend comfort to this doctrine of dual jurisdiction is this Court's conclusion in *O'Donoghue* v. *United States,* 289 U. S. 516, that certain courts of the District of Columbia, theretofore deemed legislative courts created under Article I,[7] owe their jurisdiction to Article I and

[6] 304 U. S. 64. If it were assumed that the Constitution requires the application of local law in traditional diversity suits (cf. *id.* at 77–80; *Black & White Taxicab Co.* v. *Brown & Yellow Taxicab Co.,* 276 U. S. 518, dissenting opinion at 533; but cf. *Cohen* v. *Industrial Loan Corp., post* at 541, dissenting opinion at 557), it may be wondered whether that requirement would also govern the rationale of jurisdiction today advanced: Under this rationale, Congress might well find in Article I power to authorize articulation of a body of federal substantive law for the decision of diversity cases involving citizens of the District of Columbia.

[7] *Federal Radio Commission* v. *General Electric Co.,* 281 U. S. 464; *Postum Cereal Co.* v. *California Fig Nut Co.,* 272 U. S. 693; *Keller* v. *Potomac Electric Co.,* 261 U. S. 428. Cf. *Ex parte Bakelite Corp.,* 279 U. S. 438, 450; *Federal Radio Commission* v. *Nelson Bros.,* 289 U. S. 266, 274–276; *United States* v. *Jones,* 336 U. S. 641, 652, n. 12.

Article III. With the merits of the *O'Donoghue* decision in holding that Article III barred salary reductions for judges of the courts in question, we are not presently concerned. Suffice it to point out that the express language of the *O'Donoghue* decision negatives the view that federal courts in the several states share this hybrid heritage:

> ". . . Congress derives from the District clause distinct powers in respect of the constitutional courts of the District which Congress does not possess in respect of such courts outside the District." [8]

The limits of the *O'Donoghue* decision are only underscored by the dissenting view of Chief Justice Hughes and Justices Van Devanter and Cardozo that all District of Columbia courts are solely the creatures of Article I:

> "As the courts of the District do not rest for their creation on § 1 of Article III, their creation is not subject to any of the limitations of that provision. Nor would those limitations, if considered to be applicable, be susceptible of division so that some might be deemed obligatory and others might be ignored." 289 U. S. at 552.

Comfort is sought to be drawn, however, from this Court's rationale in *Williams* v. *United States,* 289 U. S. 553, which, in sanctioning salary reductions for judges of the Court of Claims, held that that court did not derive its jurisdiction from Article III. That conclusion stemmed in part from the proposition that suits *against* the United States are not "Controversies to which the United States shall be a Party," within the meaning of Article III, § 2. Hence, it is said, the permissible inference is that the long-established concurrent jurisdiction of district courts over claims against the United States

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[8] *O'Donoghue* v. *United States,* 289 U. S. 516, 551. Cf. *Pitts* v. *Peak,* 60 App. D. C. 195, 197.

is likewise not derived from Article III.[9] We need not today determine the nature of district court jurisdiction of suits against the United States. Suffice it to say that, if such suits are not "Controversies to which the United States shall be a Party," they are presumptively within the purview of the federal-question jurisdiction to which MR. JUSTICE FRANKFURTER'S opinion directs our attention—the Article III, § 2 grant of power over "Cases . . . arising under . . . the Laws of the United States." This is, at least, the conventional view of district court jurisdiction under the Tucker Act. 2 Moore, Federal Practice (2d ed., 1948) 1633.

But, in any event, to rely on *Williams* as dispositive of the present case is to rely on a bending reed: *Williams* and *O'Donoghue* were companion cases, argued together and decided together; and the opinions were written by the same Justice. Accordingly, what was said in one must be read in the light of what was said in the other. *O'Donoghue,* as has been observed, expressly rejected the proposition today announced—that Congress can vest in constitutional courts outside the District of Columbia jurisdiction derived from the District clause of Article I.

But *O'Donoghue* went further, and in so doing undermined any implication in *Williams* that Article III courts outside the District could be vested with any form of non-Article III jurisdiction, when it pointed out that no courts of the District of Columbia could be granted "administrative and other jurisdiction," if, "in creating and defining the jurisdiction of the courts of the District, Congress were limited to Art. III, as it is in dealing with the other federal courts . . . ." 289 U. S. at 546. Moreover, the Justices who dissented from the *O'Donoghue* rationale of dual jurisdiction expressed no disagreement with the *Williams* opinion. In these circumstances, cer-

[9] See Comments, 43 Yale L. J. 316, 319 (1933).

tainly no more strength can be drawn from the language of a case upholding salary reductions for one group of judges than from the holding in a case striking down salary reductions for another group of judges.

Nor is there merit in the view that the bankruptcy jurisdiction of district courts does not stem from Article III. Of course it is true that Article I is the source of *congressional* power over bankruptcy, as it is the source of *congressional* power over interstate commerce, taxation, the coining of money, and other powers confided by the states to the exclusive exercise of the national legislature. But, as MR. JUSTICE FRANKFURTER'S opinion makes clear, federal court adjudication of disputes arising pursuant to bankruptcy and other legislation is conventional federal-question jurisdiction. And no case cited in any of today's opinions remotely suggests the contrary.

Furthermore, no case cited supports the view that jurisdiction over a suit to collect estate assets under § 23 (b) of the Bankruptcy Act, brought by the trustee in a district court with the "consent" of the defendant, is a departure from the general rule and is derived from Article I alone. To be sure, although this Court indicated a contrary view in the early case of *Lovell* v. *Newman & Son,* 227 U. S. 412, 426, Chief Justice Hughes' opinion in *Schumacher* v. *Beeler,* 293 U. S. 367, made it perfectly clear that district courts can, with the consent of the proposed defendant, entertain trustee suits under § 23 (b) which the bankrupt, *but for the Bankruptcy Act,* could not have prosecuted in a federal court absent diversity or some independent federal question "arising under . . . the Laws of the United States." The opinion stated:

> "Conflicting views have been held of the meaning of the provision for consent in § 23 (b). In one view, the provision relates merely to venue, that is, only to a consent to the 'local jurisdiction.' . . .

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> The opposing view was set forth by the court below in *Toledo Fence & Post Co.* v. *Lyons,* 290 Fed. 637, 645, and that decision was followed in the instant case. . . . It proceeds upon the ground that the Congress had power to permit suits by trustees in bankruptcy in the federal courts against adverse claimants, regardless of diversity of citizenship, and that by § 23 (b) the Congress intended that the federal courts should have that jurisdiction in cases where the defendant gave consent, and, without that consent, in cases which fell within the stated exceptions.
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> "We think that the latter view is the correct one." 293 U. S. at 371.

Chief Justice Hughes' opinion does not intimate that this "consent jurisdiction" arises solely from Article I. Quite the contrary, the opinion by Judge Denison outlining the "view" which the Chief Justice described as "the correct one" expressly stated that such suits are a segment of the district court's federal-question jurisdiction:

> "The trustee must allege and prove that valid proceedings were taken under the Bankruptcy Act, leading to a valid adjudication, whereby title passed, and that by valid proceedings under the act he was chosen as trustee. If the proof fails in any of these particulars, the suit fails. The suit is one step in the collection of assets in the execution of the Bankruptcy Act. That such a case would be one 'arising under the laws of the United States' we think is the result of well-settled principles. It will be observed that under the constitutional limitations of the federal judicial power (article 3, sec. 2), and with exceptions not to this question important, Congress has no power to confer jurisdiction on the inferior federal courts excepting as to suits which do so arise; and every decision which upholds the right to sue in the

> federal court by one who merely acquires title through the operation of a federal law is therefore, by necessary implication, a holding that such a suit 'arises under' federal laws." *Toledo Fence & Post Co.* v. *Lyons,* 290 F. 637, 641; and cf. *Beeler* v. *Schumacher,* 71 F. 2d 831, 833.

There seems no reason therefore to suppose that this Court, in holding "correct" the view that district courts have jurisdiction over a trustee suit which could not have been brought by the bankrupt, rejected the explicit Article III basis of that jurisdiction.

And neither reliance on *Gully* v. *First National Bank,* 299 U. S. 109; *Puerto Rico* v. *Russell & Co.,* 288 U. S. 476, and related cases, nor the suggestion that "a suit arises under the law that creates the cause of action," *American Well Works* v. *Layne,* 241 U. S. 257, 260, compels the conclusion that Congress could not and did not classify § 23 (b) suits to collect estate assets as federal-question cases arising under the Bankruptcy Act. As this Court has had occasion to observe, a " 'cause of action' may mean one thing for one purpose and something different for another." *United States* v. *Memphis Cotton Oil Co.,* 288 U. S. 62, 67–68; and see *Gully* v. *First National Bank, supra,* at 117. Similarly, as students of federal jurisdiction have taken pains to point out, the "substantial identity of the words" in the *constitutional* and *statutory* grants of federal-question jurisdiction, "does not, of course, require, on that score alone, an identical interpretation." Shulman and Jaegerman, Some Jurisdictional Limitations on Federal Procedure, 45 Yale L. J. 393, 405, n. 47 (1936). Confusion of the two is a natural, but not an insurmountable, hazard. The *Gully* and *Puerto Rico* cases were concerned with the general statutory grant to district courts of jurisdiction over federal questions; they were not concerned with the constitutional grant of jurisdiction, nor with the specific

statutory grant of jurisdiction found in the Bankruptcy Act and approved in *Schumacher* v. *Beeler, supra.*

It has never heretofore been doubted that the constitutional grant of power is broader than the general federal-question jurisdiction which Congress has from time to time thought to confer on district courts by statute. In one of the federal land-grant cases relied on in MR. JUSTICE JACKSON'S opinion, this Court had occasion to make this distinction clear:

> "By the Constitution (art. 3, sec. 2) the judicial power of the United States extends 'to all cases, in law and equity, arising under this Constitution, the laws of the United States' and to controversies 'between citizens of different States.' By article 4, s. 3, cl. 2, Congress is given 'power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.' Under these clauses Congress might doubtless provide that any controversy of a judicial nature arising in or growing out of the disposal of the public lands should be litigated only in the courts of the United States. The question, therefore, is not one of the power of Congress, but of its intent. It has so constructed the judicial system of the United States that the great bulk of litigation respecting rights of property, although those rights may in their inception go back to some law of the United States, is in fact carried on in the courts of the several States." *Shoshone Mining Company* v. *Rutter,* 177 U. S. 505, 506.

Indeed, were we to adopt the view that the *Gully* rule is a test applicable to the *constitutional* phrase, we would effectively repudiate Chief Justice Marshall's conclusion in *Osborn* v. *Bank of the United States,* 9 Wheat. 738, that Congress can allow a federally chartered corporation to bring all its litigation into federal courts

for the reason that, solely by virtue of the corporation's federal origin, all suits to which the corporation is a party are suits "arising under . . . the Laws of the United States" within the meaning of Article III. The rule of the *Bank of the United States* case, reiterated in *The Pacific Railroad Removal Cases,* 115 U. S. 1; *Matter of Dunn,* 212 U. S. 374; *American Bank & Trust Co.* v. *Federal Bank,* 256 U. S. 350; *Sowell* v. *Federal Reserve Bank,* 268 U. S. 449; and *Federal Bank* v. *Mitchell,* 277 U. S. 213, has been limited by statute but never by subsequent constitutional construction. The survival of the rule was acknowledged by Mr. Justice Stone in *Puerto Rico* v. *Russell & Co., supra* at 485, and by Mr. Justice Cardozo in *Gully* v. *First National Bank, supra,* at 114.

In short, Congress has at no time conferred on federal district courts original jurisdiction over all federal questions, preferring to leave trial of many and perhaps most such questions to state adjudication, subject to the ultimate review of this Court. But exceptions to the congressional policy of limitation there have been, and one of these is the trustee suit under § 23 (b). 2 Moore, Federal Practice (2d ed., 1948) 1633.

Thus I see no warrant for gymnastic expansion of the jurisdiction of federal courts outside the District. At least as to these latter courts sitting in the states, I have thought it plain that Article III described and defined their "judicial Power," and that where "power proposed to be conferred . . . was not judicial power within the meaning of the Constitution . . . [it] was, therefore, unconstitutional, and could not lawfully be exercised by the courts." [10]

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[10] Note by Chief Justice Taney inserted by order of the Court after the opinion in *United States* v. *Ferreira,* 13 How. 40, 53, summarizing the Court's conclusions in *Hayburn's Case,* 2 Dall. 409, and *United States* v. *Yale Todd,* decided without opinion by this Court on February 17, 1794, and apparently unreported.

If Article III were no longer to serve as the criterion of district court jurisdiction, I should be at a loss to understand what tasks, within the constitutional competence of Congress, might not be assigned to district courts. At all events, intimations that district courts could only undertake the determination of "justiciable" controversies seem inappropriate, since the very clause of Article I today relied on has long been regarded as the source of the "legislative," *Keller* v. *Potomac Electric Co.,* 261 U. S. 428, and "administrative," *Postum Cereal Co.* v. *California Fig Nut Co.,* 272 U. S. 693, powers of the courts of the District of Columbia. Moreover, the suggestion that the Constitutional Convention recognized a constructive limitation of federal jurisdiction to "cases of a Judiciary nature," II Farrand, Records of the Federal Convention 430–431, merely lays bare the ultimate fallacy underlying rejection of the boundaries of Article III. For the constructive limitation referred to in the Convention debates is a limitation imposed by Article III, and the opinion of MR. JUSTICE JACKSON by hypothesis denies that Article III expresses the full measure of power which can be delegated to federal district courts. If district courts are—as I agree they are—confined to "cases of a Judiciary nature," then too they are confined to cases "between Citizens of different States," except insofar as other Article III provisions expand the potential grant of jurisdiction. For—to borrow the words of the *O'Donoghue* dissent—the limitations of Article III, "if considered to be applicable, [would not] be susceptible of division so that some might be deemed obligatory and others might be ignored." 289 U. S. at 552.

In view of the rationale adopted by MR. JUSTICE JACKSON'S opinion, I do not understand the necessity for its examination of the limits of the diversity clause of Article III. That opinion has, however, made clear the view that the diversity clause excludes citizens of the

District of Columbia, although where that view may now be applied it does not point out. If I concurred in that conception of the diversity clause I would vote to affirm the judgment of the Court of Appeals.

II.

However, nothing but naked precedent, the great age of the *Hepburn* ruling, and the prestige of Marshall's name, supports such a result. It is doubtful whether anyone could be found who now would write into the Constitution such an unjust and discriminatory exclusion of District citizens from the federal courts. All of the reasons of justice, convenience, and practicality which have been set forth for allowing District citizens a furtive access to federal courts, point to the conclusion that they should enter freely and fully as other citizens and even aliens do.

Precedent of course is not lightly to be disregarded, even in the greater fluidity of decision which the process of constitutional adjudication concededly affords.[11] And

[11] Cf. *Screws* v. *United States,* 325 U. S. 91, 112–113. See the trenchant discussion by Mr. Justice Brandeis of the lesser impact of *stare decisis* in the realm of constitutional construction, *Burnet* v. *Coronado Oil & Gas Co.,* 285 U. S. 393, 405–410 (dissenting opinion), and the views of MR. JUSTICE FRANKFURTER dissenting in *Commissioner* v. *Estate of Church,* 335 U. S. 632, 676–677. Instances in which this Court has overruled prior constitutional determinations are catalogued in *Burnet* v. *Coronado Oil & Gas Co., supra* at 407, n. 2, 409, n. 4, and in *Helvering* v. *Griffiths,* 318 U. S. 371, 401, n. 52; compare Mr. Justice Brandeis' compilations in *Burnet* v. *Coronado Oil & Gas Co., supra* at 406, n. 1, and in his dissenting opinion in *Washington* v. *Dawson & Co.,* 264 U. S. 219, 238, n. 21. Chief Justice Stone, speaking for the Court on the death of Mr. Justice Brandeis, took occasion to note the prime role played by the latter in liberating the Court from mechanical adherence to precedent where constitutional issues are at stake: "He never lost sight of the fact that the Constitution is primarily a great charter of government, and often repeated Marshall's words: 'it is *a constitution* we are expounding' 'intended to endure for ages to come, and, consequently, to be adapted to the various crises

Marshall's sponsorship in such matters always is weighty. But when long experience has disclosed the fallacy of a ruling, time has shown its injustice, and nothing remains but a technicality the only effect of which is to perpetuate inequity, hardship and wrong, those are the circumstances which this Court repeatedly has said call for reexamination of prior decisions. If those conditions are fulfilled in any case, they are in this one.

The *Hepburn* decision was made before time, through later decisions here, had destroyed its basic premise and at the beginning of Marshall's judicial career, when he had hardly started upon his great work of expounding the Constitution. The very brevity of the opinion and its groundings, especially in their ambiguity, show that the master hand which later made his work immortal faltered.[12]

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of human affairs.' Hence, its provisions were to be read not with the narrow literalism of a municipal code or a penal statute, but so that its high purposes should illumine every sentence and phrase of the document and be given effect as a part of a harmonious framework of government. Notwithstanding the doctrine of *stare decisis*, judicial interpretations of the Constitution, since they were beyond legislative correction, could not be taken as the final word. They were open to reconsideration, in the light of new experience and greater knowledge and wisdom." 317 U. S. XLII, XLVII.

[12] The *Hepburn* case was not the only one in those earlier years where the master touch was lacking. Cf. *Bank of the United States* v. *Deveaux*, 5 Cranch 61; *Hope Insurance Co.* v. *Boardman*, 5 Cranch 57; *Maryland Insurance Co.* v. *Woods*, 6 Cranch 29, 7 Cranch 402; McGovney, A Supreme Court Fiction, 56 Harv. L. Rev. 853, 863–885 (1943). See particularly the discussion at 876–883. By positing the capacity of a corporation to sue or be sued under the diversity clause on the citizenship of its shareholders, the *Deveaux* decision opened the way for corporations ultimately to be brought within the diversity jurisdiction, but only by the long and tortuous evolution of the law through the stages first of rebuttable and finally of conclusive presumption (now most often contrary to the fact) that all the shareholders are citizens of the state of incorporation. See *Louisville, C. & C. R. Co.* v. *Letson*, 2 How. 497.

The sole reason Marshall assigned for the decision was "a conviction that the members of the American confederacy only are the states contemplated in the constitution," a conviction resulting as he said from an examination of the use of that word in the charter to determine "whether Columbia is a state in the sense of that instrument." 2 Cranch at 452. "When the same term which has been used plainly in this limited sense [as designating a member of the union] in the articles respecting the legislative and executive departments, is also employed in that which respects the judicial department, it must be understood as retaining the sense originally given to it." *Ibid.*

This narrow and literal reading was grounded exclusively on three constitutional provisions: the requirements that members of the House of Representatives be chosen by the people of the several states; that the Senate shall be composed of two Senators from each state; and that each state "shall appoint, for the election of the executive," the specified number of electors; all, be it noted, provisions relating to the organization and structure of the political departments of the government, not to the civil rights of citizens as such. Put to one side were other provisions advanced in argument as showing "that the term state is sometimes used in its more enlarged sense" on the ground that "they do not prove what was to be shown by them." *Ibid.* But cf. 446–448, 450.

Whether or not this answer was adequate at the time,[13]

[13] Counsel for the plaintiffs had made, among others, two different, though closely related, arguments. One was that "state" as used in the diversity clause should be given what Marshall characterized as "the signification attached to it by writers on the law of nations," a political entity in a broad and general sense. To this argument his answer was obviously appropriate. But in view of other constitutional provisions relied upon in the argument, 2 Cranch 446–448, 450, it seems at least questionable that the answer met the other contention, namely, that "those territories which are under the exclu-

our Constitution today would be very different from what it is if such a narrow and literal construction of each of its terms had been transmuted into an inflexible rule of constitutional interpretation. It is to be remembered, as bearing on the very issue before us, that the Sixth Amendment's guarantee of "an impartial jury of the State . . . wherein the crime shall have been committed" extends to criminal prosecutions in the Nation's capital.[14] Similarly, the word "Citizens" has a broader

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sive government of the United States are to be considered in some respects as included in the term 'states' as used in the constitution." *Id.* at 446.

[14] The Court's initial determination that District residents were entitled to a jury trial in criminal cases, *Callan* v. *Wilson,* 127 U. S. 540, rested in large measure on the more inclusive language of Article III, § 2: "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed." The Court in the *Callan* case rejected the Government's argument that Article III, § 2, permits Congress to dispense with a jury when the crime takes place in the District rather than in a state. But Article III does not seem to have been the sole basis of decision, for the Court said, 127 U. S. at 550: "In *Reynolds* v. *United States,* 98 U. S. 145, 154, it was taken for granted that the Sixth Amendment of the Constitution secured to the people of the Territories the right of trial by jury in criminal prosecutions; . . . We cannot think that the people of this District have, in that regard, less rights than those accorded to the people of the Territories of the United States." See *District of Columbia* v. *Clawans,* 300 U. S. 617, 624; *Capital Traction Co.* v. *Hof,* 174 U. S. 1, 5; cf. *Thompson* v. *Utah,* 170 U. S. 343, 348–349.

But, though it be true that "The Sixth Amendment was not needed to require trial by jury in cases of crimes," *United States* v. *Wood,* 299 U. S. 123, 142, nevertheless the recognized right of District residents to an "impartial jury" is conferred by the force of the Sixth Amendment. See *Frazier* v. *United States,* 335 U. S. 497, 498, 514. Nor is this distinction a mere form of words: In *United States* v. *Wood, supra,* at 142–143, Chief Justice Hughes, in weighing the impartiality of a District of Columbia jury, noted the Article III

meaning in Article III, § 2, where it now includes corporations,[15] than it has in the privileges and immunities clause of Article IV, § 2,[16] or in the like clause of the Fourteenth Amendment.[17] Instances might, but need not, be multiplied.

In construing the diversity clause we are faced with the apparent fact that the Framers gave no deliberate consideration one way or another to the diversity litigation of citizens of the District of Columbia. And indeed, since the District was not in existence when the

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guarantee of a jury trial and then observed: "The Sixth Amendment provided further assurances. It added that 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.' "

Thus it has been uniformly assumed that in criminal prosecutions a resident of the District of Columbia is possessed of Sixth Amendment rights "to a speedy . . . trial," *United States* v. *McWilliams,* 69 F. Supp. 812, affirmed 163 F. 2d 695; "to be informed of the nature and cause of the accusation," cf. *Johnson* v. *United States,* 225 U. S. 405, 409, 411; "to be confronted with the witnesses against him," *Curtis* v. *Rives,* 123 F. 2d 936, 937; *Jordon* v. *Bondy,* 114 F. 2d 599, 602, "to have compulsory process for obtaining witnesses in his favor," *ibid.;* "and to have the Assistance of Counsel for his defence," *Noble* v. *Eicher,* 143 F. 2d 1001; see *Williams* v. *Huff,* 142 F. 2d 91, 146 F. 2d 867.

[15] See note 12 *supra.* Compare *Louisville, C. & C. R. Co.* v. *Letson,* 2 How. 497, with *Bank of the United States* v. *Deveaux,* 5 Cranch 61.

[16] *Paul* v. *Virginia,* 8 Wall. 168, 177. It is to be noted, however, that Hamilton's 80th Federalist expressly justified the grant of diversity jurisdiction as effectively implementing the guaranties of the privileges and immunities clause of Article IV.

[17] *Hague* v. *C. I. O.,* 307 U. S. 496, 514, cf. *id.* at 527; *Grosjean* v. *American Press Co.,* 297 U. S. 233, 244; *Orient Insurance Company* v. *Daggs,* 172 U. S. 557, 561.

Constitution was drafted, it seems in no way surprising that the Framers, after conferring on Congress plenary power over the future federal capital, made no express provision for litigating outside the boundaries of a hypothetical city conjectured controversies between unborn citizens and their unknown neighbors. Under these circumstances I cannot accept the proposition that absence of affirmative inclusion is, here, tantamount to deliberate exclusion.

If exclusion of District citizens is not compelled by the language of the diversity clause, it likewise cannot be spelled out by inference from the historic purposes of that clause. We have, needless to say, no concern with the merits of diversity jurisdiction; [18] nor need we resolve scholarly dispute over the substantiality of those local prejudices which, when the Constitution was drafted, the grant of diversity jurisdiction was designed to nullify.[19] Our only duty is to determine the scope of the jurisdictional grant, and we must bow to congressional determination of whether federal adjudication of local issues does more good than harm. But, in resolving the imme-

[18] For contrasting views prior to *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, compare Yntema, The Jurisdiction of the Federal Courts in Controversies between Citizens of Different States, 19 A. B. A. J. 71 (1933), and Yntema and Jaffin, Preliminary Analysis of Concurrent Jurisdiction, 79 U. Pa. L. Rev. 869 (1931), with Frankfurter, A Note on Diversity Jurisdiction—In Reply to Professor Yntema, 79 U. Pa. L. Rev. 1097 (1931), and Frankfurter, Distribution of Judicial Power between United States and State Courts, 13 Corn. L. Q. 499, 520–530 (1928). For post-*Erie* analyses see Shulman, The Demise of Swift v. Tyson, 47 Yale L. J. 1336 (1938); Clark, State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins, 55 Yale L. J. 267 (1946).

[19] See note 18, and see also Friendly, The Historic Basis of Diversity Jurisdiction, 41 Harv. L. Rev. 483 (1928); Warren, New Light on the History of the Federal Judiciary Act of 1789, 37 Harv. L. Rev. 49, 81–90 (1923); Frank, Historical Bases of the Federal Judicial System, 13 Law & Contem. Prob. 3, 22–28 (1948).

diate issue, we should not blink the fact that, whatever the need for federal jurisdiction over suits between litigant citizens of the several states, the same need equally compels the safeguards of federal trial for suits brought by citizens of the District of Columbia against citizens of the several states. Conversely, if we assume that today's ruling tacitly validates suits brought *by* state citizens *against* citizens of the District of Columbia, it would seem the plaintiff citizen of a state is as deserving of a federal forum when suing a District defendant as when suing a defendant in a neighbor state.

Marshall's sole premise of decision in the *Hepburn* case has failed, under the stress of time and later decision, as a test of constitutional construction. Key words like "state," "citizen," and "person" do not always and invariably mean the same thing.[20] His literal application disregarded any possible distinction between the purely political clauses and those affecting civil rights of citizens, a distinction later to receive recognition.

Moreover, Marshall himself recognized the incongruity of the decision: "It is true that as citizens of the United States, and of that particular district which is subject to the jurisdiction of congress, it is extraordinary that the courts of the United States, which are open to aliens, and to the citizens of every state in the union, should be closed upon *them*." But, he added, "this is a subject for legislative not for judicial consideration." 2 Cranch at 453.

With all this we may well agree, with one reservation. In spite of subsequent contrary interpretation and Marshall's own identification of the statutory word "state" with the same word in the Constitution, we cannot be unreservedly sure that the last-quoted sentence referred to the process of constitutional amendment rather than

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[20] Cf. notes 14–17 *supra* and text.

congressional reconsideration. If the former had been the intent, it seems likely it would have been stated in words not so characteristic of the latter process. The Court was construing the statute,[21] which made no explicit inclusion of citizens of the District. Whether, if it had done so, the Court's ruling would have been the same or, if a later act had sought to include District citizens, it would have been held unconstitutional, we can only speculate.

But I do not rest on this ambiguity, more especially in view of the later decisions clearly accepting the *Hepburn* decision as one of constitutional import. On the other hand, the later and general repudiation of the decision's narrow and literal rule for construing the Constitution, in which Marshall's own part was not small, has cut from beneath the *Hepburn* case its only grounding and with it, in my judgment, the anomaly in result which the ruling always has been. It is perhaps unnecessary to go so far in criticizing the decision as was done by a judge who long afterwards bowed to it.[22] But the time has come

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[21] The arguments for the defendant were two, one statutory, the other constitutional. They were stated as follows: "Even if the constitution of the United States authorises a more enlarged jurisdiction than the judiciary act of 1789 has given, yet the court can take no jurisdiction which is not given by the act. . . .

"This is not a case between citizens of different states, within the meaning of the constitution." 2 Cranch at 449–450.

[22] After noting that the *Hepburn* decision had been extended by *New Orleans* v. *Winter,* 1 Wheat. 91, to territories and their citizens, the opinion in *Watson* v. *Brooks,* 13 F. 540, stated at 543–544: "But it is very doubtful if this ruling would now be made if the question was one of first impression; and it is to be hoped it may yet be reviewed and overthrown.

"By it, and upon a narrow and technical construction of the word 'state,' unsupported by any argument worthy of the able and distinguished judge who announced the opinion of the court, the large and growing population of American citizens resident in the District of Columbia and the eight territories of the United States are deprived of the privilege accorded to all other American citizens, as

when the hope he expressed for removing this highly unjust discrimination from a group of our citizens larger than the population of several states of the Union should be realized.

III.

Pragmatically stated, perhaps, the problem is not of earth-shaking proportions. For, by present hypothesis, federal court disposition of diversity suits must be in accord with local law in all matters of substance. But symbolically the matter is of very considerable importance. Reasonable men may differ perhaps over whether or, more appropriately, to what extent citizens of the District should have political status and equality with their fellow citizens. But with reference to their civil rights, especially in such a matter as equal access to the federal courts, none now can be found to defend discrimination against them save strictly on the ground of precedent.

I cannot believe that the Framers intended to impose so purposeless and indefensible a discrimination, although they may have been guilty of understandable oversight in not providing explicitly against it. Despite its great age and subsequent acceptance, I think the *Hepburn* decision was ill-considered and wrongly decided. Nothing hangs on it now except the continuance or removal of a gross and wholly anomalous inequality applied against a substantial group of American citizens, not in relation to their substantive rights, but in respect to the forums available for their determination. This Court has not

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well as aliens, of going into the national courts when obliged to assert or defend their legal rights away from home. Indeed, in the language of the court in *Hepburn* v. *Ellzey, supra,* they may well say: 'It is extraordinary that the courts of the United States, which are open to aliens, and to the citizens of every state in the Union, should be closed upon them.' But so long as this ruling remains in force, the judgment of this court must be governed by it."

hesitated to override even long-standing decisions when much more by way of substantial change was involved and the action taken was much less clearly justified than in this case, a most pertinent instance being *Erie R. Co.* v. *Tompkins, supra.*

That course should be followed here. It should be followed directly, not deviously. Although I agree with the Court's judgment, I think it overrules the *Hepburn* decision in all practical effect. With that I am in accord. But I am not in accord with the proposed extension of "legislative" jurisdiction under Article I for the first time to the federal district courts outside the District of Columbia organized pursuant to Article III, and the consequent impairment of the latter Article's limitations upon judicial power; and I would dissent from such a holding even more strongly than I would from a decision today reaffirming the *Hepburn* ruling. That extension, in my opinion, would be the most important part of today's decision, were it accepted by a majority of the Court. It is a dangerous doctrine which would return to plague both the district courts and ourselves in the future, to what extent it is impossible to say. The *O'Donoghue* and *Williams* decisions would then take on an importance they have never before had and were never considered likely to attain.

MR. CHIEF JUSTICE VINSON, with whom MR. JUSTICE DOUGLAS joins, dissenting.

While I agree with the views expressed by MR. JUSTICE FRANKFURTER and MR. JUSTICE RUTLEDGE which relate to the power of Congress under Art. I of the Constitution to vest federal district courts with jurisdiction over suits between citizens of States and the District of Columbia, and with the views of MR. JUSTICE FRANKFURTER and MR. JUSTICE JACKSON as to the proper interpretation of the word "States" in the diversity clause of Art. III, I

am constrained to state my views individually because of the importance of these questions to the administration of the federal court system.

I.

The question whether Congress has the power to extend the diversity jurisdiction of the federal district courts to citizens of the District of Columbia by virtue of its authority over the District under Art. I of the Constitution depends, in turn, upon whether the enumeration in Art. III of the cases to which the judicial power of the United States shall extend defines the outer limits of that power or is merely a listing of the types of jurisdiction with which Congress may invest federal courts without invoking any of the specific powers granted that body by other Articles of the Constitution. It has long been settled that inferior federal courts receive no powers directly from the Constitution but only such authority as is vested in them by the Congress. *Turner* v. *Bank of North-America,* 4 Dall. 8 (1799); *McIntire* v. *Wood,* 7 Cranch 504 (1813); *Kendall* v. *United States,* 12 Pet. 524 (1838); *Cary* v. *Curtis,* 3 How. 236 (1845).[1] Since, therefore, there is no minimum of power prescribed for the inferior federal courts, and Congress need not have established any such courts, *Lockerty* v. *Phillips,* 319 U. S. 182, 187 (1943), the question is whether the enumeration of cases in Art. III, § 2 prescribes a maximum of power or performs only the very limited office mentioned above.[2]

The theory that § 2 of Art. III is merely a supplement to the powers specifically granted Congress by the Con-

[1] See also *Sheldon* v. *Sill,* 8 How. 441 (1850); *Kline* v. *Burke Construction Co.,* 260 U. S. 226 (1922); *Lauf* v. *E. G. Shinner & Co.,* 303 U. S. 323 (1938); *Lockerty* v. *Phillips,* 319 U. S. 182 (1943).

[2] *I. e.,* is an enumeration of cases to which Congress may extend the jurisdiction of the federal courts without invoking other of its powers under the Constitution.

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stitution is not, however, accepted at face value even by those who urge it. For they still would require that a case or controversy be presented. We are told that

> "Of course there are limits to the nature of duties which Congress may impose on the constitutional courts vested with the federal judicial power . . . [but] this statute . . . does not authorize or require either the district courts or this Court to participate in any legislative, administrative, political or other nonjudicial function or to render any advisory opinion." *Ante,* pp. 590–591.

But as my Brothers FRANKFURTER and RUTLEDGE have pointed out, if Art. III contains merely a grant of power to Congress, there is no more reason to find any limitation in the fact that the judicial power extends only to cases and controversies than in the specific enumeration of the kinds of cases or controversies to which it shall extend. The fundamental error in this position, as I see it, is the failure to distinguish between two entirely different principles embodied in Art. III, as elsewhere in the Constitution, both of which were repeatedly adverted to in the Constitutional Convention and have since been followed by this Court without substantial deviation.

The first of these principles is that the three branches of government established by the Constitution are of coordinate rank, and that none may encroach upon the powers and functions entrusted to the others by that instrument. This principle found expression in the requirement of Art. III that the judicial power shall extend only to cases and controversies. Of equal importance, however, was the second principle, that the Constitution contains a grant of power by the states to the federal government, and that all powers not specifically granted were reserved to the states or to the people.[3] The powers

[3] This principle, implicit in the arguments at the Constitutional Convention, was made explicit in the 10th Amendment.

granted the federal judiciary were spelled out with care and precision in Art. III by a delineation of the kinds of cases to which the judicial power could be extended.

The first principle is not now under attack, but proper perspective in viewing the second requires some examination of its origin and history. The framers of the Constitution were presented with, and rejected, proposals which would have vested nonjudicial powers in the national judiciary. Charles Pinckney of South Carolina proposed, for example, that "Each branch of the Legislature, as well as the Supreme Executive shall have authority to require the opinions of the supreme Judicial Court upon important questions of law, and upon solemn occasions."[4] Early in the Convention, however, the principle that the courts to be established should have jurisdiction only over *cases* became fixed. Thus it was that when the proposal was made on the floor of the Convention that the words, "arising under this Constitution" be inserted before "the Laws of the United States," in what is now Art. III, § 2, Madison's objection that it was "going too far to extend the jurisdiction of the Court generally to cases arising Under the Constitution, & whether it ought not to be limited to cases of a Judiciary Nature" was met by the answer that it was, in his own words, "generally supposed that the jurisdiction given was constructively limited to cases of a Judiciary nature—."[5]

Clear as this principle is, however, it was attacked in this Court on precisely the same grounds now asserted to sustain the diversity jurisdiction here in question. In *Keller* v. *Potomac Electric Co.*, 261 U. S. 428 (1923), where this Court had before it an Act under which the courts of the District of Columbia were given revisory power over rates set by the Public Utilities Commission

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[4] 2 Farrand, *Records of the Federal Convention* 341, hereinafter cited as Farrand.

[5] *Id.* at 430.

of the District, the appellee sought to sustain the appellate jurisdiction given this Court by the Act on the basis that "Although Art. III of the Constitution limits the jurisdiction of the federal courts, this limitation is subject to the power of Congress to enlarge the jurisdiction, where such enlargement may reasonably be required to enable Congress to exercise the express powers conferred upon it by the Constitution." 261 U. S. at 435. There, as here, the power relied upon was that given Congress to exercise exclusive jurisdiction over the District of Columbia, and to make all laws necessary and proper to carry such powers into effect. But this Court clearly and unequivocally rejected the contention that Congress could thus extend the jurisdiction of constitutional courts, citing the note to *Hayburn's Case,* 2 Dall. 409, 410 (1792); *United States* v. *Ferreira,* 13 How. 40, note, p. 52 (1851), and *Gordon* v. *United States,* 117 U. S. 697 (1864). These and other decisions of this Court clearly condition the power of a constitutional court to take cognizance of any cause upon the existence of a suit instituted according to the regular course of judicial procedure, *Marbury* v. *Madison,* 1 Cranch 137 (1803), the power to pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision, *Muskrat* v. *United States,* 219 U. S. 346 (1911); *Gordon* v. *United States, supra,* the absence of revisory or appellate power in any other branch of Government, *Hayburn's Case, supra; United States* v. *Ferreira, supra,* and the absence of administrative or legislative issues or controversies, *Keller* v. *Potomac Electric Co., supra; Postum Cereal Co.* v. *California Fig Nut Co.,* 272 U. S. 693 (1927). While "judicial power," "cases," and "controversies" have sometimes been given separate definitions,[6] these concepts are inextricably intertwined. The term "Judicial power" was itself sub-

[6] See *Muskrat* v. *United States,* 219 U. S. 346, 356 (1911).

stituted for the phrase, "The jurisdiction of the Supreme Court" to conform Art. III to the use of the terms "legislative Powers" and "executive Power" in Arts. I and II.[7] It thus draws life from that to which it extends: to cases and controversies. That much, at any rate, is clear. Whether it draws life from any cases or controversies other than those specifically enumerated in Art. III must now be considered.

The second principle, that any powers not specifically granted to the national judiciary by Art. III were reserved to the states or the people, is here challenged. The reason such an attack is possible at this late date is, ironically enough, because of the implicit acceptance of that principle by the framers, by Congress, and by litigants ever since. Unlike the question of the relations between the branches of government, which first arose during Washington's presidency and subsequently gave rise, in the cases previously adverted to, to frequent definition of the nature of cases and controversies, acceptance of the principle that Art. III contains a limitation on the power of the federal judiciary was so complete that the question did not often arise directly. Nevertheless, it is possible to demonstrate in a number of contexts the true intent of the framers.

First, the examination and rejection of various alternative proposals concerning the jurisdiction of the national judiciary by the Convention throws considerable light upon the compromise reached.[8] On the one hand

[7] 2 Farrand 425.

[8] The propriety of considering the proposals and debates of the Constitutional Convention was long ago considered by those most intimately concerned with its formulation. Washington, in his message to the House of Representatives refusing the demands of that body for the papers relating to Jay's treaty, stated: "If other proofs than these, and the plain letter of the Constitution itself, be necessary to ascertain the point under consideration, they may be found

were those who thought that no inferior federal tribunals should be authorized; that state courts should be entrusted with the decision of all federal questions, subject to appeal to one Supreme Court. Madison's notes reveal that

> "Mr. Rutlidge havg. obtained a rule for reconsideration of the clause for establishing *inferior* tribunals under the national authority, now moved that that part of the clause . . . should be expunged: arguing that the State Tribunals might and ought to be left in all cases to decide in the first instance the right of appeal to the supreme national tribunal being sufficient to secure the national rights & uniformity of Judgmts: that it was making an unnecessary encroachment on the jurisdiction of the States, and creating unnecessary obstacles to their adoption of the new system." [9]

The motion was carried and the clause establishing inferior federal tribunals excised from the draft Constitution. Madison, however, immediately moved "that the National Legislature be empowered to institute inferior tribunals," urging that some provision for such courts was a necessity in a federal system. Madison's notes then record the reaction of Pierce Butler of South Carolina to this proposal:

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in the Journals of the General Convention, which I have deposited in the office of the Department of State. In those Journals it will appear, that a proposition was made, 'that no Treaty should be binding on the United States which was not ratified by a law,' and that the proposition was explicitly rejected." 5 Annals of Congress, Fourth Congress, 1st Sess., p. 761. See also the comment of Madison at a later date. 9 *Writings of James Madison* 240.

[9] 1 Farrand 124. See the argument of Luther Martin before the Maryland House of Representatives opposing ratification of the Constitution in 3 Farrand 156. See also 2 Elliot, *Debates* 408; 3 *id.* at 562 *et seq.*

> "The people will not bear such innovations. The States will revolt at such encroachments. Supposing such an establishment to be useful, we must not venture on it. We must follow the example of Solon who gave the Athenians not the best Govt. he could devise; but the best they wd. receive." [10]

On the other hand, some members of the Convention favored a wider federal jurisdiction than was ultimately authorized. The Connecticut delegation, led by Roger Sherman, proposed "That the legislature of the United States be authorised to institute one supreme tribunal, and such other tribunals as they may judge necessary for the purpose aforesaid, and ascertain their respective powers and jurisdictions." [11] This proposal, which is not substantially different in its effect from the interpretation now urged upon us, was not adopted by the Convention. When it became established that inferior federal courts were to be authorized by the Constitution, the limits of their jurisdiction immediately became an issue of paramount importance. The outline of federal jurisdiction was established only after much give and take, proposal and counterproposal, and—in the end—compromise. It was early proposed, for example, that federal jurisdiction be made to extend to "all piracies & felonies on the high seas, captures from an enemy; cases in which foreigners or citizens of other States applying to such jurisdictions may be interested, or which respect the collection of the National revenue; impeachments of any National officers, and questions which may involve the national peace and harmony." [12] But this was only one of many proposals concerning the extent

[10] This account, taken from Madison's notes, is found in 1 Farrand 124–125.

[11] 3 Farrand 616.

[12] 1 Farrand at 22.

of federal jurisdiction,[13] and not before many concessions and compromises had been made was the enumeration of cases now found in Art. III, § 2 agreed upon.

The judicial power was thus jealously guarded by the states and unwillingly granted to the national judiciary. Only when it could be demonstrated that a particular head of jurisdiction was acutely needed for the purposes of uniformity and national harmony was it granted. In every state convention for ratification of the Constitution, advocates and opponents of ratification considered in detail the kinds of cases and controversies to which the national judicial power was to extend. Each had to be justified.[14] Far from assuming that the judicial power could be, by any means short of constitutional amendment, extended beyond those cases expressly provided for in Art. III, that Article was subjected to severe attacks on the ground that those powers specifically given

[13] *Id.* at 231. The sense of the Convention at this point was expressed in Yates' Notes as follows: "Gov. Randolph observed the difficulty in establishing the powers of the judiciary—the object however at present is to establish this principle, to wit, the security of foreigners where treaties are in their favor, and to preserve the harmony of states and that of the citizens thereof. This being once established, it will be the business of a sub-committee to detail it; and therefore moved to obliterate such parts of the resolve so as only to establish the principle, to wit, *that the jurisdiction of the national judiciary shall extend to all cases of national revenue, impeachment of national officers, and questions which involve the national peace or harmony.* Agreed to unanimously." 1 Farrand 238.

[14] See, *e. g.*, Madison's defense of the Judiciary Article before the Virginia Convention, 5 *Writings of James Madison* 216–225; 2 Elliot, *Debates* 109; *id.* at 409, where among the resolutions affecting Art. III was one which "*Resolved,* as the opinion of this committee, that the jurisdiction of the Supreme Court of the United States, or of any other court to be instituted by the Congress, ought not, in any case, to be increased, enlarged, or extended, by any fiction, collusion, or mere suggestion"; *id.* at 489–494; 3 Elliot, *Debates* 517–584.

would destroy the state courts. A delegate to the Virginia Convention, for example, stated that "My next objection to *the federal judiciary* is, that it is not expressed in a definite manner. The jurisdiction of all cases arising under the Constitution and the laws of the Union is of stupendous magnitude." [15] If, in addition to justifying every particle of power given to federal courts by the Constitution, its defenders had been obliged to justify the competence of Congress—itself suspect by those who opposed ratification—to extend that jurisdiction whenever it was thought necessary to effectuate one of the powers expressly given that body, their task would have been insuperable. The debates make that fact plain.

That the federal judicial power was restricted to those classes of cases set forth in Art. III was clearly the opinion of those who had most to do with its drafting and acceptance. In the 80th Number of The Federalist, Hamilton listed the types of cases to which it was thought necessary that the judiciary authority of the nation should extend. All are found represented in Art. III.[16] In the 81st Number, he wrote:

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[15] 3 Elliot, *Debates* 565. And see Patrick Henry's remarks, *id.* at 539–546.

[16] The cases enumerated were the following: "1st, to all those which arise out of the laws of the United States, passed in pursuance of their just and constitutional powers of legislation; 2d, to all those which concern the execution of the provisions expressly contained in the articles of Union; 3d, to all those in which the United States are a party; 4th, to all those which involve the PEACE of the CONFEDERACY, whether they relate to the intercourse between the United States and foreign nations, or to that between the States themselves; 5th, to all those which originate on the high seas, and are of admiralty or maritime jurisdiction; and, lastly, to all those in which the State tribunals cannot be supposed to be impartial and unbiased." P. 494.

> "The amount of the observations hitherto made on the authority of the judicial department is this: *that it has been carefully restricted to those causes which are manifestly proper* for the cognizance of the national judicature . . . ." P. 511. (Emphasis added.)

while in No. 82, the following appears:

> "The only outlines described [for inferior courts] are that they shall be 'inferior to the Supreme Court,' and that *they shall not exceed the specified limits of the federal judiciary.*" P. 516. (Emphasis added.)

And Madison, in a letter to a correspondent who had contended that the common law had been incorporated by the Constitution as federal law, wrote:

> "A characteristic peculiarity of the Govt. of the U. States is, that its powers consist of special grants taken from the general mass of power, whereas other Govts. possess the general mass with special exceptions only. Such being the plan of the Constitution, it cannot well be supposed that the Body which framed it with so much deliberation, and with so manifest a purpose of specifying its objects, and defining its boundaries, would, if intending that the Common Law shd. be a part of the national code, have omitted to express or distinctly indicate the intention; when so many far inferior provisions are so carefully inserted, and such appears to have been the public view taken of the Instrument, whether we recur to the period of its ratification by the States, or to the federal practice under it." [17]

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[17] 9 *Writings of James Madison* 199–200. And see *United States* v. *Hudson and Goodwin,* 7 Cranch 32 (1812); *Erie R. Co.* v. *Tompkins,* 304 U. S. 64 (1938).

Cases in this Court which support the view that Art. III, § 2 limits the power of constitutional courts are not lacking. In *The Mayor* v. *Cooper,* 6 Wall. 247, 252 (1867), the Court defined the jurisdiction of inferior federal courts as follows:

> "As regards all courts of the United States inferior to this tribunal, two things are necessary to create jurisdiction, whether original or appellate. *The Constitution must have given to the court the capacity to take it,* and an act of Congress must have supplied it. Their concurrence is necessary to vest it. It is the duty of Congress to act for that purpose up to the limits of the granted power. *They may fall short of it, but cannot exceed it.*" (Emphasis added.)

And in a series of three cases decided between 1800 and 1809, the Court refused to give literal effect to § 11 of the Judiciary Act of 1789, which had extended the jurisdiction of Circuit Courts to suits where "an alien is a party," because of the limitations imposed by Art. III. In *Mossman* v. *Higginson,* 4 Dall. 12, 14 (1800), it was decided that "as the legislative power of conferring jurisdiction on the federal Courts, is, in this respect, confined to suits *between citizens and foreigners,* we must so expound the terms of the law, as to meet the case, 'where, indeed, an alien is one party,' but a citizen is the other." This construction of the statute was adhered to in *Montalet* v. *Murray,* 4 Cranch 46 (1807); and in *Hodgson* v. *Bowerbank,* 5 Cranch 303 (1809), where Chief Justice Marshall dismissed the contention that "The judiciary act gives jurisdiction to the circuit courts in all suits in which *an alien is a party*" with this admonition: "Turn to the article of the constitution of the United States, for the statute cannot extend the jurisdiction beyond the limits of the constitution."

Other examples may be cited of the Court's consistent adherence to the principle that the judicial power of the United States is a constituent part of the concessions made by the states to the federal government and may not be extended. See *Turner* v. *Bank of North-America, supra; United States* v. *Hudson and Goodwin,* 7 Cranch 32, 33 (1812); *Murray's Lessee* v. *Hoboken Land and Improvement Co.,* 18 How. 272, 280–281 (1855); *Kline* v. *Burke Construction Co.,* 260 U. S. 226, 233–234 (1922); *Ex parte Bakelite Corp.,* 279 U. S. 438, 449 (1929); *Federal Radio Commission* v. *General Electric Co.,* 281 U. S. 464, 469 (1930). Over a century and a half of consistent interpretation of Art. III is well summed up in one sentence from this Court's opinion in *Sheldon* v. *Sill,* 8 How. 441, 449 (1850):

> "The Constitution has defined the limits of the judicial power of the United States, but has not prescribed how much of it shall be exercised by the Circuit Court; consequently, the statute which does prescribe the limits of their jurisdiction, cannot be in conflict with the Constitution, *unless it confers powers not enumerated therein.*" (Emphasis added.)

The cases chiefly relied upon by those who contend that Art. III does not define the limits of the judicial power are *O'Donoghue* v. *United States,* 289 U. S. 516 (1933), and *Williams* v. *United States,* 289 U. S. 553 (1933), which concerned reductions in salary of judges of the District Court for the District of Columbia and the Court of Claims respectively. In these cases, this Court held that Art. III, § 1 of the Constitution forbade reduction of the salary of the former, who was found to be a judge of a "constitutional" (*i. e.,* an inferior court as used in Arts. I and III) court, but not of the latter, a judge of a "legislative" court.

Two separate but related points concerning the *O'Donoghue* case should be emphasized. The first is that since

District of Columbia courts may be given nonjudicial duties, *Butterworth* v. *Hoe,* 112 U. S. 50 (1884); *Baldwin Co.* v. *Howard Co.,* 256 U. S. 35 (1921); *Keller* v. *Potomac Electric Co., supra,* reliance upon that case to support the Act now under consideration is incompatible with the position that constitutional courts may only decide "cases" and "controversies" of a judicial nature. The second is that the rationale of the *O'Donoghue* case is, by its terms, limited to courts of the District. For the Court said (at p. 546): "If, in creating and defining the jurisdiction of the courts of the District, Congress were limited to Art. III, as it is in dealing with the other federal courts, the administrative and other jurisdiction spoken of could not be conferred upon the former."

In view of this express limitation, the *O'Donoghue* case lends no support to the Act now in question. To extend its applicability beyond the courts of the District is warranted neither by the language nor the reasoning of that case. The Court in no way diminished the authority of *American Insurance Co.* v. *Canter,* 1 Pet. 511 (1828), which had held that the courts of Florida Territory were legislative courts not created pursuant to Art. III and incapable of receiving the judicial power set out therein. Since territorial courts cannot be invested with Art. III power, the strict dichotomy between legislative and constitutional courts still exists—except in the District of Columbia. It is not enough to refer to the breadth of congressional power over the District; that such power is national in character rather than merely local. The power of Congress over the territories is equally broad, yet territorial courts cannot be invested with Art. III power under the *O'Donoghue* case. And some of the very statements now relied upon as indicating the scope of Congress' power over the District [18] were quoted in the

[18] From *Grether* v. *Wright,* 75 F. 742 (1896).

*O'Donoghue* case, but the rationale of that case was expressly limited to courts of the District, as noted above. The District of Columbia courts were there regarded as unique—different in powers and makeup from either territorial courts or other constitutional courts. Extension of the *O'Donoghue* case to all constitutional courts is clearly unwarranted under these circumstances, especially in the face of the uncontradicted constitutional history previously outlined.

Except in the District of Columbia, therefore, *American Insurance Co.* v. *Canter, supra,* and a long line of cases in the same vein [19] prohibit the intermixture or combination of the personnel, powers, or duties of constitutional and legislative courts. Whether a court is of one category or the other depends upon what power of Congress was utilized in its creation. If it was the power to create inferior constitutional courts, the court may exercise only the judicial power outlined in Art. III. If Congress creates a judicial body to implement another of its constitutional powers, that body is a legislative court and may exercise none of the judicial power of Art. III.[20] We have

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[19] See e. g., *Benner* v. *Porter,* 9 How. 235 (1850); *Clinton* v. *Englebrecht,* 13 Wall. 434 (1871); *Reynolds* v. *United States,* 98 U. S. 145 (1878); *McAllister* v. *United States,* 141 U. S. 174 (1891); *United States* v. *Burroughs,* 289 U. S. 159 (1933); *Ex parte Bakelite Corp.,* 279 U. S. 438 (1929).

[20] In *Williams* v. *United States,* 289 U. S. 553 (1933), the Court found that the Court of Claims had been created pursuant to the power of Congress under Art. I to pay the debts of the United States and had been given powers and duties inconsistent with those of an Art. III court. The Court's consideration of the question whether "Controversies to which the United States shall be a Party" in Art. III includes suits against the United States was therefore unnecessary to the decision, since an affirmative answer would not have converted the Court of Claims into a constitutional court. It is "incapable of receiving" the Art. III power. *American Insurance Co.* v. *Canter, supra.* Furthermore, the Court recognized inferentially that the Court of Claims does exercise jurisdiction over some

held that the answer to the question whether a court is of one kind or another "lies in the power under which the court was created and in the jurisdiction conferred." *Ex parte Bakelite Corp., supra* at 459. I would adhere to that test.

What has been said does not mean, of course, that legislative courts cannot exercise jurisdiction over questions of the same nature as those enumerated in Art. III, § 2. It was clearly contemplated by the framers that state courts should have federal question jurisdiction concurrent with that exercised by inferior federal courts, yet they are not constitutional courts nor do they exercise the judicial power of Art. III. The legislative courts created by Congress also can and do decide questions arising under the Constitution and laws of the United States (and, in the case of territorial courts, other types of jurisdiction enumerated in Art. III, § 2 as well), but that jurisdiction is not, and cannot be, "a part of that judicial power which is defined in the 3d article of the Constitution." These courts are "incapable of receiving it." *American Insurance Co.* v. *Canter, supra* at 546; *Reynolds* v. *United States, supra* at 154.[21]

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questions of the kind enumerated in Art. III when, with reference to claims founded upon the Constitution, it held that "the requirement is one imposed by the Constitution and equally applicable whether jurisdiction be exercised by a legislative court or a constitutional court." 289 U. S. at 581. Since Court of Claims jurisdiction also includes claims founded upon any Act of Congress, it is clear that that court exercises parallel jurisdiction with that of constitutional courts over cases arising under the Constitution and laws of the United States, although limited to suits involving claims against the United States. This points up the fact that the Court's discussion of the phrase, "Controversies to which the United States shall be a Party," was unnecessary to the decision.

[21] It is argued that because federal district courts exercise jurisdiction over claims against the United States concurrent with that of the Court of Claims, the former are exercising jurisdiction of non-Art. III nature. Whether or not the dictum in *Williams* v. *United*

The appellate jurisdiction of this Court is, in fact, dependent upon the fact that the case reviewed is of a kind within the Art. III enumeration. That article, after setting out the cases of which inferior courts may take

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*States,* 289 U. S. 553 (1933) that suits against the United States are not within the Art. III phrase, "Controversies to which the United States shall be a Party," proves correct, see note 20, *supra,* such actions seem to be clearly within the Art. III federal question jurisdiction. See 2 Moore, *Federal Practice* (1948 ed.) 1633. Of course the fact that Congress extends the jurisdiction of federal courts to suits involving certain subject matter does not itself make them the subject of federal question jurisdiction. But the sovereign's immunity from suit has never been regarded simply as a question of unavailability of a forum. As Hamilton said in The Federalist, No. 81, p. 508: "The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force. They confer no right of action, independent of the sovereign will." When the sovereign consents to be sued, therefore, considerably more is involved than opening the courts to plaintiffs already possessed of causes of action. For as Mr. Justice Brandeis said in *Lynch* v. *United States,* 292 U. S. 571, 582 (1934): "The sovereign's immunity from suit exists whatever the character of the proceeding or the source of the right sought to be enforced. It applies alike to causes of action arising under acts of Congress, . . . and to those arising from some violation of rights conferred upon the citizen by the Constitution, . . . The character of the cause of action—the fact that it is in contract as distinguished from tort—may be important in determining (as under the Tucker Act) whether consent to sue was given. Otherwise, it is of no significance. For immunity from suit is an attribute of sovereignty which may not be bartered away."

Since any right of action against the United States is completely and wholly dependent upon whether an Act of Congress has authorized the suit, see *United States* v. *Minnesota Mutual Investment Co.,* 271 U. S. 212, 217 (1926), a question arising under the laws of the United States, as that phrase is used in Art. III, is clearly presented by any claim against the federal government. Since Congress has decreed that all such actions shall be brought in federal courts, the question presented in *Gully* v. *First National Bank,* 299 U. S. 109 (1936), *Puerto Rico* v. *Russell & Co.,* 288 U. S. 476 (1933) and related cases is not involved.

cognizance and the original jurisdiction of this Court, extends the appellate jurisdiction of the Supreme Court only as far as "all the other Cases *before mentioned.*" (Emphasis added.) We can no more review a legislative court's decision of a case which is not among those enumerated in Art. III than we can hear a case from a state court involving purely state law questions. But a question under the Constitution and laws of the United States, whether arising in a constitutional court, a state court, or a legislative court may, under the Constitution, be a subject of this Court's appellate jurisdiction. It was long ago held that

> "The appellate power is not limited by the terms of the third article to any particular courts. The words are, 'the judicial power (which includes appellate power) shall extend *to all cases,*' &c., and 'in all other cases before mentioned the supreme court shall have appellate jurisdiction.' It is the *case,* then, and not *the court,* that gives the jurisdiction. If the judicial power extends to the case, it will be in vain to search in the letter of the constitution for any qualification as to the tribunal where it depends." *Martin* v. *Hunter's Lessee,* 1 Wheat. 304, 338 (1816).

There is no anomaly, therefore, in the fact that legislative courts, as well as constitutional courts, exercise federal question jurisdiction, and that they sometimes exercise concurrent jurisdiction over the same matters. That does not make the former constitutional courts, *American Insurance Co.* v. *Canter, supra; Ex parte Bakelite Corp., supra.* Still less does it make the latter legislative courts, which is the effect of the statute now being considered. It is one thing to say that legislative courts may exercise jurisdiction over some of the same matters that are within Art. III judicial power. It is quite another thing to hold that constitutional courts may take cognizance of causes which are not within the scope of that power.

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It may be argued that the distinction between constitutional and legislative courts is meaningless if the latter may be invested with jurisdiction over the subjects of Art. III judicial power. But there are limitations which insure the preservation of the system of federal constitutional courts distinct from legislative courts. In the first place, a legislative court must be established under some one of the specific powers given to Congress, and it is unlikely that all of the subjects of the judicial power could be justified as an exercise of those powers.[22] Furthermore, we cannot impute to Congress an intent now or in the future to transfer jurisdiction from constitutional to legislative courts for the purpose of emasculating the former. Chief Justice Marshall suggested another limitation in the *Canter* case, when he said that within the States, admiralty jurisdiction can be exercised solely by constitutional courts, although that limitation does not apply to the Territories. It is at least open to question, therefore, whether all of the subjects of Art. III judicial power, or only federal question jurisdiction, may be transferred to legislative courts within the States. Finally, *Ex parte Bakelite Corp., supra,* has been read as suggesting that the jurisdiction of legislative courts is limited to matters which, while proper subjects of judicial determination, need not be so determined under the Constitution.[23] The least that may be said is that no decisions of this Court have suggested that legislative courts may take over the entire field of federal judicial authority.

There is a certain surface appeal to the argument that, if Congress may create statutory courts to hear these cases, it should be able to adopt the less expensive and more practical expedient of vesting that jurisdiction

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[22] Except, perhaps, when Congress legislates for the Territories or the District of Columbia.

[23] Katz, *Federal Legislative Courts,* 43 Harv. L. Rev. 894, 916–917.

in the existing and functioning federal courts throughout the country. No doubt a similar argument was pressed upon the judges in *Hayburn's Case*. Unless expediency is to be the test of jurisdiction of the federal courts, however, the argument falls of its own weight. The framers unquestionably intended that the jurisdiction of inferior federal courts be limited to those cases and controversies enumerated in Art. III. I would not sacrifice that principle on the altar of expediency.

II.

There are numerous sections of the Constitution which are concerned solely with the mechanics of government and, of necessity, set rather arbitrary limits upon the exercise of power by the three branches of government. No doubt requirements of this kind have proven in the past, and may, in the future, prove unduly restrictive and undesirable. Yet if a question concerning any one of them were before us, I do not suppose that any member of the Court would read into the Constitution the changes thought desirable in our day.

The only difference in respect of the most explicit of these limitations of power and the limitation imposed by the word "State" in Art. III is that the meaning urged upon the Court is not expressly controverted by the language of the Constitution. That it was not the specific intent of the framers to extend diversity jurisdiction to suits between citizens of the District of Columbia and the States seems to be conceded. One well versed in that subject, writing for the Court within a few years of adoption of the Constitution, so held.

The question is, then, whether this is one of those sections of the Constitution to which time and experience were intended to give content, or a provision concerned solely with the mechanics of government. I think there can be little doubt but that it was the latter. That we

would now write the section differently seems hardly a sufficient justification for an interpretation admittedly inconsonant with the intent of the framers. Ours is not an amendatory function.

I hardly need add that I consider a finding of unconstitutionality of a statute a matter of grave concern. Nevertheless, Congress cannot do that which the Constitution specifically forbids. I think that it has attempted to do so here.

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

No provisions of the Constitution, barring only those that draw on arithmetic, as in prescribing the qualifying age for a President and members of a Congress or the length of their tenure of office, are more explicit and specific than those pertaining to courts established under Article III. "The judicial power" which is "vested" in these tribunals and the safeguards under which their judges function are enumerated with particularity. Their tenure and compensation, the controversies which may be brought before them, and the distribution of original and appellate jurisdiction among these tribunals are defined and circumscribed, not left at large by vague and elastic phrasing. The precision which characterizes these portions of Article III is in striking contrast to the imprecision of so many other provisions of the Constitution dealing with other very vital aspects of government. This was not due to chance or ineptitude on the part of the Framers. The differences in subject-matter account for the drastic differences in treatment. Great concepts like "Commerce . . . among the several States," "due process of law," "liberty," "property" were purposely left to gather meaning from experience. For they relate to the whole domain of social and economic fact, and the statesmen who founded this Nation knew too well that only a stagnant society remains unchanged. But when

the Constitution in turn gives strict definition of power or specific limitations upon it we cannot extend the definition or remove the translation. Precisely because "it is *a constitution* we are expounding," *M'Culloch* v. *Maryland,* 4 Wheat. 316, 407, we ought not to take liberties with it.

There was deep distrust of a federal judicial system, as against the State judiciaries, in the Constitutional Convention. This distrust was reflected in the evolution of Article III.[1] Moreover, when they dealt with the distribution of judicial power as between the courts of the States and the courts of the United States, the Framers were dealing with a technical subject in a professional way. More than that, since the judges of the courts for which Article III made provision not only had the last word (apart from amending the Constitution) but also enjoyed life tenure, it was an essential safeguard against control by the judiciary of its own jurisdiction, to define the jurisdiction of those courts with particularity. The Framers guarded against the self-will of the courts as well as against the will of Congress by marking with exactitude the outer limits of federal judicial power.

According to Article III, only "judicial power" can be "vested" in the courts established under it. At least this limitation, which has been the law of the land since 1792, *Hayburn's Case,* 2 Dall. 409, is not yet called into question. And so the President could not today elicit this Court's views on ticklish problems of international law any more than Washington was able to do in 1793. See the exchange between Secretary of State Jefferson and Chief Justice Jay in 3 Johnston, Correspondence and

[1] The story of the scope of jurisdiction of the federal courts devised by Article III is easily traceable through the admirable index in Farrand, *The Records of the Federal Convention* (Rev. ed., 1937); the data are assembled in Prescott, *Drafting the Federal Constitution,* ch. 17 (1941); see also Friendly, *The Historic Basis of Diversity Jurisdiction,* 41 Harv. L. Rev. 483 (1928).

Public Papers of John Jay, 486–89 (1891), and 10 Sparks, Writings of George Washington, 542–45 (1840).

But if courts established under Article III can exercise wider jurisdiction than that defined and confined by Article III, and if they are available to effectuate the various substantive powers of Congress, such as the power to legislate for the District of Columbia, what justification is there for interpreting Article III as imposing one restriction in the exercise of those other powers of the Congress—the restriction to the exercise of "judicial power"—yet not interpreting it as imposing the restrictions that are most explicit, namely, the particularization of the "cases" to which "the judicial Power shall extend"?

It is conceded that the claim for which access is sought in the District Court for Maryland, one of the courts established under Article III, is not included among the "cases" to which the judicial power can be made to extend. But if the precise enumeration of cases as to which Article III authorized Congress to grant jurisdiction to the United States District Courts does not preclude Congress from vesting these courts with authority which Article III disallows, by what rule of reason is Congress to be precluded from bringing to its aid the advisory opinions of this Court or of the Courts of Appeals? In the exercise of its constitutional power to regulate commerce, to establish uniform rules of naturalization, to raise and support armies, or to execute any of the other powers of Congress that are no less vital than its power to legislate for the District of Columbia, the Congress may be greatly in need of informed and disinterested legal advice. If Congress may grant to the United States District Courts authority to act in situations in which Article III denies it, why may not this Court respond to calls upon it by Congress if confronted with the conscientious belief of Congress that such a call is made under the Necessary-and-Proper Clause in order to deal wisely and effectively with some substantive con-

stitutional power of Congress? Again, if the United States District Courts are not limited to the jurisdiction rigidly defined by Article III, why is the jurisdiction of this Court restricted to original jurisdiction only in "Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party"? Why is not Congress justified in conferring original jurisdiction upon this Court in litigation involving the exercise of its power to make all laws which shall be necessary and proper "for carrying into Execution" its power "To declare War," or "To raise and support Armies"?

Courts set up under Article III to exercise the judicial power of the United States do so either because of the nature of the subject-matter or because of the special position of the parties. So far as the subject-matter is concerned, it extends to cases arising under the "Constitution, the Laws of the United States, and Treaties," as well as "to all Cases of admiralty and maritime Jurisdiction." Article I, § 8, is an enumeration of the subjects in relation to which the Constitution authorizes Congress to make laws. Its eighteen divisions of legislative power are the sources of federal rights and sanctions. Laws enacted under them are "the Laws of the United States," to which the "judicial power," granted by Article III, extends. Laws affecting revenue, war, commerce, immigration, naturalization, bankruptcy, and the rest, as well as the vast range of laws authorized by the "Necessary-and-Proper" Clause, are the generating sources of "all Cases, in Law and Equity, arising under . . . the Laws of the United States," and therefore cognizable by the courts established under Article III. Congress can authorize the making of contracts; it can therefore authorize suit thereon in any district court. Congress can establish post offices; it can therefore authorize suits against the United States for the negligent killing of a child by a post-office truck.

Insofar as the courts established under Article III can entertain a case not involving the Constitution, the laws of the United States or treaties, nor concerning admiralty, they do so because of the status of the parties, enumerated with particularity in Article III.

We are here concerned with the power of the federal courts to adjudicate merely because of the citizenship of the parties. Power to adjudicate between citizens of different states, merely because they are citizens of different states, has no relation to any substantive rights created by Congress. When the sole source of the right to be enforced is the law of a State, the right to resort to a federal court is restricted to "Citizens of different States." The right to enforce such State-created obligations derives its sole strength from Article III. No other provision of the Constitution lends support. But for Article III, the judicial enforcement of rights which only a State, not the United States, creates would be confined to State courts. It is Article III and nothing outside it that authorizes Congress to treat federal courts as "only another court of the State," *Guaranty Trust Co.* v. *York,* 326 U. S. 99, 108, and Article III allows it to do so only when the parties are citizens of different "States." If Congress, in its law-making power over the District of Columbia, created some right for the inhabitants of the District, it could choose to provide for the enforcement of that right in any court of the United States, because the case would be one arising under "the Laws of the United States." But here the controversy is one arising not under the laws of the United States but under the laws of Maryland. By the command of the Constitution, this Maryland-created right can be enforced in a federal court only if the controversy is between "Citizens of different States" in relation to the State in which the federal court is sitting.

The diversity jurisdiction of the federal courts was probably the most tenuously founded and most unwill-

ingly granted of all the heads of federal jurisdiction which Congress was empowered by Article III to confer. It is a matter of common knowledge that the jurisdiction of the federal courts based merely on diversity of citizenship has been more continuously under fire than any other.[2] Inertia largely accounts for its retention. By withdrawing the meretricious advantages which diversity jurisdiction afforded one of the parties in some types of litigation, *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, has happily eliminated some practical but indefensible reasons for its retention. An Act for the elimination of diversity jurisdiction could fairly be called an Act for the relief of the federal courts. Concededly, no great public interest or libertarian principle is at stake in the desire of a corporation which happens to have been chartered in the District of Columbia, to pursue its claim against a citizen of Maryland in the federal court in Maryland on the theory that the right of this artificial citizen of the District of Columbia cannot be vindicated in the State courts of Maryland.

But in any event, the dislocation of the Constitutional scheme for the establishment of the federal judiciary and the distribution of jurisdiction among its tribunals so carefully formulated in Article III is too heavy a price to pay for whatever advantage there may be to a citizen of the District, natural or artificial, to go to a federal court in a particular State instead of to the State court in suing a citizen of that State. Nor is it merely a dislocation for the purpose of accomplishing a result of trivial importance in the practical affairs of life. The process

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[2] See for example, Hearings and S. Rep. No. 626, on S. 3151, 70th Cong., 1st Sess. (1928); S. Rep. No. 691, on S. 4357, 71st Cong., 2d Sess. (1930); S. 937, S. 939, H. R. 10594, H. R. 11508, S. Rep. No. 530 and S. Rep. No. 701, 72d Cong., 1st Sess. (1932); Hearings on S. 466, 79th Cong., 1st Sess. (1945). Earlier attacks on diversity jurisdiction are summarized in Frankfurter and Landis, *The Business of the Supreme Court,* 90 *et seq.,* 136 *et seq.* (1928).

of reasoning by which this result is reached invites a use of the federal courts which breaks with the whole history of the federal judiciary and disregards the wise policy behind that history. It was because Article III defines and confines the limits of jurisdiction of the courts which are established under Article III that the first Court of Claims Act fell, *Gordon* v. *United States*, 2 Wall. 561, 117 U. S. 697. And it was in observance of these Constitutional limits that this Court had to decline appellate powers sought to be conferred by the Congress in an exercise of its legislative power over the District. *Keller* v. *Potomac Electric Power Co.*, 261 U. S. 428.

To find a source for "the judicial Power," therefore, which may be exercised by courts established under Article III of the Constitution outside that Article would be to disregard the distribution of powers made by the Constitution.[3] The other alternative—to expand "the judicial

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[3] Reliance on *Williams* v. *Austrian*, 331 U. S. 642, 657, seems singularly inapposite. When a petition for bankruptcy is filed, there may be outstanding claims by the bankrupt against debtors and by creditors against the bankrupt. Of course Congress has power to determine whether all such claims—those for, and those against, the bankrupt estate—should be enforced through the federal courts. That a particular claim dissociated from the fact of bankruptcy would have to be brought in a State court for want of any ground of federal jurisdiction is irrelevant. This is so because in the exercise of its power to "pass uniform laws on the subject of bankruptcies" Congress may deem it desirable that the federal courts be utilized for all the claims that pertain to the bankrupt estate whether in the federal court in which the bankruptcy proceeding is pending or in a more convenient federal court. The congeries of controversies thus brought into being by reason of bankruptcy may be lodged in the federal courts because they arise under "the Laws of the United States," to wit, laws concerning the "subject of bankruptcies." It is a matter of congressional policy whether there must be a concourse of all claims affecting the bankrupt's estate in the federal court in which the bankruptcy proceeding is pending or whether auxiliary suits be pursued in other federal courts.

Power" of Article III to include a controversy between a citizen of the District of Columbia and a citizen of one of the States by virtue of the provision extending "the judicial Power" to controversies "between Citizens of different States"—would disregard an explicit limitation of Article III. For a hundred and fifty years "States" as there used meant "States"—the political organizations that form the Union and alone have power to amend the Constitution. The word did not cover the district which was to become "the Seat of the Government of the United States," nor the "Territory" belonging to the United States, both of which the Constitution dealt with in differentiation from the States. A decent respect for unbroken history since the country's foundation, for contemporaneous interpretation by those best qualified to make it, for the capacity of the distinguished lawyers among the Framers to express themselves with precision when dealing with technical matters, unite to admonish against disregarding the explicit language of Article III extending the diversity jurisdiction of the federal courts "to Controversies . . . between Citizens of different States," not to controversies between "Citizens of different States, including the District and the Territory of the United States."

The Framers, in making provision in regard to "States," meant the States which sent them as delegates to the Philadelphia Convention and the States which were to be admitted later. It was not contemplated that the district which was to become the seat of government could ever become a State. Marshall had no mean share in securing adoption of the Constitution and took special interest in the Judiciary Article. He merely gave expression to the common understanding—the best test of the meaning of words—when he rejected summarily the notion that the Citizens of the District are included among Citizens of "States."

The very subject-matter of §§ 1 and 2 of Article III is technical in the esteemed sense of that term. These sections do not deal with generalities expanding with experience. Provisions for the organization of courts and their jurisdiction presuppose definiteness and precision of phrasing. These requirements were heeded and met by those who were concerned with framing the Judiciary Article; Wilson and Madison and Morris and Rutledge and Sherman were lawyers of learning and astuteness. The scope of the judicial power with which the federal courts were to be entrusted was, as I have said, one of the most sharply debated and thoroughly canvassed subjects in Independence Hall. When the Framers finally decided to extend the judicial Power to controversies "between Citizens of different States," they meant to be restrictive in the use of that term. They were not unaware of the fact that outside the States there was the Northwest Territory, and that there was to be a Seat of Government. Considering their responsibility, their professional habits, and their alertness regarding the details of Article III, the precise enumeration of the heads of jurisdiction made by the Framers ought to preclude the notion that they shared the latitudinarian attitude of Alice in Wonderland toward language.

It is suggested that other provisions of the Constitution relating to "States" apply to the District. If the mere repetition of an inaccuracy begets truth, then that statement is true, not otherwise. Decisions concerned with the District involving trial by jury in criminal and civil cases, full faith and credit for its proceedings, and the power to tax residents, rest on provisions in the Constitution not limited to "States." There may be a decision in which the source of rights or obligations affecting the District of Columbia derives from a legal right relating solely to "States" or a duty to which only "States" must be obedient. I know of no such case.

Of course every indulgence must be entertained in favor of constitutionality when legislation of Congress can fairly be deemed an exercise of the discretion, in the formulation of policy, given to Congress by the Constitution. But the cases to which jurisdiction may be extended under Article III to the courts established under it preclude any claim of discretionary authority to add to the cases listed by Article III or to change the distribution as between original and appellate jurisdiction made by that Article. Congress need not establish inferior courts; Congress need not grant the full scope of jurisdiction which it is empowered to vest in them; Congress need not give this Court any appellate power; it may withdraw appellate jurisdiction once conferred and it may do so even while a case is *sub judice*. *Ex parte McCardle*, 7 Wall. 506. But when the Constitution defined the ultimate limits of judicial power exercisable by courts which derive their sole authority from Article III, it is beyond the power of Congress to extend those limits. If there is one subject as to which this Court ought not to feel inhibited in passing on the validity of legislation by doubts of its own competence to judge what Congress has done, it is legislation affecting the jurisdiction of the federal courts. When Congress on a rare occasion through inadvertence or generosity exceeds those limitations, this Court should not good-naturedly ignore such a transgression of congressional powers.

A substantial majority of the Court agrees that each of the two grounds urged in support of the attempt by Congress to extend diversity jurisdiction to cases involving citizens of the District of Columbia must be rejected—but not the same majority. And so, conflicting minorities in combination bring to pass a result—paradoxical as it may appear—which differing majorities of the Court find insupportable.

# NATIONAL LABOR RELATIONS BOARD *v.* PITTSBURGH STEAMSHIP CO.

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

No. 258. Argued April 19, 1949.—Decided June 20, 1949.

1. In a proceeding under the Wagner Act, 49 Stat. 449, the National Labor Relations Board adopted a trial examiner's findings without substantial change, and issued a cease-and-desist order against an employer. The Court of Appeals, without passing upon the sufficiency of the evidence, held that the findings and the order were invalidated by the trial examiner's bias as disclosed by his crediting Board witnesses and discrediting witnesses for the employer, and refused enforcement of the order. *Held:* The decision of the Court of Appeals refusing enforcement of the order, on the ground of the trial examiner's bias, was not supported by the record. Pp. 657–660.
2. The Administrative Procedure Act and the Taft-Hartley Act were enacted after the Board's order and before the Court of Appeals' decision. Questions as to the applicability and possible effect of either or both of those Acts were apparently not dealt with by the Court of Appeals and were not briefed with any elaboration before this Court. *Held:* Although the evidence in the case was sufficient under the Wagner Act to sustain the Board's findings and order, the cause is remanded to the Court of Appeals for consideration of the applicability and possible effect of the Administrative Procedure Act and the Taft-Hartley Act, which questions should be considered in the first instance by that Court. Pp. 661–662.

167 F. 2d 126, reversed.

A cease-and-desist order issued by the National Labor Relations Board under the Wagner Act, 69 N. L. R. B. 1395, was refused enforcement by the Court of Appeals. 167 F. 2d 126. This Court granted certiorari. 335 U. S. 857. *Reversed and remanded,* p. 662.

*Robert L. Stern* argued the cause for petitioner. With him on the brief were *Solicitor General Perlman, Robert N. Denham, David P. Findling* and *Ruth Weyand.*

*Nathan L. Miller* argued the cause for respondent. With him on the brief were *Lee C. Hinslea, Lucian Y. Ray* and *Roger M. Blough.*

MR. JUSTICE RUTLEDGE delivered the opinion of the Court.

In 1945 the National Labor Relations Board, petitioner here, issued its complaint charging respondent with the commission of certain unfair labor practices in the course of operating its fleet of Great Lakes bulk cargo vessels. As developed at a hearing before a trial examiner, the Board's charges were in substance that in 1944 respondent interfered with attempts by the National Maritime Union to organize respondent's seamen, with the purpose and the ultimately achieved effect of causing the union's repudiation at a Board-sponsored election.[1] Specifically, there was testimony tending to show that licensed personnel (officers) on certain of respondent's ships by word and deed had expressed to their unlicensed seamen bitter hostility to the union and its members; that respondent's president, one Ferbert, had written two letters to every seaman covertly suggesting in inaccurate fashion the possible disadvantages of NMU representation; and that one Shartle was discharged from respondent's employ for engaging in union organization. Some of the Board's testimony, tendered by union witnesses, was controverted by respondent's witnesses; and respondent also introduced testimony tending to show that it had strictly enjoined its licensed personnel to remain wholly neutral

[1] The question voted on was acceptance of the NMU as collective-bargaining agent: the NMU was rejected by a vote of 889 to 720.

in the weeks leading up to and including the Board election.

The trial examiner concluded that respondent had interfered with NMU organization, in violation of §§ 7 and 8 (1) of the Wagner Act, 29 U. S. C. §§ 157, 158 (1), and had fired an employee for union activity, in violation of § 8 (3), 29 U. S. C. § 158 (3). Respondent's exceptions to the trial examiner's findings were briefed and argued before the Board, in accordance with its usual procedure. On August 13, 1946, the Board adopted the trial examiner's findings without substantial change, and issued its order requiring respondent to cease and desist from its antiunion conduct and to reinstate the wrongfully discharged Shartle with full seniority and reimbursement for lost wages. 69 N. L. R. B. 1395.

Two months later respondent petitioned the Court of Appeals to review the Board's order; the Board filed a counterpetition for enforcement of the order. On April 5, 1948, the court announced its decision refusing enforcement. 167 F. 2d 126. The court did not determine whether the evidence, if credited, would support the findings. Instead it held the findings and the order based thereon invalidated by the latent, pervasive and unremedied bias of the trial examiner—a bias found apparent on the face of the record: "Without exception, whenever there was a conflict of evidence, the witnesses for the [Company] were held to be untrustworthy and those for the union reliable. . . . It is enough to say that the unvarying repudiation of every witness for the petitioner because of falsity, evasion or faint recollection, along with the consistent exaltation of every union witness as truthful, forthright and accurate, destroys completely any confidence that might otherwise be placed in the findings of the trial examiner and stamp[s] them as arbitrary. The Labor Board having adopted them in toto, its blanket pro forma findings are in no better

posture. . . . With due respect for the rule that the findings of the Board are binding upon us if based upon evidence, it becomes impossible to sustain an order upon the adoption of a trial examiner's report which, upon its face, so clearly bears the imprint of bias and prejudice that it lacks all semblance of fair judicial determination." 167 F. 2d at 128–129. To review the court's determination, we granted certiorari. 335 U. S. 857.

*First:* We are constrained to reject the court's conclusion that an objective finder of fact could not resolve all factual conflicts arising in a legal proceeding in favor of one litigant. The ordinary lawsuit, civil or criminal, normally depends for its resolution on which version of the facts in dispute is accepted by the trier of fact. Where the number of facts in dispute increases, the arithmetical chance of their uniform resolution diminishes—but it does not disappear. Yet it is not mere arithmetical chance which controls our present inquiry, for the facts disputed in litigation are not random unknowns in isolated equations—they are facets of related human behavior, and the chiseling of one facet helps to mark the borders of the next. Thus, in the determination of litigated facts, the testimony of one who has been found unreliable as to one issue may properly be accorded little weight as to the next. Accordingly, total rejection of an opposed view cannot of itself impugn the integrity or competence of a trier of fact. The gist of the matter has been put well by the Court of Appeals for the Fifth Circuit, speaking through Judge Hutcheson, in granting enforcement of an NLRB order:

> "The fact alone . . . of which Respondent makes so much, that Examiner and Board uniformly credited the Board's witnesses and as uniformly discredited those of the Respondent, though the Board's witnesses were few and the Respondent's witnesses were many, would not furnish a basis for a finding

> by us that such a bias or partiality existed and therefore the hearings were unfair. Unless the credited evidence . . . carries its own death wound, that is, is incredible and therefore, cannot in law be credited, and the discredited evidence . . . carries its own irrefutable truth, that is, is of such nature that it cannot in law be discredited, we cannot determine that to credit the one and discredit the other is an evidence of bias." [2]

Suffice it to say in this case that our attention has been called to no credited testimony which "carries its own death wound," and to none discredited which "carries its own irrefutable truth." Indeed, careful scrutiny of the record belies the view that the trial examiner did in fact believe all union testimony [3] or that he even believed the union version of every disputed factual issue.[4] Rather, the printed transcript suggests thoughtful and discriminating evaluation of the facts.

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[2] *Labor Board* v. *Robbins Tire & Rubber Co.,* 161 F. 2d 798, 800; see *Labor Board* v. *Auburn Foundry,* 119 F. 2d 331, 333.

[3] Thus, for example, the trial examiner had the following to say by way of footnote to his intermediate report: "No attempt will be made to describe all statements and activities claimed by counsel for the Board to constitute part of the respondent's course of anti-union conduct. Thus, no mention is made of those incidents which the undersigned regards as insubstantial in character or as unsupported by a fair preponderance of credible evidence." 69 N. L. R. B. at 1402, n. 6.

[4] Important issues of fact arose, for example, over whether respondent had been responsible for distributing to the unlicensed seamen (1) copies of a speech hostile to the NMU delivered by a Member of Congress, (2) copies of a union pamphlet entitled "NMU Fights Jim Crow," which the union wished to withhold from circulation for fear the unlicensed seamen would react unfavorably to a union advocating racial equality. As to these issues the trial examiner had the following to say: "The respondent admitted responsibility for the issuance of the Ferbert letters [see text, *supra*], but denied that it distributed copies of the speech and pamphlet, both of which,

*Second:* A question remains as to the proper disposition of this case. It is urged upon us by the Board that, there being substantial evidence in the record to support the Board's findings and order, we should remand the case with instructions to enforce the Board's order without further delay. Without doubting the existence here of evidence substantial enough under the Wagner Act, *Consolidated Edison Co.* v. *Labor Board,* 305 U. S. 197, 229, to warrant the Board's findings, we are not certain whether that standard controls this case. For questions have arisen whether the Administrative Procedure Act, 60 Stat. 237, 5 U. S. C. § 1001 *et seq.,* and the Taft-Hartley Act, 61 Stat. 136, 29 U. S. C. (1946 ed., Supp. I), § 141 *et seq.,* enacted between issuance of the Board's order and the Court of Appeals' decision, are applicable to and, if applicable, in any way affect Board procedures and the scope of judicial review of Board orders. The applicability and possible effect of either or both of these statutes apparently were not dealt with by the Court of Appeals, which neither discussed the statutes nor cited cases discussing them; the statutes and their

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the record establishes, came through the mails. There is no substantial evidence in the record showing that the respondent was responsible for the distribution of the speech. The Jim Crow pamphlet, which set forth the Union's opposition to racial discrimination in employment, was admittedly a publication of the Union. While there is evidence that the Union and its organizers did not issue or use that pamphlet as part of its campaign to organize the respondent's vessels, and some support for the assertion that the respondent was responsible for its distribution is to be found in the evidence . . . showing the manner in which the respondent's supervisory personnel used the pamphlet and its subject matter in playing upon the racial prejudices, antagonisms and fears of the employees, the record is likewise bare of substantial evidence tracing responsibility for its distribution to the respondent. Consequently, and in view of the respondent's disclaimer of responsibility, it is found that the respondent did not cause the distribution of the pamphlet or the speech." 69 N. L. R. B. at 1400.

impact have not been briefed with any elaboration before this Court. These questions should be considered in the first instance by the Court of Appeals. Accordingly, in order to afford such an opportunity, we remand the cause to the Court of Appeals for proceedings not inconsistent with this opinion.

*Reversed and remanded.*

MR. JUSTICE JACKSON reserves opinion as to the sufficiency of the evidence under the Wagner Act in view of the Court's determination to return the case to the Court of Appeals.

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## INTERSTATE OIL PIPE LINE CO. *v.* STONE, CHAIRMAN STATE TAX COMMISSION.

APPEAL FROM THE SUPREME COURT OF MISSISSIPPI.

No. 287. Argued January 13, 1949.—Decided June 20, 1949.

Appellant owns and operates pipe lines used to transport oil from lease tanks to railroad loading racks in Mississippi. Delivery of the oil to appellant by the owner is accompanied by instructions for shipping it interstate. The oil is pumped from the loading racks into railroad tank cars; and, if no tank cars are available, it is stored, but never longer than a week. In the bills of lading, which covered only the rail shipment, the owner is designated as shipper and appellant as his agent, and the out-of-State destination is indicated. Mississippi levied against appellant a tax measured by appellant's receipts from the transportation of the oil from the lease tanks to the loading racks. *Held:* The tax did not violate the Commerce Clause of the Federal Constitution. Pp. 663–665, 668.

203 Miss. 715, 35 So. 2d 73, affirmed.

A state tax levied against a pipe-line company was sustained by the State Supreme Court against a claim of invalidity under the Federal Constitution. 203 Miss. 715, 35 So. 2d 73. On appeal to this Court, *affirmed,* p. 668.

*Phelan H. Hunter* argued the cause for appellant. With him on the brief were *Villard Martin* and *Garrett Logan.*

*J. H. Sumrall* argued the cause and filed a brief for appellee.

MR. JUSTICE RUTLEDGE announced the judgment of the Court and the following opinion, in which MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS and MR. JUSTICE MURPHY join.

This appeal questions the power of Mississippi, as affected by the commerce clause, to impose a tax measured by gross receipts from the operation of a pipe line wholly within the state.

Appellant is a Delaware corporation which has qualified to do business in Mississippi as a foreign corporation. It owns and operates pipe lines which are used to transport oil from lease tanks in various oil fields in Mississippi to loading racks adjacent to railroads elsewhere in the state.[1] From these racks the oil is pumped into railroad tank cars for shipment outside the state. If there are no tank cars available the oil is stored in tanks near the racks. But such delays in loading are usually of short duration and never exceed a week, according to appellant's uncontradicted statement. When delivered to appellant the oil is accompanied by shipping orders from the producer or owner directing that the oil be transported to out-of-state destinations. There are no refineries in Mississippi. There is no through bill of lading from the point of origin at the fields to the destination outside the state. Appellant ships the oil by rail as agent of the owner on bills of lading showing the owner as shipper,

[1] Appellant also gathers oil which is transported through the Mississippi pipe lines directly into interstate trunk lines, through which the oil is carried outside the state. Mississippi has not attempted to tax the receipts attributable to shipments of this kind.

the appellant as agent of the shipper, and indicating the destination specified in the shipping orders issued to appellant. Appellant is paid by the producer at the rate per barrel specified in its tariff [2] for transporting the oil from the gathering point to the rack, and is paid an additional charge for loading the oil in the tank cars.

The chairman of the Mississippi State Tax Commission, appellee, levied a tax against appellant for the years 1944, 1945 and the first half of 1946, in the sum of $20,296.36, measured by appellant's receipts for transporting oil from the lease tanks to the railroad loading platforms, pursuant to the following sections of the Mississippi Code, Miss. Code, 1942, Ann., tit. 40, c. 3, § 10105, and § 10109 (1948 Cum. Supp.), which provide:

> "10105. . . . There is hereby levied and shall be collected annual privilege taxes, measured by the amount or volume of business done, against the persons, on account of the business activities, and in the amounts to be determined by the application of rates against values, or gross income, or gross proceeds of sales, as the case may be, as follows [see sections following]:"
>
> "10109. . . . Upon every person engaging or continuing within this state in the business of operating a pipe line for transporting for compensation or hire from one point to another in this state oil or natural gas or artificial gas through pipes or conduits in this state, there is likewise hereby levied and shall be collected a tax, on account of the business engaged in, equal to two per cent of the gross income of the business.
>
> . . . . .

[2] All appellant's transportation of oil in Mississippi is covered by tariffs which are published and filed with the Interstate Commerce Commission as required by the Interstate Commerce Act, as amended, 49 U. S. C. §§ 1 (1), 1 (3), and 6.

> "There shall be excepted from the gross income used in determining the measure of the tax imposed in this section so much thereof as is derived from the business conducted in commerce between this state and other states of the United States, or between this state and foreign countries which the state of Mississippi is prohibited from taxing under the constitution of the United States of America. . . ." [3]

The State Tax Commission sustained the assessment. The trial court dismissed a declaration seeking review of the Commission's action. The Supreme Court of Mississippi affirmed that judgment, overruling appellant's contention that because the tax was levied on the privilege of conducting an interstate business and measured by gross receipts therefrom the tax could not be imposed without offending the commerce clause of the Federal Constitution. 203 Miss. 715, 35 So. 2d 73.

The state supreme court held that the operation of these pipe lines between points within the state was intrastate rather than interstate commerce, and that the tax was therefore "merely on the privilege of operating a pipe line wholly within this State as a local activity. . . . a tax on the privilege of doing an intrastate business, and measured by a percent of gross income as a matter of convenience." 203 Miss. at 732, 35 So. 2d at 81.

Appellant contends that operation of the pipe lines between points in Mississippi was in fact interstate commerce, and that the tax was construed by the Supreme Court of Mississippi to be a tax on the privilege of oper-

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[3] Other provisions of the Mississippi Code not here involved impose franchise, net income and *ad valorem* property taxes, all of which appellant paid for the years involved. This fact does not of course preclude Mississippi from exacting a different tax for the protection upon which one or more of these taxes is based. E. g., *Memphis Gas Co.* v. *Stone*, 335 U. S. 80, 85.

ating the pipe lines. From these premises, together with the major premise that no state can tax the privilege of engaging in interstate commerce, appellant concludes that the tax may not constitutionally be imposed.

We do not pause to consider whether the business of operating the intrastate pipe lines is interstate commerce, for, even if we assume that it is, Mississippi has power to impose the tax involved in this case. Further, we do not find it necessary to dispute that the Supreme Court of Mississippi construed the statute as imposing a tax on the privilege of operating a pipe line wholly within the state, and not a tax solely upon the "local activities of 'maintaining, keeping in repair, and otherwise in manning the facilities' " situated in Mississippi, *Memphis Gas Co.* v. *Stone,* 335 U. S. 80, 92–93, or upon the gross receipts themselves, *Central Greyhound Lines* v. *Mealey,* 334 U. S. 653. While we are of course bound by the construction given a state statute by the highest court of the State,[4] we are concerned with the practical operation of challenged state tax statutes, not with their descriptive labels.[5]

The statute is not invalidated by the commerce clause of the Federal Constitution merely because, unlike the statute attacked in *Memphis Gas Co.* v. *Stone, supra,* it imposes a "direct" tax on the "privilege" of engaging in interstate commerce.[6] Any notions to the contrary should not have survived *Maine* v. *Grand Trunk R. Co.,* 142 U. S. 217, which flatly rules the case at bar. That case sustained a state statute which imposed upon an interstate railroad corporation "an annual excise tax

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[4] *Minnesota* v. *Probate Court,* 309 U. S. 270, 273; *Guaranty Trust Co.* v. *Blodgett,* 287 U. S. 509, 513.

[5] *International Harvester Co.* v. *Dept. of Treasury,* 322 U. S. 340, 346, 347; *Nelson* v. *Sears, Roebuck & Co.,* 312 U. S. 359, 363.

[6] See concurring opinion in *Freeman* v. *Hewit,* 329 U. S. 249, 259.

[measured by apportioned gross receipts], for the privilege of exercising its franchises in this State."[7] The *Grand Trunk* decision has been approved by this Court as recently as the other controlling case of *Central Greyhound Lines* v. *Mealey, supra* at 658, 663, in which the Court permitted New York to impose a tax on the gross receipts from the operation of an interstate bus line, provided that tax was apportioned according to mileage traveled within the state. The *Mealey* case is not distinguished by saying that it involved only a tax on gross receipts and not a tax on interstate commerce itself, for gross receipts taxes have long been regarded as "direct" in cases which are supposed to support the proposition that "direct" taxes on interstate commerce are invalid under the commerce clause.[8]

Since all the activities upon which the tax is imposed are carried on in Mississippi, there is no due process ob-

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[7] Nothing in the *Grand Trunk* opinion suggests the explanation hazarded by Mr. Justice Holmes in *Galveston, H. & S. A. R. Co.* v. *Texas,* 210 U. S. 217, 226, that the tax in the *Grand Trunk* case was sustained on the ground that it was imposed in lieu of *ad valorem* taxes. A copy of the statute reprinted in the margin of the Reports discloses that the tax was "in lieu of all taxes upon such railroad, its property and stock," except that cities and towns were permitted to tax not only all buildings owned by the railroad but also railroad-owned "lands and fixtures" outside the right of way. 142 U. S. 217–218, n. 1.

[8] See the cases discussed in *Western Live Stock* v. *Bureau of Revenue,* 303 U. S. 250, 255–257; concurring opinion in *Freeman* v. *Hewit,* 329 U. S. 249, 264–266. As the cited discussions point out, most of the cases invalidating "direct" taxes on interstate commerce are explicable on the ground that the taxes were not fairly apportioned. But cf. the following cases, which involve apportioned franchise or privilege taxes measured by a standard other than gross receipts: *Ozark Pipe Line Corp.* v. *Monier,* 266 U. S. 555; *Alpha Portland Cement Co.* v. *Massachusetts,* 268 U. S. 203; cf. *Anglo-Chilean Nitrate Sales Corp.* v. *Alabama,* 288 U. S. 218.

jection to the tax.[9] The tax does not discriminate against interstate commerce in favor of competing intrastate commerce of like character.[10] The nature of the subject of taxation makes apportionment unnecessary; there is no attempt to tax interstate activity carried on outside Mississippi's borders. No other state can repeat the tax.[11] For these reasons the commerce clause does not invalidate this tax.

The judgment is

*Affirmed.*

MR. JUSTICE BURTON, concurring.

I join in the judgment of affirmance announced by the Court but do not join in the opinion rendered in support of it.

I concur in the judgment solely on the ground that the tax imposed by the State of Mississippi was a tax on the privilege of operating a pipe line for transporting oil in Mississippi in intrastate commerce and that, as such, it was a valid tax. The Supreme Court of Mississippi, in the case below, 203 Miss. 715, 35 So. 2d 73, held that this tax had been authorized by a statute of that State, Miss. Code Ann. §§ 10105, 10109 (1942), and, for the reasons stated by that court, I believe that neither the statute nor the application of the tax in the present instance violated the Constitution of the United States.

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[9] *Nippert* v. *Richmond*, 327 U. S. 416, 423–424; *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435, 444–445; separate opinion in *International Harvester Co.* v. *Dept. of Treasury*, 322 U. S. 340, 352–353; concurring opinion in *Freeman* v. *Hewit*, 329 U. S. 249, 271; concurring opinion in *Memphis Gas Co.* v. *Stone*, 335 U. S. 80, 96.

[10] *Best & Co.* v. *Maxwell*, 311 U. S. 454; *Hale* v. *Bimco Trading Co.*, 306 U. S. 375; *Guy* v. *Baltimore*, 100 U. S. 434.

[11] Cf. *Gwin, White & Prince* v. *Henneford*, 305 U. S. 434, 439–440; *Adams Mfg. Co.* v. *Storen*, 304 U. S. 307, 311–312; *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250, 255–257.

On that basis, there is no issue here as to the validity of a tax upon the privilege of transporting oil in Mississippi in interstate commerce.

MR. JUSTICE REED, with whom THE CHIEF JUSTICE, MR. JUSTICE FRANKFURTER and MR. JUSTICE JACKSON join, dissenting.

Mississippi's effort to collect a privilege tax from this appellant for "operating a pipe line" is upheld by this Court through two separately expressed theories. One, that the activities taxed are wholly intrastate; and the other, that even though the privilege taxed is for the carrying on of wholly interstate operations, such a privilege tax is permissible. As each theory may have effect far beyond this particular case, we think it advisable to state the reasons for our disagreement with both.

The tax which Mississippi demanded, and which appellant is now trying to recover, was computed only upon appellant's receipts as a common carrier for transporting oil from the lease tanks to the railroad loading platforms within the state. The Supreme Court of Mississippi upheld this tax on the ground that the activity producing the receipts was intra- rather than interstate commerce. At one point in its opinion, the Supreme Court of Mississippi said that the tax "had been collected for the privilege of operating the pumping machinery and other pipe line equipment in the transportation of oil in the manner hereinbefore set forth . . . ." *Interstate Oil Pipe Line Co.* v. *Stone,* 203 Miss. 715, 723, 35 So. 2d 73, 75. See an opinion of three members of this Court in *Memphis Natural Gas Co.* v. *Stone,* 335 U. S. 80. The section here in question gives no indication of such a purpose. It thus differs widely from the statute under consideration in the *Memphis* case with its definition of "doing business." See *Stone* v. *Memphis Natural Gas Co.,* 201 Miss. 670, 674–675, 29 So. 2d 268, 270. Since this statute did

not apply to pipe lines reaching across the state line, we conclude that the State Supreme Court did not mean by these words to indicate that the privilege tax of § 10109 for "operating a pipe line" was for the privilege of operating pumping machinery or other equipment as incidents apart from the flow of the interstate commerce. Cf. *Coverdale* v. *Pipe Line Co.*, 303 U. S. 604. Such an interpretation would be inconsistent with the nonliability for the tax of pipe lines, admittedly doing an interstate business. The tax, it said, was "merely on the privilege of operating a pipe line wholly within this State as a local activity. . . . a tax on the privilege of doing an intrastate business, and measured by a percent of gross income as a matter of convenience." 203 Miss. at 732, 35 So. 2d at 81. The opinion emphasizes that in the view of the state court it is the intrastate character of the transportation that makes it permissible to charge the appellant a tax for the privilege of "engaging . . . in the business of operating a pipe line." Miss. Code, 1942, Ann. (1948 Cum. Supp.) § 10109.[1] It considered taxability of the transportation in the light of *Coe* v. *Errol,* 116 U. S. 517, and *Champlain Co.* v. *Brattleboro,* 260 U. S. 366.

*First.* From the facts, §§ 10105 and 10109 of the statute, and the opinion of the Supreme Court of Mississippi, we believe that this statute was determined by the state to impose a privilege tax for carrying on the intrastate business of common carrier of oil in Mississippi and that

[1] "Hence, the statute was designed only for the purpose of taxing the privilege of operating a pipe line for transporting the oil from one point to another in the State where it is then delivered to an interstate carrier prior to the beginning of its ultimate passage to a foreign state in interstate commerce. Most assuredly, no pipe line company would be deemed justified in installing an oil gathering system to transport oil other than that destined for ultimate interstate shipment, there being no oil refineries here." 203 Miss. at 729, 35 So. 2d at 77.

the amount of that privilege tax was to be determined by a measure—two percent of the gross income—of that intrastate business. Mississippi's interpretation of the meaning of its statute is binding on this Court.[2] A federal question at once emerges—whether the shipment of the oil from the gathering point to the railroad loading racks, both points being in Mississippi, is intra- or interstate transportation. This we decide for ourselves from the undisputed facts in this record.[3] Our first inquiry then must be as to whether the transportation of this oil, wholly within Mississippi from origin to railroad loading racks, is in interstate or intrastate commerce.[4]

In the absence of a rule written into the Constitution or enacted by Congress to determine what transportation is interstate and what intrastate, the courts have been required to determine the character of the transportation, case by case, as it became necessary to reach a judicial conclusion. It was decided years ago in *The Daniel Ball,* 10 Wall. 557, as to navigation on a waterway within a single state, disconnected from any other transportation system leading to or from other states, that the carriage of freight destined for or received from places outside the state of navigation was interstate commerce and made

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[2] *Southern Gas Corp.* v. *Alabama,* 301 U. S. 148, 153; cf. *Aero Transit Co.* v. *Comm'rs,* 332 U. S. 495, 499. Such determination may be rejected only if a palpable evasion for avoiding a contrary ruling under federal law. *Union Pac. R. Co.* v. *Public Service Comm'n,* 248 U. S. 67; *Appleby* v. *City of New York,* 271 U. S. 364, 379; *Drivers Union* v. *Meadowmoor Dairies,* 312 U. S. 287, 294.

[3] *Southern Gas Corp.* v. *Alabama, supra,* at 154; *Hooven & Allison Co.* v. *Evatt,* 324 U. S. 652, 658. See *Caldarola* v. *Eckert,* 332 U. S. 155, 158; *Standard Oil Co.* v. *Johnson,* 316 U. S. 481, 483.

[4] There is no problem as to any differentiation between "in" commerce or "affecting" commerce. Mississippi has decided that the statute applies only to transportation "in" intrastate commerce. 203 Miss. at 715, 35 So. 2d 73. Cf. *Schechter Corp.* v. *United States,* 295 U. S. 495, 542; *McLeod* v. *Threlkeld,* 319 U. S. 491.

the boat subject to regulation by Congress.[5] The wording of a judicial declaration of the precise line that marks the change from intrastate movement to interstate movement has been difficult. In *Coe* v. *Errol,* 116 U. S. 517, a case that dealt with the taxability by New Hampshire of logs moved from her forests to a place of shipment in readiness for out-of-state transportation at the convenience of the owner, this Court held the logs taxable. The theory was that the first movement was preliminary to the interstate transportation,[6] because of the deliberate

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[5] "So far as she was employed in transporting goods destined for other States, or goods brought from without the limits of Michigan and destined to places within that State, she was engaged in commerce between the States, and however limited that commerce may have been, she was, so far as it went, subject to the legislation of Congress. She was employed as an instrument of that commerce; for whenever a commodity has begun to move as an article of trade from one State to another, commerce in that commodity between the States has commenced. The fact that several different and independent agencies are employed in transporting the commodity, some acting entirely in one State, and some acting through two or more States, does in no respect affect the character of the transaction." 10 Wall. at 565.

[6] "What we have already said, however, in relation to the products of a State intended for exportation to another State will indicate the view which seems to us the sound one on that subject, namely, that such goods do not cease to be part of the general mass of property in the State, subject, as such, to its jurisdiction, and to taxation in the usual way, until they have been shipped, or entered with a common carrier for transportation to another State, or have been started upon such transportation in a continuous route or journey. . . . But this movement does not begin until the articles have been shipped or started for transportation from the one State to the other. The carrying of them in carts or other vehicles, or even floating them, to the depôt where the journey is to commence is no part of that journey. That is all preliminary work, performed for the purpose of putting the property in a state of preparation and readiness for transportation. Until actually launched on its way to another State, or committed to a common carrier for transportation

detention to await a suitable time for shipment across a state line. *Kelley* v. *Rhoads,* 188 U. S. 1, 6. But where there was no intentional delay, only the use of a "harbor of refuge," the interstate transportation by flotage began when the logs were put into the water. *Champlain Co.* v. *Brattleboro,* 260 U. S. 366.[7] Incidental dealings with the moving commodity do not break the interstate journey.[8] Recently we have considered the effect of "split" means of transportation as to whether the transportation was interstate. *United States* v. *Capital Transit Co.,* 325 U. S. 357, 363. There a traveler went from the District

to such State, its destination is not fixed and certain. It may be sold or otherwise disposed of within the State, and never put in course of transportation out of the State. Carrying it from the farm, or the forest, to the depôt, is only an interior movement of the property, entirely within the State, for the purpose, it is true, but only for the purpose, of putting it into a course of exportation; it is no part of the exportation itself. Until shipped or started on its final journey out of the State its exportation is a matter altogether *in fieri,* and not at all a fixed and certain thing." 116 U. S. at 527–28.

[7] "The interstate commerce clause of the Constitution does not give immunity to movable property from local taxation which is not discriminative, unless it is in actual continuous transit in interstate commerce. When it is shipped by a common carrier from one State to another, in the course of such an uninterrupted journey it is clearly immune. The doubt arises when there are interruptions in the journey and when the property in its transportation is under the complete control of the owner during the passage. If the interruptions are only to promote the safe or convenient transit, then the continuity of the interstate trip is not broken. . . . In other words, in such cases interstate continuity of transit is to be determined by a consideration of the various factors of the situation. Chief among these are the intention of the owner, the control he retains to change destination, the agency by which the transit is effected, the actual continuity of the transportation, and the occasion or purpose of the interruption during which the tax is sought to be levied." 260 U. S. at 376–77.

[8] *State Tax Comm'n* v. *Gas Co.,* 284 U. S. 41, 43 (reduction of pressure and metering gas).

of Columbia via streetcar or bus to a bus terminal and from there by a different bus to nearby Virginia. We held this to be interstate transportation.[9]

Comment should be made as to several precedents that might be thought contrary to the rather definite line marking the beginning of interstate commerce that appears in the above cases. These are the so-called casual or incidental movements of transportation wholly within a single state immediately preceding or following recognized interstate transportation. They were referred to in *Coe* v. *Errol, supra,* as haulage preliminary to consignment to interstate carriers. This involves the vehicles that carry passengers or freight to or from terminals in their interstate movement.[10] An interstate journey

[9] "As previously pointed out, twice a day more than 15,000 government employees traveled between the Virginia agencies and their homes via one of the four bus systems. Most of them either went to or from these bus terminals from or to their homes over any of Transit's then available buses or streetcars. Their travel was at certain hours each day, at which special rush hour buses and cars were made available for their carriage. Their interstate journey to work actually began at the time they boarded a Transit bus or streetcar near their home, and actually ended when they alighted from the Virginia-going bus at their place of work. On returning from work their interstate journey actually began when they boarded a bus near their work and actually ended when they alighted from a Transit streetcar or bus near their home. True, their interstate trip was broken at the District termini of the Virginia buses, when they stepped from one vehicle to another. But in the commonly accepted sense of the transportation concept, their entire trip was interstate. . . . And the fact that, except as to Transit, they paid a combination of two rates, one for travel wholly within the District, and the other for travel between the District and Virginia, and the journey from their residences to Virginia and back again was taken in two segments, does not mean that the total interstate trip was not on a 'through route.'" 325 U. S. at 363.

[10] *Interstate Commerce Comm'n* v. *Detroit, Grand Haven & Milwaukee R. Co.,* 167 U. S. 633; *Pennsylvania R. Co.* v. *Knight,* 192 U. S. 21; *United States* v. *Yellow Cab Co.,* 332 U. S. 218.

must have a beginning and an end. Common sense rejects an extension of the journey to the traveler's front door or the producer's farm or factory when no through order for carriage is in effect. The exact limits of interstate commerce in such fringe situations are uncertain.[11]

We are of the view, however, that the reach of interstate commerce goes to the delivery to Interstate, a common carrier, of the oil by the producer with his tender of shipment. That offer, when accepted, by its form is an order covering the amount of oil, origin and out-of-state destination, and the route and tariff under which shipment is made. The commodity has been placed in the stream of commerce and will cross state lines in the regular course of business. We have held that shipping instructions, given to a freight conductor on a common carrier prior to any movement, put a car into interstate commerce [12] when the instructions were for shipment to an out-of-state destination after a preliminary transit between points in the state of loading. When a shipper delivers his commodity to a common carrier with instructions for billing by such carrier without purposeful delay via another or other common carriers to an out-of-state destination, we think interstate commerce has begun. Such an application of the commerce clause to transporta-

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[11] *United States* v. *Yellow Cab Co., supra,* at 232–33; *Interstate Commerce Comm'n* v. *Parker,* 326 U. S. 60, 71, note 6.

[12] *Philadelphia & Reading R. Co.* v. *Hancock,* 253 U. S. 284, 285: "The duties of the deceased never took him out of Pennsylvania; they related solely to transporting coal from the mines. When injured he belonged to a crew operating a train of loaded cars from Locust Gap Colliery to Locust Summit Yard, two miles away. The ultimate destination of some of these cars was outside of Pennsylvania. This appeared from instruction cards or memoranda delivered to the conductor by the shipping clerk at the mine. Each of these referred to a particular car by number and contained certain code letters indicating that such car with its load would move beyond the State."

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tion accords with that given to regulation of other phases of interstate commerce.[13] The absence of a through bill of lading is not significant. It is true that the shipment might be diverted to an intrastate destination without crossing a state line but that cannot change the character of the commerce until such diversion order is given. The movement in commerce has begun by the order and the delivery and continues until the commodity is restored to the mass of property within a state by the termination of the transportation. See *Joy Oil Co.* v. *State Tax Commission,* 337 U. S. 286.

*Second.* Mississippi determined that this tax was a privilege tax for carrying on the intrastate business of common carrier of oil in Mississippi, measured by a percentage of the income from that business. The preceding subdivision of this opinion expounds the arguments for our conclusion that all the business of appellant in operating a pipe line for transporting oil committed to move out-of-state from one point to another in Mississippi is interstate transportation. The statute in question was interpreted by Mississippi as laying a tax solely upon that business of transporting oil, not upon the "local activities of 'maintaining, keeping in repair, and otherwise in manning the facilities'" such as are discussed in the opinions in the undecisive case of *Memphis Gas Co.* v. *Stone,* 335 U. S. 80, at 92–93.

An opinion has been filed in this case, asserting that the Mississippi tax could be collected from the petitioner notwithstanding that its entire business is interstate commerce. With that conclusion we disagree.

Since appellant does only an interstate transportation business, the privilege tax exacted by Mississippi is actually a privilege tax for carrying on the interstate busi-

[13] *Dahnke-Walker Co.* v. *Bondurant,* 257 U. S. 282; *Lemke* v. *Farmers Grain Co.,* 258 U. S. 50; *Walling* v. *Jacksonville Paper Co.,* 317 U. S. 564, 567.

ness of common carrier of oil, measured by a percentage of the gross income from that business, apportioned so as to include only income derived from that portion of the interstate commerce carried on wholly in Mississippi. The gross receipts from interstate commerce are the costs of carriage from point of origin—the field tanks—to the point of destination—the out-of-state refinery. As only that portion of the costs covering the carriage from origin to pipe-line loading racks, both points in Mississippi, is used to measure the privilege tax, it is clear that the interstate gross receipts are apportioned to carriage wholly within the state. Our issue at this point is whether a privilege tax for carrying on a wholly interstate transportation business measured by a fairly apportioned part of gross receipts for carriage in interstate commerce is constitutionally permissible.

Phrased in terms of a privilege for carrying on an interstate business, such a tax historically has been deemed unconstitutional. The cases abound in statements to the effect that the privilege of carrying on interstate commerce itself is immune from state taxation. This is because it is a privilege beyond the power of a state to grant. ". . . it is a right which every citizen of the United States [and every corporation] is entitled to exercise under the Constitution and laws of the United States; . . . ." *Crutcher* v. *Kentucky,* 141 U. S. 47, 57; *International Textbook Co.* v. *Pigg,* 217 U. S. 91. The cases hold not only that a state may not exact a tax as a condition precedent to the doing of interstate business, but also that it may not levy privilege, excise or franchise taxes on a foreign corporation for the privilege of carrying on or the actual doing of solely interstate business after its admission to the state.[14] *Ozark Pipe Line Corp.* v.

[14] Since we perceive no difference for the purposes of this case between franchise, privilege, and excise taxes, insofar as they are exacted for the privilege of doing or the doing of interstate business,

*Monier,* 266 U. S. 555; *Alpha Portland Cement Co.* v. *Massachusetts,* 268 U. S. 203. Cf. *Anglo-Chilean Nitrate Sales Corp.* v. *Alabama,* 288 U. S. 218, in the light of *Southern Gas Corp.* v. *Alabama,* 301 U. S. 148, 153.[15] The decisions in these cases were reached in spite of the fact that in each of them the tax sought to be levied was fairly measured according to the connections of the corporate taxpayer with the state. Thus in *Ozark* the tax was measured by a percentage of the capital stock and surplus of the corporation employed in business in the state, that proportion being deemed employed within the state "that its property and assets in this State bears to all its property and assets wherever located"; in *Alpha* by a percentage of the value of the "corporate excess" employed within the commonwealth (determined as in *Ozark*) and a percentage of "that part of its net income . . . which is derived from business carried on within the Commonwealth" (also determined as in *Ozark*); in *Anglo-Chilean* by a percentage of capital employed in the state.

A recent pronouncement of this Court has recognized this limitation on state power. In *Aero Transit Co.* v. *Comm'rs,* 332 U. S. 495, we upheld a tax on motor carriers only after stressing the fact that the tax was "affirmatively laid for the privilege of using the state's highways" and was not imposed upon "the privilege of doing the interstate business." P. 504. See *Memphis Natural Gas Co.*

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we have treated them as identical as far as their validity under the commerce clause is concerned. In *Ozark* and *Anglo-Chilean Nitrate* the taxes were called franchise taxes; in *Alpha* it was labeled an excise tax.

[15] See the discussion of these cases in the opinion of REED, J., in *Memphis Gas Co.* v. *Stone,* 335 U. S. 80. See also *New York ex rel. Pennsylvania R. Co.* v. *Knight,* 192 U. S. 21, 26; *State Tax Comm'n* v. *Interstate Natural Gas Co.,* 284 U. S. 41, 43.

v. *Stone,* 335 U. S. 80, 88, note 10. Where the corporate taxpayer conducts intrastate as well as interstate business, a franchise privilege or excise tax on the former is of course permissible.[16] We have frequently upheld such a tax although it was measured by property or receipts which were used in or attributable to interstate business.[17]

The growth of commerce that is carried on in more than one state has brought responsibilities to states other than the one in which the commerce may be said to have originated. Producers, either directly or through middlemen and independent dealers, distribute natural resources, agricultural and manufactured products on a nation-wide scale. Transportation runs across state lines. All states are called upon to give governmental services for this commerce—service that costs and should be paid for by those who profit from its maintenance. In the absence of congressional direction as to the taxation of interstate commerce, this Court has interpreted the commerce clause to permit state nondiscriminatory taxation, for the use of state facilities, upon the property used in interstate commerce, upon production for commerce and upon net proceeds therefrom. Through such taxes, the states may exact payment for their protection and encouragement of commerce. *Joseph* v. *Carter & Weekes Co.,* 330 U. S. 422, 429, and cases cited. We have upheld a tax on gross receipts from interstate transportation

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[16] *Memphis Natural Gas Co.* v. *Beeler,* 315 U. S. 649; *Ford Motor Co.* v. *Beauchamp,* 308 U. S. 331; *Atlantic Refining Co.* v. *Virginia,* 302 U. S. 22; *Southern Natural Gas Corp.* v. *Alabama,* 301 U. S. 148; *Pacific Tel. Co.* v. *Tax Comm'n,* 297 U. S. 403; see collection of cases 105 A. L. R. 11, 36–56.

[17] *International Harvester Co.* v. *Evatt,* 329 U. S. 416; *Atlantic Lumber Co.* v. *Comm'r,* 298 U. S. 553; *Matson Nav. Co.* v. *State Bd. of Equalization,* 297 U. S. 441.

"when apportioned as to the mileage within the State." *Greyhound Lines* v. *Mealey*, 334 U. S. 653, 663.[18]

Notwithstanding the wide latitude for taxation of incidents connected with interstate commerce, see *Memphis Gas Co.* v. *Stone*, 335 U. S. 80, this Court has never interpreted the commerce clause to allow a state tax for the privilege of carrying on interstate commerce or one upon that commerce itself. *Joseph* v. *Carter & Weekes Co.*, 330 U. S. 422. This is not because of the financial burden. Other taxes may equally burden the commerce. It is not because in transportation the same result cannot be obtained by levying a tax for intrastate activities measured by gross receipts appropriately apportioned to the activities in the state. It is because the commerce clause of the Constitution does not leave to the states any power to permit or refuse the carrying on of interstate commerce. It likewise bars a state from taxing the privilege of doing interstate commerce or the doing of interstate commerce, with or without fair apportionment even if not discriminatory.

*Maine* v. *Grand Trunk R. Co.*, commented upon in note 18, is inapposite to the taxation here attempted by Mississippi. Interstate did a wholly interstate business. *Grand Trunk*, concerning a tax on the privilege of exercis-

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[18] This decision followed a prolonged controversy over the taxability of the proceeds of interstate commerce. *Maine* v. *Grand Trunk R. Co.*, 142 U. S. 217, has been cited for the same proposition, see e. g., *Adams Mfg. Co.* v. *Storen*, 304 U. S. 307, 329, although there is in the report of the case, p. 218, § 2 of the Act there in question, support for Mr. Justice Holmes' treatment of it in *Galveston, H. & S. A. R. Co.* v. *Texas*, 210 U. S. 217, 226, as a tax in lieu of ad valorem taxes. See *Joseph* v. *Carter & Weekes Co.*, 330 U. S. 422, at 427, notes 5, 6 and 7, and cases cited. *Western Live Stock* v. *Bureau*, 303 U. S. 250, 255. Powell, More Ado about Gross Receipts Taxes, 60 Harv. L. Rev. 501, 710, 747, *et seq.*; Dunham, Gross Receipts Taxes on Interstate Transactions, 47 Col. L. Rev. 211, 220 *et seq.*

ing a franchise in Maine, can only be reconciled with the later cases commented upon at note 15 if Grand Trunk did an intrastate as well as an interstate business. A state franchise tax for that is permissible. See notes 16 and 17, *supra.* The method of apportionment employed in the *Grand Trunk* case has had approval as recently as the *Greyhound* case, 334 U. S. at 663. There was no approval of *Grand Trunk* in *Greyhound* as a precedent for a tax on the privilege of doing an interstate business. See p. 658.

Control of interstate commerce passed into the hands of Congress and thus welded the Federation into a Nation. So long as states are forbidden to impose taxes upon interstate commerce or for the privilege of carrying it on, a toll cannot be exacted from interstate commerce even if a similar tax is borne by local commerce. So, interstate commerce is not susceptible to taxation, as such, and thus has been protected against exactions aimed at it, no matter how nondiscriminatory. It may be taxed only under enactments which likewise tax intrastate commerce for like intrastate activities. It gets no advantage over intrastate commerce from anything furnished by the state and pays the state nothing for what the state doesn't possess, that is, the power to allow interstate business within its borders.

All interstate commerce thus has free access to local markets, subject only to nondiscriminatory taxes such as the tax on apportioned gross receipts from intrastate mileage as in *Central Greyhound Lines* v. *Mealey, supra,* or the tax on disconnected local incidents as discussed in the opinions in *Memphis Gas Co.* v. *Stone, supra,* or in *International Harvester Co.* v. *Evatt, supra,* or *American Manufacturing Co.* v. *St. Louis,* 250 U. S. 459. So long as a tax on the privilege of doing interstate business or a tax on the doing of that business is prohibited, interstate commerce remains free from state exactions levied

on that commerce. Yet that commerce must bear, like intrastate commerce, the cost of those facilities or protections, apart from the interstate commerce itself, which the state furnishes or allows within its borders. Such has been and is the freedom that the commerce clause grants to those engaged in commerce between the states.

The judgment should be reversed.

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## LARSON, WAR ASSETS ADMINISTRATOR AND SURPLUS PROPERTY ADMINISTRATOR, *v.* DOMESTIC AND FOREIGN COMMERCE CORP.

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

No. 31. Argued November 12, 1948.—Decided June 27, 1949.

1. Plaintiff, a private corporation, brought suit in a Federal District Court against the Administrator of the War Assets Administration, an agency of the United States, in his official capacity. The complaint alleged that the Administration had sold certain surplus coal to the plaintiff, but had refused to deliver it and had made a new contract to sell it to others. The prayer was for an injunction prohibiting the Administrator, his agents and all persons acting under their direction, from selling or delivering the coal to anyone other than the plaintiff and for a declaration that the sale to the plaintiff was valid and the sale to the second purchaser invalid. There was no allegation that the contract of sale was with the Administrator personally, no allegation of any statutory limitation on his powers as a sales agent, and no claim that his action constituted an unconstitutional taking of property. *Held:* The suit was one against the United States and, in the absence of consent by the United States, the District Court was without jurisdiction. Pp. 684–705.
2. In determining whether a suit nominally against an officer is against the officer individually or against the sovereign, the crucial question is whether the relief sought is relief against the sovereign. Pp. 687–688.

3. If the actions of an officer do not conflict with the terms of his valid statutory authority, then they are actions of the sovereign, whether or not they are tortious under general law, if they would be regarded as the actions of a private principal under the normal rules of agency. A government officer is not thereby necessarily immunized from liability, if his action is such that liability would be imposed by the general law of torts. But the action itself cannot be enjoined or directed, since it is also the action of the sovereign. *United States* v. *Lee,* 106 U. S. 196, distinguished. Pp. 689–697.
4. The action of an officer of the sovereign (be it holding, taking or otherwise legally affecting a plaintiff's property) can be regarded as so "illegal" as to permit a suit for specific relief against the officer as an individual only if it is not within the officer's statutory powers or, if within those powers, only if the powers, or their exercise in the particular case, are constitutionally void. *Goldberg* v. *Daniels,* 231 U. S. 218, followed; *Goltra* v. *Weeks,* 271 U. S. 536, discussed. Pp. 697–702.
5. Since the very basis of plaintiff's action is that the Administrator was authorized to enter into a binding contract to sell the Government's coal, there is no allegation of any statutory limitation on his authority, as sales agent, to deliver only when he believed he was required to do so under the contract, and there is no claim that his action in refusing to deliver constituted an unconstitutional taking of plaintiff's property, the Administrator's action in so refusing was that of the United States and the effort to enjoin it must fail as an effort to enjoin the United States. P. 703.
6. In the absence of a claim of constitutional limitation, the necessity of permitting the Government to carry out its functions unhampered by direct judicial intervention outweighs the possible disadvantage to the citizen in being relegated to the recovery of money damages after the event. Pp. 703–704.
7. It is not for this Court to examine the necessity of immunity of the particular Government agency involved, since that is a function of the Congress. Pp. 704–705.

83 U. S. App. D. C. 13, 165 F. 2d 235, reversed.

A suit against the Administrator of the War Assets Administration was dismissed by the District Court, for want of jurisdiction, as a suit against the United States.

The Court of Appeals reversed. 83 U. S. App. D. C. 13, 165 F. 2d 235. This Court granted certiorari, and Larson was substituted for Littlejohn as the party petitioner. 333 U. S. 872. *Reversed,* p. 705.

*Assistant Attorney General Morison* argued the cause for petitioner. With him on the brief were *Solicitor General Perlman, Paul A. Sweeney* and *Oscar H. Davis.*

*T. Peter Ansberry* argued the cause for respondent. With him on the brief were *Stephen J. McMahon, Jr.* and *Seth W. Richardson.*

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

This suit was brought in the United States District Court for the District of Columbia by the Domestic & Foreign Commerce Corporation against Robert M. Littlejohn, the then head of the War Assets Administration.[1] The complaint alleged that the Administration had sold certain surplus coal to the plaintiff; that the Administrator refused to deliver the coal but, on the contrary, had entered into a new contract to sell it to others. The prayer was for an injunction prohibiting the Administrator from selling or delivering the coal to anyone other than the plaintiff and for a declaration that the sale to the plaintiff was valid and the sale to the second purchaser invalid.

A temporary restraining order was issued *ex parte.* At the subsequent hearing on the issuance of a preliminary injunction, the defendant moved to dismiss the complaint on the ground, among others, that the court did not have jurisdiction because the suit was one against the United

[1] Littlejohn resigned on November 28, 1947. On April 19, 1948, we granted the Government's motion to substitute his successor, Jess Larson, as petitioner here.

States. The motion was granted. The Court of Appeals reversed, holding that the jurisdictional capacity of the court depended on whether or not title to the coal had passed.[2] Since this was also one of the questions on the merits, it remanded the case for trial. We granted certiorari.[3] 333 U. S. 872.

The controversy on the merits concerns the interpretation to be given to the contract of sale. The War Assets Administration construed the contract as requiring the plaintiff to deposit funds to pay for the coal in advance and, when an unsatisfactory letter of credit was offered in place of a deposit, it considered that the contract was breached. The respondent, on the other hand, construed the contract as requiring payment only on delivery of the documents covering the coal shipment. In its view, it was not obliged to deposit any funds in advance of shipment and, therefore, had not breached the contract by failing to do so.

A second question, related to but different from the question of breach, was whether legal title to the coal had passed to the respondent when the contract was made. If the contract required the deposit of funds then, of course, title could not pass until the contract terms were complied with. If, on the other hand, the contract required payment only on the delivery of documents, a question remained as to whether title nevertheless passed at the time the contract was made.

Since these questions were not decided by the courts below we do not pass on them here. They are important only insofar as they illuminate the basis on which it

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[2] 165 F. 2d 235 (1947).

[3] The judgment of the Court of Appeals was not a final one, but we considered it appropriate for review here since, in our view, the jurisdictional issue was "fundamental to the further conduct of the case." See *Land* v. *Dollar,* 330 U. S. 731, 734 (1947).

was claimed that the district court had jurisdiction over the suit. It was not alleged that the contract for the sale of the coal was a contract with the officer personally.[4] The basis of the action, on the contrary, was that a contract had been entered into with the United States. Nor was it claimed that the Administrator had any personal interest in this coal or, indeed, that he himself had taken any wrongful action. The complaint was directed against him because of his official function as chief of the War Assets Administration.[5] It asked for an injunction against him in that capacity, and against "his agents, assistants, deputies and employees and all persons acting or assuming to act under their direction." The relief sought was, in short, relief against the Administration for wrongs allegedly committed by subordinate officials in that Administration. The question presented to the courts below was whether such an injunction was barred by the sovereign's immunity from suit.

Before answering that question it is perhaps advisable to state clearly what is and what is not involved. There is not involved any question of the immunization of Government officers against responsibility for their wrongful actions. If those actions are such as to create a personal liability, whether sounding in tort or in contract, the fact that the officer is an instrumentality of the sovereign does not, of course, forbid a court from taking jurisdiction over a suit against him. *Sloan Shipyards* v. *U. S. Fleet Corp.*, 258 U. S. 549, 567 (1922). As was said in *Brady*

[4] Cf. *Sloan Shipyards* v. *U. S. Fleet Corp.*, 258 U. S. 549 (1922), where the question was whether a corporate agency of the United States could be sued where it, not the United States, was the contractor.

[5] For this reason, there obviously was no objection to the substitution in this Court of the present Administrator for his predecessor, although all the actions complained of in the complaint were taken during the predecessor's administration.

v. *Roosevelt S. S. Co.*, 317 U. S. 575, 580 (1943), the principle that an agent is liable for his own torts "is an ancient one and applies even to certain acts of public officers or public instrumentalities." But the existence of a right to sue the officer is not the issue in this case. The issue here is whether this particular suit is not also, in effect, a suit against the sovereign. If it is, it must fail, whether or not the officer might otherwise be suable.

If the denomination of the party defendant by the plaintiff were the sole test of whether a suit was against the officer individually or against his principal, the sovereign, our task would be easy. Our decision then would be that the United States is not being sued here because it is not named as a party. This would be simple and would not leave room for controversy. But controversy there has been, in this field above all others, because it has long been established that the crucial question is whether the relief sought in a suit nominally addressed to the officer is relief against the sovereign.[6] In a suit against the officer to recover damages for the agent's personal actions, that question is easily answered. The judgment sought will not require action by the sovereign or disturb the sovereign's property. There is, therefore, no jurisdictional difficulty.[7] The question becomes difficult

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[6] *In re Ayers*, 123 U. S. 443 (1887). As was said in *Minnesota* v. *Hitchcock*, 185 U. S. 373, 387 (1902): ". . . whether a suit is one against a State is to be determined, not by the fact of the party named as defendant on the record, but by the result of the judgment or decree which may be entered . . . ."

[7] There are, of course, limitations on the right to recover damages from public officers. See *Gibson* v. *Reynolds*, 172 F. 2d 95 (1949); *Glass* v. *Ickes*, 117 F. 2d 273 (1940); Harper, *Law of Torts* (1933) § 298. These limitations are matters of substantive law, applicable in suits indubitably addressed to the officer, not the sovereign. They are not necessarily coincidental with the limitations on the court's jurisdiction to hear a suit directed against the sovereign. See Jen-

and the area of controversy is entered when the suit is not one for damages but for specific relief: *i. e.*, the recovery of specific property or monies, ejectment from land, or injunction either directing or restraining the defendant officer's actions. In each such case the question is directly posed as to whether, by obtaining relief against the officer, relief will not, in effect, be obtained against the sovereign. For the sovereign can act only through agents and, when an agent's actions are restrained, the sovereign itself may, through him, be restrained. As indicated, this question does not arise because of any distinction between law and equity. It arises whenever suit is brought against an officer of the sovereign in which the relief sought from him is not compensation for an alleged wrong but, rather, the prevention or discontinuance, *in rem*, of the wrong. In each such case the compulsion, which the court is asked to impose, may be compulsion against the sovereign, although nominally directed against the individual officer. If it is, then the suit is barred, not because it is a suit against an officer of the Government, but because it is, in substance, a suit against the Government over which the court, in the absence of consent, has no jurisdiction.

The relief sought in this case was not the payment of damages by the individual defendant.[8] To the contrary,

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nings, *Tort Liability of Administrative Officers*, 21 Minn. L. Rev. 263 (1937), and note the differing treatment accorded the claim for compensation and the claim for specific relief in *Belknap* v. *Schild*, 161 U. S. 10, 27 (1896).

[8] Whether such relief is obtainable from any Government officer on the basis of the facts set out in the complaint is, as stated, not the question here. But it may seriously be doubted whether damages could, in any event, be recovered from Jess Larson, the present War Assets Administrator, or from his predecessor, Robert M. Littlejohn. The complaint did not charge them with any personal wrongdoing nor even with knowledge of the alleged wrongdoing of their subordinates. Cf. *Robertson* v. *Sichel*, 127 U. S. 507, 515–516 (1888). Since the

it was asked that the court order the War Assets Administrator, his agents, assistants, deputies and employees and all persons acting under their direction, not to sell the coal involved and not to deliver it to anyone other than the respondent.[9] The district court held that this was relief against the sovereign and therefore dismissed the suit. We agree.

There may be, of course, suits for specific relief against officers of the sovereign which are not suits against the sovereign. If the officer purports to act as an individual and not as an official, a suit directed against that action is not a suit against the sovereign. If the War Assets Administrator had completed a sale of his personal home, he presumably could be enjoined from later conveying it to a third person. On a similar theory, where the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions. The officer is not doing the business which the sovereign has empowered him to do or he is doing it in a way which the sovereign has forbidden. His actions are *ultra vires* his authority and therefore may be made the object of specific relief. It is important to note

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complaint did not ask for damages but for specific relief, the Administrator, in his official capacity, was, of course, a proper party. Cf. *Williams* v. *Fanning,* 332 U. S. 490 (1947).

[9] The complaint also asked for declaratory relief even more clearly directed at the sovereign. It was asked that the court declare that "the sale of this coal . . . is still valid and in effect." The Administrator, an agent for a disclosed principal, was not a party to the contract of sale. See 2 Restatement, Agency (1933) § 320. The request for an adjudication of the validity of the sale was thus, even in form, a request for an adjudication against the sovereign. Such a declaration of the rights of the respondent *vis-à-vis* the United States would clearly have been beyond the court's jurisdiction. See *Stanley* v. *Schwalby,* 162 U. S. 255 (1896). We do not rest our conclusion here on the request for such a declaration, since the district court could have granted only the injunctive relief requested.

that in such cases the relief can be granted, without impleading the sovereign, only because of the officer's lack of delegated power. A claim of error in the exercise of that power is therefore not sufficient. And, since the jurisdiction of the court to hear the case may depend, as we have recently recognized,[10] upon the decision which it ultimately reaches on the merits, it is necessary that the plaintiff set out in his complaint the statutory limitation on which he relies.

A second type of case is that in which the statute or order conferring power upon the officer to take action in the sovereign's name is claimed to be unconstitutional. Actions for *habeas corpus* against a warden and injunctions against the threatened enforcement of unconstitutional statutes are familiar examples of this type. Here, too, the conduct against which specific relief is sought is beyond the officer's powers and is, therefore, not the conduct of the sovereign. The only difference is that in this case the power has been conferred in form but the grant is lacking in substance because of its constitutional invalidity.

These two types have frequently been recognized by this Court as the only ones in which a restraint may be obtained against the conduct of Government officials. The rule was stated by Mr. Justice Hughes in *Philadelphia Co.* v. *Stimson,* 223 U. S. 605, 620 (1912), where he said: ". . . in case of an injury threatened by his illegal action, the officer cannot claim immunity from injunction process. The principle has frequently been

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[10] *Land* v. *Dollar,* 330 U. S. 731, 739 (1947). Since jurisdiction in this type of case does rest on the decision on the merits there can be no question that dismissal of a suit in which "the alleged claim under the Constitution or federal statutes clearly appears to be . . . made solely for the purpose of obtaining jurisdiction or . . . is wholly insubstantial and frivolous" would be dismissal for lack of jurisdiction. See *Bell* v. *Hood,* 327 U. S. 678, 682–683 (1946).

applied with respect to state officers seeking to enforce unconstitutional enactments. [Citing cases.] And it is equally applicable to a Federal officer acting in excess of his authority or under an authority not validly conferred." [11]

It is not contended by the respondent that the present case falls within either of these categories. There was no claim made that the Administrator and his agents, etc., were acting unconstitutionally or pursuant to an unconstitutional grant of power. Nor was there any allegation of a limitation on the Administrator's delegated power to refuse shipment in cases in which he believed the United States was not obliged to deliver. There was, it is true, an allegation that the Administrator was acting "illegally," and that the refusal to deliver was "unauthorized." But these allegations were not based and did not purport to be based upon any lack of delegated power.[12] Nor could they be, since

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[11] Of course, a suit may fail, as one against the sovereign, even if it is claimed that the officer being sued has acted unconstitutionally or beyond his statutory powers, if the relief requested can not be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign or the disposition of unquestionably sovereign property. *North Carolina* v. *Temple,* 134 U. S. 22 (1890).

[12] This case must, therefore, be clearly distinguished from cases like *Noble* v. *Union River Logging R. Co.,* 147 U. S. 165 (1893). In that case, it was held that the officer being sued lacked power to refuse delivery because, under the statutory scheme, his predecessor's determination that the plaintiff was entitled to delivery was binding. A similar case would be presented here if the statute expressly provided that the Administrator's interpretations of contracts should be binding and irrevocable and if a later, or subordinate, official refused to follow a prior binding interpretation. In such a case the issue would not be the correctness or incorrectness of the later decision under general law but simply the power of the official, under the statute, to make a decision at all. Cf. *Ickes* v. *Fox,* 300 U. S. 82 (1937).

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the Administrator was empowered by the sovereign to administer a general sales program encompassing the negotiation of contracts, the shipment of goods and the receipt of payment. A normal concomitant of such powers, as a matter of general agency law, is the power to refuse delivery when, in the agent's view, delivery is not called for under a contract and the power to sell goods which the agent believes are still his principal's to sell.

The respondent's contention, which the Court of Appeals sustained, was that there exists a third category of cases in which the action of a Government official may be restrained or directed. If, says the respondent, an officer of the Government wrongly takes or holds specific property to which the plaintiff has title, then his taking or holding is a tort, and "illegal" as a matter of general law, whether or not it be within his delegated powers. He may therefore be sued individually to prevent the "illegal" taking or to recover the property "illegally" held.

If this is an adequate theory on which to rest the conclusion that the relief asked is not relief against the sovereign, then the respondent's complaint made out a sufficient basis for jurisdiction. The complaint alleged that the respondent's contract with the United States was an immediate contract of sale under which title to the coal had passed. The coal was thus alleged to be the respondent's coal, not the United States' coal. Retention of it by the Administrator after demand was claimed to be a conversion; sale to a third party would aggravate the conversion. Since these actions were tortious they were "illegal" in the respondent's sense and hence were contended to be individual actions, not properly taken on behalf of the United States, which could be enjoined without making the United States a party.

We believe the theory to be erroneous. It confuses the doctrine of sovereign immunity with the requirement

that a plaintiff state a cause of action. It is a prerequisite to the maintenance of any action for specific relief that the plaintiff claim an invasion of his legal rights, either past or threatened. He must, therefore, allege conduct which is "illegal" in the sense that the respondent suggests. If he does not, he has not stated a cause of action. This is true whether the conduct complained of is sovereign or individual. In a suit against an agency of the sovereign, as in any other suit, it is therefore necessary that the plaintiff claim an invasion of his recognized legal rights. If he does not do so, the suit must fail even if he alleges that the agent acted beyond statutory authority [13] or unconstitutionally.[14] But, in a suit against an agency of the sovereign, it is not sufficient that he make such a claim. Since the sovereign may not be sued, it must also appear that the action to be restrained or directed is not action of the sovereign. The mere allegation that the officer, acting officially, wrongfully holds property to which the plaintiff has title does not meet that requirement. True, it establishes a wrong to the plaintiff. But it does not establish that the officer, in committing that wrong, is not exercising the powers delegated to him by the sovereign. If he is exercising such powers, the action is the sovereign's and a suit to enjoin it may not be brought unless the sovereign has consented.

It is argued, however, that the commission of a tort cannot be authorized by the sovereign. Therefore, the argument goes, the allegation that a Government officer has acted or is threatening to act tortiously toward the plaintiff is sufficient to support the claim that he has acted beyond his delegated powers. It is on this contention that the respondent's position fundamentally rests, since it is admitted that, if the action to be prevented

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[13] *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, 125 (1940).

[14] *Tennessee Power Co.* v. *T. V. A.*, 306 U. S. 118, 137–139 (1939); *Mine Safety Co.* v. *Forrestal*, 326 U. S. 371 (1945).

or compelled is authorized by the sovereign, the demand for it must fail as a demand against the sovereign. It has been said, in a very special sense, that, as a matter of agency law, a principal may never lawfully authorize the commission of a tort by his agent. But that statement, in its usual context, is only a way of saying that an agent's liability for torts committed by him cannot be avoided by pleading the direction or authorization of his principal.[15] The agent is himself liable whether or not he has been authorized or even directed to commit the tort. This, of course, does not mean that the principal is not liable nor that the tortious action may not be regarded as the action of the principal. It does not mean, therefore, that the agent's action, because tortious, is, for that reason alone, *ultra vires* his authority. An argument to that effect was at one time advanced in connection with corporate agents, in an effort to avoid corporate liability for torts, but was decisively rejected.[16]

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[15] Thus the Court said in *Hopkins* v. *Clemson College*, 221 U. S. 636, 643 (1911) ". . . neither a State nor an individual can confer upon an agent authority to commit a tort *so as to excuse the perpetrator*." (Emphasis added.) See also 1 Mechem, *Agency* (2d ed., 1914) 1077.

[16] See *Philadelphia, Wilmington & Baltimore R. Co.* v. *Quigley*, 21 How. 202, 209–210 (1859); 10 Fletcher, *Cyclopedia Corporations* (1931) § 4877. The contention of the respondent in the present case is remarkably similar to that made, as regards corporate agents, in *Chestnut Hill Turnpike Co.* v. *Rutter*, 4 Serg. & R. 6 (Pa. 1818). The argument is reported as follows, *id.* at p. 9:

"Now, a corporation never was and never can be authorised by law to commit a tort; they can invest no one with power for that purpose. If, therefore, an agent constituted for a legal purpose, inflict an injury, the corporation is no more answerable, than it would be for an act of that agent, done without any authority whatever derived from it, because being unauthorised to commit a wrong, it is out of the scope of its corporate powers."

The argument was rejected by the Court. See also *Thayer* v. *Boston*, 19 Pick. 511, 515 (Mass. 1837).

There is, therefore, nothing in the law of agency which lends support to the contention that an officer's tortious action is *ipso facto* beyond his delegated powers. Nor, we think, is there anything in the doctrine of sovereign immunity which requires us to adopt such a view as regards Government agencies. If, of course, it is assumed that the basis of the doctrine of sovereign immunity is the thesis that the king can do no wrong, then it may be also assumed that if the king's agent does wrong that action cannot be the action of the king. It is on some such argument that the position of the respondent rests. It is argued that an officer given the power to make decisions is only given the power to make correct decisions. If his decisions are not correct, then his action based on those decisions is beyond his authority and not the action of the sovereign. There is no warrant for such a contention in cases in which the decision made by the officer does not relate to the terms of his statutory authority. Certainly the jurisdiction of a court to decide a case does not disappear if its decision on the merits is wrong. And we have heretofore rejected the argument that official action is invalid if based on an incorrect decision as to law or fact, if the officer making the decision was empowered to do so. *Adams* v. *Nagle,* 303 U. S. 532, 542 (1938). We therefore reject the contention here. We hold that if the actions of an officer do not conflict with the terms of his valid statutory authority, then they are the actions of the sovereign, whether or not they are tortious under general law, if they would be regarded as the actions of a private principal under the normal rules of agency. A Government officer is not thereby necessarily immunized from liability, if his action is such that a liability would be imposed by the general law of torts. But the action itself cannot be enjoined or directed, since it is also the action of the sovereign.

*United States* v. *Lee,* 106 U. S. 196 (1882), is said to have established the rule for which the respondent contends. It did not. It represents, rather, a specific application of the constitutional exception to the doctrine of sovereign immunity. The suit there was against federal officers to recover land held by them, within the scope of their authority, as a United States military station and cemetery. The question at issue was the validity of a tax sale under which the United States, at least in the view of the officers, had obtained title to the property. The plaintiff alleged that the sale was invalid and that title to the land was in him. The Court held that if he was right the defendants' possession of the land was illegal and a suit against them was not a suit against the sovereign. *Prima facie,* this holding would appear to support the contention of the plaintiff. Examination of the *Lee* case, however, indicates that the basis of the decision was the assumed lack of the defendants' constitutional authority to hold the land against the plaintiff. The Court said (106 U. S. at 219):

> "It is not pretended, as the case now stands, that the President had any lawful authority to [take the land], or that the legislative body could give him any such authority except upon payment of just compensation. The defence stands here solely upon the absolute immunity from judicial inquiry of every one who *asserts* authority from the executive branch of the government, however clear it may be made that the executive possessed no such power. Not only no such power is given, but it is absolutely prohibited, both to the executive and the legislative, to deprive any one of life, liberty, or property without due process of law, or to take private property without just compensation.
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> . . . . . .

> "Shall it be said . . . that the courts cannot give a remedy when the citizen has been deprived of his property by force, his estate seized and converted to the use of the government without lawful authority, without process of law, and without compensation, because the President has ordered it and his officers are in possession?"

The Court thus assumed that if title had been in the plaintiff the taking of the property by the defendants would be a taking without just compensation and, therefore, an unconstitutional action.[17] On that assumption, and only on that assumption, the defendants' possession of the property was an unconstitutional use of their power and was, therefore, not validly authorized by the sovereign. For that reason, a suit for specific relief, to obtain the property, was not a suit against the sovereign and could be maintained against the defendants as individuals.

The *Lee* case, therefore, offers no support to the contention that a claim of title to property held by an officer of the sovereign is, of itself, sufficient to demonstrate that the officer holding the property is not validly empowered by the sovereign to do so. Only where there is a claim that the holding constitutes an unconstitutional taking of property without just compensation does the *Lee* case require that conclusion.[18] The cases which followed *Lee's*

[17] The *Lee* case was decided in 1882. At that time there clearly was no remedy available by which he could have obtained compensation for the taking of his land. Whether compensation could be obtained today in such a case is, of course, not the issue here.

[18] For this reason the availability of a remedy in the Court of Claims may, in some cases, be relevant to the question of sovereign immunity. Where the action against which specific relief is sought is a taking or holding of the plaintiffs' property, the availability of a suit for compensation against the sovereign will defeat a contention that the action is unconstitutional as a violation of the Fifth Amendment. Compare *Hurley* v. *Kincaid,* 285 U. S. 95 (1932).

do not require a different result. There are a great number of such cases and, as this Court has itself remarked, it is not "an easy matter to reconcile all the decisions of the court in this class of cases." [19] With only one possible exception, however, specific relief in connection with property held or injured by officers of the sovereign acting in the name of the sovereign has been granted only where there was a claim that the taking of the property or the injury to it was not the action of the sovereign because unconstitutional [20] or beyond the officer's statutory pow-

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[19] *Cunningham* v. *Macon & Brunswick R. Co.*, 109 U. S. 446, 451 (1883). The ensuing years have not made the task less difficult. See *Brooks* v. *Dewar*, 313 U. S. 354, 359 (1941); *Land* v. *Dollar*, 330 U. S. 731, 738 (1947).

[20] Thus, in *Tindal* v. *Wesley*, 167 U. S. 204, 222 (1897), the Court stated that a suit to recover possession of property owned by the plaintiff and withheld by officers of a State was analogous to a suit to enjoin the officers from enforcing an unconstitutional statute. Any other view, the Court said, would lead to the result "that if a State, by its officers . . . should seize for public use the property of a citizen, without making or securing just compensation for him, and thus violate the constitutional provision declaring that no State shall deprive any person of property without due process of law . . . the citizen is remediless so long as the State, by its agents, chooses to hold his property . . . ."

And in *Scranton* v. *Wheeler*, 179 U. S. 141, 152–153 (1900), the Court said that the state court

"was under a duty to inquire whether the defendant had or could have any authority in law to do what he had done; and the suit was not to be deemed one against the United States because in the consideration of that question it would become necessary to ascertain whether the defendant could constitutionally acquire from the United States authority to obstruct the plaintiff's access . . . without making or securing compensation to him. . . .

"The vital question therefore is . . . whether the prohibition in the Constitution of the United States of the taking of private property for public use without just compensation has any application to the case . . . ."

ers.[21] Certainly, the Court has repeatedly stated these to be the cases in which such relief could be granted.[22] A contrary doctrine was stated in *Goltra* v. *Weeks,* 271 U. S. 536 (1926). In that case the United States had leased barges to the plaintiff under a contract which gave it a right to repossess under certain conditions. Believing that those conditions existed, officers of the Government attempted to repossess the barges. The Court held that a suit to enjoin them from doing so was not a suit against the United States. The Court said that the taking of the barges was alleged to be a trespass and hence "illegal." Therefore, the actions of the officers were personal actions, not the actions of the United States, and injunction against them would not be injunction against the United States. 271 U. S. at 544. For this conclusion the Court relied entirely upon the opinion of Mr. Justice Hughes in *Philadelphia Co.* v. *Stimson,* 223 U. S. 605 (1912). The reliance was misplaced, since the opinion in

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[21] See, e. g., *Payne* v. *Central Pacific R. Co.,* 255 U. S. 228, 238 (1921), where the Court said that specific relief could be had because the Government officers had "departed from a plain official duty" "through a mistaken conception of their authority," and *Santa Fe Pac. R. Co.* v. *Fall,* 259 U. S. 197, 199 (1922), where the contention was "that the Secretary went beyond the powers conferred upon him by the statute." The cases are myriad and it is unnecessary to review them here.

[22] *Poindexter* v. *Greenhow,* 114 U. S. 270, 288 (1884); *Philadelphia Co.* v. *Stimson, supra,* p. 7. Although stated in reference to a suit for damages, the rule of the *Lee* line of cases was thus summed up by Mr. Chief Justice Hughes, in *Yearsley* v. *Ross Constr. Co.,* 309 U. S. 18, 21 (1940):

"Where an agent or officer of the Government purporting to act on its behalf has been held to be liable for his conduct causing injury to another, *the ground of liability has been found to be either that he exceeded his authority or that it was not validly conferred.*" (Emphasis added.)

that case clearly and specifically rested on the claim that there was a lack of statutory power to act, not simply on a claim of tortious injury to the plaintiff.[23]

Opposed to the rationale of the *Goltra* opinion is the decision, by Mr. Justice Holmes, in *Goldberg* v. *Daniels,* 231 U. S. 218 (1913). There, as here, the question concerned the effect of a claimed sale of Government surplus property. The plaintiff submitted a sealed bid for a surplus war vessel, accompanied in that case by a certified check as payment in advance. When the bids were opened his was the highest. The Secretary of the Navy, however, determined not to accept the bid and refused to deliver the vessel. The plaintiff brought mandamus. He alleged that the sale was complete when the bids were opened and that the ownership of the vessel was therefore in him, and he asked that the Secretary be compelled to deliver it. The lower courts examined the details of the transaction and concluded that the sale was not complete until the Secretary announced his acceptance of the bid. On appeal here, it was expressly held that it was not necessary to decide whether the lower courts were correct. The suit must fail as one against the United States, the Court said, whether or not the sale was complete. In so holding the Court said, in effect, that the question of title was immaterial to the court's jurisdiction. Wrongful the Secretary's conduct might be, but a suit to relieve the wrong by obtaining the vessel would inter-

[23] The Court in the *Stimson* case said, 223 U. S. at p. 622:

"While the complainant's title lay at the foundation of the suit, and it would be necessary for the complainant to prove it, if denied, still if its title to the lands under water were established or admitted to be as alleged, the question would remain whether the defendant in imposing restrictions upon the use of the property was acting by virtue of authority validly conferred by a general act of Congress. This was the principal question which the complainant sought to have determined."

fere with the sovereign behind its back and hence must fail.[24]

Both cases are pressed upon us. The petitioner argues, and correctly, that the *result* in the *Goldberg* case calls for a similar result in this case—a dismissal of the suit for want of jurisdiction. The respondent argues, with equal correctness, that the *theory* of the *Goltra* opinion—that an allegation that the actions of Government officers are wrongful under general law is sufficient to show that they are "unauthorized"—calls for an affirmance of the decision below. Since we must therefore resolve the conflict in doctrine [25] we adhere to the rule applied in the *Goldberg* case and to the principle which has been frequently repeated by this Court, both before and after the *Goltra* case: the action of an officer of the sovereign (be it holding, taking or otherwise legally affecting the

[24] The reasoning of the *Goltra* case is also contradicted by the conclusion reached by the Court in the converse case—where a suit is brought against the United States, in which it is claimed that the tortious actions of public officers, within the scope of their delegated powers, *are* the actions of the United States and give rise to a cause of action against it for breach of an implied contract. *Portsmouth Co.* v. *United States*, 260 U. S. 327 (1922), demonstrates that such suits cannot be defeated by arguing that the officers' actions, because tortious, are outside of their authority and hence not actions of the United States. Cf. *Hooe* v. *United States*, 218 U. S. 322 (1910) (specific limitation on the agent's authority). See also *United States* v. *Causby*, 328 U. S. 256, 267 (1946).

[25] Whether the actual decision in the *Goltra* case, on the basis of the facts there presented, was correct or not is not relevant to the disposition of the present case, and we express no opinion on that question. *Goltra*, unlike *Goldberg*, does not present a parallel to the facts in the case at bar. The action complained of there was a seizure with a strong hand which was claimed to be unconstitutional, as an arbitrary taking of property without due process of law. Indeed, the District Court took jurisdiction on the theory that the case before it, like the *Lee* case, was a case of unconstitutional action. There is no such claim in the present case.

plaintiff's property) can be regarded as so "illegal" as to permit a suit for specific relief against the officer as an individual only if it is not within the officer's statutory powers or, if within those powers, only if the powers, or their exercise in the particular case, are constitutionally void.[26]

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[26] In addition to *Goltra* v. *Weeks, supra,* three other cases are argued to be inconsistent with this principle: *Sloan Shipyards* v. *U. S. Fleet Corp.,* 258 U. S. 549 (1922); *Land* v. *Dollar,* 330 U. S. 731 (1947); and *Ickes* v. *Fox,* 300 U. S. 82 (1937).

The *Sloan Shipyards* case is entirely inapposite. The suit there was against a corporate agency of the United States which had not acted in the name of the United States but in its own corporate name and right. The Court held only that the fact of agency did not immunize the agent from liability on its own contracts.

In *Land* v. *Dollar,* where the plaintiffs alleged that they were entitled to stock held by the Maritime Commission because the stock was received by the Commission only as a pledge, it was contended that any other kind of acquisition would constitute a violation of § 207 of the Merchant Marine Act, which allegedly gave the Commission authority to acquire stock only as collateral. The complaint therefore alleged that the members of the Commission "acted in excess of their authority as public officers." 330 U. S. at 738.

The ground for decision in *Ickes* v. *Fox* is not altogether clear. The argument was made in that case that the Secretary of the Interior had no statutory power to overrule a determination of the rights of the plaintiffs made by his predecessor in office. 300 U. S. at 86. The tortious injury to the plaintiffs was also argued, in reliance on *Goltra* v. *Weeks,* as a basis for avoiding the sovereign's immunity. The Court appears to have relied on both grounds without indicating which was controlling. It said: "The suits . . . are brought to enjoin the Secretary of the Interior from enforcing an order, the wrongful effect of which will be to deprive respondents of vested property rights not only acquired under Congressional acts, state laws and government contracts, *but settled and determined by his predecessors in office*" (emphasis added). *Id.* at 96–97. In support of the conclusion that the suit could be maintained, the Court relied first on *Noble* v. *Union Logging R. Co.,* 147 U. S. 165 (1893), a decision resting entirely on the officer's lack of statutory power to overrule the decision of his predecessor.

The application of this principle to the present case is clear. The very basis of the respondent's action is that the Administrator was an officer of the Government, validly appointed to administer its sales program and therefore authorized to enter, through his subordinates, into a binding contract concerning the sale of the Government's coal. There is no allegation of any statutory limitation on his powers as a sales agent. In the absence of such a limitation he, like any other sales agent, had the power and the duty to construe such contracts and to refuse delivery in cases in which he believed that the contract terms had not been complied with. His action in so doing in this case was, therefore, within his authority even if, for purposes of decision here, we assume that his construction was wrong and that title to the coal had, in fact, passed to the respondent under the contract. There is no claim that his action constituted an unconstitutional taking.[27] It was, therefore, inescapably the action of the United States and the effort to enjoin it must fail as an effort to enjoin the United States.

It is argued that the principle of sovereign immunity is an archaic hangover not consonant with modern morality and that it should therefore be limited wherever possible. There may be substance in such a viewpoint as applied to suits for damages. The Congress has increasingly permitted such suits to be maintained against

[27] There could not be since the respondent admittedly has a remedy, in a suit for breach of contract, in the Court of Claims. Such a suit, indeed, would be based on the theory that the action of the Administrator in refusing to deliver *was* the action of the United States and thus created a cause of action against it for breach of contract. Only if the Administrator's action was within his authority could such a suit be maintained. *Hooe* v. *United States,* 218 U. S. 322 (1910). It has never been suggested that a suit in the Court of Claims for breach of an express contract could be defeated because the action of the officer in breaching it constituted a tort and was therefore "unauthorized."

the sovereign and we should give hospitable scope to that trend.[28] But the reasoning is not applicable to suits for specific relief. For, it is one thing to provide a method by which a citizen may be compensated for a wrong done to him by the Government. It is a far different matter to permit a court to exercise its compulsive powers to restrain the Government from acting, or to compel it to act. There are the strongest reasons of public policy for the rule that such relief cannot be had against the sovereign. The Government, as representative of the community as a whole, cannot be stopped in its tracks by any plaintiff who presents a disputed question of property or contract right. As was early recognized, "The interference of the Courts with the performance of the ordinary duties of the executive departments of the government, would be productive of nothing but mischief . . . ." [29]

There are limits, of course. Under our constitutional system, certain rights are protected against governmental action and, if such rights are infringed by the actions of officers of the Government, it is proper that the courts have the power to grant relief against those actions. But in the absence of a claim of constitutional limitation, the necessity of permitting the Government to carry out its functions unhampered by direct judicial intervention outweighs the possible disadvantage to the citizen in being relegated to the recovery of money damages after the event.

It is argued that a sales agency, such as the War Assets Administration, is not the type of agency which requires the protection from direct judicial interference which the doctrine of sovereign immunity confers. We do not doubt that there may be some activities of the Government which do not require such protection. There are others

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[28] See *Brooks* v. *United States*, 337 U. S. 49 (1949).

[29] *Decatur* v. *Paulding*, 14 Pet. 497, 516 (1840).

in which the necessity of immunity is apparent. But it is not for this Court to examine the necessity in each case. That is a function of the Congress. The Congress has, in many cases, entrusted the business of the Government to agencies which may contract in their own names and which are subject to suit in their own names. In other cases it has permitted suits for damages, but, significantly, not for specific relief, in the Court of Claims. The differentiations as to remedy which the Congress has erected would be rendered nugatory if the basis on which they rest—the assumed immunity of the sovereign from suit in the absence of consent—were undermined by an unwarranted extension of the *Lee* doctrine.

The cause is reversed with directions that the complaint be dismissed.

*It is so ordered.*

MR. JUSTICE DOUGLAS.

I think that the principles announced by the Court are the ones which should govern the selling of government property. Less strict applications of those principles would cause intolerable interference with public administration. To make the right to sue the officer turn on whether by the law of sales title had passed to the buyer would clog this governmental function with intolerable burdens. So I have joined the Court's opinion.

MR. JUSTICE RUTLEDGE concurs in the result.

MR. JUSTICE JACKSON dissents.

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

Case-by-case adjudication gives to the judicial process the impact of actuality and thereby saves it from the hazards of generalizations insufficiently nourished by

experience. There is, however, an attendant weakness to a system that purports to pass merely on what are deemed to be the particular circumstances of a case. Consciously or unconsciously the pronouncements in an opinion too often exceed the justification of the circumstances on which they are based, or, contrariwise, judicial preoccupation with the claims of the immediate leads to a succession of *ad hoc* determinations making for eventual confusion and conflict. There comes a time when the general considerations underlying each specific situation must be exposed in order to bring the too unruly instances into more fruitful harmony. The case before us presents one of those problems for the rational solution of which it becomes necessary, as a matter of judicial self-respect, to take soundings in order to know where we are and whither we are going.

The case before us is this.

The Government had some surplus coal at an Army camp in Texas. On March 11, 1947, the War Assets Administration, through the Regional Office in Dallas, Texas, invited a bid from the plaintiff, respondent here, for purchase of the coal. The Dallas office expressed thus its approval of the bid submitted by the plaintiff: ". . . your terms of placing $17,500.00 with the First National Bank, Dallas, Texas, for payment upon presentation of our invoices to said bank are accepted." Thereupon the plaintiff arranged for resale of the coal and its shipment abroad. On April 1, 1947, the Dallas office wired the plaintiff that unless the sum of $17,500 was deposited in the First National Bank in Dallas by noon April 4, "the sale will be cancelled and other disposition made." Though claiming that this demand was in the teeth of the contract, the plaintiff arranged for an irrevocable letter of credit payable through the First National Bank of Dallas to the War Assets Administration. The Dallas office now insisted that unless cash was deposited

"the sale of 10,000 tons of coal . . . will be cancelled ten days from this date." That office disregarded further endeavors by the plaintiff to adjust the matter, and on April 16 it informed the plaintiff that the contract was canceled. Having learned that the coal was to be sold to another concern, the plaintiff, asserting ownership in the coal and the threat of irreparable damage, brought this suit in the District Court of the United States for the District of Columbia to restrain the War Assets Administrator and those under his control from transferring the coal to any other person than the plaintiff.[1]

After issuing a temporary restraining order the District Court on May 6, 1947, dismissed the suit with this oral

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[1] The prayer for relief in the complaint is as follows:

"(1) That this court issue its temporary restraining order against the defendant, his agents, assistants, deputies and employees and all persons acting or assuming to act under their direction, enjoining and restraining them from:

"(a) Carrying into effect the purported illegal and unauthorized concellation [*sic*] of the sale to the plaintiff of this coal.

"(b) Reselling or attempting to resell this coal to any other person whatsoever than the plaintiff, the legal owner thereof.

"(c) Delivering any or all of this coal to any other person.

"(2) That upon hearing of motion for a preliminary injunction that this Court continue the temporary restraining order as a preliminary injunction.

"(3) That upon final hearing this Court make permanent the preliminary injunction.

"(4) That upon hearing of this cause the Court decrees that:

"(a) The sale of this coal to the plaintiff by letter of War Assets Administration, dated March 19, 1947, is still valid and in effect.

"(b) That the purported sale to the Midland Coal Company is illegal, because title to this coal is in the plaintiff.

"(c) That, in view of the delay and disruption of arrangements caused by the purported cancellation, plaintiff shall have thirty days from the date of this Court's final order in which to give shipping instructions.

"(d) That the plaintiff may have such other further and different relief as may to the Court seem proper and just in the premises."

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observation: "I am satisfied that this suit is in effect a suit for specific performance and the United States is a necessary party, and this Court is without jurisdiction." The Court of Appeals took a different view: "Appellant . . . did not seek the court's aid to interfere in the use of official discretion by the appellee. Such discretion was exercised at the time the contract with appellant was entered into. If that contract served to vest title immediately in appellant then it follows that the ruling in *Philadelphia Co.* v. *Stimson,* 223 U. S. 605, . . . is controlling here. . . . Clearly, then, it was incumbent upon the lower court in determining its jurisdictional capacity to decide the ultimate question of whether or not a contract of sale had been consummated between appellant and appellee." 165 F. 2d 235.

The conflict between the District Court and the Court of Appeals on these facts reflects fairly enough the seeming disharmony of the numerous opinions in which this Court has dealt with the claim of immunity of government from unconsented suit. As to the States, legal irresponsibility was written into the Constitution by the Eleventh Amendment; as to the United States, it is derived by implication. *Monaco* v. *Mississippi,* 292 U. S. 313, 321; see Block, *Suits Against Government Officers and the Sovereign Immunity Doctrine,* 59 Harv. L. Rev., 1060, 1064–1065 (1946). The sources of the immunity are formally different but they present the same legal issues.

The subject is not free from casuistry. This is doubtless due to the fact that a steady change of opinion has gradually undermined unquestioned acceptance of the sovereign's freedom from ordinary legal responsibility. The vehement speed with which the Eleventh Amendment displaced the decision in *Chisholm* v. *Georgia,* 2 Dall. 419 (1793), proves how deeply rooted that doctrine was in the early days of the Republic. See *New*

*Hampshire* v. *Louisiana,* 108 U. S. 76, 86–88. In the course of a century or more a steadily expanding conception of public morality regarding "governmental responsibility" has led to a "generous policy of consent for suits against the government" to compensate for the negligence of its agents as well as to secure obedience to its contracts. *Keifer & Keifer* v. *Reconstruction Finance Corp.,* 306 U. S. 381, 396; see also Borchard's bibliography in 20 A. B. A. J. 747, 748, and the materials in Judge Mack's opinion in *The Pesaro,* 277 F. 473, reversed, 271 U. S. 562.

The course of decisions concerning sovereign immunity is a good illustration of the conflicting considerations that often struggle for mastery in the judicial process, at least implicitly. In varying degrees, at different times, the momentum of the historic doctrine is arrested or deflected by an unexpressed feeling that governmental immunity runs counter to prevailing notions of reason and justice. Legal concepts are then found available to give effect to this feeling, and one of its results is the multitude of decisions in which this Court has refused to permit an agent of the government to claim that he is *pro tanto* the government and therefore sheltered by its immunity. Multitudinous as are these cases and the seeming inconsistencies among them, analysis reveals certain common considerations. The cases in which claim was made that a suit against one who holds public office is in fact a suit against the government fall into well-defined categories. (See the Appendix, *post,* pp. 729–732.) Though our opinions have not always been consciously directed toward this classification, it is supported not only by what was actually decided but also by much that is expressly said.

Our decisions fall under these heads:

(1) Cases in which the plaintiff seeks an interest in property which concededly, even under the allegation of

the complaint, belongs to the government, or calls for an assertion of what is unquestionably official authority.[2]

(2) Cases in which action to the legal detriment of a plaintiff is taken by an official justifying his action under an unconstitutional statute.[3]

(3) Cases in which a plaintiff suffers a legal detriment through action of an officer who has exceeded his statutory authority.[4]

(4) Cases in which an officer seeks shelter behind statutory authority or some other sovereign command for the commission of a common-law tort.[5]

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[2] E. g., *Governor of Georgia* v. *Madrazo*, 1 Pet. 110 (1828); *Louisiana* v. *Jumel*, 107 U. S. 711; *Cunningham* v. *Macon & Brunswick R. Co.*, 109 U. S. 446; *Hagood* v. *Southern*, 117 U. S. 52; *Christian* v. *Atlantic & North Carolina R. Co.*, 133 U. S. 233; *North Carolina* v. *Temple*, 134 U. S. 22; *New York Guaranty & Indemnity Co.* v. *Steele*, 134 U. S. 230; *Belknap* v. *Schild*, 161 U. S. 10; *Oregon* v. *Hitchcock*, 202 U. S. 60; *Murray* v. *Wilson Co.*, 213 U. S. 151; *Hopkins* v. *Clemson Agricultural College*, 221 U. S. 636; *Louisiana* v. *McAdoo*, 234 U. S. 627; *Lankford* v. *Platte Iron Works*, 235 U. S. 461; *Wells* v. *Roper*, 246 U. S. 335; *Morrison* v. *Work*, 266 U. S. 481; see *Land* v. *Dollar*, 330 U. S. 731, 737–738.

[3] E. g., *Osborn* v. *Bank of the United States*, 9 Wheat. 738 (1824); *Board of Liquidation* v. *McComb*, 92 U. S. 531; *Poindexter* v. *Greenhow*, 114 U. S. 270; *White* v. *Greenhow*, 114 U. S. 307; *Chaffin* v. *Taylor*, 114 U. S. 309; *Allen* v. *Baltimore & O. R. Co.*, 114 U. S. 311; *Pennoyer* v. *McConnaughy*, 140 U. S. 1; *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362; *Smyth* v. *Ames*, 169 U. S. 466; *Mississippi R. Comm'n* v. *Illinois C. R. Co.*, 203 U. S. 335; *Ex parte Young*, 209 U. S. 123; *Rickert Rice Mills* v. *Fontenot*, 297 U. S. 110.

[4] E. g., *Scully* v. *Bird*, 209 U. S. 481; *Atchison, T. & S. F. R. Co.* v. *O'Connor*, 223 U. S. 280; *Philadelphia Co.* v. *Stimson*, 223 U. S. 605; *Waite* v. *Macy*, 246 U. S. 606; *Santa Fe Pac. R. Co.* v. *Fall*, 259 U. S. 197; *Work* v. *Louisiana*, 269 U. S. 250.

[5] E. g., *United States* v. *Lee*, 106 U. S. 196; *South Carolina* v. *Wesley*, 155 U. S. 542; *Tindal* v. *Wesley*, 167 U. S. 204; *Hopkins* v. *Clemson Agricultural College*, 221 U. S. 636; *Sloan Shipyards Corp.* v. *United States Fleet Corp.*, 258 U. S. 549; *Goltra* v. *Weeks*, 271 U. S. 536; *Ickes* v. *Fox*, 300 U. S. 82; *Land* v. *Dollar*, 330 U. S. 731. In

1. The series of cases which come within the first category began with *Governor of Georgia* v. *Madrazo,* 1 Pet. 110 (1828). There a claim was made upon the Governor of Georgia, as Governor, for moneys in the treasury of the State and slaves in its possession. The Court, in an opinion by Chief Justice Marshall, held that the State was actually though not formally the defendant in the suit. This was a departure by Marshall from what he had said a few years earlier in *Osborn* v. *Bank of the United States,* 9 Wheat. 738, to the effect that the Eleventh Amendment is "limited to those suits in which a State is a party on the record." *Id.* at p. 857. Such a formal test could not long survive experience, and it was explicitly laid to rest in *In re Ayers,* 123 U. S. 443, 487, *et seq.*

The crucial question in this class of cases is: when does a suit against one holding office inevitably involve the exercise of powers that are his as a functionary of government? Marshall's decision in the case of the Governor of Georgia disposed of this question with his sententious characterization of the nature of the claim against the Governor: "The demand made upon him, is not made personally, but officially." *Governor of Georgia* v. *Madrazo, supra,* 1 Pet. 110, 123. But the answer is not

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four cases before the *Lee* case, suit was permitted against the governmental agent for trespass to property under the claim that it was owned by the government without any discussion that a question of sovereign immunity might be involved. *Meigs* v. *M'Clung's Lessee,* 9 Cranch 11 (1815); *Wilcox* v. *Jackson,* 13 Pet. 498 (1839); *Brown* v. *Huger,* 21 How. 305 (1858); *Grisar* v. *McDowell,* 6 Wall. 363 (1867). And where the sovereign immunity argument was raised, it was dismissed with "it certainly can never be alleged, that a mere suggestion of title in a state to property, in possession of an individual, must arrest the proceedings of the court, and prevent their looking into the suggestion, and examining the validity of the title." *United States* v. *Peters,* 5 Cranch 115, 139–40 (1809); see also *The Davis,* 10 Wall. 15 (1869).

always as manifest as it was in that case, for the Governor was asked to surrender moneys actually in the State's treasury and property in its possession. The fact that a defendant has no personal connection with conduct for which redress is sought is an indication that he is being sued because his position empowers him to carry out the desired relief. On the other hand, the mere fact that his official capacity is ascribed to the agent against whom relief is sought is not conclusive that he is being sued as for his sovereign. See e. g., *Perkins* v. *Elg,* 307 U. S. 325.

The pervasive manifestations of modern government beget situations in which it is not always obvious whether the demand made upon an individual is, in Marshall's phraseology, "not made personally, but officially." Such an ambiguity as to the meaning of particular circumstances is a commonplace task for the judicial process. The governing principle is clear enough. If a defendant is asked to transfer the possession or title of property which is the Government's, judged by the conventional tests of possession or ownership, or if he is asked to exercise authority with which the State has invested him and the desired action is in fact governmental action so far as an individual is ever *pro tanto* the impersonal government, such demands are effectively demands upon the sovereign, which require the sovereign's consent as a prerequisite to the grant of judicial remedies.

2. To the second category belong the cases where an official asserts the authority of a statute for his action but the injured plaintiff challenges the constitutionality of the statute. Threatened injury will then be enjoined if the plaintiff otherwise satisfies the requirements for equitable intervention. *Allen* v. *Baltimore & O. R. Co.,* 114 U. S. 311; *Reagan* v. *Farmers' Loan & Trust Co.,* 154 U. S. 362; *Ex parte Young,* 209 U. S. 123; *Rickert Rice Mills* v. *Fontenot,* 297 U. S. 110. So also recovery may be

had of property in an action against an official when the statute under which the seizure of the property was made is unconstitutional. *Poindexter* v. *Greenhow,* 114 U. S. 270. In these cases the suit against one holding office is deemed "a suit against him personally as a wrongdoer and not against the State." *Ex parte Young, supra,* 209 U. S. 123, 151.

These cases likewise apply a principle that is clear. There is an appearance of inconsistency in some of the cases only because opinions also are prey to the frailties of composition. Familiar phrases are not always used with critical precision or with due relevance to the circumstances of a particular case.

Specifically, there are instances where the unconstitutionality of a statute was conceded and yet the language of sovereign immunity was invoked to bar suit. See, e. g., *North Carolina* v. *Temple,* 134 U. S. 22; *Christian* v. *Atlantic & N. C. R. Co.,* 133 U. S. 233; *New York Guaranty & Indemnity Co.* v. *Steele,* 134 U. S. 230. These cases do not qualify the principle of the cases in category two. Regard for the facts of these cases brings them within the first category because the nature of the relief requested makes them either cases in which Government property would have to be transferred, or cases where the person sued could satisfy the court decree only by acting in an official capacity. The tortfeasor, that is, is not immunized because he happened to hold office, but because the tort cannot be redressed or, if threatened, averted, without bringing into operation governmental machinery.

Thus, even though a plaintiff's rights under a bond are unconstitutionally sought to be diminished, he cannot have his bond respected if to do so a court would have to order the levying and collecting of a tax. Only the State can exact taxes, and that sovereign function cannot be enforced without the State's consent by pretending

to sue a tax collector as an individual even though the individual sued had the duty, under the statute, to collect the tax. *North Carolina* v. *Temple,* 134 U. S. 22. Again, if title to property is in the Government, a suit to secure transfer of that property to the plaintiff will not lie against an official sued as an individual even though the State acquired title by way of an unconstitutional statute. *Cunningham* v. *Macon & Brunswick R. Co.,* 109 U. S. 446; *Christian* v. *Atlantic & N. C. R. Co.,* 133 U. S. 233; see *Land* v. *Dollar,* 330 U. S. 731, 737–738. So, also, if the relief sought by an injured plaintiff would involve, in part at least, destruction of the Government's interest in property, that part of relief cannot be granted even though a tort committed by a governmental agent gave rise to the injury. *Belknap* v. *Schild,* 161 U. S. 10; *Hopkins* v. *Clemson Agricultural College,* 221 U. S. 636. To the extent that relief can be granted without affecting property rights of a State, not a consenting party to a controversy, an action is not barred. *Hopkins* v. *Clemson Agricultural College, supra,* 221 U. S. 636, 649; see *International Postal Supply Co.* v. *Bruce,* 194 U. S. 601, 605–606.

Since the cases to which reference has just been made usually involve State debts and money in a State treasury, they have served to sponsor the proposition that a suit will not be permitted where the relief sought would "expend itself on the public treasury or domain, or interfere with the public administration." *Land* v. *Dollar,* 330 U. S. 731, 738. This is a way of saying that a court cannot entertain an action, when the sovereign has not consented to be sued, if the judgment sought from the court would require an official to do that which he could only do by virtue of the fact that he is an official, that *quoad hoc* he is the State. But the statement quoted does not mean that the mere fact that a State's revenue is adversely affected, is conclusive of a court's jurisdiction

to entertain suit against one who happens to hold a public office. For example, in *Board of Liquidation* v. *McComb,* 92 U. S. 531, a bondholder was permitted to enjoin an issue of bonds which would have reduced the value of his holdings because the issue was authorized by a statute which offended the impairment-of-obligation clause. And see *Allen* v. *Baltimore & O. R. Co.,* 114 U. S. 311; *Atchison, T. & S. F. R. Co.* v. *O'Connor,* 223 U. S. 280. And suits have lain to obtain public lands where the decree involved no discretion on the part of the individual whom the decree bound. *Santa Fe Pac. R. Co.* v. *Fall,* 259 U. S. 197; *Noble* v. *Union River Logging R. Co.,* 147 U. S. 165; *Payne* v. *Central Pac. R. Co.,* 255 U. S. 228.

The matter boils down to this. The federal courts are not barred from adjudicating a claim against a governmental agent who invokes statutory authority for his action if the constitutional power to give him such a claim of immunity is itself challenged. Sovereign immunity may, however, become relevant because the relief prayed for also entails interference with governmental property or brings the operation of governmental machinery into play. The Government then becomes an indispensable party and without its consent cannot be implicated. See Mr. Justice Brandeis in *Morrison* v. *Work,* 266 U. S. 481, 486–487.

It should also be noted that a cause of action which would, for one reason or another, fail if brought against a private agent, is not saved because it is brought against one holding public office purporting to act under an unconstitutional statute. The action may fail because there is no "case" or "controversy," [6] or because the plaintiff

[6] See *Fitts* v. *McGhee,* 172 U. S. 516; see Block, *Suits against Government Officers and the Sovereign Immunity Doctrine,* 59 Harv. L. Rev. 1060, 1078, 1082 (1946).

has not suffered invasion of a legally protected interest,[7] or because the foundation for equitable relief is wanting,[8] or because the particular defendant has committed no wrong.[9] Such situations present no problem of sovereign immunity, but language pertaining to sovereign immunity sometimes creeps into opinions disposing of them.

3. Recovery has been sustained where, although the official acts under a valid statute, he actually exceeded the authority with which the statute had invested him. An action then lies against the agent because "he is not sued as, or because he is, the officer of the government, but as an individual, and the court is not ousted of jurisdiction because he *asserts* authority as such officer. To make out his defence he must show that his authority was sufficient in law to protect him." *Pennoyer* v. *McConnaughy,* 140 U. S. 1, 14; *Scully* v. *Bird,* 209 U. S. 481; *Philadelphia Co.* v. *Stimson,* 223 U. S. 605. Here also the traditional criteria for judicial action are prerequisite (see, e, g., *Louisiana* v. *McAdoo,* 234 U. S. 627); if they are not satisfied the question of sovereign immunity does not emerge. And if the relief necessarily implicates a resort to State funds the State becomes an indispensable party and without its consent the suit must fail. See *Louisiana* v. *McAdoo, supra; Lankford* v. *Platte Iron Works,* 235 U. S. 461.

4. The fourth category of cases brings us to the controversy immediately before the Court and demands detailed analysis. These are the cases, it will be recalled, in which an official seeks to screen himself behind the sovereign in a suit against him based on the commission

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[7] *Louisiana* v. *McAdoo,* 234 U. S. 627; *In re Ayers,* 123 U. S. 443.

[8] *Hawks* v. *Hamill,* 288 U. S. 52; *Morrison* v. *Work,* 266 U. S. 481.

[9] *Fitts* v. *McGhee,* 172 U. S. 516; *Worcester County Trust Co.* v. *Riley,* 302 U. S. 292.

of a common-law tort. See Appendix, Part II, C, *post*, p. 732. A plaintiff's right "under general law to recover possession of specific property wrongfully withheld" may be enforced against an official and he cannot plead the sovereign's immunity against the court's power to afford a remedy. *Land* v. *Dollar*, 330 U. S. 731, 736; *Belknap* v. *Schild*, 161 U. S. 10, 18–20; *Hopkins* v. *Clemson Agricultural College*, 221 U. S. 636, 643.

The starting point of this line of cases is *United States* v. *Lee*, 106 U. S. 196. Familiar as that case is, its controlling facts bear rehearsal. The Arlington estate of General Robert E. Lee was seized for nonpayment of taxes. These taxes had in fact been tendered by a friend, but the official had interpreted his authority as permitting payment of the taxes only by the record owner. After seizure, the United States established a fort and cemetery on the land. The plaintiff, in whom title to the Arlington estate vested if its seizure could not be justified, brought an action of ejectment against the governmental custodians of the estate. After the overruling of a suggestion by the Attorney General of the United States that the Circuit Court was without jurisdiction because the property was in possession of the United States, the action was sustained against the defendants since they could not justify their possession by proof of a valid title in the Government. This Court affirmed, holding that the lower court was competent to decide the issues between the parties without the need of impleading the Government whose consent was withheld.

While there was some talk in the *Lee* opinion, as well as in some of the cases which followed that decision, about taking property without compensation, the basis of the action was that the defendants were ordinary tortfeasors, not immunized for their wrongful invasion of the plaintiff's property by the fact that they claimed to have

acted on behalf of the Government.[10] This group of cases is quite different from those in which the plaintiff claimed that the defendant, purporting to act in an official capacity, exceeded the authority which a statute conferred upon him, or that the statute under which he justified his action exceeded the power of the legislature to confer such authority. In this class of cases the governmental agent had valid statutory authority but he determined erroneously the condition which had to exist before he could exercise it. The basis of action in this class of cases is the defendant's personal responsibility for the commission of a tort, which makes it irrelevant that by waiving the case against the governmental agent the plaintiff might choose to sue the Government as for a contract. A detailed consideration of four recent cases should leave no doubt regarding the settled course of decision in conformity with this principle.

(a) In *Sloan Shipyards Corp.* v. *United States Fleet Corp.*, 258 U. S. 549, the controversy arose in connection with a contract between Sloan Shipyards and the Fleet Corporation, a Government corporation. A proviso in the contract authorized the United States to take over the plant and complete the contract on Sloan Shipyards'

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[10] The principle of the *Lee* case cannot be explained away by suggesting that at the time it was decided recovery could not be had against the United States in the Court of Claims for the misconduct of the governmental agent in seizing the Lee estate. The short and conclusive answer is that recovery against the United States could not be had today unless a whole series of cases is to be overruled. See, e. g., *Tempel* v. *United States*, 248 U. S. 121, 130, and the cases cited therein; *Russell* v. *United States*, 182 U. S. 516, 535; *Harley* v. *United States*, 198 U. S. 229, 235; *Hill* v. *United States*, 149 U. S. 593; *United States* v. *North American Trans. & Trading Co.*, 253 U. S. 330, 335; *Juragua Iron Co.* v. *United States*, 212 U. S. 297. And there is nothing in the Federal Torts Claim Act which would indicate that under its provision suit could be brought. 28 U. S. C. § 2680 (a).

failure to perform. Under a statute the United States could also condemn the land and the business, if that were deemed necessary for the successful conduct of the war. That would bring into play a right to compensation enforceable in the Court of Claims. The Fleet Corporation seized the plant, but it was not made manifest that the seizure of the plant was an exercise of the Government's power of condemnation. Sloan Shipyards brought suit for the return of the property. The lower courts treated this as a suit for compensation, pursuable as such against the Government, in the Court of Claims. This Court, speaking through Mr. Justice Holmes, reversed, took the bill on its face as one based on the wrongful acts of the Fleet Corporation and as such entertainable regardless of the fact that the conduct of the Fleet Corporation might also give rise to a claim for compensation against the Government.[11]

This decision, which had thorough consideration here, would have to be overruled if the theory now proposed for this class of cases is to be accepted. The crux of the Court's opinion leaves no room for doubt:

> "The plaintiffs are not suing the United States but the Fleet Corporation, and if its act was unlawful, even if they might have sued the United States, they are not cut off from a remedy against the agent that did the wrongful act. In general the United States cannot be sued for a tort, but its immunity does not extend to those that acted in its name. It is not impossible that the Fleet Corporation purported to act under the contract giving it the right to take

[11] This case is clearly apposite to the question whether in a suit against an agent the defense of sovereign immunity is applicable. To take away the immunity of a governmental corporation merely prevents the corporation from claiming that it is immunized from suit. But a suit will still not lie if a decree will affect the Government's, rather than the corporation's, property.

possession in certain events, but that the plaintiffs can show that the events had not occurred." 258 U. S. 549, 567–68.

(b) So, too, *Goltra* v. *Weeks,* 271 U. S. 536, would have to go by the board if the theory now proposed were accepted. The Government had leased its barges for operation by the plaintiff. Following a seizure of some of the barges and a threat to seize the rest for alleged failure to comply with the lease terms, the plaintiff brought a bill against the Secretary of War and the Chief of Engineers to enjoin the threatened seizure and to secure restoration of the barges already seized. This Court found that it was error for the Court of Appeals to hold that the United States was a necessary party and to have dismissed the bill for that reason. The governing principle was thus formulated by Mr. Chief Justice Taft:

"The bill was suitably framed to secure the relief from an alleged conspiracy of the defendants without lawful right to take away from the plaintiff the boats of which by lease or charter he alleged that he had acquired the lawful possession and enjoyment for a term of five years. He was seeking equitable aid to avoid a threatened trespass upon that property by persons who were government officers. If it was a trespass, then the officers of the Government should be restrained whether they professed to be acting for the Government or not. Neither they nor the Government which they represent could trespass upon the property of another, and it is well settled that they may be stayed in their unlawful proceeding by a court of competent jurisdiction, even though the United States for whom they may profess to act is not a party and can not be made one. By reason of their illegality, their acts or threatened acts are personal and derive no official justification from

their doing them in asserted agency for the Government." 271 U. S. 536, 544.

(c) This line of cases, beginning with *United States* v. *Lee, supra,* 106 U. S. 196, was again followed in *Ickes* v. *Fox,* 300 U. S. 82. There a bill was sustained against the defendant, the Secretary of the Interior, based on the claim that compliance by the plaintiff with the terms of an agreement made with a predecessor Secretary of the Interior rendered the Secretary's action a trespass and as such enjoinable, though the action was justified as a governmental prerogative. In reaching this result, the Court specifically referred to the principles formulated in *Goltra* v. *Weeks,* above quoted.

(d) Only the other day this Court decided *Land* v. *Dollar,* 330 U. S. 731. There it was ruled that a claim by the plaintiff for the recovery of the possession of property physically controlled by members of the United States Maritime Commission but alleged to have been wrongfully withheld was not inherently a suit against the Government and gave jurisdiction to the court "to determine its jurisdiction by proceeding to a decision on the merits"—that is to determine whether the plaintiffs' claim that withholding of the pledged property was, under the circumstances, tortious and therefore subject to relief against the agents as individuals. 330 U. S. at 739. The Court once more applied the principle of *United States* v. *Lee, supra,* reinforced by reference to the cases that apply the *Lee* doctrine, including *Sloan Shipyards Corp.* v. *United States Fleet Corp., supra, Goltra* v. *Weeks, supra,* and *Ickes* v. *Fox, supra.* It also pointed out that the fact that there existed a remedy in the Court of Claims against the Government was irrelevant. 330 U. S. at 738.

In each of these cases this Court sanctioned a suit against an officer of the Government merely because the officer misconceived the facts, or misapplied the legal

principles, on which rested the plaintiff's right "under general law to recover possession of specific property wrongfully withheld." *Land* v. *Dollar, supra,* 330 U. S. at 736. Under such circumstances an officer acquires no immunity even though he committed a tort while attempting to discharge what would be his duty if he were correct on his assumption as to the ownership of the property or as to the right to its possession under the legal instruments governing the transaction. See Holmes, J., in *Miller* v. *Horton,* 152 Mass. 540, 26 N. E. 100; *Belknap* v. *Schild,* 161 U. S. 10, 18–19; *Hopkins* v. *Clemson Agricultural College,* 221 U. S. 636, 643–5; *Sloan Shipyards Corp.* v. *United States Fleet Corp.,* 258 U. S. 549, 567. In this class of cases the officer can escape liability only if "special remedies have been provided by statute that displace those that otherwise would be at the plaintiff's command." *Sloan Shipyards Corp.* v. *United States Fleet Corp., supra* at 567. When there is such a special remedy the suit against the officer is barred, not because he enjoys the immunity of the sovereign but because the sovereign can constitutionally change the traditional rules of liability for the tort of the agent by providing a fair substitute. *Crozier* v. *Fried,* 224 U. S. 290; *Richmond Screw Anchor Co.* v. *United States,* 275 U. S. 331. But the general statute permitting suit in the Court of Claims in certain instances against the Government is not a statute that provides that remedies otherwise at the plaintiff's command are to be displaced.[12] A holding that the avail-

[12] When Congress has wished to displace the ordinary remedies against the agent, it has used explicit language to do so. See, *e. g.,* 56 Stat. 1013, 35 U. S. C. §§ 89–96; 36 Stat. 851, as amended, 40 Stat. 705, 35 U. S. C. § 68. It is of course not a denial of due process to make the remedy, even for unconstitutional action of the agents who do the Government's work, solely against the Government instead of the agent who committed the wrong. Cf. *Coffman* v. *Federal Laboratories, Inc.,* 171 F. 2d 94 (C. A. 3d Cir.); *Richmond Screw Anchor Co.* v. *United States,* 275 U. S. 331; *Crozier* v. *Fried,*

ability of an action for monetary damages in the Court of Claims against the United States prevents a suit at law, or, if the necessary requisites for equity jurisdiction are present, in equity, against the governmental agent, would be as novel as it is indefensible in the light of the settled course of decisions. Indeed, this argument is not novel; it has been explicitly negatived in at least two cases. See *Sloan Shipyards Corp.* v. *United States Fleet Corp.*, 258 U. S. 549, 567, 568; *Land* v. *Dollar*, 330 U. S. 731, 738.

"Sovereign immunity" carries an august sound. But very recently we recognized that the doctrine is in "disfavor." *Federal Housing Administration* v. *Burr*, 309 U. S. 242, 245.[13] It ought not to be extended by discredit-

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224 U. S. 290. It is upon such cases, interpreting specific provisions, stating that relief should be only against the Government, that the Court relied in *Yearsley* v. *Ross Construction Co.*, 309 U. S. 18. That case is based on the *Richmond Screw Anchor Co.* case and the *Crozier* case and is to be understood in the light of them. In the *Yearsley* case suit was brought against a governmental agent who had taken land under a statute which authorized the taking of that particular land. Impliedly the owner was to be compensated for it in the Court of Claims. The Court held that in an authorized taking there is no liability on the part of the Government's representatives who do the taking. The fact that there was entire compensation provided for emphasized the exclusive character of the remedy against the Government. In other words the Court was dealing with a situation like the one involved in the *Richmond Screw Anchor Co.* case. Thus the *Yearsley* case does not touch the cases decided, before and since that decision, on the basis of the *Lee* line of cases. Moreover, in this case petitioner alleges that there was no authority on the part of the defendant to rescind the contract. This Court has explicitly rejected the theory that the Government could be sued for a tort in such circumstances. *Tempel* v. *United States*, 248 U. S. 121, 129, and cases cited; see also 28 U. S. C. § 2680 (a).

[13] "Whether this immunity is an absolute survival of the monarchial privilege, or is a manifestation merely of power, or rests on abstract logical grounds, see *Kawananakoa* v. *Polyblank*, 205 U. S. 349, it

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ing a long line of decisions. No considerations of policy warrant the overruling of *United States* v. *Lee, supra,* and the cases which have applied it in giving a remedy for wrongdoing without harm to any public interest that deserves protection. To overrule the *Lee* case would at least have the merit of candor. To attempt to explain it on the ground that the Government itself was not suable for the wrongdoing at the time of the *Lee* decision is to invent a new theory to explain away a decision which has held its ground for nearly seventy years.

This liability for torts committed by defendants even though they conceive themselves to be acting as officials and for the public good, rests ultimately on the conviction that the policy behind the immunity of the sovereign from suit without its consent does not call for disregard of a citizen's right to pursue an agent of the government for a wrongful invasion of a recognized legal right unless the legislature deems it appropriate to displace the right of suing the individual defendant with the right to sue the Government. The fact that the governmental agent cannot claim the immunity of the sovereign of course does not spell liability, under all circumstances, for the discharge of what he conceived to be his duty. See, e. g., *Seavey* v. *Preble,* 64 Me. 120; *Fields* v. *Stokley,* 99 Pa. 306; the conflicting considerations are presented in *Miller* v. *Horton,* 152 Mass. 540, 26 N. E. 100. Similarly, equitable considerations bearing on the propriety of granting

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undoubtedly runs counter to modern democratic notions of the moral responsibility of the State. Accordingly, courts reflect a strong legislative momentum in their tendency to extend the legal responsibility of Government and to confirm Maitland's belief, expressed nearly fifty years ago, that 'it is a wholesome sight to see "the Crown" sued and answering for its torts.' 3 Maitland, Collected Papers, 263." *Great Northern Life Ins. Co.* v. *Read,* 322 U. S. 47, 57, 59 (dissenting opinion). See also *Kennecott Copper Corp.* v. *State Tax Comm'n,* 327 U. S. 573, 580, 582 (dissenting opinion).

the extraordinary remedy of an injunction may here come into play, as is true whenever a private claim cuts across the public interest.[14] But these are matters wholly beside the issue of sovereign immunity.

Of course where the United States is the owner in possession of property a court cannot interfere without the Government's consent. But if it is to be denied that a court can decide the question, when properly presented, whether property held by an official belongs to the plaintiff, *Goltra* v. *Weeks, Sloan Shipyards Corp.* v. *United States Fleet Corp., Ickes* v. *Fox, Land* v. *Dollar,* and the other cases cited in Part II, C of the Appendix, *post,* p. 732, must be overruled.

Only the other day we said:

> "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 . . . . 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, . . . it settled as between the parties the controversy over possession.

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[14] Of course if control is sought over property which the Government seeks to retain, the considerations as to whether the equitable relief should be granted might be different. Cf. *Louisiana* v. *Garfield,* 211 U. S. 70; *Goldberg* v. *Daniels,* 231 U. S. 218. Here, however, that question is not involved, since the coal to which the plaintiff asserts title is, according to the complaint, to be sold to another dealer. As between the two, the plaintiff, if it be a fact that he has fully complied with the contract, is entitled to the property. The threatened transfer of property wrongfully withheld from the plaintiff may be enjoined if the conventional requirements of equitable relief are present.

> Precisely the same will be true here, if we assume the allegations of the complaint are proved." *Land* v. *Dollar, supra,* p. 737.

When a pleading raises a substantial claim that the defendant is wrongfully withholding from the plaintiff property belonging to him, the defendant has not heretofore been permitted to shield himself behind the immunity of the sovereign. Only after the preliminary question of ownership is decided against the plaintiff does the claim of sovereign immunity come into play. Only then can it be said that the decree will affect property of the sovereign.

The Court tries to explain away *Land* v. *Dollar, supra,* by suggesting that it was a case where the officers acted in excess of their authority, although the opinion in that case makes clear that, even if the officers had authority, there still remained the issue whether the shares of stock were sold or pledged to the United States. If the latter, to hold after satisfaction of the pledge would be tortious, and the stock could be recovered in the suit against the defendants. The Court seeks to avoid the decision in *Ickes* v. *Fox, supra,* by saying that the ground of decision is not made clear. But not even these most dubious arguments can explain away *Goltra* v. *Weeks,* 271 U. S. 536. Accordingly, the Court impliedly overrules that decision. No reason of policy is vouchsafed for overruling a decision that carries the authority that the *Goltra* case does. It was based on a long series of prior cases, it was decided by a unanimous Court and delivered by a Chief Justice who brought to the Court from his Presidential experience a partiality toward freedom for executive action, as evinced by his opinion in the contemporaneous case of *Myers* v. *United States,* 272 U. S. 52. The *Goltra* case has since been frequently, and always approvingly, cited, most recently in *Land* v. *Dollar, supra,* as an application of the *Lee* doctrine. See also *Ickes* v.

*Fox,* 300 U. S. 82, 97. The *Goltra* case is now thrown into the discard because it did not cite *Goldberg* v. *Daniels,* 231 U. S. 218. That earlier case is deemed in conflict with the later *Goltra* decision and therefore the later case, so we are told, must yield to the earlier case. One would suppose that the failure of a full-dress opinion in a later case, which was thoroughly argued and not hastily decided, to cite an earlier opinion would not be attributed either to the Court's unawareness of the earlier opinion or its silent overruling of it. That the Court could not have been unaware of the decision in the *Goldberg* case is incontestably proved by the fact that it was referred to in the briefs in the *Goltra* case. That there was not obvious inconsistency between the two decisions is indicated by the fact that Mr. Justice Holmes, who wrote the *Goldberg* opinion, joined in the *Goltra* opinion. It is too much to assume that there was concerted silence about the *Goldberg* decision by the Court in *Goltra.*

A more obvious explanation lies on the surface. *Goldberg* was not cited in *Goltra* for the conclusive reason that *Goldberg* had nothing to do with *Goltra.* In the *Goldberg* case the Court, on the basis of the pleadings before it, was dealing with a suit where "the United States is the owner in possession of the vessel." 231 U. S. 218, 221–222. Accordingly, the suit was not for a tortious withholding of the plaintiff's property and the Government's immunity barred suit. In *Goltra,* on the contrary, the claim was for the delivery of property allegedly belonging to the plaintiff and tortiously in possession of the individual defendants, and the Court held that the plaintiff is entitled to establish such a claim as he can, "even though the United States for whom they [the defendants] may profess to act is not a party and can not be made one." 271 U. S. at 544. That is this case.

As is true of the present case, the right of control over property may depend on compliance with the terms of a

contract. The fact of compliance may rest, certainly in the first instance, in the judgment of a particular official. But that would not authorize him to rescind a valid contract if there had been full compliance. Of course, even that power may be conferred by agreement or by statute. But in the absence of such an agreement, or such a provision in a statute, a plaintiff may have redress against a defendant who has wrongfully rescinded a valid contract fully performed if a property right of the plaintiff is thereby tortiously affected. He may also have his day in court if he denies the right of an official to determine definitively want of compliance, when the issue of compliance is decisive of the defendant's alleged wrongdoing. And these are precisely the issues tendered by this complaint. It is no answer at this stage of the case, to say that it was in fact within the agent's authority to do what he did. If a valid statute gives him power to withhold property which belongs to another, or if he has the power to revest title in the Government after a valid contract has vested it in another, then of course he is free from liability. But these are matters that go to the merits. The very purpose of this suit is to determine whether what the governmental agent did here was within his power. To decide whether the "authority is rightfully assumed is the exercise of jurisdiction, and must lead to the decision of the merits of the question." *United States* v. *Lee,* 106 U. S. 196, 219. The issues outlined above are issues which may be contested against a defendant, even though he hold office. *Noble* v. *Union River Logging R. Co.,* 147 U. S. 165; *Payne* v. *Central Pacific R. Co.,* 255 U. S. 228; *Santa Fe Pacific R. Co.* v. *Fall,* 259 U. S. 197; *Land* v. *Dollar,* 330 U. S. 731.

The District Court therefore had jurisdiction over the controversy because only after a consideration of the

merits of the respondent's claim could it be determined whether the decree would affect Government property. Since that court has jurisdiction it can also determine whether a cause of action was stated and whether there are any considerations which would cause a court of equity not to grant the relief requested.

I would affirm the judgment of the Court of Appeals.

## APPENDIX.

*Cases since Osborn* v. *Bank of the United States, 9 Wheat. 738 (1824), concerning suits against governmental agents in which defense of sovereign immunity was raised.*

I. Cases in which jurisdiction was found wanting.

A. Plaintiff sought interest in property which concededly belonged to the Government, or demanded relief calling for an assertion of what was unquestionably official authority.

*Governor of Georgia* v. *Madrazo,* 1 Pet. 110 (1828); *Louisiana* v. *Jumel,* 107 U. S. 711; *Cunningham* v. *Macon & Brunswick R. Co.,* 109 U. S. 446; *Hagood* v. *Southern,* 117 U. S. 52; *Christian* v. *Atlantic & N. C. R. Co.,* 133 U. S. 233; *North Carolina* v. *Temple,* 134 U. S. 22; *New York Guaranty & Indemnity Co.* v. *Steele,* 134 U. S. 230; *Belknap* v. *Schild,* 161 U. S. 10; *Oregon* v. *Hitchcock,* 202 U. S. 60; *Louisiana* v. *Garfield,* 211 U. S. 70; *Murray* v. *Wilson Co.,* 213 U. S. 151; *Hopkins* v. *Clemson Agricultural College,* 221 U. S. 636; *Goldberg* v. *Daniels,* 231 U. S. 218; *Louisiana* v. *McAdoo,* 234 U. S. 627; *Lankford* v. *Platte Iron Works,* 235 U. S. 461; *Wells* v. *Roper,* 246 U. S. 335; *Morrison* v. *Work,* 266 U. S. 481; *Minnesota* v. *United States,* 305 U. S. 382.

B. Decisions couched in terms of sovereign immunity or later so interpreted but which actually turned on other considerations.

1. No legally protected interest of the plaintiff was affected.

*Louisiana* v. *McAdoo,* 234 U. S. 627; *Tennessee Electric Power Co.* v. *Tennessee Valley Authority,* 306 U. S. 118.

2. The particular defendant was unrelated to the plaintiff's claim because he was not threatening plaintiff's interest.

*In re Ayers,* 123 U. S. 443; *Fitts* v. *McGhee,* 172 U. S. 516; *Worcester County Trust Co.* v. *Riley,* 302 U. S. 292; *Mine Safety Appliances Co.* v. *Forrestal,* 326 U. S. 371 (alternative reason).

3. Nature of the adjudication required presence of the sovereign as a necessary party.

*Christian* v. *Atlantic & North Carolina R. Co.,* 133 U. S. 233; *Stanley* v. *Schwalby,* 162 U. S. 255; *New Mexico* v. *Lane,* 243 U. S. 52.

4. Case dismissed for want of ordinary requirements of equity jurisdiction.

*Hawks* v. *Hamill,* 288 U. S. 52; *Morrison* v. *Work,* 266 U. S. 481 (alternative ground).

C. Cases in which legislation specifically provided that only the sovereign itself could be sued for action authorized by statute.

*Crozier* v. *Fried, Krupp Aktiengesellschaft,* 224 U. S. 290; *Richmond Screw Anchor Co.* v. *United States,* 275 U. S. 331.

D. Cases in which the plaintiff pursued a statutory procedure indicating consent to suit against the sovereign and is therefore bound by its limitations.

*Smith* v. *Reeves,* 178 U. S. 436; *Great Northern Life Ins. Co.* v. *Read,* 322 U. S. 47; *Ford Motor Co.* v. *Department of Treasury of Indiana,* 323 U. S. 459; *Kennecott Copper Corp.* v. *State Tax Comm'n,* 327 U. S. 573.

II. Cases in which jurisdiction was entertained.

A. Cases in which an official justified his action under an unconstitutional statute.

*Osborn* v. *Bank of the United States,* 9 Wheat. 738 (1824); *Board of Liquidation* v. *McComb,* 92 U. S. 531; *Poindexter* v. *Greenhow,* 114 U. S. 270; *White* v. *Greenhow,* 114 U. S. 307; *Chaffin* v. *Taylor,* 114 U. S. 309; *Allen* v. *Baltimore & O. R. Co.,* 114 U. S. 311; *Pennoyer* v. *McConnaughy,* 140 U. S. 1; *In re Tyler,* 149 U. S. 164; *Reagan* v. *Farmers' Loan & Trust Co.,* 154 U. S. 362; *Scott* v. *Donald,* 165 U. S. 58; *Scott* v. *Donald,* 165 U. S. 107; *Smyth* v. *Ames,* 169 U. S. 466; *Prout* v. *Starr,* 188 U. S. 537; *Mississippi R. Comm'n* v. *Illinois C. R. Co.,* 203 U. S. 335; *Ex parte Young,* 209 U. S. 123; *General Oil Co.* v. *Crain,* 209 U. S. 211; *Ludwig* v. *Western Union Telegraph Co.,* 216 U. S. 146; *Western Union Telegraph Co.* v. *Andrews,* 216 U. S. 165; *Herndon* v. *Chicago, R. I. & Pac. R. Co.,* 218 U. S. 135; *Truax* v. *Raich,* 239 U. S. 33; *Tanner* v. *Little,* 240 U. S. 369; *Greene* v. *Louisville & I. R. Co.,* 244 U. S. 499; *Public Service Co.* v. *Corboy,* 250 U. S. 153; *Sterling* v. *Constantin,* 287 U. S. 378; *Rickert Rice Mills* v. *Fontenot,* 297 U. S. 110.

B. Cases in which an officer exceeded his statutory authority.

*Rolston* v. *Missouri Fund Commissioners,* 120 U. S. 390; *Scully* v. *Bird,* 209 U. S. 481; *Atchison, T. & S. F. R. Co.* v. *O'Connor,* 223 U. S. 280; *Philadelphia Co.* v.

*Stimson,* 223 U. S. 605; *Waite* v. *Macy,* 246 U. S. 606; *Payne* v. *Central Pac. R. Co.,* 255 U. S. 228; *Santa Fe Pac. R. Co.* v. *Fall,* 259 U. S. 197; *Work* v. *Louisiana,* 269 U. S. 250.

C. Cases in which an officer sought shelter behind statutory authority or some other sovereign command for the commission of a common-law tort.

1. Cases in which an officer was not relieved of liability for tort merely because he was acting for the sovereign.

*Stanley* v. *Schwalby,* 147 U. S. 508; *Scranton* v. *Wheeler,* 179 U. S. 141; *Sloan Shipyards Corp.* v. *United States Fleet Corp.,* 258 U. S. 549; *Goltra* v. *Weeks,* 271 U. S. 536; *Ickes* v. *Fox,* 300 U. S. 82; *Land* v. *Dollar,* 330 U. S. 731.

2. Cases in which an officer was held liable for a common-law tort, but the opinion made reference to a situation involving an unconstitutional taking.

*United States* v. *Lee,* 106 U. S. 196; *Noble* v. *Union River Logging R. Co.,* 147 U. S. 165; *South Carolina* v. *Wesley,* 155 U. S. 542; *Tindal* v. *Wesley,* 167 U. S. 204; *Hopkins* v. *Clemson Agricultural College,* 221 U. S. 636.

Syllabus.

# COMMISSIONER OF INTERNAL REVENUE *v.* CULBERTSON ET UX.

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

No. 313. Argued February 7, 1949.—Decided June 27, 1949.

Respondent taxpayer, engaged in the business of breeding and selling cattle, formed a family partnership with his four sons, to whom he sold an undivided one-half interest in the business, taking their promissory note therefor. The note was paid by proceeds from the business and by gifts from respondent. The eldest son was, before and after the formation of the partnership, foreman of the ranch and received compensation as such. In 1940, the first year during which the partnership operated, the second son finished college and went into the Army. The two younger sons went to school in the winter and worked on the ranch in the summer. For the taxable years 1940 and 1941, the Tax Court held that the entire income of the business was taxable to respondent, on the ground that the sons had not contributed to the partnership any capital originating with them nor any vital services. The Court of Appeals reversed, holding that the expectation that the sons would in the future contribute their time and services was sufficient for recognition of the partnership for income tax purposes. *Held:*

1. Members of a partnership who contributed neither capital nor services during the tax year cannot be regarded as "carrying on business in partnership" within the meaning of § 181 of the Internal Revenue Code. Pp. 737–740.

(a) To hold that "individuals carrying on business in partnership" includes persons who contribute nothing during the tax period would violate the first principle of income taxation: that income must be taxed to him who earns it. Pp. 739–740.

(b) The intent to provide money, goods, labor, or skill sometime in the future cannot satisfy the requirement of §§ 11 and 22 (a) of the Code that he who presently earns the income through his labor and skill be taxed therefor. P. 740.

2. In determining whether there was a true partnership for income tax purposes, the fact that there was no contribution of "original capital" or "vital services" is to be taken into consideration, but it is not conclusive. Pp. 741–745.

(a) The test is whether, considering all the facts—the agreement, the conduct of the parties in execution of its provisions, their statements, the testimony of disinterested persons, the relationship of the parties, their respective abilities and capital contributions, the actual control of income and the purposes for which it is used, and any other facts throwing light on their true intent—the parties in good faith and acting with a business purpose intended to join together in the present conduct of the enterprise. P. 742.

(b) If, upon a consideration of all the facts, it is found that the partners joined together in good faith to conduct a business, having agreed that the services or capital to be contributed presently by each is of sufficient value to the partnership that the contributor should participate in the distribution of profits, that is sufficient. Pp. 744–745.

3. A contribution of "original capital" is not essential to membership in a family partnership. Pp. 745–748.

(a) A finding that no true partnership was intended is not to be inferred automatically from the fact of a gift to a member of one's family, followed by its investment in the family partnership. P. 746.

(b) If the donee of property who then invests it in the family partnership exercises dominion and control over that property—and through that control influences the conduct of the partnership and the disposition of its income—he may well be a true partner. P. 747.

4. The cause must be remanded to the Tax Court for decision as to which, if any, of respondent's sons were partners with him in the operation of the business during the tax years in question. P. 748.

168 F. 2d 979, reversed.

The Commissioner's determination of a deficiency in respondent's income tax for 1940 and 1941 was sustained by the Tax Court. The Court of Appeals reversed. 168 F. 2d 979. This Court granted certiorari. 335 U. S. 883. *Reversed and remanded,* p. 748.

*Arnold Raum* argued the cause for petitioner. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack* and *Harry Baum.*

*Benjamin L. Bird* argued the cause and filed a brief for respondents.

*William A. Sutherland* and *Arthur H. Kent* filed a brief, as *amici curiae,* supporting respondents.

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

This case requires our further consideration of the family partnership problem. The Commissioner of Internal Revenue ruled that the entire income from a partnership allegedly entered into by respondent and his four sons must be taxed to respondent,[1] and the Tax Court sustained that determination. The Court of Appeals for the Fifth Circuit reversed. 168 F. 2d 979. We granted certiorari, 335 U. S. 883, to consider the Commissioner's claim that the principles of *Commissioner* v. *Tower,* 327 U. S. 280 (1946), and *Lusthaus* v. *Commissioner,* 327 U. S. 293 (1946), have been departed from in this and other courts of appeals decisions.

Respondent taxpayer is a rancher. From 1915 until October 1939, he had operated a cattle business in partnership with R. S. Coon. Coon, who had numerous business interests in the Southwest and had largely financed the partnership, was 79 years old in 1939 and desired to dissolve the partnership because of ill health. To that end, the bulk of the partnership herd was sold until, in October of that year, only about 1,500 head remained. These cattle were all registered Herefords, the brood or foundation herd. Culbertson wished to keep these cattle and approached Coon with an offer of $65 a head. Coon agreed to sell at that price, but only upon

[1] Gladys Culbertson, the wife of W. O. Culbertson, Sr., is joined as a party because of her community of interest in the property and income of her husband under Texas law.

condition that Culbertson would sell an undivided one-half interest in the herd to his four sons at the same price. His reasons for imposing this condition were his intense interest in maintaining the Hereford strain which he and Culbertson had developed, his conviction that Culbertson was too old to carry on the work alone, and his personal interest in the Culbertson boys. Culbertson's sons were enthusiastic about the proposition, so respondent thereupon bought the remaining cattle from the Coon and Culbertson partnership for $99,440. Two days later Culbertson sold an undivided one-half interest to the four boys, and the following day they gave their father a note for $49,720 at 4 per cent interest due one year from date. Several months later a new note for $57,674 was executed by the boys to replace the earlier note. The increase in amount covered the purchase by Culbertson and his sons of other properties formerly owned by Coon and Culbertson. This note was paid by the boys in the following manner:

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|---|---|
| Credit for overcharge | $5,930 |
| Gifts from respondent | 21,744 |
| One-half of a loan procured by Culbertson & Sons partnership | 30,000 |

The loan was repaid from the proceeds from operation of the ranch.

The partnership agreement between taxpayer and his sons was oral. The local paper announced the dissolution of the Coon and Culbertson partnership and the continuation of the business by respondent and his boys under the name of Culbertson & Sons. A bank account was opened in this name, upon which taxpayer, his four sons and a bookkeeper could check. At the time of formation of the new partnership, Culbertson's oldest son was 24 years old, married, and living on the ranch, of which he had for two years been foreman under the

Coon and Culbertson partnership. He was a college graduate and received $100 a month plus board and lodging for himself and his wife both before and after formation of Culbertson & Sons and until entering the Army. The second son was 22 years old, was married and finished college in 1940, the first year during which the new partnership operated. He went directly into the Army following graduation and rendered no services to the partnership. The two younger sons, who were 18 and 16 years old respectively in 1940, went to school during the winter and worked on the ranch during the summer.[2]

The tax years here involved are 1940 and 1941. A partnership return was filed for both years indicating a division of income approximating the capital attributed to each partner. It is the disallowance of this division of the income from the ranch that brings this case into the courts.

*First.* The Tax Court read our decisions in *Commissioner* v. *Tower, supra,* and *Lusthaus* v. *Commissioner, supra,* as setting out two essential tests of partnership for income-tax purposes: that each partner contribute to the partnership either vital services or capital originating with him. Its decision was based upon a finding that none of respondent's sons had satisfied those requirements during the tax years in question. Sanction for the use of these "tests" of partnership is sought in this paragraph from our opinion in the *Tower* case:

> "There can be no question that a wife and a husband may, under certain circumstances, become partners for tax, as for other, purposes. If she either invests capital originating with her or substantially

[2] A daughter was also made a member of the partnership some time after its formation upon the gift by respondent of one-quarter of his one-half interest in the partnership. Respondent did not contend before the Tax Court that she was a partner for tax purposes.

> contributes to the control and management of the business, or otherwise performs vital additional services, or does all of these things she may be a partner as contemplated by 26 U. S. C. §§ 181, 182. The Tax Court has recognized that under such circumstances the income belongs to the wife. A wife may become a general or a limited partner with her husband. But when she does not share in the management and control of the business, contributes no vital additional service, and where the husband purports in some way to have given her a partnership interest, the Tax Court may properly take these circumstances into consideration in determining whether the partnership is real within the meaning of the federal revenue laws." 327 U. S. at 290.

It is the Commissioner's contention that the Tax Court's decision can and should be reinstated upon the mere reaffirmation of the quoted paragraph.

The Court of Appeals, on the other hand, was of the opinion that a family partnership entered into without thought of tax avoidance should be given recognition tax-wise whether or not it was intended that some of the partners contribute either capital or services during the tax year and whether or not they actually made such contributions, since it was formed "with the full expectation and purpose that the boys would, in the future, contribute their time and services to the partnership." [3] We must consider, therefore, whether an intention to contribute capital or services sometime in the future is

[3] 168 F. 2d 979 at 982. The court further said: "Neither statute, common sense, nor impelling precedent requires the holding that a partner must contribute capital or render services to the partnership prior to the time that he is taken into it. These tests are equally effective whether the capital and the services are presently contributed and rendered or are later to be contributed or to be rendered." *Id.* at 983. See Note, 47 Mich. L. Rev. 595.

sufficient to satisfy ordinary concepts of partnership, as required by the *Tower* case. The sections of the Internal Revenue Code involved are §§ 181 and 182,[4] which set out the method of taxing partnership income, and §§ 11 and 22 (a),[5] which relate to the taxation of individual incomes.

In the *Tower* case we held that, despite the claimed partnership, the evidence fully justified the Tax Court's holding that the husband, through his ownership of the capital and his management of the business, actually created the right to receive and enjoy the benefit of the income and was thus taxable upon that entire income under §§ 11 and 22 (a). In such case, other members of the partnership cannot be considered "Individuals carrying on business in partnership" and thus "liable for income tax . . . in their individual capacity" within the meaning of § 181. If it is conceded that some of the partners contributed neither capital nor services to the partnership during the tax years in question, as the Court of Appeals was apparently willing to do in the present case, it can hardly be contended that they are in any way responsible for the production of income during those years.[6] The partnership sections of the Code are, of course, geared to the sections relating to taxation of individual income, since no tax is imposed upon partnership income as such. To hold that "Individuals carrying on business in partnership" includes persons who contribute nothing during the tax period would violate the first principle of income taxation: that income must

[4] 26 U. S. C. §§ 181, 182.

[5] 26 U. S. C. §§ 11, 22 (a).

[6] Of course one who has been a bona fide partner does not lose that status when he is called into military or government service, and the Commissioner has not so contended. On the other hand, one hardly becomes a partner in the conventional sense merely because he might have done so had he not been called.

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be taxed to him who earns it. *Lucas* v. *Earl,* 281 U. S. 111 (1930); *Helvering* v. *Clifford,* 309 U. S. 331 (1940); *National Carbide Corp.* v. *Commissioner,* 336 U. S. 422 (1949).

Furthermore, our decision in *Commissioner* v. *Tower, supra,* clearly indicates the importance of participation in the business by the partners during the tax year. We there said that a partnership is created "when persons join together their money, goods, labor, or skill for the purpose of carrying on a trade, profession, or business and when there is community of interest in the profits and losses." *Id.* at 286. This is, after all, but the application of an often iterated definition of income—the gain derived from capital, from labor, or from both combined [7]—to a particular form of business organization. A partnership is, in other words, an organization for the production of income to which each partner contributes one or both of the ingredients of income—capital or services. *Ward* v. *Thompson,* 22 How. 330, 334 (1859). The intent to provide money, goods, labor, or skill sometime in the future cannot meet the demands of §§ 11 and 22 (a) of the Code that he who presently earns the income through his own labor and skill and the utilization of his own capital be taxed therefor. The vagaries of human experience preclude reliance upon even good faith intent as to future conduct as a basis for the present taxation of income.[8]

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[7] *Eisner* v. *Macomber,* 252 U. S. 189, 207 (1920); *Merchants Loan & Trust Co.* v. *Smietanka,* 255 U. S. 509, 519 (1921). See Treas. Reg. 101, Art. 22 (a)–1. See 1 Mertens, *Law of Federal Income Taxation,* 159 *et seq.*

[8] The *reductio ad absurdum* of the theory that children may be partners with their parents before they are capable of being entrusted with the disposition of partnership funds or of contributing substantial services occurred in *Tinkoff* v. *Commissioner,* 120 F. 2d 564, where a taxpayer made his son a partner in his accounting firm the day the son was born.

*Second.* We turn next to a consideration of the Tax Court's approach to the family partnership problem. It treated as essential to membership in a family partnership for tax purposes the contribution of either "vital services" or "original capital." [9] Use of these "tests" of partnership indicates, at best, an error in emphasis. It ignores what we said is the ultimate question for decision, namely, "whether the partnership is real within the meaning of the federal revenue laws" and makes decisive what we described as "circumstances [to be taken] into consideration" in making that determination.[10]

The *Tower* case thus provides no support for such an approach. We there said that the question whether the family partnership is real for income-tax purposes depends upon

> "whether the partners really and truly intended to join together for the purpose of carrying on business and sharing in the profits or losses or both. And their intention in this respect is a question of fact, to be determined from testimony disclosed by

[9] While the Tax Court went on to consider other factors, it is clear from its opinion that a contribution of either "vital services" or "original capital" was considered essential to membership in the partnership. After finding that none of respondent's sons had, in the court's opinion, contributed either, the court continued: "In addition to the above inquiry as to the presence of those elements deemed by the *Tower* case essential to partnerships recognizable for Federal tax purposes, . . . ." 6 CCH TCM 692, 699. Again, the court commented:

"Though the petitioner urges that many cattle businesses are composed of fathers and sons, and that the nature of the industry so requires, we think the same is probably equally true of other industries where men wish to take children into business with them. Nevertheless, we think that fact does not override the many decisions to the general effect that partners must contribute capital originating with them, or vital services." *Id.* at 700.

[10] See Mannheimer and Mook, *A Taxwise Evaluation of Family Partnerships,* 32 Iowa L. Rev. 436, 447–48.

> their 'agreement, considered as a whole, and by their conduct in execution of its provisions.' *Drennen* v. *London Assurance Co.*, 113 U. S. 51, 56; *Cox* v. *Hickman,* 8 H. L. Cas. 268. We see no reason why this general rule should not apply in tax cases where the Government challenges the existence of a partnership for tax purposes." 327 U. S. at 287.

The question is not whether the services or capital contributed by a partner are of sufficient importance to meet some objective standard supposedly established by the *Tower* case, but whether, considering all the facts—the agreement, the conduct of the parties in execution of its provisions, their statements, the testimony of disinterested persons, the relationship of the parties, their respective abilities and capital contributions, the actual control of income and the purposes for which it is used, and any other facts throwing light on their true intent—the parties in good faith and acting with a business purpose intended to join together in the present conduct of the enterprise.[11]

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[11] This is not, as we understand it, contrary to the approach taken by the Bureau of Internal Revenue in its most recent statement of policy. I. T. 3845, 1947 Cum. Bull. 66, states at p. 67:

"Where persons who are closely related by blood or marriage enter into an agreement purporting to create a so-called family partnership or other arrangement with respect to the operation of a business or income-producing venture, under which agreement all of the parties are accorded substantially the same treatment and consideration with respect to their designated interests and prescribed responsibilities in the business as if they were strangers dealing at arm's length; where the actions of the parties as legally responsible persons evidence an intent to carry on a business in a partnership relation; and where the terms of such agreement are substantially followed in the operation of the business or venture, as well as in the dealings of the partners or members with each other, it is the policy of the Bureau to disregard the close family relationship existing between the parties and to recognize, for Federal income tax purposes, the division of profits as prescribed by such agreement. However, where the instrument purporting to create the family partnership expressly provides

There is nothing new or particularly difficult about such a test. Triers of fact are constantly called upon to determine the intent with which a person acted.[12] The Tax Court, for example, must make such a determination in every estate tax case in which it is contended that a transfer was made in contemplation of death, for "The question, necessarily, is as to the state of mind of the donor." *United States* v. *Wells,* 283 U. S. 102, 117 (1931). See *Allen* v. *Trust Co. of Georgia,* 326 U. S. 630 (1946). Whether the parties really intended to carry on business as partners is not, we think, any more difficult of determination or the manifestations of such intent any less perceptible than is ordinarily true of inquiries into the subjective.

But the Tax Court did not view the question as one concerning the bona fide intent of the parties to join together as partners. Not once in its opinion is there even an oblique reference to any lack of intent on the part of respondent and his sons to combine their capital and services "for the purpose of carrying on the business." Instead, the court, focusing entirely upon concepts of "vital services" and "original capital," simply decided that

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that the wife or child or other member of the family shall not be required to participate in the management of the business, or is merely silent on that point, the extent and nature of the services of such individual in the actual conduct of the business will be given appropriate evidentiary weight as to the question of intent to carry on the business as partners."

[12] Nearly three-quarters of a century ago, Bowen, L. J., made the classic statement that "the state of a man's mind is as much a fact as the state of his digestion." *Edgington* v. *Fitzmaurice,* 29 L. R. Ch. Div. 459, 483. State of mind has always been determinative of the question whether a partnership has been formed as between the parties. See, e. g., *Drennen* v. *London Assurance Co.,* 113 U. S. 51, 56 (1885); *Meehan* v. *Valentine,* 145 U. S. 611, 621 (1892); *Barker* v. *Kraft,* 259 Mich. 70, 242 N. W. 841 (1932); *Zuback* v. *Bakmaz,* 346 Pa. 279, 29 A. 2d 473 (1943); *Kennedy* v. *Mullins,* 155 Va. 166, 154 S. E. 568 (1930).

the alleged partners had not satisfied those tests when the facts were compared with those in the *Tower* case. The court's opinion is replete with such statements as "we discern nothing constituting what we think is a requisite contribution to a real partnership," "we find no son adding 'vital additional service' which would take the place of capital contributed because of formation of a partnership," and "the sons made no capital contribution, within the sense of the *Tower* case." [13] 6 CCH TCM 698, 699.

Unquestionably a court's determination that the services contributed by a partner are not "vital" and that he has not participated in "management and control of the business" [14] or contributed "original capital" has the effect of placing a heavy burden on the taxpayer to show the bona fide intent of the parties to join together as partners. But such a determination is not conclusive, and that is the vice in the "tests" adopted by the Tax Court. It assumes that there is no room for an honest difference of opinion as to whether the services or capital furnished by the alleged partner are of sufficient importance to justify his inclusion in the partnership. If, upon a consideration of all the facts, it is found that the partners joined

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[13] In the *Tower* case the taxpayer argued that he had a right to reduce his taxes by any legal means, to which this Court agreed. We said, however, that existence of a tax avoidance motive gives some indication that there was no bona fide intent to carry on business as a partnership. If *Tower* had set up objective requirements of membership in a family partnership, such as "vital services" and "original capital," the motives behind adoption of the partnership form would have been irrelevant.

[14] Although "management and control of the business" was one of the circumstances emphasized by the *Tower* case, along with "vital services" and "original capital," the Tax Court did not consider it an alternative "test" of partnership. See discussion, *infra,* at part *Third,* and note 17.

together in good faith to conduct a business, having agreed that the services or capital to be contributed presently by each is of such value to the partnership that the contributor should participate in the distribution of profits, that is sufficient. The *Tower* case did not purport to authorize the Tax Court to substitute its judgment for that of the parties; it simply furnished some guides to the determination of their true intent. Even though it was admitted in the *Tower* case that the wife contributed no original capital, management of the business, or other vital services, this Court did not say as a matter of law that there was no valid partnership. We said, instead, that "There was, thus, more than ample evidence to support the Tax Court's finding that no genuine union for partnership business purposes *was ever intended* and that the husband earned the income." 327 U. S. at 292. (Italics added.)

*Third.* The Tax Court's isolation of "original capital" as an essential of membership in a family partnership also indicates an erroneous reading of the *Tower* opinion. We did not say that the donee of an intra-family gift could never become a partner through investment of the capital in the family partnership, any more than we said that all family trusts are invalid for tax purposes in *Helvering* v. *Clifford, supra.* The facts may indicate, on the contrary, that the amount thus contributed and the income therefrom should be considered the property of the donee for tax, as well as general law, purposes. In the *Tower* and *Lusthaus* cases this Court, applying the principles of *Lucas* v. *Earl, supra; Helvering* v. *Clifford, supra;* and *Helvering* v. *Horst,* 311 U. S. 112, found that the purported gift, whether or not technically complete, had made no substantial change in the economic relation of members of the family to the income. In each case the husband continued to manage and control the busi-

ness as before, and income from the property given to the wife and invested by her in the partnership continued to be used in the business or expended for family purposes. We characterized the results of the transactions entered into between husband and wife as "a mere paper reallocation of income among the family members," noting that "The actualities of their relation to the income did not change." 327 U. S. at 292. This, we thought, provided ample grounds for the finding that no true partnership was intended; that the husband was still the true earner of the income.

But application of the *Clifford-Horst* principle does not follow automatically upon a gift to a member of one's family, followed by its investment in the family partnership. If it did, it would be necessary to define "family" and to set precise limits of membership therein. We have not done so for the obvious reason that existence of the family relationship does not create a status which itself determines tax questions,[15] but is simply a warning that things may not be what they seem. It is frequently stated that transactions between members of a family will be carefully scrutinized. But, more particularly, the family relationship often makes it possible for one to shift tax incidence by surface changes of ownership without disturbing in the least his dominion and control over the subject of the gift or the purposes for which the income from the property is used. He is able, in other words, to retain "the substance of full enjoyment of all the rights which previously he had in the property." *Helvering* v. *Clifford, supra,* at 336.[16]

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[15] Except, of course, when Congress defines "family" and attaches tax consequences thereto. See, *e. g.* 26 U. S. C. § 503 (a) (2).

[16] It is not enough to say in this case, as we did in the *Clifford* case, that "It is hard to imagine that respondent felt himself the poorer after this [partnership agreement] had been executed or,

The fact that transfers to members of the family group may be mere camouflage does not, however, mean that they invariably are. The *Tower* case recognized that one's participation in control and management of the business is a circumstance indicating an intent to be a bona fide partner despite the fact that the capital contributed originated elsewhere in the family.[17] If the donee of property who then invests it in the family partnership exercises dominion and control over that property—and through that control influences the conduct of the partnership and the disposition of its income—he may well be a true partner. Whether he is free to, and does, enjoy the fruits of the partnership is strongly indicative of the reality of his participation in the enterprise. In the *Tower* and *Lusthaus* cases we distinguished between active participation in the affairs of the business by a donee of a share in the partnership on the one hand,

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if he did, that it had any rational foundation in fact." 309 U. S. at 336. Culbertson's interest in his partnership with Coon was worth about $50,000 immediately prior to dissolution of the partnership. In order to sustain the Tax Court, we would have to conclude that he felt himself worth approximately twice that much upon his purchase of Coon's interest, even though he had agreed to sell that interest to his sons at the same price.

[17] As noted above (note 13), participation in control and management of the business, although given equal prominence with contributions of "vital services" and "original capital" as circumstances indicating an intent to enter into a partnership relation, was discarded by the Tax Court as a "test" of partnership. This indicates a basic and erroneous assumption that one can never make a gift to a member of one's family without retaining the essentials of ownership, if the gift is then invested in a family partnership. We included participation in management and control of the business as a circumstance indicative of intent to carry on business as a partner to cover the situation in which active dominion and control of the subject of the gift had actually passed to the donee. It is a circumstance of prime importance.

and his passive acquiescence to the will of the donor on the other.[18] This distinction is of obvious importance to a determination of the true intent of the parties. It is meaningless if "original capital" is an essential test of membership in a family partnership.

The cause must therefore be remanded to the Tax Court for a decision as to which, if any, of respondent's sons were partners with him in the operation of the ranch during 1940 and 1941. As to which of them, in other words, was there a bona fide intent that they be partners in the conduct of the cattle business, either because of services to be performed during those years, or because of contributions of capital of which they were the true owners, as we have defined that term in the *Clifford, Horst,* and *Tower* cases? No question as to the allocation of income between capital and services is presented in this case, and we intimate no opinion on that subject.

The decision of the Court of Appeals is reversed with directions to remand the cause to the Tax Court for further proceedings in conformity with this opinion.

*Reversed and remanded.*

Mr. Justice Black and Mr. Justice Rutledge think that the Tax Court properly applied the principles of the *Tower* and *Lusthaus* decisions (327 U. S. 280, *id.*, 293) in this case. However, they consider it of paramount importance in this case to have a court interpretation of the applicable taxing statute, for guidance in its application. Accordingly, they acquiesce in the Court's opinion and judgment.

[18] There is testimony in the record as to the participation by respondent's sons in the management of the ranch. Since such evidence did not fall within either of the "tests" adopted by the Tax Court, it failed to consider this testimony. Without intimating any opinion as to its probative value, we think that it is clearly relevant evidence of the intent to carry on business as partners.

MR. JUSTICE BURTON, concurring, states that, upon remand of the cause to the Tax Court, there is nothing in the facts which have been presented here which, as a matter of law, will preclude that court from finding that the 1940 and 1941 income was properly taxable on a partnership basis. The physical absence of some of the Culbertson boys from the ranch does not necessarily preclude them or others from the obligations or the benefits of the partnership for tax purposes. Their contributions of capital, their participation in the income and their commitments to return to the ranch or otherwise to render service to the partnership are among the material factors to be considered. A present commitment to render future services to a partnership is in itself a material consideration to be weighed with all other material considerations for the purposes of taxation as well as for other partnership purposes.

MR. JUSTICE JACKSON would affirm on the opinion of the court below, being of the view that the ordinary common-law tests of validity of partnerships are the tests for tax purposes and that they were met in this case.

MR. JUSTICE FRANKFURTER, concurring.

The Court finds that the Tax Court applied wrong legal standards in determining that the arrangement in controversy did not constitute a partnership. It remands the case to the Tax Court because it is for that court, and not for the Court of Appeals, to ascertain, on the basis of appropriate legal criteria, the existence of a partnership within the provisions of Int. Rev. Code §§ 181 and 182. With these conclusions I agree. I think, however, that it is due to the Tax Court, the Courts of Appeals, the Treasury and the bar to make more explicit what the appropriate legal criteria are.

The Tax Court's decision rested on a misconception of our decision in *Commissioner* v. *Tower,* 327 U. S. 280.

It is, however, fair to say that it was led into that misconception by phrases which it culled from the *Tower* opinion with inadequate attention to the opinion in its entirety—both what it said and what it significantly did not say. The *Tower* opinion did not say what the Government now urges upon this Court; the Court's opinion did not take the position of the concurring opinion. In short, the opinion did not say that family partnerships are not to be regarded as partnerships for income-tax purposes even though they be genuine commercial partnerships; the opinion did not even announce hobbling presumptions under the income-tax law against such partnerships.

On the contrary, in defining the relevant considerations for determining the existence of a partnership, the Court in the *Tower* case relied on familiar decisions formulating the concept of partnership for purposes of various commercial situations in which the nature of that concept was decisive. It is significant that among the cases cited was the leading case of *Cox* v. *Hickman,* 8 H. L. Cas. 268. The Court today reaffirms this reliance by its quotation from the *Tower* case. The final sentence of the portion quoted underlines the fact that the Court did not purport to announce a special concept of "partnership" for tax purposes differing from the concept that rules in ordinary commercial-law cases. The sentence is:

> "We see no reason why this general rule should not apply in tax cases where the Government challenges the existence of a partnership for tax purposes." 327 U. S. at 287.

The taxability of income under §§ 181 and 182 is not a purely economic problem like the determination under § 22 (a) of what is income and to whom it is attributable. The word "income" has none but an economic significance, and so the application of § 22 (a) is properly a matter of economic analysis. Cf. *Lucas* v. *Earl,* 281 U. S.

111. But §§ 181 and 182 import a concept of a different sort. These sections make taxability turn on the existence of the relation of "partnership." The term carries its own meaning, just as does "negligence" in the Federal Employers' Liability Act, because such a common-law concept has a content familiar throughout the country to those to whom the law speaks. The basic criteria which determine its applicability have been so well and so long established that they were implicitly incorporated by the Internal Revenue Code's definition of "partnership."[1] Congress has thereby stamped a nationwide meaning upon the term which disregards minor local variants or an occasional legal sport. Only in the application to a given case of the criteria thus incorporated do economic data become relevant, and such data are inevitably subject to differing inferences by different triers of fact. It is in the appraisal of facts, therefore, that difficulty arises, and this difficulty is reflected by an appellate court in the degree of respect it accords to the particular tribunal whose appraisal of the facts is before it for review.

That, as I see it, is the crux of the problem that is presented by these family partnerships in their relation to

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[1] The Code defines "partnership" in the following terms:

"§ 3797. Definitions.

. . . . . .

"(2) Partnership and partner.

"The term 'partnership' includes a syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, financial operation, or venture is carried on, and which is not, within the meaning of this title, a trust or estate or a corporation; and the term 'partner' includes a member in such a syndicate, group, pool, joint venture, or organization."

This definition carries two necessary implications: (1) recourse to the law of a particular State is precluded, see Treas. Reg. 111, §§ 29.3797–1, 29.3797–4; see also *Lyeth* v. *Hoey*, 305 U. S. 188, 193–94; (2) use of the words "The term 'partnership' includes" presupposes that the term has a recognized content. If this is not to be found in the law of a particular State, it can only be found in the general law of partnership.

the income tax. Men may put on the habiliments of a partnership whenever it advantages them to be treated as partners underneath, although in fact it may be a case of "The King has no clothes on" to the sharp eyes of the law. Since there are special temptations to appear as a partnership in order to avoid the hardships of heavy taxation, the tribunal which presumably is gifted with superior discernment in differentiating between the real thing and the imitation—the Tax Court—will naturally be on the alert against being taken in. Therefore, a finding by the Tax Court that that which has the outward appearance of an arrangement to engage in a common enterprise is not in fact such an associated business venture ought to be respected when challenged in another court, unless such a determination is wholly without warrant in fact or, as in this case, the wrong standards for judgment have been applied.

A fair reading of our *Tower* opinion in its entirety reflects the formulation of the concept of partnership which is set forth at the beginning of its analysis and which the Court now quotes. While recognizing the importance of the question "who actually owned a share of the capital attributed to the wife on the partnership books," the *Tower* opinion states the ultimate issue to be "whether this husband and wife really intended to carry on business as a partnership." 327 U. S. at 289. To that determination it was of course relevant that no new capital was brought into the business as a result of the formation of the partnership, that the wife drew on income of the partnership only to pay for the type of things she had previously bought for the family, and that the consequence was a mere paper reallocation of income. But these circumstances were not cited as giving the term "partnership" a content peculiar to the Internal Revenue Code. They were characterized, rather, simply as "more than ample evidence to support

the Tax Court's finding that no genuine union for partnership business purposes was ever intended" and, as a corollary, "that the husband earned the income." 327 U. S. at 292.

Recognition of the importance, in applying §§ 181 and 182, of the appraisal of facts makes manifest why, quite apart from the definition contained in § 3797, a determination by a State court should not, as the *Tower* opinion pointed out, foreclose a contrary determination by a federal tribunal charged with administration of the tax laws. Such an inconsistency would not mean that the legal standards applied by each were inconsistent; it would be a result simply of the commonplace that no finder of fact can see through the eyes of any other finder of fact. See *Texas* v. *Florida,* 306 U. S. 398, 411. Nor would inconsistency be created by a State court's concern for the protection of creditors which lead it to seize upon adoption of the outward form as the vital fact. So, indeed, might the taxing authorities refuse to be precluded from holding the taxpayer to his election to adopt the form of a partnership. Cf. *Higgins* v. *Smith,* 308 U. S. 473, 477. The need for guarding against misuse of the outward form of a partnership as a device for obtaining tax advantages is properly satisfied by reliance on the vigilance of the Tax Court, not by distorting the concept of partnership. It is not for this Court, by redefinition or the erection of presumptions, to amend the Internal Revenue Code so as virtually to ban partnerships composed of the members of an intimate family group.

The present case, nevertheless, is not the first manifestation of an impression that the *Tower* opinion had precisely such an effect.[2] It seems to me important, therefore,

[2] See, e. g., *Fletcher* v. *Commissioner,* 164 F. 2d 182 (C. A. 2d Cir.); *Hougland* v. *Commissioner,* 166 F. 2d 815 (C. A. 6th Cir.). In this connection see also Tuttle and Wilson, *The Confusion on Family Partnerships,* 9 Ga. B. J. 353 (1947).

to make crystal clear that there is no special concept of "partnership" for tax purposes, while at the same time recognizing that in view of the temptations to assume a virtue that they have not for the sake of tax savings, men and women may appear in a guise which the gimlet eye of the Tax Court is entitled to pierce. We should leave no doubt in the minds of the Tax Court, of the Courts of Appeals, of the Treasury and of the bar that the essential holding of the *Tower* case is that there is "no reason" why the "general rule" by which the existence of a partnership is determined "should not apply in tax cases where the Government challenges the existence of a partnership for tax purposes."

In plain English, if an arrangement among men is not an arrangement which puts them all in the same business boat, then they cannot get into the same boat merely to seek the benefits of §§ 181 and 182. But if they are in the same business boat, although they may have varying rewards and varied responsibilities, they do not cease to be in it when the tax collector appears.

Syllabus.

# FARMERS RESERVOIR & IRRIGATION CO. *v.* McCOMB, WAGE & HOUR ADMINISTRATOR.

NO. 128. CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.*

Argued December 16, 1948.—Decided June 27, 1949.

The sole activity of a mutual irrigation company owned entirely by farmers is the collection, storage and distribution of water for irrigation purposes, wholly within Colorado. The water is supplied by the company to farmers at headgates on the company's canals, whence it is taken into the farmers' own laterals and used by them in the production of agricultural products to be shipped in interstate commerce. The company is nonprofit and distributes water only to its stockholders. *Held:* The company's field employees (ditch riders, lake tenders and maintenance men) and its bookkeeper are within the coverage of the Fair Labor Standards Act, as employed in an "occupation necessary to the production" of goods for interstate commerce, within the meaning of § 3 (j); and are not exempt under § 13 (a) as "employed in agriculture." Pp. 756–770.

1. The fact that a particular activity *is necessary* to agricultural production does not require the conclusion that it *is* agricultural production. P. 759.

2. The test of whether a particular type of activity is agricultural is whether the activity is carried on as part of the agricultural function or is separately organized as an independent productive activity. P. 761.

3. The irrigation company is not engaged in "agriculture," within the meaning of § 3 (f) of the Act, since it owns no farms, raises no crops, and is not engaged in cultivating or tilling the soil or in growing any agricultural commodity. Pp. 762–764.

4. In § 3 (f) of the Act, which defines "agriculture," the word "production" is not used in the special expanded meaning in which it is used in § 3 (j) of the Act. Pp. 764–766.

*Together with No. 196, *McComb, Wage & Hour Administrator,* v. *Farmers Reservoir & Irrigation Co.,* on certiorari to the same Court.

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5. The activities of the employees in question are not exempt, under § 3 (f), as practices "performed by a farmer or on a farm." Pp. 766–768.

6. Assuming that the agricultural exemption includes the work of persons who do no farming but are employed by farmers, the employees here in question are nonetheless not exempt, since they are employed not by farmers but by the company, and the fact that the company is owned by farmers and is nonprofit is immaterial. Pp. 768–769.

167 F. 2d 911, modified and affirmed.

A suit by the Administrator to restrain alleged violations of the Fair Labor Standards Act by a mutual irrigation company was dismissed by the District Court, which held the employees in question exempt as employed in agriculture. The Court of Appeals reversed, except as to a bookkeeper, whose case it regarded as moot. 167 F. 2d 911. This Court granted cross-petitions for certiorari. 335 U. S. 809. *Modified and affirmed,* p. 770.

*Frank N. Bancroft* and *John P. Akolt* argued the cause for the company. With them on the brief was *Walter W. Blood.*

*Jeter S. Ray* argued the cause for the Wage & Hour Administrator. With him on the brief were *Solicitor General Perlman, William S. Tyson* and *Bessie Margolin.*

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

The principal question to be decided in this case is whether the employees of a mutual ditch company are exempt from the provisions of the Fair Labor Standards Act [1] as persons employed in agriculture. The company is the Farmers Reservoir & Irrigation Company, a Colorado corporation having an authorized capital stock of $1,050,000 and an authorized bonded indebtedness of

[1] 52 Stat. 1060, 29 U. S. C. §§ 201–219.

$850,000, $450,000 of which is presently outstanding in the hands of the public. The company has central offices in Denver. It owns four large and several small reservoirs and a system of canals from 200 to 300 miles long, all in Colorado. The sole activity of the corporation is the collection, storage and distribution of water for irrigation purposes. The water is diverted from the public streams of Colorado, stored in the company's reservoirs and distributed to farmers through the company's canals.

The company is a mutual one. It does not sell water. It distributes it only to its own stockholders, who are each entitled to a limited quantity for each share of stock held. The income of the company is derived largely from assessments levied on the stockholders annually to pay for the costs of operating the system. There are no profits and no dividends.

The company did not comply with either the record keeping or the wages and hours provisions of the Fair Labor Standards Act, and the Administrator sought an injunction directed against continuation of these alleged violations. The company claimed that its employees were not subject to the Act. These employees fall into two categories. First, there are the field employees—ditch riders, lake tenders and maintenance men. Their activity, in general, consists of the physical operation, control and maintenance of the company's canals, reservoirs, and headgates. The second category comprises the company's office force in Denver. For purposes of this case it contains only one occupant—the company's bookkeeper.

The District Court held that the field employees were engaged in the production of goods for commerce, as those terms are defined in § 3 of the Act, but that the bookkeeper was not. It held, however, that all of the company's employees were exempt under § 13 (a) (6) as persons "employed in agriculture." This second hold-

ing was reversed, as to the field employees, by the Court of Appeals for the Tenth Circuit,[2] one judge dissenting, and, in No. 128, we granted the company's petition for certiorari on the exemption issue. The Court of Appeals did not pass on the bookkeeper's status. It regarded his case as moot because his salary was said by the company, in its brief, to have been raised to $210 per month while the appeal was pending. The court regarded this as sufficient to establish his exemption as an administrative employee under § 13 (a) (1) of the Act and therefore limited its consideration and its reversal of the District Court to the field employees. In No. 196, we granted the Administrator's cross-petition with respect to the bookkeeper.

It is conceded here that the courts below were correct in holding that the field employees are engaged in the production of goods for commerce. The company, however, argues that this requires the conclusion that they are employed in agriculture. This argument rests on the fact that the activities of the company and its employees are entirely confined within the State of Colorado. The company diverts water in Colorado, stores it in Colorado, distributes it in Colorado to farmers who, finally, consume it in Colorado. The only products moving in interstate commerce are the agricultural commodities produced by the farmers who consume the company's water. Hence, it is said that we can hold that the company's employees are engaged in the production of goods for interstate commerce only if we say that their work in supplying water to the farmers is an integral part of the production of the farm products which are shipped in interstate commerce. But that production is, of course, agriculture. Hence, the company's employees, if they are engaged in the production of goods for commerce, must be exempt as persons employed in agriculture.

[2] 167 F. 2d 911 (1948).

The argument rests on a misconstruction of § 3 (j) of the Fair Labor Standards Act[3]—the section which the courts below relied on in concluding that the field employees of the company are engaged in the production of goods for commerce. Section 3 (j) provides that "for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed . . . in *any process or occupation necessary* to the production thereof."[4] From the beginning, this Court has refused either to read this provision out of the Act by limiting the coverage of the Act to those actually engaged in production or, on the other hand, to expand it so as to include every process or occupation affecting production for commerce. We have held that, if an occupation, not itself production for commerce, has "a close and immediate tie" with the process of production, it comes within the provisions of § 3 (j).[5] Applying this standard, the Court of Appeals quite properly held that the field employees here are engaged in an occupation necessary, in the statutory sense, for the production of agricultural commodities shipped in commerce.[6]

But the conclusion that the work *is necessary* to agricultural production does not require us to say that it *is* agricultural production. This distinction between ne-

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[3] 52 Stat. 1061, 29 U. S. C. § 203 (j).

[4] Emphasis added.

[5] *Kirschbaum Co.* v. *Walling,* 316 U. S. 517, 525 (1942); *Armour & Co.* v. *Wantock,* 323 U. S. 126 (1944); *Roland Co.* v. *Walling,* 326 U. S. 657, 663 (1946).

[6] "Necessary" understates the case. The water supplied by the company's employees is, in this case, an indispensable prerequisite for agricultural production. Cultivation began only with irrigation and it will end if the irrigation ceases. Under such circumstances, there can be no doubt of the immediacy of the connection between the production, by the farmers, for commerce and the work of the company's field employees in providing water for irrigation.

cessity and identity, or, differently phrased, between production in the normal sense and production in the special sense defined in § 3 (j), disposes of the company's contention. The question here is whether the occupation of the field employees of the ditch company can itself be termed agriculture. The answer to that question is not predetermined by the fact that the occupation is within the scope of the Act because it has a necessary connection, in commerce, with agricultural production.[7]

Agriculture, as an occupation, includes more than the elemental process of planting, growing and harvesting crops. There are a host of incidental activities which are necessary to that process. Whether a particular type of activity is agricultural depends, in large measure, upon

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[7] The fallacy of the notion that an exemption carries with it all occupations whose nexus with interstate commerce is the exempted occupation is demonstrated by authority as well as by logic. In *Boutell* v. *Walling*, 327 U. S. 463 (1946), for example, the question was whether men who were employed by a service company to service trucks carrying goods in interstate commerce were exempt, under § 13 (b) (1), as the employees of an interstate carrier subject to regulation by the Interstate Commerce Commission. Their only connection with commerce was their work on the trucks of the interstate carrier. The Court divided as to whether the employees were themselves employed by the carrier within the meaning of the Motor Carrier Act and, therefore, exempt. But there was no suggestion in either of the opinions in the case that, if not employed by the carrier, they were nevertheless exempt because their only connection with interstate commerce was through an enterprise which was itself exempt.

In only one case brought to our attention was a contention presented similar to that made here. In *Dize* v. *Maddrix*, 144 F. 2d 584 (1944), *aff'd*, 324 U. S. 697 (1945), the local manufacture of boxes was held to be within the Act because the boxes were used by fishermen to ship their fish in interstate commerce. The fishermen were exempt under a specific exemption in the Act covering fishing, and it was argued that the manufacturer of the boxes should therefore be exempt as "fishing" because its only connection with commerce was through fishing. The argument was rejected summarily.

the way in which that activity is organized in a particular society. The determination cannot be made in the abstract. In less advanced societies the agricultural function includes many types of activity which, in others, are not agricultural. The fashioning of tools, the provision of fertilizer, the processing of the product, to mention only a few examples, are functions which, in some societies, are performed on the farm by farmers as part of their normal agricultural routine. Economic progress, however, is characterized by a progressive division of labor and separation of function. Tools are made by a tool manufacturer, who specializes in that kind of work and supplies them to the farmer. The compost heap is replaced by factory-produced fertilizers. Power is derived from electricity and gasoline rather than supplied by the farmer's mules. Wheat is ground at the mill. In this way, functions which are necessary to the total economic process of supplying an agricultural product become, in the process of economic development and specialization, separate and independent productive functions operated in conjunction with the agricultural function but no longer a part of it. Thus, the question as to whether a particular type of activity is agricultural is not determined by the necessity of the activity to agriculture nor by the physical similarity of the activity to that done by farmers in other situations. The question is whether the activity in the particular case is carried on as part of the agricultural function or is separately organized as an independent productive activity. The farmhand who cares for the farmer's mules or prepares his fertilizer is engaged in agriculture. But the maintenance man in a power plant [8] and the packer in a fertilizer factory [9] are not employed in agriculture, even

[8] *Meeker Cooperative Light & Power Assn.* v. *Phillips,* 158 F. 2d 698 (1946).

[9] *McComb* v. *Super-A Fertilizer Works,* 165 F. 2d 824 (1948).

if their activity is necessary to farmers and replaces work previously done by farmers. The production of power and the manufacture of fertilizer are independent productive functions, not agriculture.

In the absence of a detailed definition of agriculture we should be compelled to determine whether the activity concerned in the present case—the diversion, storage and distribution of water for irrigation purposes—is carried on as part of the agricultural function or is so separately organized and conducted as to be treated as an independent, nonagricultural productive function. Fortunately, however, the Fair Labor Standards Act provides a carefully considered definition which is of substantial aid in helping us to make that determination.

The definition is contained in § 3 (f) of the Fair Labor Standards Act. It says:

> "Sec. 3 (f). 'Agriculture' includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 15 (g) of the Agricultural Marketing Act, as amended), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market."

As can be readily seen, this definition has two distinct branches. First, there is the primary meaning. Agriculture includes farming in all its branches. Certain specific practices such as cultivation and tillage of the soil, dairying, etc., are listed as being included in this primary meaning. Second, there is the broader mean-

ing. Agriculture is defined to include things other than farming as so illustrated. It includes any practices, whether or not themselves farming practices, which are performed either by a farmer or on a farm, incidentally to or in conjunction with "such" farming operations.

Dealing with these two branches of the definition in order, it is clear, first, that the occupation in which the company's employees are engaged is not farming. The company owns no farms and raises no crops. Irrigation, strictly defined—that is the actual watering of the soil—may no doubt be called farming. And the work of the farmers in seeing to it that the water released from the company's ditches is properly distributed to the growing plants undoubtedly is included in farming as being part of the process of cultivating and tilling the soil. But the significant fact in this case is that this work is not done by the company's employees. There is a clear and definite division of function. The ditch company carries the water in its own canals to the lands of the farmers. When a farmer desires water so that he can irrigate his fields he notifies the company. Its employees then operate the headgates, which are located on the company's canals and which the farmers are forbidden to operate,[10] so that the appropriate quantity of water can pass out of the company's canals and off the company's land into the farmer's irrigation ditches. The responsibility of the company's employees ceases when they so release the water. The water is supplied to the farmer at the headgates and he takes it over there and uses it, in his own laterals, as he sees fit, to irrigate his crops.

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[10] Article VII, § 5 of the Company's By-Laws provides as follows:

"All headgates in the Company's canals shall be operated and maintained by and under the exclusive control of this company and no stockholder or any other person shall have the right to interfere with, reconstruct, repair, change, or alter, open or close said headgates or any of them in any manner whatsoever."

The ditch company, then, is not engaged in cultivating or tilling the soil or in growing any agricultural commodity. It is contended, however, that it is nevertheless engaged in farming because of the use, in the definition, of the words "production . . . of any agricultural . . . commodities" in addition to the words cultivation, tillage, harvesting, etc. Since produce is defined in § 3 (j) of the Act so as to include, "for purposes of this Act," any occupation necessary to production, it is argued that production of agricultural commodities includes any occupation necessary to the production of agricultural commodities. It is thus argued that in the case of agriculture, as distinguished from other exemptions, Congress did provide that the exemption should include not only the occupation named but also all of those other occupations whose work is necessary to it.

If Congress intended to convey that meaning by using the word production in the definition of agriculture, we should, of course, give the definition its intended scope. But we do not "make a fortress out of the dictionary." [11] And we have, therefore, consistently refused to pervert the process of interpretation by mechanically applying definitions in unintended contexts. *Lawson* v. *Suwannee S. S. Co.,* 336 U. S. 198 (1949); *Atlantic Cleaners & Dyers* v. *United States,* 286 U. S. 427 (1932). In the present case, the legislative history confirms what a natural reading of the language of the agricultural exemption would indicate—the word production was not there used in the artificial and special sense in which it was defined in § 3 (j). Certainly, if it were meant in that sense, it would make surplusage of the remainder of the carefully wrought definition. And it would hardly have been innocuously placed among such specific terms as "cultivation," "tillage," "growing," and "harvesting."

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[11] L. Hand, J., in *Cabell* v. *Markham,* 148 F. 2d 737, 739 (1945), *aff'd,* 326 U. S. 404 (1945).

But we need not speculate on the congressional meaning. The history of the use of the word production is crystal clear. It was added to the definition of agriculture in order to take care of a special situation—the production of turpentine and gum rosins by a process involving the tapping of living trees. There had been indications that such activity would not be considered agriculture, since turpentine is neither cultivated nor grown.[12] And a special amendment, § 15 (g), had been added to the Agricultural Marketing Act specifying that commodities so produced were to be considered agricultural commodities for the purposes of that Act.[13] To insure the inclusion of the process within the agricultural exemption of the Fair Labor Standards Act, the word "production" was added to § 3 (f) in conjunction with the words "including commodities defined as agricultural commodities in section 15 (g) of the Agricultural Marketing Act, as amended." [14]

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[12] See S. Rep. No. 230, 71st Cong., 2d Sess. (1930).

[13] 46 Stat. 1550, 12 U. S. C. § 1141j (g). This language originated in S. 2354, 71st Congress. That bill was reported to the Senate (S. Rep. No. 230) and passed. 72 Cong. Rec. 7016 (1930). It did not come to a vote in the House. Its substance was added by the Senate to H. R. 16836, an amendment to the oleomargarine tax laws, and in this form became law. See 74 Cong. Rec. 6688, 7196 (1931).

[14] H. R. Rep. No. 2738, 75th Cong., 3d Sess., p. 2. The word "production" was not actually contained in either the House or Senate bills as originally passed. The Senate bill, S. 2475, 75th Cong., 1st Sess., as passed, contained the reference to § 15 (g) of the Agricultural Marketing Act in the following way: ". . . 'agriculture' . . . further includes the definition contained in subdivision (g) of section 15 of the Agricultural Marketing Act . . . ." See 81 Cong. Rec. 7659 (1937). This language was faulty, since the section referred to was not a definition of agriculture but of an agricultural commodity. The language was retained in this form when the bill was first debated in the House. See 82 Cong. Rec. 1580, 1690 (1937). The House voted to recommit the bill. *Id.* at 1835. In committee, the definition of agriculture was completely

It is unnecessary to decide whether, in view of this history, the word production in the agricultural exemption should be limited to those specific products defined in § 15 (g) of the Agricultural Marketing Act or should be given its normal meaning. The only question here is whether the word was used in the special expanded meaning defined in § 3 (j) of the present Act. It is clear that it was not used in this special sense. And it follows that it does not encompass the work of the company's employees who cannot be said, in any normal use of the term, to be engaged in the production of agricultural commodities. Their work is necessary to agricultural production, but it is not production.

The work of the company's employees is not, then, farming. But, coming to the second branch of the definition of agriculture, it is equally clear that it does constitute a practice performed as an incident to or in conjunction with farming. If the Act exempted all such practices, the company would be exempt. But the exemption is limited. Such practices are exempt only if they are performed by a farmer or on a farm.[15]

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redrafted and the reference to the Agricultural Marketing Act omitted. See H. R. Rep. No. 2182, 75th Cong., 3d Sess. (1938). The bill passed the House in this form. In conference, it was agreed that the House version of the definition of agriculture should be adopted, with three stated exceptions. Only one of the three is relevant here—the reinsertion of the reference to the Agricultural Marketing Act. The word "production" was added in conjunction with that reference and was obviously used only to make the reference grammatically correct. The committee report states the change in this way: "The production of commodities defined as agricultural commodities in section 15 (g) of the Agricultural Marketing Act is included within the definition of agriculture . . . ." H. R. Rep. No. 2738, 75th Cong., 3d Sess., p. 29 (1938).

[15] Although not relevant here, there is the additional requirement that the practices be incidental to "such" farming. Thus, processing on a farm of commodities produced by other farmers is incidental to or in conjunction with the farming operation of the other farmers

This language was carefully considered by Congress. As originally introduced, the exemption covered such practices only if performed by a farmer. On the floor of the Senate it was objected that this would exclude the threshing of wheat or other functions necessary to the farmer if those functions were not performed by the farmer and his hands, but by separate companies organized for and devoted solely to that particular job.[16] To take care of that situation the words "or on a farm" were added to the definition. Thus, the wheat threshing companies, even though they were separate enterprises, were included in the exemption because their work was incidental to farming and was done on the farm.[17] In the face of this careful use of language, we are required to limit the exemption as Congress intended it should be limited, to practices performed by a farmer or on a farm. In the present case it is clear that the work of the company's employees is done neither on a farm or by farmers.

Clearly, it is not done on a farm. Nor, we think, is it done "by a farmer." Since we have already said that

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and not incidental to or in conjunction with the farming operation of the farmer on whose premises the processing is done. Such processing is, therefore, not within the definition of agriculture. *Bowie* v. *Gonzalez*, 117 F. 2d 11 (1941).

[16] "Mr. TYDINGS. . . . In the case I visualize . . . the farmer is not performing the service. The man to whom I refer makes a business of doing nothing but threshing. He owns his own machine, and hauls it from farm to farm, and enters into contracts with farmers to thresh their crops; the point being that while he is dealing with an agricultural commodity, he is not necessarily a farmer, and he is not doing work ordinarily done by a farmer.

"Mr. BORAH. He is doing the exact work which the farmer did before he took it up.

"Mr. TYDINGS. That is true; but I do not think the bill is drawn in sufficient detail to bring the man to whom I refer under its provisions of exemption." 81 Cong. Rec. 7653 (1937). See also the comments of Senator Bone, *id.* at 7659.

[17] 81 Cong. Rec. 7888 (1937).

the company's employees are not engaged in farming, it is perhaps too obvious that the work that they do is not done by farmers. But an argument to the contrary is made. It is based on the fact that the company is a mutual one, owned by the farmers whom it serves. It is argued that the company is therefore merely a formal conduit or agent, by which the farmers cooperatively operate their common water supply system and cooperatively employ the men. The men are, therefore, said to be farmers because they are said to be employed by farmers.

Even if it were conceded that the exemption includes the work of persons who do no farming but are employed by farmers, it still does not include the company's employees because they are not, in fact, so employed. There is a difference between the hiring of mutual servants by a group of employers and the creation by them of a separate business organization, with its own officers, property, and bonded indebtedness, which in turn hires working men. Those working men are in no real sense employees of the shareholders of the organization. They are hired by the organization, fired by the organization, controlled and directed by the organization, and paid by it. The fact that the organization is a corporate one adds to the picture but is not controlling. The controlling fact is that the company has been set up by the farmers as an independent entity to operate an integrated, unitary water supply system. The function of supplying water has thus been divorced by the farmers from the farming operation and set up as a separate and self-contained activity in which the farmers are forbidden, by the company's by-laws, to interfere.[18] Those employed in that activity are employed by the company, not by the farmers who own the company. The fact that the company is not operated for profit is immaterial.

[18] See n. 10, *supra*.

It is nonetheless the employer. Of course, if Congress had intended the absence of profit to be material and had provided that the employees of agricultural cooperatives should be exempted because their work is done for the benefit of the farmers who own the cooperatives, we should honor that provision. But the legislative history of the existing definition clearly shows that no such result was intended.[19]

We conclude therefore that the Court of Appeals correctly determined that the field employees of the company are not exempt from the provisions of the Fair Labor Standards Act as persons employed in agriculture.[20]

There remains for consideration the bookkeeper's case. The Court of Appeals limited its reversal of the District Court to the field employees because it regarded the bookkeeper as exempt, in any event, as an administrative employee. We need not decide whether it erred in so doing, since the company in this Court disclaims—as it did in the District Court—any reliance on the administrative exemption. And our discussion with regard to the field employees makes it clear that the Court of

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[19] The debate in both Houses shows a clear awareness that the employees of farmers cooperative associations would not be exempted as employees of farmers. At various times amendments were offered, and adopted, exempting the employees of certain types of cooperatives. See 81 Cong. Rec. 7947 (1937), 82 Cong. Rec. 1783 (1937). All such special exemptions were, however, omitted from the bill as it finally became law. See also *Interpretative Bulletin,* issued by the Administrator, Wage & Hour Division, 29 C. F. R. 1947 Supp., §§ 780.81, 780.82.

[20] While it lacks relevance to the question of congressional intention in 1938, we may note that the precise question here involved was discussed at length on the Senate floor in 1946 in connection with certain amendments to the Fair Labor Standards Act. It was clearly stated, without objection, that employees of an irrigation company which supplied water to farmers were, like the employees of a power company which supplies electricity to farmers, not exempt as employed in agriculture. 92 Cong. Rec. 2318–2319 (1946).

Appeals decision is, in the absence of any claim of administrative exemption, equally applicable to the bookkeeper. It has been stipulated that his work is a necessary part of the operation of the company's water supply system. The fact that it is clerical rather than manual is immaterial. *Borden Co.* v. *Borella,* 325 U. S. 679 (1945). It follows that his case is on all fours with that of the field workers and that he is engaged, as they are, in the production of goods for commerce and is not exempt as employed in agriculture. The judgment of the Court of Appeals, reversing the District Court and remanding the case to it, should, therefore, be treated as applicable to both types of employee.

As so modified, the judgment is

*Affirmed.*

MR. JUSTICE FRANKFURTER, concurring.

Both in the employments which the Fair Labor Standards Act covers and in the exemptions it makes, the Congress has cast upon the courts the duty of making distinctions that often are bound to be so nice as to appear arbitrary in relation to each other. A specific situation, like that presented in this case, presents a problem for construction which may with nearly equal reason be resolved one way rather than another. Except when a conflict between Courts of Appeals requires settlement by this Court, it does not seem to me very profitable to bring the individual cases here for adjudication. But since this case is here it has to be decided. The nature of the problem being what it is, I acquiesce in the judgment that commends itself to the majority of my brethren.

MR. JUSTICE JACKSON, dissenting.

If employees operating these irrigation works are so necessary to the raising of crops destined for interstate commerce that they are "producing goods for commerce"

within the Fair Labor Standards Act, I cannot agree that they are not "employed in agriculture" within its exemptions.

It is admitted that as a separate enterprise this handling of irrigation water does not bring these employees within the Act regulating interstate commerce, because the water is captured, stored, transmitted, delivered and consumed solely within one state. The reasoning by which they are nevertheless brought under the Act is this: To deliver water on arid lands is so inseparable from agriculture thereon that it is to produce goods, that is, agricultural crops, for commerce.

However, 29 U. S. C. § 213 (a) (6) exempts individuals "employed in agriculture." It would seem logical that one who is producing agricultural products for commerce is "employed in agriculture." But according to the Court he is not. The irrigation activity seems endowed with some esoteric duplicity not apparent on its face. When we read 29 U. S. C. § 206 or § 207, the irrigator is producing crops because his activity is inseparable from crop production; but when we read on a half-dozen sections and get to 29 U. S. C. § 213 (a) (6), the irrigation has been converted into a distinct and disconnected enterprise.

This paradox is attributed to the definition of agriculture in 29 U. S. C. § 203 (f), which is said to make a distinction between agricultural production "in a normal sense" and the same thing "in the special sense" of § 3 (j) of the statute, 29 U. S. C. § 203 (j). However, its text and history seem to show that the congressional purpose was not to make the agricultural exemption less comprehensive than "normal" agricultural operations but to make certain that nothing connected with farming remained subject to the Act. It exempted "any practices . . . performed by a farmer or on a farm as an incident to or in conjunction with such farming operations." Thus the farm exemption did not end at the line fence.

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This irrigation seems to me to be "performed by a farmer" and hence, by definition, part of the operation of agriculture. Certainly the agricultural exemption is not lost because farmers pool their capital through a mutual, nonprofit corporation for no other purpose whatever than to carry water to their own arid lands to make it possible to produce crops. The only purpose of the corporate form is to limit individual liability for a project which is subsidiary to each farmer's main enterprise but which is beyond the means or demands of any of them as individuals. Only the landowners can become stockholders; only the stockholders can become water users, and the operating costs and capital charges are met by assessing them in proportion to their water benefits. Employees engaged in the water operation would be on a quite different footing if it were a water company selling water to the public or the farmer for profit.

If, as the Court holds, these employees are engaged in production of agricultural crops for commerce, I do not see how it can hold that they are not engaged in agriculture. If the Court could say "To be or not to be: that is the question," it might reasonably answer in support of either side. But here the Court tells us that the real solution of this dilemma is "to be" and "not to be" at the same time. While this is a unique contribution to the literature of statutory construction, I can only regret the great loss to the literature of the drama that this possibility was overlooked by the Bard of Avon. It will probably now be as great a surprise to the proponents of the agricultural exemption as it would have been to Shakespeare, had it been suggested to him.

## GIBBS *v.* BURKE, WARDEN.

CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

No. 418. Argued April 21–22, 1949.—Decided June 27, 1949.

Petitioner, a man in his thirties, was tried and convicted in a Pennsylvania state court for larceny, and was sentenced to imprisonment for 2½ to 5 years. He conducted his own defense, appointment of counsel having been neither requested by petitioner nor offered by the court. At the trial, considerable hearsay and otherwise incompetent evidence prejudicial to petitioner was admitted; the prosecuting witness, being recalled for further cross-examination, was made a witness for petitioner, to the latter's detriment; petitioner was prevented from proving a fact clearly relevant to his defense; and the trial judge, advising petitioner of his privilege against self-incrimination, made reference in the presence of the jury to petitioner's criminal record. Petitioner's subsequent application to the State Supreme Court for a writ of habeas corpus, claiming a denial of federal constitutional right on his trial, was denied. *Held:*

1. The federal question was adequately raised, and the case is properly considered here on its merits. P. 779.

(a) Reliance on the Sixth rather than the Fourteenth Amendment in the habeas corpus petition was not fatal, since meticulousness in procedural allegations is not essential in a habeas corpus proceeding. P. 779.

(b) It appears that habeas corpus was a proper method of testing the constitutionality of the conviction and that it was within the original jurisdiction of the Pennsylvania Supreme Court. P. 779.

2. The facts of the case, particularly the occurrences at the trial, sufficiently show that petitioner was handicapped by lack of counsel to such an extent that he was denied a fair trial contrary to the due process clause of the Fourteenth Amendment. Pp. 774–778, 780–782.

Reversed.

The Supreme Court of Pennsylvania, in an original proceeding, denied petitioner's application for a writ of habeas corpus. This Court granted certiorari, 335 U. S.

867, and appointed a member of the Bar of this Court to serve as counsel for the petitioner. 335 U. S. 895. *Reversed and remanded,* p. 782.

*Frederick Bernays Wiener,* acting under an assignment by the Court, argued the cause for petitioner. With him on the brief was *Alvin O. West.*

*Karl W. Johnson* argued the cause for respondent. With him on the brief was *C. William Kraft, Jr.*

MR. JUSTICE REED delivered the opinion of the Court.

This case raises the question whether, under the circumstances of petitioner's trial for larceny in a state court without counsel, Pennsylvania deprived him of a federal constitutional right protected by the due process clause of the Fourteenth Amendment.

Petitioner, a man in his thirties, was arrested in Pennsylvania in 1947 for the larceny of certain clothing and other personal effects allegedly belonging to one James Blades. Upon the return of an indictment he pleaded not guilty, was tried before a jury which found him guilty, and was sentenced to a term of two and one-half to five years in the penitentiary. The record shows neither a request for counsel by the petitioner nor an offer of counsel by the court. Petitioner conducted his own defense.

On May 24, 1948, Gibbs filed in the Supreme Court of Pennsylvania a petition for habeas corpus in which he alleged his arrest, trial, conviction and sentence, and in which he also stated that he "was denied counsel and through ignorance of law and fact was forced to act as his own counsel" and that he "was denied his constitutional Rights as set forth in the Ten Original Amendments, Article VI." Upon the issuance of a rule to show cause, respondent answered, admitting the formal allega-

tions and the fact of trial and sentence, but alleging the following concerning the denial of right to counsel: "The transcript of the notes of testimony taken in the matter does not disclose that the relator demanded counsel nor requested that counsel be appointed to represent him. . . . It is also averred by way of answer that the relator's examination of witnesses and questions asked during the course of the trial fully disclosed his familiarity with legal process in the criminal courts." The answer also attached a transcript of the proceedings at the trial and a transcript of petitioner's criminal record. It showed eight convictions and nine acquittals, discharges, and no true bills. On July 6, 1948, the Supreme Court of Pennsylvania denied the writ. As the allegations of the petition raised grave doubts as to whether petitioner had been accorded due process in his trial, we granted the motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari. 335 U. S. 867.

James Blades, the prosecuting witness, Mrs. Lafield, his mother, Constable Fleming, the arresting officer, and James Silverstein, a secondhand dealer, testified for the state. Briefly summarized, their testimony tended to prove that petitioner came to Blades' home on the morning of the alleged theft, looked in Blades' room, where the stolen articles were in plain view, and, finding Blades absent, departed. When Blades returned home that day he noticed that the articles were missing from his room and, upon learning from his mother that Gibbs had been there, he notified the police. He and Constable Fleming found some of the missing articles in a pawnshop and found the petitioner in a taproom wearing Blades' hat and watch. Later Blades' wallet was found in the jail cell in which petitioner was incarcerated. Silverstein, the secondhand dealer in the pawnshop, testified that Gibbs had brought the missing clothing in and had sold them to him.

Petitioner, by means of cross-examination, sought to establish that the articles had been taken, and some of them sold, pursuant to an understanding between him and Blades.

Several events occurring at the trial are pertinent to petitioner's claim that failure to appoint counsel violated the Federal Constitution. (1) Considerable inadmissible hearsay and otherwise incompetent evidence was allowed to go in without objection by Gibbs.[1] (2) When petitioner recalled the prosecuting witness Blades for further cross-examination, the trial judge accepted the prosecutor's suggestion and made Blades the petitioner's witness for the purpose of the unfavorable testimony then elicited.[2] Thus he made this testimony binding on the

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[1] *Blades:* "Then she [witness's mother] tells me about him [petitioner] being there."

*Constable Fleming:* "I got a telephone call from the Chief of Police, Mr. Miller, to go up to Mrs. Lafield's to investigate a robbery that occurred there. . . . I asked Jim, where was the suitcase. He said, the suitcase was by the bed. . . ."

"I went to three pawnshops and they gave me a description of Edward Gibbs . . . ."

The District Attorney's unsworn offer of proof concerning the missing articles was as follows:

"Mr. Johnson: I want to offer into evidence the wallet, the watch, which were identified and found—The watch was found in the possession of the defendant. This wallet, containing the papers of Mr. Blades, which was found in the jail cell that had been occupied by the defendant.

"The Court: What about the radio?

"Mr. Johnson: It has been recovered and returned to the owner."

[2] "The Defendant: May I call the prosecutor [Blades] back on the stand?

"Mr. Johnson: He desires to call the prosecutor as his witness."

In his charge to the jury the judge said with reference to this episode:

"As he has presented no evidence of his own, except having called Mr. Blades and certain questions were asked Mr. Blades and certain answers made; that is the only evidence he presented."

petitioner although the Pennsylvania rule would seem to be that an adverse witness can be so examined and yet remain the witness of the opposing party.[3] (3) Although, as we have already noted, petitioner attempted to defend himself on the ground that he took and sold the articles pursuant to an agreement with the prosecuting witness, he was prevented from proving a fact clearly relevant to that defense,[4] *i. e.,* that Blades had previously made a baseless criminal charge against him under similar circumstances.[5] (4) The trial judge also advised petitioner in the presence of the jury, so far as the record shows, as to his opportunity to avail himself of the privilege against self-incrimination which was his under Pennsylvania law. In doing so he made reference to possible past convictions.[6] So to require him to claim his con-

[3] *Commonwealth* v. *Reeves,* 267 Pa. 361, 362–363, 110 A. 158, 159; *Commonwealth* v. *Eisenhower,* 181 Pa. 470, 476, 37 A. 521, 522.

[4] *Commonwealth* v. *Farrell,* 187 Pa. 408, 423–24, 41 A. 382, 384; see 3 Wigmore, Evidence (3d ed., 1940) § 950.

[5] "Q. Last fall, last year, didn't you wreck your own automobile and enter a complaint that I stole your car and wrecked it?

"Mr. Johnson: Objected to.

"The Court: Objection sustained. It has nothing to do with this case.

"The Defendant: All right."

[6] "The Court: Now then, Gibbs, you may, if you want to, take the stand and say anything you want to say, but I warn you if you do, if you have any record of any prior conviction, any felonies or any misdemeanors in the nature of what we call crimen falsi, the commonwealth may offer the record of any convictions you may have had. I am warning you in advance. You may, however, take the stand and testify or you may refuse to take the stand and if you do refuse to take the stand, the commonwealth and the court may not comment unfavorably about your failure to take the stand and testify. I want to warn you fully before you do take the stand.

"Do you want to take the stand?

"The Defendant: No, I don't have anything to say in court."

stitutional safeguard in the presence of the jury was, petitioner claims, a violation of Pennsylvania law. Cf. *Philadelphia* v. *Cline,* 158 Pa. Super. 179, 185, 44 A. 2d 610, 613; *Commonwealth* v. *Valeroso,* 273 Pa. 213, 116 A. 828. Respondent does not claim otherwise. The information given by the judge as to past convictions could have been given by a lawyer to the petitioner beyond the jury's hearing. (5) Finally, when sentencing petitioner, the judge used language which, it is claimed, evinced a hostile and thoroughly unjudicial attitude.[7]

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[7] "By the Court:

"Q. Gibbs, do you have anything to say before we impose sentence?

"A. No, I guess not.

"Q. How long have you been in jail?

"A. Two months and a half.

"Q. What is the matter with you; why can't you keep out of trouble?

"A. I don't know, sir.

"Q. You don't know why you can't do it? What do you do, get drunk or something, or are you just ornery?

"Mr. Johnson: Don't you think this man would be better if he were sent to the Eastern Penitentiary?

"By the Court:

"Q. Do you realize you can be put away for the rest of your life?

"A. (No answer.)

"The Court: It is a wonder the district attorney doesn't indict you for it. You can be indicted.

"Mr. Johnson: If he comes back again, I will take it as my personal job to indict him.

"The Court: In 1928 you were found guilty of burglary, larceny, receiving stolen goods, before Judge Fronefield—one to two years, county jail. In 1931, plead guilty to larceny—$100 fine and costs, one to two years, Judge MacDade. 1932 found guilty of larceny and receiving stolen goods, $50 fine and costs, six months to three years in county jail, Judge Morrow. That is three. 1934 larceny, found guilty, $100 fine and costs, six months to three years in county jail; sentenced to one year in county jail for violation of parole; Judge Fronefield. That is four. 1937, receiving stolen goods, $10

Two procedural points require but brief attention. The federal question was adequately if inartistically raised in the petition for a writ of habeas corpus. We consider insignificant under these circumstances the fact that petitioner cited the Sixth rather than the Fourteenth Amendment to the Constitution.[8] Meticulous insistence upon regularity in procedural allegations is foreign to the purpose of habeas corpus.[9] The state does not contest the propriety of a consideration of the case on its merits.[10] Thus it apparently concedes that habeas corpus was a proper method of testing the constitutionality of the conviction and that it was within the original jurisdiction of the Supreme Court of Pennsylvania.[11]

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fine and costs, one to three years county jail, sentence suspended by Judge MacDade. That is five. 1938, larceny; found guilty, one and half to three years county jail, Judge Crichton. I don't believe there is anyone you missed up to now. You were before me a year ago. No, just last March. You beat that, not guilty. Now, here you are the seventh time.

"All I can do is give him two and a half to five years, if you don't want to indict these fourth offenders.

"Sentence

"On No. 417 September Sessions 1947, the sentence of the court is that you undergo imprisonment in the Eastern State Penitentiary at solitary confinement and hard labor for two and a half to five years and stand committed until this sentence be complied with. If I could give you life, I would do it.

"Take him away."

[8] Cf. *Price* v. *Johnston,* 334 U. S. 266, 292, and cases there cited.

[9] *Tomkins* v. *Missouri,* 323 U. S. 485, 487.

[10] Respondent's brief states: "The issue now to be determined is whether he was properly charged with the offense, tried, convicted and sentenced, under the laws of the Commonwealth of Pennsylvania and the Constitution of the United States, more particularly the portion of the Fourteenth Amendment . . . ."

[11] See *Commonwealth ex rel. McGlinn* v. *Smith,* 344 Pa. 41, 24 A. 2d 1; *Commonwealth ex rel. Penland* v. *Ashe,* 341 Pa. 337, 19 A. 2d 464.

Since it is clear that a failure to request counsel does not constitute a waiver when the defendant does not know of his right to counsel, *Uveges* v. *Pennsylvania,* 335 U. S. 437, we proceed to the merits. We consider this case on the theory upheld in *Betts* v. *Brady,* 316 U. S. 455, that the Constitution does not guarantee to every person charged with a serious crime in a state court the right to the assistance of counsel regardless of the circumstances. *Betts* v. *Brady* rejected the contention that the Fourteenth Amendment automatically afforded such protection. In so doing, however, it did not, of course, hold or intimate that counsel was never required in noncapital cases in state courts in order to satisfy the necessity for basic fairness which is formulated in that Amendment.

There have been made to this Court without avail arguments based on the long practice as to counsel in state courts to convince us that under the Fourteenth Amendment a state may refuse to furnish counsel even when needed by the accused in serious felonies other than capital. Our decisions have been that where the ignorance, youth, or other incapacity of the defendant made a trial without counsel unfair, the defendant is deprived of his liberty contrary to the Fourteenth Amendment.[12] Counsel necessary for his adequate defense would be lacking.

Respondent argues that to hold to such precedents leaves the state prosecuting authorities uncertain as to whether to offer counsel to all accused who are without adequate funds and under serious charges in state courts. We cannot offer a panacea for the difficulty. Such an interpretation of the Fourteenth Amendment would be an unwarranted federal intrusion into state control of

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[12] *Uveges* v. *Pennsylvania,* 335 U. S. 437, 441, and cases there cited.

its criminal procedure. The due process clause is not susceptible of reduction to a mathematical formula.[13]

Furthermore, the fair conduct of a trial depends largely on the wisdom and understanding of the trial judge. He knows the essentials of a fair trial. The primary duty falls on him to determine the accused's need of counsel at arraignment and during trial. He may guide a defendant without a lawyer past the errors that make trials unfair. Cf. *Uveges* v. *Pennsylvania, supra.* Failure to protect properly the rights of one accused of serious offenses is unusual. Obviously a fair trial test necessitates an appraisal before and during the trial of the facts of each case to determine whether the need for counsel is so great that the deprivation of the right to counsel works a fundamental unfairness. The recent discussion of the problem in *Uveges* v. *Pennsylvania, supra,* makes further elaboration unnecessary. We think that the facts of this case, particularly the events occurring at the trial, reveal, in the light of that opinion and the precedents there cited, that petitioner was handicapped by lack of counsel to such an extent that his constitutional right to a fair trial was denied. This case is of the type referred to in *Betts* v. *Brady, supra,* at 473, as lacking fundamental fairness because neither counsel nor adequate judicial guidance or protection was furnished at the trial.

A defendant who pleads not guilty and elects to go to trial is usually more in need of the assistance of a lawyer than is one who pleads guilty. The record in this case evidences petitioner's helplessness, without counsel and without more assistance from the judge, in defending himself against this charge of larceny. We take no note of the tone of the comments at the time of the

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[13] *Betts* v. *Brady,* 316 U. S. 455; *Bute* v. *Illinois,* 333 U. S. 640, 676; *Townsend* v. *Burke,* 334 U. S. 736, 739.

sentence. The trial was over. The questionable issues allowed to pass unnoticed as to procedure, evidence, privilege, and instructions detailed in the first part of this opinion demonstrate to us that petitioner did not have a trial that measures up to the test of fairness prescribed by the Fourteenth Amendment.

Reversed and remanded for proceedings not inconsistent with this opinion.

*Reversed and remanded.*

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS concur in the judgment of the Court. They think that *Betts* v. *Brady* should be overruled. If that case is to be followed, however, they agree with the Court's opinion insofar as it holds that petitioner is entitled to relief under the *Betts* v. *Brady* doctrine.

MR. JUSTICE MURPHY and MR. JUSTICE RUTLEDGE concur in the result.

Syllabus.

# COSMOPOLITAN SHIPPING CO. *v.* McALLISTER.

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

No. 351. Argued February 1–2, 1949.—Decided June 27, 1949.

A general agent employed by the United States under the terms of the war-time standard form of general agency agreement to manage certain phases of the business of a ship owned by the United States and operated by the War Shipping Administration is not liable under § 33 of the Merchant Marine Act of 1920, known as the Jones Act, to a member of the crew of the ship who suffered physical injury through the negligence of its master and officers, when the injury occurred after March 24, 1943, the date of enactment of the War Shipping Administration Act, known as the Clarification Act. Pp. 785–801.

1. Rationale of *Caldarola* v. *Eckert*, 332 U. S. 155, followed; *Hust* v. *Moore-McCormack Lines*, 328 U. S. 707, overruled. Pp. 787–794.

(a) The opinion in the *Hust* case misconceived the ruling of *Brady* v. *Roosevelt S. S. Co.*, 317 U. S. 575, which decided no more, directly or by implication, than that an action could be maintained against agents of the United States at common law for the agents' own torts and did not involve the right to recover against employers under the Jones Act. P. 789.

(b) Neither the statutes relating to sailors' rights nor the history behind their enactment discloses any legislative purpose to create in seamen employees of the United States through the War Shipping Administration a right to enforce tort claims under the Jones Act against others than their employers or any recognition that such right ever existed. Pp. 789–790.

(c) A construction of the Jones Act carrying out the intention of Congress to grant certain new rights to seamen against their employers does not require or permit a holding that a general agent under the standard form of war-time general agency agreement is an employer under the Jones Act. Pp. 790–791.

(d) Nothing in the Clarification Act of March 24, 1943, or its legislative history indicates a congressional purpose to do anything other than to extend existing rights of merchant seamen to all seamen employed through the War Shipping Administration. Pp. 791–793.

2. The conclusion here reached is supported by a re-examination of the terms of the present standard service agreements, the actual conduct of the parties thereunder, and the purpose and effect of the agreements. Pp. 794–801.

(a) An examination of the terms of the general agency agreement and the actual conduct of the parties thereunder demonstrates that the United States had retained for the entire voyage the possession, management, and navigation of the vessel and control of the ship's officers and crew to the exclusion of the general agent. Pp. 795–796.

(b) The duties of the general agent were expressly and intentionally limited to those of a ship's husband, who has been engaged to take care of the shoreside business of the ship and who has no part in the actual management or navigation of the vessel. P. 796.

(c) Under the standard service agreements, the shoreside services and administration of the merchant fleet were to be handled by existing private companies while the United States, through the master of the ship, retained full control over the navigation and physical operation of the vessel. Pp. 796–798.

169 F. 2d 4, reversed.

A member of the crew of a ship owned by the United States and operated by the War Shipping Administration obtained a judgment in a Federal District Court against a general agent employed by the United States to manage certain phases of the ship's business, for injuries sustained through the negligence of its master and officers. The Court of Appeals affirmed. 169 F. 2d 4. This Court granted certiorari. 335 U. S. 870. *Reversed,* p. 801.

*Leavenworth Colby* argued the cause for petitioner. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Morison, Paul A. Sweeney* and *Morton Hollander.*

*Jacob Rassner* argued the cause for respondent. With him on the brief was *Bertram J. Dembo.*

*Silas B. Axtell* and *Myron Scott* filed a brief for the Friends of Andrew Furuseth Legislative Association, as *amicus curiae,* supporting respondent.

MR. JUSTICE REED delivered the opinion of the Court.

This case, like *Hust* v. *Moore-McCormack Lines,* 328 U. S. 707, and *Caldarola* v. *Eckert,* 332 U. S. 155, presents questions concerning the liability for injury to third persons of a general agent who, under the terms of the wartime standard form of agency agreement, GAA 4–4–42,[1] manages certain phases of the business of ships owned by the United States and operated by the War Shipping Administration. More specifically the issue raised by these facts is whether such a general agent is liable under § 33 of the Merchant Marine Act of 1920, known as the Jones Act,[2] to a member of the crew who suffered physical injury through the negligence of the master and officers of such a vessel, when the injury occurred after March 24, 1943, the date of enactment of the War Shipping Administration (Clarification) Act.[3]

Respondent was procured from the union hiring hall by petitioner in accordance with the terms of the standard agreement[4] and made available to the master for employment by him. The master is designated by the contract as an agent and employee of the United States. In July of 1945 respondent was signed on the S. S. *Edward B. Haines* at New York by the master of that vessel as second assistant engineer. In the space on the shipping articles entitled "Operating Company on this Voyage" there was written "Cosmopolitan Shipping Co., Inc., as general agent for the United States." The articles were

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[1] 46 C. F. R. Cum. Supp. § 306.44.

[2] 41 Stat. 1007, 46 U. S. C. § 688, which provides in pertinent part: "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; . . ."

[3] 57 Stat. 45, 50 U. S. C. App. § 1291.

[4] See text, p. 796, *infra.*

stamped at the top as follows: "You Are Being Employed By the United States." [5]

In November, 1945, when *The Haines* was on voyage and either in port or off the coast of China, respondent contracted poliomyelitis. At that time the master exercised "full control, responsibility and authority with respect to the navigation and management of the vessel" as provided in § 3A (d) of the contract. See p. 796, *infra.* Because of alleged negligence of the master and officers in furnishing proper treatment, he suffered permanent injury from the disease. McAllister sued the petitioner, Cosmopolitan, under the Jones Act. The complaint alleged that Cosmopolitan "managed, operated and controlled" *The Haines* under a General Agency Agreement with its owner, that McAllister was in the employ of Cosmopolitan, and that his injuries resulted from the negligence of Cosmopolitan, "its agents, servants, and employees" in failing to take precautions against a known poliomyelitis epidemic and in failing to provide proper treatment. The answer denied these allegations. The jury found a verdict for respondent for $100,000.

On appeal the United States Court of Appeals for the Second Circuit affirmed. *McAllister* v. *Cosmopolitan Shipping Co.,* 169 F. 2d 4. While recognizing that Cosmopolitan was "a shipping company which contracted with the War Shipping Administration to attend to the accounting and certain other shoreside business of The Haines . . . in accordance with the standard form of General Agency Service Agreement," *id.* at p. 5, the court felt itself bound by the decision of this Court in *Hust* v. *Moore-McCormack Lines, supra.* It relied upon the fact that we expressly distinguished the *Hust*

[5] Under 46 U. S. C. §§ 564, 565, 713, the crewman signs the shipping articles in the presence of a United States Shipping Commissioner who certifies that the crewman fully understands the contents of the instrument.

case in *Caldarola* v. *Eckert, supra.* The Court of Appeals reached this conclusion despite the fact that the injury to Hust occurred prior to the Clarification Act, and the injury here occurred subsequent to that act. In its view the *Hust* case held, as a matter of law, that before the Clarification Act a seaman under the Jones Act could recover for a tort against a service agreement general agent, as an employer. The court did not perceive how the Clarification Act changed this liability. 169 F. 2d 4, 8.

I.

We are impelled to the conclusion that the Clarification Act affords no basis for distinguishing the present case from the *Hust* case and that the reasoning in the later *Caldarola* case, which we accept as sound, calls for the rejection of the basis of the *Hust* case. The *Hust* case went on the theory that the general agents for the United States under the same standard service agreement were employers of the injured seaman, Hust, for the purposes of liability under the Jones Act.[6] The general agent was found to be liable to the seaman by two steps of reasoning: first, that the overruling of *Fleet Corporation* v. *Lustgarten,* 280 U. S. 320, by *Brady* v. *Roosevelt S. S. Co.,* 317 U. S. 575, gave a seaman a right to sue under the Jones Act such general agents as were employed under contracts like Moore-McCormack's for torts committed against seamen by masters and crew, 328 U. S. 716–722; second, that although "technically the agree-

[6] Note 2, *supra.*

As § 33 shows on its face, a seaman has the advantages of the Act only against his employer. *Panama R. Co.* v. *Johnson,* 264 U. S. 375, 389; *Nolan* v. *General Seafoods Corp.,* 112 F. 2d 515, 517; *The Norland,* 101 F. 2d 967; *Baker* v. *Moore-McCormack Lines,* 57 F. Supp. 207, 208; *Eggleston* v. *Republic Steel Corp.,* 47 F. Supp. 658, 659; *Gardiner* v. *Agwilines, Inc.,* 29 F. Supp. 348.

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ment made Hust an employee of the United States," p. 723, the "rules of private agency," p. 724, should not be applied to take away "protections" from seamen. See 332 U. S. 165–166.[7] This second step was said to find support in the election given to seamen by § 1 of the Clarification Act to proceed under the new Act for claims arising after October 1, 1941, and before the enactment of the Clarification Act, March 24, 1943. 328 U. S. at 725, *et seq.*[8]

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[7] It should be noted that a concurring opinion added to the grounds given in the Court's opinion an argument that Moore-McCormack was owner *pro hac vice.* 328 U. S. 734. This view was again rejected in *Caldarola* v. *Eckert,* 332 U. S. at 159. A contract such as this does not give "exclusive possession, command, and navigation of the vessel," *Reed* v. *United States,* 11 Wall. 591, 600, and therefore fails to give the operator an owner's power. *Leary* v. *United States,* 14 Wall. 607, 611; *United States* v. *Shea,* 152 U. S. 178, 186–89.

[8] 57 Stat. 45, 50 U. S. C. App. § 1291:

"(a) officers and members of crews (hereinafter referred to as 'seamen') employed on United States or foreign flag vessels as employees of the United States through the War Shipping Administration shall, with respect to (1) laws administered by the Public Health Service and the Social Security Act, as amended by subsection (b) (2) and (3) of this section; (2) death, injuries, illness, maintenance and cure, loss of effects, detention, or repatriation, or claims arising therefrom not covered by the foregoing clause (1); and (3) collection of wages and bonuses and making of allotments, have all of the rights, benefits, exemptions, privileges, and liabilities, under law applicable to citizens of the United States employed as seamen on privately owned and operated American vessels. Such seamen, because of the temporary wartime character of their employment by the War Shipping Administration, shall not be considered as officers or employees of the United States for the purposes of the United States Employees Compensation Act, as amended; the Civil Service Retirement Act, as amended; the Act of Congress approved March 7, 1942 (Public Law 490, Seventy-seventh Congress); or the Act entitled 'An Act to provide benefits for the injury, disability, death, or detention of employees of contractors with the United States and certain other persons or reimbursement therefor', approved December

As to the first conclusion, we think it arises from a misconception of the ruling of the *Brady* case. The *Brady* case decided no more, directly or by implication, than that an action could be maintained against agents of the United States at common law for the agents' own torts. The case did not involve the right to recover against employers under the Jones Act. Brady was a customs inspector suing for injuries sustained when a ship's ladder broke. The opinion said, 317 U. S. at 577, "The sole question here is whether the Suits in Admiralty Act makes private operators such as respondent non-suable for their torts." [9] Cf. *Caldarola* v. *Eckert,* 332 U. S. at 159–160.

As to the second conclusion, we are unable to perceive in the statutes relating to sailors' rights or the history

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2, 1942 (Public Law 784, Seventy-seventh Congress). Claims arising under clause (1) hereof shall be enforced in the same manner as such claims would be enforced if the seaman were employed on a privately owned and operated American vessel. Any claim referred to in clause (2) or (3) hereof shall, if administratively disallowed in whole or in part, be enforced pursuant to the provisions of the Suits in Admiralty Act, notwithstanding the vessel on which the seaman is employed is not a merchant vessel within the meaning of such Act. Any claim, right, or cause of action of or in respect of any such seaman accruing on or after October 1, 1941, and prior to the date of enactment of this section may be enforced, and upon the election of the seaman or his surviving dependent or beneficiary, or his legal representative to do so shall be governed, as if this section had been in effect when such claim, right, or cause of action accrued, such election to be made in accordance with rules and regulations prescribed by the Administrator, War Shipping Administration. Rights of any seaman under the Social Security Act, as amended by subsection (b) (2) and (3), and claims therefor shall be governed solely by the provisions of such Act, so amended. When used in this subsection the term 'administratively disallowed' means a denial of a written claim in accordance with rules or regulations prescribed by the Administrator, War Shipping Administration. . . ."

[9] See the discussion of the *Brady* case at 328 U. S. 745–47.

behind their enactment any legislative purpose to create in seamen employees of the United States through the War Shipping Administration a right to enforce tort claims under the Jones Act against others than their employers or any recognition that such right ever existed. The Jones Act was welfare legislation that created new rights in seamen for damages arising from maritime torts. As welfare legislation, this statute is entitled to a liberal construction to accomplish its beneficent purposes. Compare *Aguilar* v. *Standard Oil Co.,* 318 U. S. 724; *American Stevedores* v. *Porello,* 330 U. S. 446. In considering similar legislation in other fields, we have concluded that Congress intended that the purposes of such enactments should not be restricted by common-law concepts of control so as to bar from welfare legislation as independent contractors persons who were as a matter of economic reality a part of the processes and dependent upon the businesses to which they rendered service.[10]

The issue in this case is whether a construction of the Jones Act carrying out the intention of Congress to grant those new rights to seamen against their employers requires or permits a holding that the general agent under the contract here in question is an employer under the Jones Act. The decision depends upon the interpretation of the contract between respondent and Cosmopolitan on one hand and that between Cosmopolitan and the United States on the other. We assume, without deciding, that the rule of the *Hearst* case applies, that is, the word "employment" should be construed so as to give protection to seamen for torts committed against them by those standing in the proximate relation of employer, and the rules of private agency should not be rigorously ap-

[10] Newsboys, *Labor Board* v. *Hearst Publications,* 322 U. S. 111, 120, 128–31; unloaders of coal cars, *United States* v. *Silk,* 331 U. S. 704, 713; meat boners, *Rutherford Food Corp.* v. *McComb,* 331 U. S. 722.

plied.[11] Yet this Court may not disregard the plain and rational meaning of employment and employer to furnish a seaman a cause of action against one completely outside the broadest lines or definitions of employment or employer. We have no doubt that, under the Jones Act, only one person, firm, or corporation can be sued as employer. Either Cosmopolitan or the Government is that employer.[12] The seaman's substantive rights are the same whoever is the employer. Under the Jones Act, his remedy permits him to demand a jury trial. If the Government is the employer, his remedy is in admiralty without a jury. See the excerpt from the House Report, p. 792, *infra*.

It was said in *Hust* that the election of remedies granted seamen injured between October 1, 1941, and the effective date of the Clarification Act, March 24, 1943, indicated that a seaman had broader rights before the Clarification Act than he did after. 328 U. S. at 725, Part III. The suggestion was that Congress could not have intended to restrict suits against general agents. This statement springs from the Court's then understanding of the *Brady* case, which we have heretofore considered. The reason for the election given by the Clarification Act was quite different. It was to give seamen employees of the United States through the War Shipping Administration on public vessels or foreign-flag vessels or otherwise

[11] But compare *Robinson* v. *Baltimore & Ohio R. Co.*, 237 U. S. 84, 94:

"We are of the opinion that Congress used the words 'employé' and 'employed' in the statute in their natural sense, and intended to describe the conventional relation of employer and employé."

*Hull* v. *Philadelphia & Reading R. Co.*, 252 U. S. 475.

[12] It is much the same type of problem as was presented in *Bartels* v. *Birmingham*, 332 U. S. 126. There we concluded that the leader and organizer of a traveling orchestra was the employer of the band members rather than the various dance hall proprietors for whom the orchestra performed.

an election to employ the means for redress theretofore possessed by them, such as those mentioned in § 1 of the Clarification Act, note 8, *supra,* or to enjoy the same rights as similar employees on merchant vessels.[13] Nothing has been presented to us from the Act or from its legislative history indicative of congressional purpose to do anything other than to extend existing rights of merchant seamen to all seamen employed through the War Shipping Administration. This was specifically declared in H. R. Rep. No. 107, 78th Cong., 1st Sess., p. 21:

> "The various rights and remedies under statute and general maritime law with respect to death, injury, illness, and other casualty to seamen, have been rather fully set forth hereinabove. Under clause 2 of section 1 (a) these substantive rights would be governed by existing law relating to privately employed seamen. The only modification thereof arises from the remedial provision that they shall be enforced in accordance with the provisions of the Suits in Admiralty Act. This procedure is appropriate in view of the fact that the suits will be against the Government of the United States. In such a suit no provision is made for a jury trial as may otherwise be had in a proceeding such as one under the Jones Act for reasons set forth in the letter of the Attorney General (September 14, 1942)."

See S. Rep. No. 62, 78th Cong., 1st Sess., pp. 11–12; S. Rep. No. 1813, 77th Cong., 2d Sess., p. 6; Hearings before the Committee on the Merchant Marine and Fish-

[13] For a full discussion see the dissent in *Hust* v. *Moore-McCormack,* 328 U. S. 707, 744, and the excerpts from the Senate and House Reports, footnotes 9 and 10.

For the background of the statutory distinctions drawn between public vessels and merchant vessels, see *Canadian Aviator, Ltd.* v. *United States,* 324 U. S. 215, 218–22; *American Stevedores* v. *Porello,* 330 U. S. 446, 450–54.

eries, House of Representatives, 77th Cong., 2d Sess., on H. R. 7424, p. 33.

The *Caldarola* case, 332 U. S. 155, undermined the foundations of *Hust*. See the dissent therein at pp. 161–163. *Caldarola* held that the general agents under the standard form contract were not in possession and control of the vessel so as to make them liable under New York law to an invitee for injuries arising from negligence in its maintenance. Pp. 158–59. Our ruling was based on "the interpretation of that contract" as "a matter of federal concern." We do not think it consistent to hold that the general agent has enough "possession and control" to be an employer under the Jones Act but not enough to be responsible for maintenance under New York law. It is true, as respondent argues, that *Caldarola* dealt only with the general agent's liability to a stevedore, as opposed to a crew member, under the law of New York. We think, however, that vicarious liability to anyone must be predicated on the relation which exists under the standard form agreement and the shipping articles between the general agent on the one hand and the master and crew of the vessel on the other. *Caldarola* held that this relation was not one which involved that proximity necessary to a finding of liability in the general agent for the torts of the master and crew. We perceive no reason why the rationale of this holding does not apply with equal force to a suit under the Jones Act. Under common-law principles of agency such a conclusion is required. We think it equally compelled even if we are to adopt, as the Court in *Hust* suggested, the perhaps less technical and more substantial tests propounded in *Labor Board* v. *Hearst Publications*, 322 U. S. 111.

*Hust* was decided June 10, 1946; *Caldarola* June 23, 1947. Certainly from the latter date, the danger of relying on *Hust* was apparent to the world though it must be admitted there was enough uncertainty in the law

properly to give concern to Congress.[14] Notwithstanding there may be some undesirable results in overruling *Hust,* such as loss of rights under the Suits in Admiralty Act by reliance on *Hust,* we think that in view of *Caldarola,* the uncertainty as to remedies that the two decisions generate, and the desirability of clarifying the position of the United States as an employer through the War Shipping Administration, that case should be and is overruled.

II.

A re-examination of the present standard service agreement will make clear the conclusion set out in Part I of this opinion. 46 C. F. R. Cum. Supp. § 306.44 *et seq.*

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[14] Although Congress has not enacted legislation to make entirely clear the remedies of W. S. A. seamen against the United States for torts, there has been an effort to do so. H. R. 4873, 80th Cong., 2d Sess., sought to do so by amending the Suits in Admiralty Act, § 5, 41 Stat. 525, 526, so as to make the remedy in admiralty of that act exclusive as to the same subject matter so as to protect the general agent from suits such as *Hust* or *Caldarola.* The bill was passed by the House June 8, 1948, 94 Cong. Rec. 7388–89, but was not passed by the Senate. H. R. 483 and 4051 of the 81st Cong., 1st Sess., to the same effect, are now pending. In H. R. Rep. No. 2060 on H. R. 4873, 80th Cong., 2d Sess., the Committee on the Judiciary said, p. 2:

"Then the Supreme Court on June 23, 1947, handed down its decision in *Caldarola* v. *Eckert* (332 U. S. 155), which clarified, in the opinion of the committee, the rule previously announced so as to make it plain that the agent while liable for the negligence of its own employees was not liable for the negligence of the civil-service masters and crews with whom the United States manned the vessels. For the negligence of those, the United States was the only responsible party. The committee believes that litigants should not be made the victims of the legal confusion regarding the proper remedy in such cases, and are not responsible for the conditions brought about by the lack of clarity in the opinions of the Supreme Court. Legislative relief is requisite not only to save to litigants possessing meritorious claims their right to a day in court, but also to settle the question of remedy in future cases."

The solution of the problem of determining the employer under such a contract depends upon determining whose enterprise the operation of the vessel was. Such words as employer, agent, independent contractor are not decisive. No single phrase can be said to determine the employer. One must look at the venture as a whole. Whose orders controlled the master and the crew? Whose money paid their wages? Who hired the crew? Whose initiative and judgment chose the route and the ports? It is in the light of these basic considerations that one must read the contract. No evidence has come to our attention that indicates the general agent ever undertook to give orders or directions as to the route or management of the ship while on voyage.

An examination of the terms of the contract and the actual conduct of the parties under this agreement, so far as shown by the record, demonstrates that the United States had retained for the entire voyage the possession, management, and navigation of the vessel and control of the ship's officers and crew to the exclusion of the general agent. Under the General Agency Agreement the general agent is appointed by the United States "as its agent and not as an independent contractor, to manage and conduct the business of vessels assigned to it." Art. I. The general agent agrees "to manage and conduct the business for the United States, in accordance with such directions, orders, or regulations as the latter has prescribed, or from time to time may prescribe." Art. 2. The general agent engages itself to "maintain the vessels in such trade or service as the United States may direct," to "collect all moneys due the United States" under the agreement, to "equip, victual, supply and maintain the vessels, subject to such directions, orders, regulations and methods of supervision and inspection as the United States may from time to time prescribe," Art. 3A, to "arrange for the repair of the vessels" and to "exercise reasonable diligence in making inspections and obtaining

information with respect to the state of repair and condition of the vessels." Art. 14. The agreement provides in Art. 3A (d) that:

> "(d) The General Agent shall procure the Master of the vessels operated hereunder, subject to the approval of the United States. The Master shall be an agent and employee of the United States, and shall have and exercise full control, responsibility and authority with respect to the navigation and management of the vessel. The General Agent shall procure and make available to the Master for engagement by him the officers and men required by him to fill the complement of the vessel. Such officers and men shall be procured by the General Agent through the usual channels and in accordance with the customary practices of commercial operators and upon the terms and conditions prevailing in the particular service or services in which the vessels are to be operated from time to time. The officers and members of the crew shall be subject only to the orders of the Master. All such persons shall be paid in the customary manner with funds by the United States hereunder."

It is thus seen that the duties of the respondent were expressly and intentionally limited to those of a ship's husband who has been engaged to take care of the shoreside business of the ship and who has no part in the actual management or navigation of the vessel. This view is reinforced by the considerations which led to the establishment of the War Shipping Administration to control "the operation, purchase, charter, requisition, and use of all ocean vessels under the flag or control of the United States." [15] Secrecy, speed, and efficiency of oper-

[15] Executive Order 9054 of February 7, 1942, issued under the First War Powers Act of December 18, 1941, 55 Stat. 838. 3 C. F. R. Cum. Supp. 1086.

ation were of paramount importance. Direct governmental operation of the merchant fleet insured sovereign immunity from regulation, taxation, and inspection, by other sovereignties both local and foreign. At the same time, the services of private shipping companies could be utilized because they possessed personnel skilled in the shoreside business of a ship and familiar with local port facilities and conditions. In addition these private companies were favorably situated through their union and other connections to secure seamen to man the vessels. As a result service agreements were designed whereby the shoreside services and administration of the merchant fleet were to be handled by existing private companies while the United States, through the master of the ship, retained full control over the navigation and physical operation of the vessel.

Two types of service agreements were drafted—the General Agency Agreement, with which we are presently concerned, and the Berth Agency Agreement.[16] The general agent has the responsibility of husbanding the vessel and his duties are to victual, supply, maintain, and repair the ship. The duties of the berth agent relate primarily to the handling and loading of cargo and other port services such as wharfage and pilotage needed by the vessel. In foreign ports the berth agent also takes care of the husbanding services. There is necessarily a certain overlapping of duties, but to avoid any conflict of authority both the general agent and the berth agent were made subject to "such directions, orders, or regulations as the [United States] has prescribed, or from time to time may prescribe." [17] This division of duties between

[16] Promulgated by the Administrator, War Shipping Administration, in General Order No. 21, Sept. 22, 1942, and Supp. 4 thereto, Dec. 29, 1943. 7 Fed. Reg. 7561; 8 Fed. Reg. 17512.

[17] Article 2 of the General Agency Agreement, form GAA 4–4–42, and Article 2 of the Berth Agency Agreement, form BA 12–29–43.

the general agent and the berth agent emphasizes the fact that neither the possession nor management of the vessel was conferred on either of them. There could be no occasion for any conflict of authority with regard to orders received by the master as to the actual operation of the ship, for he was expressly made, in Art. 3A (d), the agent and employee of the United States with "full control, responsibility and authority with respect to the navigation and management of the vessel."

Even the discretion vested in the agents was decreased by the master contracts which the United States executed for the furnishing of numerous services and supplies required by the vessels.[18] There were also detailed instructions issued by the War Shipping Administration as to the terms of the contracts which the agents were authorized to enter into,[19] and these contracts were required to be executed in the name of the United States as principal.[20]

At the time of the wartime requisition of the privately owned merchant fleet, the government administrative agencies concerned gave careful study to the question of whether the crews were to be employees of the shipping companies or of the United States.[21] There were outstanding many collective bargaining agreements between the private shipping companies and the maritime unions. It was manifestly undesirable to disturb these existing agreements and for the Government to negotiate new

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[18] Examples of such contracts are contained in the record of *Caldarola* v. *Eckert*, 332 U. S. 155, No. 625, 1946 Term.

[19] For example, see Operations Regulations Nos. 27 (towage contracts); 84 (duties of berth agents, general agents, and agents); 97 (bunker oil contracts); 99, Supp. 1 and 2 (pilferage).

[20] General Order No. 42 of the War Shipping Administration, 9 F. R. 4110.

[21] See letter of April 28, 1947, from the General Counsel of the Maritime Commission to the Department of Justice.

ones.[22] Yet it was essential that the masters and crews be government employees in order to obviate strikes and work stoppages, to insure sovereign immunity for the vessels, and to preserve wartime secrecy by confining all litigation concerning operation of the vessels to the admiralty courts where appropriate security precautions could be observed. The service agreements, therefore, provided that the officers and men to fill the complement of the vessel should be procured by the general agent through the usual channels upon the terms and conditions customarily prevailing in the services in which the vessels were to be operated.[23] These men, however, were to be hired by the master of the ship and were to be subject to his orders only. The responsibility of employing the officers, so the Regulations show, was vested exclusively in the master,[24] and the men so hired became employees of the United States and not of the general agent.[25]

Previously existing collective bargaining agreements were adhered to so that seamen's conditions of employment would be disrupted as little as possible by the change-over occasioned by government requisition of the vessels. See the War Shipping Administration's over-all collective bargaining arrangement with the nine princi-

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[22] See the Statements of Policy of May 4 and May 12, 1942, issued by the War Shipping Administration and the various maritime unions. WSA Operations Regulation No. 1.

[23] Article 3A (d) of the General Agency Agreement, set out in text of opinion at p. 796.

[24] Operations Regulations No. 15, Directive No. 2, issued by the War Shipping Administration provided: "The Master of a vessel has full discretion in signing on crew members and may reject any person seeking employment . . . . Records shall be kept of the names of those rejected and of the reason for rejection and shall be submitted to the port office of the Recruitment and Manning Organization of the War Shipping Administration in the port in which the rejection occurs."

[25] See Restatement, Agency, § 79, comment (a).

pal maritime unions, known as the "Statements of Policy," WSA Operations Regulations 1, May 25, 1942. Although the War Shipping Administration seamen fell within the exclusion of employees of the United States from the coverage of the National Labor Relations Act, the Administrator arranged to utilize the facilities of the National Labor Relations Board for the designation of bargaining units, while specifically reserving the Administration's rights with respect to the Board's absence of jurisdiction over personnel aboard WSA operated vessels.[26] The House Committee on Merchant Marine and Fisheries, in reporting the Clarification Act, expressly approved of this practical solution of the collective bargaining problem.[27] A similar practical arrangement was made in connection with the functioning of the War Labor Board.

The shipping articles summarized above, pp. 785–786, complied with the tenor of the General Agency Agreement by making it clear that respondent was an employee of the United States. In order to pay the crew and the other expenses incidental to the operation of the ship, the War Shipping Administration deposited funds in a special joint bank account set up in the name of the agent "as general agent for the War Shipping Administration." From this special account the general agent drew the funds and turned them over to the master to pay the crew. No money of the general agent was used for this purpose or in the operation of the vessel.

Thus the cases and an analysis of the relations established by the standard form agreement lead to the con-

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[26] See letter of October 20, 1942, from the War Shipping Administration to the National Labor Relations Board, and the reply of October 26, 1942, record, pp. 43–51, in No. 360, *Fink* v. *Shepard Steamship Co., post,* p. 810.

[27] H. R. Rep. No. 107, 78th Cong., 1st Sess., pp. 23–24.

clusion that an agent such as Cosmopolitan, who contracts to manage certain shoreside business of a vessel operated by the War Shipping Administration, is not liable to a seaman for injury caused by the negligence of the master or crew of such a vessel.

*Reversed.*

MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, MR. JUSTICE MURPHY and MR. JUSTICE RUTLEDGE dissent.

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## WEADE ET AL. *v.* DICHMANN, WRIGHT & PUGH, INC.

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

No. 179. Argued February 1, 1949.—Decided June 27, 1949.

1. Respondent was employed by the United States as a general agent under the terms of the war-time standard form of general agency agreement to manage certain phases of the business of a ship owned by the United States and operated by the War Shipping Administration. By an addendum to the agreement, it was also required to arrange for the transportation of passengers as agent of the United States. Certain women passengers and the husband of one of them sued respondent for damages sustained through injuries to the women resulting from the wrongful act of a member of the ship's crew. *Held:* Respondent was not liable as the owner *pro hac vice*, or as a common carrier operating the vessel, or as the employer of the master or crew. *Cosmopolitan Shipping Co.* v. *McAllister, ante,* p. 783. Pp. 802–809.
2. Performance of such shoreside duties as issuing tickets, maintaining the vessel in the service directed by the United States, maintaining terminals and offices, arranging for loading and unloading passengers, arranging for advertising, provisioning the ship, and procuring officers and crew for hire by the master, all as agent of the United States, did not make the general agent liable as a common carrier to the public or anyone. Pp. 805–808.
3. Petitioners argued here that respondent as an agent is independently liable for its negligence in procuring unsuitable crew mem-

bers; but this theory of liability was not relied upon at the trial, instructions upon the point were not given or requested, and no exceptions were taken by petitioner to the instructions given. *Held:* In these circumstances, error cannot be urged here as to this point. P. 808.

4. There being suggestions in the complaint and evidence of alleged liability of respondent to petitioners for respondent's own negligence while acting as general agent, the Court of Appeals, which reversed the trial court's judgment for petitioners, erred in directing the trial court to enter a judgment for respondent. Pp. 808–809.
5. No opinion is expressed as to the circumstances in which respondent might be liable for its own actions as general agent. P. 809.

168 F. 2d 914, modified and affirmed.

A Federal District Court gave a judgment to certain passengers and the husband of one of them against a general agent employed by the United States to manage certain phases of the business of a ship owned by the United States and operated by the War Shipping Administration, for injuries sustained as a result of the wrongful conduct of a member of the ship's crew. The Court of Appeals reversed. 168 F. 2d 914. This Court granted certiorari. 335 U. S. 810. *Modified and affirmed,* p. 809.

*William E. Leahy* argued the cause for petitioners. With him on the brief were *Michael F. Keogh, J. Robert Carey, Richard H. Love, Edward L. Breeden, Jr., Walter E. Hoffman* and *William J. Hughes, Jr.*

*Leavenworth Colby* argued the cause for respondent. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Morison* and *Paul A. Sweeney.*

Mr. Justice Reed delivered the opinion of the Court.

On August 3, 1945, at Old Point Comfort, Virginia, petitioners, Mrs. Lillian A. Weade and Mrs. Roberta L. Stinemeyer, purchased tickets and embarked as passen-

gers on the *Meteor,* a steamboat owned by the United States through the War Shipping Administration and operating between Norfolk, Virginia, and Washington, D. C. The ladies retired to their stateroom about 11:00 p. m. and because of the warm weather opened both the glass and the shutter of the window which faced onto the boat deck. During the night the second cook of the *Meteor* entered the stateroom through the open window and raped Mrs. Weade, who was sleeping in the lower berth. Mrs. Stinemeyer suffered fright and shock from witnessing this atrocity. The perpetrator of the crime was subsequently tried, convicted, and executed.

This case involves the liability of a general agent to passengers under a contract similar to that discussed in *Cosmopolitan Shipping Co.* v. *McAllister, ante,* p. 783, decided this day. The agency agreement covered passenger boats through an addendum to the contract providing for additional services by the general agent.[1]

Petitioners, Lillian A. Weade and her husband, instituted a civil action for damages against respondent in the United States District Court for the Eastern District of Virginia. The husband alleged as his damages loss of consortium and the expenses of the hospitalization of his wife. Petitioner Mrs. Stinemeyer brought a separate civil action for her damages in the same court. Jurisdiction in both actions was based on diversity of citizenship, and the two civil actions were consolidated for trial. In addition Mrs. Weade filed a libel in admiralty against the United States, which action has been continued pending the final determination of the present proceedings.

The complaint of Mr. and Mrs. Weade alleged, so far as now important, that the steamboat was operated as a common carrier by respondent and that petitioners

[1] See note 3, *infra,* and 46 C. F. R. Cum. Supp. § 306.44.

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were injured through the failure of respondent to provide adequate protection for its passengers from the personal misconduct of its employees, and through the failure to use due care in the selection of reliable, careful, and competent employees. The complaint of Mrs. Stinemeyer is substantially the same as to the specifications of negligence, though it did not assert that respondent itself was a common carrier, but did allege that the injury occurred through the act of respondent's employees. The respondent's answer denied that the vessel was operated by it as a common carrier and that the master and crew of the vessel were its employees. The answer further alleged that the vessel was operated by the War Shipping Administration, and that respondent only performed certain services for the owner of the ship as general agent in accordance with the standard service agreement.

The jury as triers of fact in this civil proceeding were instructed as a matter of law that by virtue of the contract respondent was the actual operator of the vessel as a common carrier owing the highest degree of care to its passengers. The trial judge further charged that, as a common carrier, this duty to exercise the highest degree of care extended to all acts of the carrier and included the providing of safe accommodations and protection for passengers, the providing of a suitable number of watchmen, and the selection of competent, careful, and sober employees. The jury returned verdicts for petitioners, and the trial judge denied the motion of the respondent for judgment notwithstanding the verdict, stating as his reason therefor: "While the case of *Hust* v. *Moore-McCormack Lines, Incorporated,* 328 U. S. 707, is not precisely in point, it is my view that it is controlling so far as the liability of the defendant is concerned." On appeal the Court of Appeals for the Fourth Circuit reversed and held that under *Caldarola* v. *Eckert,* 332 U. S. 155,

respondent was not the owner *pro hac vice* in possession and control of the vessel and thus could not be liable as a common carrier for the safety of the passengers. *Dichmann, Wright & Pugh* v. *Weade,* 168 F. 2d 914.

Under our holding today in No. 351, *Cosmopolitan Shipping Co.* v. *McAllister, ante,* p. 783, the instructions referred to above were erroneous. Respondent was not the owner *pro hac vice,* was not a common carrier operating the vessel, and was not the employer of the master or crew. The trial of the present proceeding revolved around these questions and did not concern the problem of negligence on the part of respondent or of its own agents in handling the ship or crew on voyage as an agent of the United States as distinguished from an employer of the master and crew or owner *pro hac vice.*

Petitioners urge in point 3 of their brief as a ground for upholding the decision of the trial court that respondent, because of the duties imposed upon it by the General Agency Agreement, was liable as a common carrier as far as the public was concerned. In support of this contention they point to the duties of the general agent to issue tickets, maintain the vessel in the service directed by the United States, maintain terminals and offices, arrange for the loading and unloading of passengers, arrange for advertising, provision the ship, and procure officers and crew for hire by the master. The performance of such shoreside duties, however, does not make the agent liable as a common carrier to the public or anyone.[2]

At the insistence of the Navy, the War Shipping Administration in 1945 instituted a nightly service of two steamboats between Norfolk and Washington. The name given to this service was the Washington-Hampton Roads Line, and the *Meteor* was one of the two vessels employed

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[2] See *Cosmopolitan Shipping Co.* v. *McAllister, ante,* p. 783.

therein. These two vessels were assigned to respondent as general agent by a passenger addendum to the standard GAA 4-4-42 agreement,[3] under which respondent had been general agent for some twenty cargo vessels. It will be noted that, under Article 3A (f) of the addendum, the general agent was to arrange for the transportation of passengers and to issue tickets for this purpose. The

[3] "Whereas, the United States of America (Herein called the 'United States') acting by and through the Administrator, War Shipping Administration, and Dichmann, Wright & Pugh, Inc. (herein called the 'General Agent') entered into an Agreement (Contract WSA–4098) dated January 9, 1943 (herein called the 'Service Agreement') whereby the United States appointed the General Agent as its agent to manage and conduct the business of cargo vessels assigned to it by the United States; and

"Whereas, it is desirable to have as far as practicable both cargo vessels and passenger vessels operated under the uniform provisions of one agreement.

"Now, Therefore:

"The United States and the General Agent agree that passenger vessels heretofore or hereafter allocated to the General Agent to conduct the business of the vessels as agent of the United States shall be governed by the provisions of the Service Agreement modified as follows:

"Section 1. Article 3A of the Service Agreement is hereby amended by adding a provision following subsection (e) thereof as follows:

" '(f) Shall arrange for the transportation of passengers when so directed, and issue or cause to be issued to such passengers customary passenger tickets. After a uniform passenger ticket shall have been adopted by the United States, such passenger ticket shall be used in all cases as soon as practicable after receipt thereof by the General Agent. Pending the issuance of such uniform passenger ticket, the General Agent may continue to use its customary form of passenger ticket.'

"Section 2. The vessels to which the Service Agreement will apply by operation of this Part II, are as listed on Exhibit B attached hereto and made a part hereof, and such additional vessels as may from time to time be assigned to the General Agent by letter agreement.

"In witness whereof . . . ."

ticket, which is set out in the margin,[4] bears the express notation that the steamboat line was "Operated by United States of America, War Shipping Administration," and that respondent was serving in the capacity of an agent.

Respondent's duties were to service the ships and to "arrange for the transportation" of passengers on them. The duty of a common carrier, on the other hand, is to transport for hire whoever employs it.[5] Here the contract called for the actual transportation to be carried out by the War Shipping Administration. The respondent's duties ended at the shore line. *Cosmopolitan Shipping Co.* v. *McAllister, supra.* The cases cited by petitioner holding a transportation agent liable as a common car-

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[4] "Issued by

"Washington-Hampton Roads Line

"Operated by United States of America, War Shipping Administration

"One First Class Passage

"Norfolk, or Old Point Comfort Va. to Washington, D. C.

"Subject to the Following contract:

"This ticket is void unless officially stamped and dated.

"Baggage valuation is limited to $100 for and adult and $50 for a child, unless purchaser hereof declares a greater valuation at time baggage is presented for transportation and pays excess valuation charges according to tariff rates, rules and regulations.

"The company will under no circumstances be responsible for any moneys or valuables unless deposited with the Purser on Steamer, nor will they be responsible for any baggage unless properly checked.

"This ticket is limited for passage within thirty days from date of sale stamped on back.

"Dichmann, Wright & Pugh, Inc., Agent.

"I. S. Walker, Gen. Passenger Agent."

[5] *Niagara* v. *Cordes,* 21 How. 7, 22; *Washington ex rel. Stimson Lumber Co.* v. *Kuykendall,* 275 U. S. 207, 211; *United States* v. *Brooklyn Eastern District Terminal,* 249 U. S. 296, 305–306. Cf. *Lehigh Valley R. Co.* v. *United States,* 243 U. S. 444; *I. C. C.* v. *Delaware, Lackawanna & Western R. Co.,* 220 U. S. 235.

rier involve situations where the actual movement of goods or passengers was carried out by the agent.[6] Under the contract respondent here was not in any way engaged in the carriage of passengers between Norfolk and Washington and had never held itself out to the public as ready to engage in such traffic. As a mere arranger of transportation it does not incur the liability of a common carrier.

Apart from their reliance upon respondent's control of the vessel on voyage under the agency contract, petitioners further argue that respondent as an agent is independently liable for its negligence in procuring unsuitable crew members. This theory of liability was not relied upon at the trial. Instructions upon the point were not given or requested. The court did charge that as principal and operator of the vessel the respondent was responsible for any tort committed by the steamship personnel and as a common carrier was under the duty to exercise the highest degree of care for the safety of the passengers including the selection of personnel. It was upon the basis of respondent's liability as common carrier that petitioners developed their causes of action, and upon that theory the jury, under the instructions discussed above, returned a verdict in their favor. At the conclusion of the trial judge's charge, counsel for petitioners stated, "If your Honor please, we have no exceptions." Under these circumstances, error cannot be urged as to this point. See Rule 8 (1), Supreme Court of the United States; Rule 51 of the Federal Rules of Civil Procedure; *United States* v. *Atkinson,* 297 U. S. 157.

By the decision below, the trial court was directed to enter a judgment for respondent, which had filed a

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[6] *United States* v. *Brooklyn Terminal,* 249 U. S. 296; *Union Stock Yard Co.* v. *United States,* 308 U. S. 213.

motion for judgment notwithstanding the verdict. As there were suggestions in the complaint and evidence of alleged liability of respondent to petitioners for respondent's own negligence while acting as general agent, this direction should not have been given. See *Brady* v. *Roosevelt S. S. Co.*, 317 U. S. 575.[7] The decision is modified so as to eliminate the direction to enter judgment.[8]

We express no opinion as to what circumstances might fix liability upon the respondent for its own actions as general agent.

*Affirmed as modified.*

MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, MR. JUSTICE MURPHY and MR. JUSTICE RUTLEDGE dissent.

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[7] See 2 Restatement, Agency § 358.

[8] *Globe Liquor Co.* v. *San Roman*, 332 U. S. 571; *Cone* v. *West Virginia Paper Co.*, 330 U. S. 212.

## FINK *v.* SHEPARD STEAMSHIP CO.

NO. 360. CERTIORARI TO THE SUPREME COURT OF OREGON.*

Argued February 2, 1949.—Decided June 27, 1949.

1. A general agent employed by the United States under the terms of the war-time standard form of general agency agreement to manage certain phases of the business of a ship owned by the United States and operated by the War Shipping Administration is not liable under § 33 of the Merchant Marine Act of 1920, known as the Jones Act, to a member of the crew of the ship who suffered physical injury through the negligence of its master and officers, when the injury occurred after March 24, 1943, the date of enactment of the War Shipping Administration Act, known as the Clarification Act. *Cosmopolitan Shipping Co.* v. *McAllister, ante,* p. 783. Pp. 811–813.
2. Nor is such a general agent liable to a member of the crew for wages and maintenance and cure, which are incidents of the employer-employee relationship. Pp. 813–815.
3. A delivery certificate reciting that a ship was "delivered" to a general agent "under terms and conditions of" the standard general agency agreement adds nothing of significance to that agreement and does not show that the general agent was in possession and control of the ship. Pp. 815–816.

183 Ore. 373, 192 P. 2d 258, affirmed.

169 F. 2d 612, affirmed.

No. 360. A member of the crew of a ship owned by the United States and operated by the War Shipping Administration obtained a judgment in an Oregon Circuit Court against a general agent employed by the United States to manage certain phases of the ship's business, for injuries sustained through the negligence of its master and officers. The Supreme Court of Oregon reversed, 183 Ore. 373, 192 P. 2d 258, and denied a rehearing, 183 Ore. 373, 193 P. 2d 537. This Court granted certiorari. 335 U. S. 870. *Affirmed,* p. 816.

*Together with No. 430, *Gaynor* v. *Agwilines, Inc.*, on certiorari to the United States Court of Appeals for the Third Circuit.

No. 430. A Federal District Court dismissed an action for wages and maintenance and cure by a member of the crew of a ship owned by the United States and operated by the War Shipping Administration against a general agent employed by the United States to manage certain phases of the ship's business, 76 F. Supp. 617. The Court of Appeals affirmed. 169 F. 2d 612. This Court granted certiorari. 335 U. S. 870. *Affirmed,* p. 816.

*James Landye* argued the cause for petitioner in No. 360. With him on the brief were *B. A. Green* and *Edwin D. Hicks.*

*Abraham E. Freedman* argued the cause and filed a brief for petitioner in No. 430.

*Leavenworth Colby* argued the cause for respondents. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Morison* and *Paul A. Sweeney.*

MR. JUSTICE REED delivered the opinion of the Court.

These two cases raise issues which, as the facts set out below indicate, are controlled by our decision in *Cosmopolitan Shipping Co.* v. *McAllister, ante,* p. 783, decided this day.

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The petitioner, Fink, signed on the S. S. *George Davidson* on June 8, 1943, as an able seaman. The shipping articles showed as the "Registered Managing Owner or Manager" the "War Shipping Administration (Owner) Shepard Steamship Co. (Gen. Agents)." The contract pursuant to which respondent, Shepard Steamship Co., handled certain phases of the ship's business was the standard form General Agency Agreement, GAA 4–4–42. Petitioner was procured by respondent from a union hiring hall for employment by the master of the vessel.

In August, 1943, while the ship was at sea, Fink was ordered by the master and boatswain to empty a garbage

can overboard. No one was assigned to help him although the can was heavy, the rail high and the sea rough. The roll of the ship caused the can to be thrown backwards against petitioner, injuring him.

Petitioner instituted this action for damages against respondent under the Jones Act[1] in a Circuit Court of Oregon, alleging that respondent was "in possession of, controlled, navigated, managed and operated" the *Davidson* and was negligent in ordering petitioner to dump the garbage in a heavy sea without assistance.[2] Respondent denied all these allegations. The jury was charged that the officers of the ship were agents of respondent and that their negligence, if any, should be imputed to respondent. Judgment was entered on a jury verdict for petitioner. The Supreme Court of Oregon reversed, *Fink* v. *Shepard S. S. Co.*, 183 Ore. 373, 192 P. 2d 258, holding that the remedy for an injury caused by the negligence of the ship's officers on a government-operated vessel such as this, subsequent to the enactment of the Clarification Act, was exclusively by suit against the United States under the Suits in Admiralty Act. It thus distinguished *Hust* v. *Moore-McCormack Lines,* 328 U. S. 707, on the ground that there the injury occurred before the effective date of the Clarification Act.[3] A petition for certiorari was granted and the case set for argument along with *Cosmopolitan Shipping Co.* v. *McAllister, supra.*

The question here is identical with that in *McAllister, i. e.,* whether the general agent of a vessel owned by the

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[1] 41 Stat. 1007, 46 U. S. C. § 688.

[2] He also filed claim on account of his injuries with the War Shipping Administration and sued the United States pursuant to the Suits in Admiralty Act and the War Shipping Administration (Clarification) Act, 57 Stat. 45, 50 U. S. C. App. § 1291. This suit was later dismissed without prejudice.

[3] See *Hust* v. *Moore-McCormack Lines, supra,* at 727.

government and operated by the War Shipping Administration is liable under the Jones Act to a seaman who is injured at sea after the date of enactment of the Clarification Act by the negligence of the officer of the vessel. The reasons and arguments supporting our negative answer to that question in *McAllister* are equally applicable here. No purpose would be served by repeating them.

We desire to point out, however, that the testimony in this case confirms the conclusions which we have drawn from a study of the standard form General Agency Agreement. It establishes that respondent was neither the employer of officers on vessels such as the *Davidson* nor a party to such a relation with them that it could be held vicariously liable for their torts. It shows that such officers were required to fill out an application form for employment captioned "War Shipping Administration, Division of Operations, Service Record." Consideration and approval of these applications by the W. S. A. made the applicants employees of the United States. Thereafter, transfer to other W. S. A. vessels for which different companies were general agents could be accomplished by furnishing to W. S. A. a transfer form. No new application for employment was required. It shows that the general agent had no voice in determining the destination or route of the vessel, in what service it would be operated, or how it would be handled in foreign ports. The soliciting and loading of cargo and the collection of freight were functions of the berth agents.

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Petitioner Gaynor signed shipping articles in 1945 as a member of the crew of the S. S. *Christopher Gadsden,* a vessel which was owned by the United States and operated by the War Shipping Administration. The ar-

ticles referred to "Agwilines, Inc., as gen. agts. for WSA," and also stated, ". . . the Master, Officers, and all other Members of the Crew are employees of the United States subject to the provisions of [the Clarification Act, 57 Stat. 45, 50 U. S. C. App. § 1291], and are not employees of Agwilines, Inc." Respondent Agwilines was the general agent for the ship under standard form contract GAA 4–4–42. The *Gadsden* departed from Philadelphia on a foreign voyage and stopped en route at Charleston where, while on authorized shore leave, petitioner was injured in a highway accident. Neither the ship, the general agent, nor the W. S. A. was directly involved in any way in the accident.

Petitioner sued respondent for wages and maintenance and cure, alleging that respondent "possessed, owned, operated and controlled" the vessel. Agwilines denied these allegations, averred that it was merely the general agent under the standard form contract, that the ship was "owned, operated and controlled by the United States," and that petitioner had failed to comply with the Clarification Act, which required complaints of this sort to be brought pursuant to the Suits in Admiralty Act.

On the pleadings, an agreed statement of facts as summarized above, the shipping articles, the standard form agreement, and the delivery and redelivery certificates evidencing the allocation of the vessel to respondent by the W. S. A., the United States District Court for the Eastern District of Pennsylvania dismissed the action on the ground that petitioner's only remedy was a suit against the United States pursuant to the Clarification Act. 76 F. Supp. 617. The United States Court of Appeals for the Third Circuit affirmed. *Gaynor* v. *Agwilines, Inc.*, 169 F. 2d 612. We granted certiorari and assigned the case for argument along with *Cosmopolitan*

*Shipping Co.* v. *McAllister, ante,* p. 783, and *Fink* v. *Shepard Steamship Co.,* No. 360, decided herewith.

Although this case involves the right to wages and maintenance and cure, whereas *McAllister* and *Fink* concern damages for negligent injury, the reasoning and decisions in those cases are dispositive here. This is so because the right to maintenance and cure is "annexed to the employment," *Cortes* v. *Baltimore Insular Line,* 287 U. S. 367, 371; see *The Osceola,* 189 U. S. 158; is "an incident of the marine employer-employee relationship," *Aguilar* v. *Standard Oil Co.,* 318 U. S. 724, 730; 1 Benedict, Admiralty (6th ed., 1940) 61, 253; and because only the owner or owner *pro hac vice* of a vessel is liable for wages, which also stem from the contract of employment. *Shilman* v. *United States,* 164 F. 2d 649, 652; *The John E. Berwind,* 56 F. 2d 13; *Everett* v. *United States,* 284 F. 203; *Cox* v. *Lykes Brothers,* 237 N. Y. 376, 383, 143 N. E. 226, 228–229. Thus liability for wages and maintenance and cure depends upon the same relationship that is required to support an action for negligent injury. That relationship does not exist between petitioner and respondent.[4]

The delivery certificate, relied upon by petitioner as showing that the *Gadsden* was in the possession and control of Agwilines, recites in pertinent part that the ship "was on the 31st day of December, 1942 . . . delivered . . . by War Shipping Administration to Agwilines, Inc. UNDER TERMS AND CONDITIONS OF 'Service Agreement, Form GAA' . . . ." It is quite obvious, we

[4] Note that wages and maintenance and cure are treated along with claims for injuries in § 1 of the Clarification Act, which, in the case of seamen employed on United States or foreign vessels as employees of the United States through the W. S. A., directs that all of these rights shall be enforced pursuant to the provisions of the Suits in Admiralty Act.

think, that this certificate refers only to a "delivery" for the purposes contemplated by the General Agency Agreement and adds nothing of significance to that agreement, which we have already held, *McAllister, supra,* to be insufficient to establish liability on the part of the general agent.

*Nos. 360 and 430 affirmed.*

MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, MR. JUSTICE MURPHY and MR. JUSTICE RUTLEDGE dissent.

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REPORTER'S NOTE.

The next page is purposely numbered 901. The numbers from 816 to 901 were purposely omitted, in order to make it possible to publish the *per curiam* decisions and orders in the current advance sheets or "preliminary prints" of the United States Reports with *permanent* page numbers, thus making the *official* citations available immediately.

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## DECISIONS PER CURIAM AND ORDERS FROM MAY 16 THROUGH JUNE 27, 1949.

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### MAY 16, 1949.

*Per Curiam Decisions.*

No. 670. SECURITIES & EXCHANGE COMMISSION *v.* PHILADELPHIA COMPANY. On petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit. *Per Curiam:* The petition for writ of certiorari is granted. The judgment of the Court of Appeals is vacated and the case is remanded to that court with directions to dismiss the petition for review as moot, on joint motion for the parties. *Solicitor General Perlman* and *Roger S. Foster* for petitioner. *Thomas J. Munsch, Jr.* for respondent. Reported below: 84 U. S. App. D. C. 73, 175 F. 2d 808.

No. 679. KENNEDY *v.* WALKER, WARDEN. Appeal from the Supreme Court of Errors of Connecticut. *Per Curiam:* The judgment is affirmed. *Hurtado* v. *California,* 110 U. S. 516; *Adamson* v. *California,* 332 U. S. 46. MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, MR. JUSTICE MURPHY, and MR. JUSTICE RUTLEDGE dissent. *Clayton L. Klein* for appellant. Reported below: 135 Conn. 262, 63 A. 2d 589.

No. 584. FEDERAL COMMUNICATIONS COMMISSION *v.* BROADCASTING SERVICE ORGANIZATION, INC. Certiorari, 336 U. S. 950, to the United States Court of Appeals for the District of Columbia Circuit. Argued May 9, 1949. Decided May 16, 1949. *Per Curiam:* The judgment is reversed. *Federal Communications Comm'n* v. *WOKO,* 329 U. S. 223. *Solicitor General Perlman* argued the cause

for petitioner. With him on the brief were *Benedict P. Cottone, Max Goldman* and *Richard A. Solomon. Walter M. Bastian* argued the cause for respondent. With him on the brief were *Ben S. Fisher* and *John P. Southmayd.* Reported below: 84 U. S. App. D. C. 152, 171 F. 2d 1007.

No. 597, Misc. IN RE FEDERAL SECURITY ADMINISTRATOR AND THE ATTORNEY GENERAL OF THE UNITED STATES. On petition for writs of prohibition and/or mandamus. Argued and decided May 16, 1949. *Per Curiam:* The rule to show cause is discharged and the petition for writs of prohibition and/or mandamus is denied. MR. JUSTICE DOUGLAS dissents. *Robert L. Stern* argued the cause for petitioners, and *Solicitor General Perlman* was on the petition. *Walter M. Bastian* argued the cause and was on the return to the rule to show cause for Clark, Associate Judge, et al., respondents. *Charles S. Rhyne* argued the cause and was on the answer for Mytinger & Casselberry, Inc., intervenor.

*Miscellaneous Orders.*

No. 13, Original. UNITED STATES *v.* LOUISIANA; and

No. 14, Original. UNITED STATES *v.* TEXAS. On motions for leave to file complaints. Argued May 9, 1949. Decided May 16, 1949. The motions for leave to file complaints are granted and process is ordered to issue returnable on or before September 1, next. MR. JUSTICE JACKSON took no part in the consideration or decision of these applications. *Solicitor General Perlman* argued the cause for the United States, plaintiff. With him on the brief were *Attorney General Clark, Assistant Attorney General Vanech, Arnold Raum, Robert E. Mulroney* and *Robert M. Vaughan. L. H. Perez* and *F. Trowbridge vom Baur* argued the cause for the defendant in No. 13. With them on the brief were *Bolivar E. Kemp, Jr.,* Attorney General of Louisiana, and *John L. Madden,* As-

sistant Attorney General. *Price Daniel,* Attorney General of Texas, argued the cause for the defendant in No. 14. With him on the brief were *J. Chrys Dougherty* and *Jesse P. Luton, Jr.,* Assistant Attorneys General.

No. 692. CASSELL *v.* TEXAS. Certiorari, 336 U. S. 943, to the Court of Criminal Appeals of Texas. It is ordered that Chris Dixie, Esq., of Houston, Texas, be appointed to serve as counsel for the petitioner in this case.

No. 760. SMITH *v.* RAGEN, WARDEN. Certiorari, 336 U. S. 966, to the Circuit Court of Will County, Illinois. It is ordered that Herbert A. Friedlich, Esq., of Chicago, Illinois, be appointed to serve as counsel for the petitioner in this case.

No. 449, Misc. MERRILL *v.* SMITH, SUPERINTENDENT;
No. 536, Misc. SWAIN *v.* DUFFY, WARDEN;
No. 538, Misc. CANADA *v.* JONES, WARDEN;
No. 545, Misc. MORSE *v.* LAINSON, WARDEN;
No. 556, Misc. FREDERICKSEN *v.* JONES, WARDEN; and
No. 579, Misc. WILLIAMS *v.* OVERHOLSER, SUPERINTENDENT. The motions for leave to file petitions for writs of habeas corpus are denied.

No. 437, Misc. TATE *v.* CALIFORNIA. Motion for leave to file petition for writ of certiorari denied.

No. 453, Misc. SCHUMAN *v.* CALIFORNIA; and
No. 487, Misc. IN RE STINSON. Applications denied.

No. 551, Misc. HOLLOWAY *v.* CLARK, ATTORNEY GENERAL, ET AL. Motion for leave to file petition for writ of mandamus denied.

No. 610, Misc. IN RE ELECTRIC POWER & LIGHT CORP. ET AL. The petitions for a stay are denied. MR. JUSTICE

REED, MR. JUSTICE DOUGLAS, and MR. JUSTICE JACKSON took no part in the consideration or decision of these applications. *Samuel Becker* and *Nathan B. Kogan* for certain committees for common stockholders of the Electric Power & Light Corp., petitioners. Memoranda opposing the petitions were filed by *Solicitor General Perlman* and *Roger S. Foster* for the Securities & Exchange Commission; *Daniel James* for the Electric Power & Light Corp.; *John F. MacLane* for the Electric Bond & Share Co.; and *Percival E. Jackson* for a certain preferred stock committee, respondents.

MR. JUSTICE FRANKFURTER, with whom MR. JUSTICE MURPHY joins, dissenting.

This is a motion to stay the execution of a plan of dissolution of Electric Power & Light Corporation as ordered by the Securities and Exchange Commission under § 11 (b) of the Public Utility Act of 1935. The Commission brought proceedings to enforce its order before the United States District Court for the Southern District of New York and that court, having found the plan "fair and equitable," ordered its enforcement. That court also denied motions for a stay of the execution of the plan. The petitioners took appeals from the order of enforcement to the Court of Appeals for the Second Circuit and asked for a stay of the execution of the plan pending appeal. It is conceded that such appeals would become nugatory if before their disposition the plan be executed. The Commission, naturally enough therefore, in its memorandum in opposition to the motions for stay before this Court, indicates that whether the requested stay should be granted or withheld turns on "the merit or lack of merit in the appeals."

But the merits of the appeals before the Court of Appeals should be determined by that court and not here. If, on the motions for stay, that court had concluded that

the appeals were frivolous, the motions for stay would fall with the dismissal of the appeals. But the Court of Appeals has not found the appeals frivolous. On the contrary, when the motions for stay came before the Court of Appeals it suggested that the appeals be expedited by setting them for argument on the merits on a "typewritten record and briefs." The Commission and the other parties now opposing these motions resisted that suggestion "because of the serious consequences of delay . . . and the absence of any issues of substance." The Court of Appeals took the matter under advisement and thereafter denied the stay but still did not find the appeals frivolous and as such dismiss them. On the contrary, it indicated that if the appellants wished the court would set the appeals for an early hearing.

Even though Congress gives an appeal as a matter of right in a defined class of cases, a Court of Appeals may find that an appeal is wholly without merit and an abusive attempt to invoke its jurisdiction, just as this Court may dismiss an appeal for want of substantiality although on the surface a case may fall in the category of controversies for which Congress has conferred an appeal as of right. Inasmuch as the Court of Appeals here has not found the appeals so lacking in merit as to call for their dismissal, but on the contrary is continuing to entertain the appeals, I cannot bring myself to agree that the right of appeal which Congress has conferred upon appellants is to be denied by rendering it wholly ineffectual. This Court ought not to be called upon in the first instance to determine whether an appeal is without substance when the Court of Appeals has refused to do so, when it is that court and not this Court to which the appeal lies.

I am duly mindful of the considerations that are urged as to the consequences of further delay. But I should think that a court of equity is not without resources to devise means for avoiding unjust enrichment by the ap-

pellants should the appeals ultimately go against them. In any event, if the appeals are without substance and should therefore be dismissed as frivolous, that conclusion ought to be capable of being summarily determined by the Court of Appeals without further delay. The disposition this Court is making of these motions is a shortcut that seems to me to disregard the relevant considerations for the exercise of appellate jurisdiction.

*Certiorari Granted.* (*See also No. 500, ante, p. 38, and No. 670, supra.*)

No. 583. REILLY, POSTMASTER, *v.* PINKUS, TRADING AS AMERICAN HEALTH AIDS CO., ALSO KNOWN AS ENERGY FOOD CENTER. C. A. 3d Cir. Certiorari granted. *Solicitor General Perlman* for petitioner. *Bernard G. Segal* and *Irving R. Segal* for respondent. Reported below: 170 F. 2d 786.

*Certiorari Denied.* (*See also No. 437, Misc., supra.*)

No. 561. BROADHURST *v.* OREGON. Supreme Court of Oregon. Certiorari denied. *W. H. Langroise* for petitioner. Reported below: 184 Ore. 178, 196 P. 2d 407.

No. 592. HOWELL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *J. Raymond Gordon* for petitioner. *Solicitor General Perlman, Assistant Attorney General Campbell* and *Robert S. Erdahl* for the United States. Reported below: 172 F. 2d 213.

No. 625. UNITED STATES *v.* FAUBER, ADMINISTRATRIX. Court of Claims. Certiorari denied. *Solicitor General Perlman* for the United States. *Arlon V. Cushman, John J. Darby, William M. Cushman* and *C. Willard Hayes* for respondent. Reported below: 112 Ct. Cl. 302, 81 F. Supp. 218.

No. 673. Scocozza et al. *v.* Erie Railroad Co. C. A. 2d Cir. Certiorari denied. *William J. Dempsey* for petitioners. *Theodore Kiendl, Edward J. McGratty, Jr.* and *Cleveland C. Cory* for respondent. Reported below: 171 F. 2d 745.

No. 681. Shaw *v.* Dreyfus et al. C. A. 2d Cir. Certiorari denied. *Morris J. Levy* for petitioner. *John A. Wilson* for respondents. Reported below: 172 F. 2d 140.

No. 682. Mather & Co. *v.* Commissioner of Internal Revenue. C. A. 3d Cir. Certiorari denied. *Frederick H. Spotts, Thomas Stokes* and *George Wharton Pepper* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack, Lee A. Jackson* and *S. Walter Shine* for respondent. Reported below: 171 F. 2d 864.

No. 683. Hartmann *v.* American News Co. C. A. 7th Cir. Certiorari denied. *Alfred A. Albert* for petitioner. *William D. Whitney* for respondent. Reported below: 171 F. 2d 581.

No. 686. Dunnell *v.* Safeway Stores, Inc. C. A. 9th Cir. Certiorari denied. *Emory L. Groff* for petitioner. *George Herrington* for respondent. Reported below: 172 F. 2d 649.

Nos. 687 and 688. Metropolitan Trust Co. *v.* Muter Company et al. C. A. 7th Cir. Certiorari denied. *Thomas D. Nash* for petitioner. *Thomas Dodd Healy* and *A. Bradley Eben* for respondents. Reported below: 171 F. 2d 380.

No. 702. Harbor Towing Corp. *v.* Parker et al. C. A. 4th Cir. Certiorari denied. *John H. Skeen* for

petitioner. *George W. P. Whip* for Parker, respondent. Reported below: 171 F. 2d 416.

No. 714. UPDIKE ET AL., DOING BUSINESS AS UPDIKE AWNING CO., *v.* WEST ET AL. C. A. 10th Cir. Certiorari denied. *Glenn O. Young* for petitioners. *Frank Settle* and *E. O. Monnet* for West et al., respondents. Reported below: 172 F. 2d 663.

No. 741. REPUBLIC OF THE UNITED STATES OF BRAZIL, TRADING AS LLOYD BRASILEIRO, *v.* GENERAL FOODS CORP. C. A. 2d Cir. Certiorari denied. *Frank J. McConnell* for petitioner. *Henry N. Longley* and *John W. R. Zisgen* for respondent. Reported below: 172 F. 2d 131.

Nos. 526 and 527. SIOUX TRIBE OF INDIANS *v.* UNITED STATES. Court of Claims. Certiorari denied. *Ralph H. Case* and *James S. Y. Ivins* for petitioner. *Solicitor General Perlman, Assistant Attorney General Vanech* and *John R. Benney* for the United States. Reported below: 112 Ct. Cl. 39, 50, 78 F. Supp. 787, 793.

No. 648. DEWAR *v.* HUNTER, WARDEN. C. A. 10th Cir. Certiorari denied. *Howard F. McCue* for petitioner. *Solicitor General Perlman, Assistant Attorney General Campbell, Robert S. Erdahl* and *Philip R. Monahan* for respondent. Reported below: 170 F. 2d 993.

No. 432, Misc. LOUGHRAN *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. *Joseph Kadans* for petitioner. Reported below: —— Md. ——, 64 A. 2d 712.

No. 436, Misc. CULVER ET AL. *v.* CARTER OIL CO. ET AL. C. A. 6th Cir. Certiorari denied. *Thaddeus Greene Ben-*

*ton* and *William J. Hughes, Jr.* for petitioners. *William M. Acton* for respondents. Reported below: 170 F. 2d 147.

No. 454, Misc. MARTINEZ *v.* CALIFORNIA. District Court of Appeal, First Appellate District, of California. Certiorari denied. *Elizabeth Cassidy* for petitioner. Reported below: 88 Cal. App. 2d 767, 199 P. 2d 375.

No. 480, Misc. AGNEW *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 490, Misc. COYLE *v.* CALIFORNIA ET AL. Supreme Court of California. Certiorari denied.

No. 537, Misc. COUTURE *v.* SMITH, SUPERINTENDENT. Supreme Court of Washington. Certiorari denied.

No. 550, Misc. MORANT *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 554, Misc. FRANKLIN *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 560, Misc. WAKAT *v.* RAGEN, WARDEN. Supreme Court of Illinois. Certiorari denied.

No. 565, Misc. TWITTY *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 566, Misc. CROWLEY *v.* RAGEN, WARDEN. Supreme Court of Illinois. Certiorari denied.

No. 567, Misc. REEVES *v.* RAGEN, WARDEN. Circuit Court of Iroquois County, Illinois. Certiorari denied.

No. 568, Misc. SCOTT *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 569, Misc. MICHAEL *v.* RAGEN, WARDEN. Criminal Court of Cook County and Supreme Court of Illinois. Certiorari denied.

No. 571, Misc. LUTZ *v.* RAGEN, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 171 F. 2d 788.

No. 572, Misc. TERRY *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 573, Misc. GAMBONY *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 402 Ill. 74, 83 N. E. 2d 321.

No. 575, Misc. DZAN *v.* RAGEN, WARDEN. Supreme Court of Illinois. Certiorari denied.

No. 577, Misc. HAMILTON *v.* RAGEN, WARDEN. Circuit Court of Saline County and Supreme Court of Illinois. Certiorari denied.

*Rehearing Granted.*

No. 185. GRAVER TANK & MFG. CO., INC. *v.* LINDE AIR PRODUCTS CO., 336 U. S. 271. The petition for rehearing is granted, limited to the question of infringement of Claims 18, 20, 22 and 23 of the Jones et al. patent. The Court desires argument as to the applicability of

the doctrine of equivalents to the findings of fact in this case. *John F. Oberlin, Ashley M. Van Duzer, Thomas V. Koykka, James R. Stewart* and *Charles L. Byron* for petitioners. *John T. Cahill, James A. Fowler, Jr., Richard R. Wolfe* and *Loftus E. Becker* for respondent.

*Rehearing Denied.*

No. 406, Misc. EAGLE *v.* CHERNEY ET AL., 336 U. S. 928. Second petition for rehearing denied.

No. 413, Misc. BIRD *v.* STATE OF WASHINGTON, 336 U. S. 954. Rehearing denied.

No. 447, Misc. LUCAS *v.* TEXAS, 336 U. S. 950. Rehearing denied.

MAY 31, 1949.

*Per Curiam Decisions.*

No. 754. TEXAS ET AL. *v.* UNITED STATES ET AL. Appeal from the United States District Court for the Western District of Oklahoma. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. *Price Daniel,* Attorney General, *Charles E. Crenshaw,* Assistant Attorney General, *Fred E. Fuller, John L. Gushman* and *Arnold Boyd* for the State of Texas et al.; and *Bolivar E. Kemp, Jr.,* Attorney General, *Carroll Buck,* First Assistant Attorney General, *A. W. Gilliland* and *Charles D. Egan* for the State of Louisiana et al., appellants. *Solicitor General Perlman* and *Daniel W. Knowlton* for appellees. Reported below: 84 F. Supp. 791.

No. 785. SAN DIEGO ELECTRIC RAILWAY CO. *v.* STATE BOARD OF EQUALIZATION. Appeal from the District Court of Appeal, Third Appellate District, of California. *Per*

*Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *William L. Holloway* and *C. Coolidge Kreis* for appellant. *Fred N. Howser,* Attorney General of California, *James E. Sabine* and *Irving H. Perluss,* Deputy Attorneys General, for appellee. Reported below: 89 Cal. App. 2d 267, 200 P. 2d 573.

*Miscellaneous Orders.*

No. 275. KILPATRICK *v.* TEXAS & PACIFIC RAILWAY CO.;

No. 276. PARKER *v.* TEXAS & PACIFIC RAILWAY CO.;

No. 119, Misc. EX PARTE KILPATRICK; and

No. 120, Misc. EX PARTE PARKER. In Nos. 275 and 276 the petition for writs of certiorari to the United States Court of Appeals for the Fifth Circuit is denied. In Nos. 119, Misc. and 120, Misc., the motion for leave to file petition for writs of prohibition is denied. *William H. DeParcq* for petitioners. *John M. Scott* and *William H. Timbers* for respondent.

No. ——. EISLER *v.* UNITED STATES. The motion for an extension of time within which to file petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is denied. MR. JUSTICE FRANKFURTER joins in denying this motion because the Court is without jurisdiction over the person of the petitioner. *David Rein, Abraham J. Isserman* and *Joseph Forer* for petitioner. *Solicitor General Perlman* for the United States.

No. 589, Misc. IN RE LEWIS ET AL. Supreme Court of Louisiana. Certiorari denied. Motion for leave to file

petition for writs of mandamus and prohibition also denied.

No. 585, Misc. IN RE ABERNATHY. Motion for leave to file petition for writ of habeas corpus denied.

No. 587, Misc. IN RE STEIMLE. Treating the application in this case as a motion for leave to file a petition for an original writ of habeas corpus, leave to file is denied. THE CHIEF JUSTICE, MR. JUSTICE REED, MR. JUSTICE FRANKFURTER, and MR. JUSTICE BURTON are of the opinion that there is want of jurisdiction. U. S. Constitution, Article III, § 2, Clause 2; see *Ex parte Betz* and companion cases, all 329 U. S. 672 (1946); *Milch* v. *United States,* 332 U. S. 789 (1947); *Brandt* v. *United States,* 333 U. S. 836 (1948); *In re Eichel,* 333 U. S. 865 (1948); *Everett* v. *Truman,* 334 U. S. 824 (1948). MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, MR. JUSTICE MURPHY, and MR. JUSTICE RUTLEDGE are of the opinion that argument should be heard on the motion for leave to file the petition in order to settle what remedy, if any, the petitioner has. MR. JUSTICE JACKSON took no part in the consideration or decision of this application.

No. 591, Misc. TOMPSETT *v.* OHIO ET AL. Motion for leave to file petition for writ of habeas corpus denied.

No. 592, Misc. IN RE RYAN. Application denied.

*Certiorari Granted.*

No. 694. COLGATE-PALMOLIVE-PEET CO. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 9th Cir. Certiorari granted limited to the question of the construction of § 8 (3) of the National Labor Relations Act of 1935 [49 Stat. 449, 29 U. S. C. § 158 (3)] in relation to this

case. *Philip S. Ehrlich* and *Bartley C. Crum* for petitioner. *Solicitor General Perlman, Robert N. Denham, David P. Findling, Ruth Weyand* and *Bernard Dunau* filed a memorandum for the National Labor Relations Board, respondent. *Mathew O. Tobriner* for the International Chemical Workers Union, A. F. of L., respondent. Reported below: 171 F. 2d 956.

No. 709. SAVORGNAN *v.* UNITED STATES ET AL. C. A. 7th Cir. Certiorari granted. *Suel O. Arnold* for petitioner. *Solicitor General Perlman, Assistant Attorney General Campbell, Oscar H. Davis, Robert S. Erdahl* and *Israel Convisser* for respondents. *Walbridge S. Taft* filed a brief for Margaret Trimble Revedin, as *amicus curiae,* supporting the petition. Reported below: 171 F. 2d 155.

No. 729. KINGSLAND, COMMISSIONER OF PATENTS, *v.* DORSEY. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. *Solicitor General Perlman* for petitioner. *William E. Leahy, William J. Hughes, Jr.* and *James F. Reilly* for respondent. Reported below: 84 U. S. App. D. C. 264, 173 F. 2d 405.

*Certiorari Denied.* (*See also Nos. 275 and 276 and No. 589, Misc., supra.*)

No. 654. SCHIAPPI *v.* WEST VIRGINIA LIQUOR CONTROL COMMISSION. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 655. UNITED STATES EX REL. DORFLER ET AL. *v.* WATKINS, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION. C. A. 2d Cir. Certiorari denied. *Joseph W. Solomon* for petitioners. *Solicitor General Perlman, Assistant Attorney General Morison* and *Sam-*

*uel D. Slade* for respondent. Reported below: 171 F. 2d 431.

No. 662. BUNDTE ET AL. *v.* CALIFORNIA. District Court of Appeal, Third Appellate District, of California. Certiorari denied. *George E. Flood* for petitioners. *Fred N. Howser,* Attorney General of California, *Walter Rountree* and *Doris H. Maier,* Deputy Attorneys General, for respondent. Reported below: 87 Cal. App. 2d 735, 197 P. 2d 823.

No. 663. MOORE ET AL. *v.* CALIFORNIA. District Court of Appeal, Third Appellate District, of California. Certiorari denied. *George E. Flood* for petitioners. *Fred N. Howser,* Attorney General of California, *Walter Rountree* and *Doris H. Maier,* Deputy Attorneys General, for respondent. Reported below: 87 Cal. App. 2d 753, 197 P. 2d 835.

No. 693. WHITING STOKER CO. *v.* CHICAGO STOKER CORP. C. A. 7th Cir. Certiorari denied. *Harry Abrahams* and *Ode L. Rankin* for petitioner. *Martin Stanton Gordon* for respondent. Reported below: 171 F. 2d 248.

No. 695. WAREHOUSE UNION LOCAL 6, INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION (C. I. O.), *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 9th Cir. Certiorari denied. *Bertram Edises* for petitioner. *Solicitor General Perlman, Robert N. Denham, David P. Findling, Ruth Weyand* and *Bernard Dunau* for the National Labor Relations Board; and *Mathew O. Tobriner* for the International Chemical Workers Union, A. F. of L., respondents. Reported below: 171 F. 2d 956.

No. 697. MASON ET AL. *v.* TEXAS COMPANY. C. A. 1st Cir. Certiorari denied. *Hardy K. Maclay* for peti-

tioners. *Solicitor General Perlman, Assistant Attorney General Morison, Samuel D. Slade, Leavenworth Colby* and *Cecelia H. Goetz* for respondent. Reported below: 171 F. 2d 559.

No. 699. BRAUN *v.* TAUB ET AL. C. A. 2d Cir. Certiorari denied. *David Haar* for petitioner. *Joseph M. Schwartz* for respondents. Reported below: 171 F. 2d 649.

No. 700. VEATCH *v.* BORTHWICK, TAX COMMISSIONER OF HAWAII. C. A. 9th Cir. Certiorari denied. *Melvin M. Belli* for petitioner. *Walter D. Ackerman, Jr.*, Attorney General of Hawaii, *Rhoda V. Lewis*, Assistant Attorney General, and *Thomas W. Flynn*, Deputy Attorney General, for respondent. Reported below: 172 F. 2d 226.

No. 704. LINQUATA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. *Harry Bergson* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, James M. McInerney, Ellis N. Slack* and *John H. Mitchell* for the United States. Reported below: 173 F. 2d 201.

No. 705. SHEPHERD ET AL. *v.* HUNTER ET AL. C. A. 7th Cir. Certiorari denied. *Burke Williamson, Jack A. Williamson* and *Robert McCormick Adams* for petitioners. *Richard E. Westbrooks* for Hunter et al.; and *R. S. Outlaw* and *W. J. Milroy* for the Atchison, Topeka & Santa Fe Railway Co., respondents. Reported below: 171 F. 2d 594.

No. 706. COURT SQUARE BUILDING, INC. *v.* CITY OF NEW YORK. Court of Appeals of New York. Certiorari denied. *M. Carl Levine, David Morgulas* and *Albert*

*Foreman* for petitioner. *John P. McGrath* for respondent. Reported below: 298 N. Y. 380, 83 N. E. 2d 843.

No. 710. GLOVER ET AL., TRUSTEES, *v.* MALONEY, COLLECTOR OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. *Carl E. Davidson* for petitioners. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack, Lee A. Jackson* and *Melva M. Graney* for respondent. Reported below: 171 F. 2d 870.

Nos. 715 and 716. B. B. B. CONSTRUCTION CORP. *v.* AETNA CASUALTY & SURETY CO. C. A. 2d Cir. Certiorari denied. *Joseph Joffe* for petitioner. *M. Carl Levine* and *David Morgulas* for respondent. Reported below: 173 F. 2d 307.

No. 717. HAMILTON FOODS, INC. *v.* ATCHISON, TOPEKA & SANTA FE RAILWAY CO. ET AL. C. A. 9th Cir. Certiorari denied. *Albert H. Allen* and *Hyman Goldman* for petitioner. *H. K. Lockwood* for the Atchison, Topeka & Santa Fe Railway Co., respondent. Reported below: 173 F. 2d 573.

No. 719. KELLY, ADMINISTRATOR, ET AL. *v.* SHAMROCK OIL & GAS CORP. C. A. 5th Cir. Certiorari denied. *Lawrence E. Kelly* and *Howard F. Saunders* for petitioners. *R. C. Johnson* and *W. M. Sutton* for respondent. Reported below: 171 F. 2d 909.

No. 720. THYS ET AL., DOING BUSINESS AS THYS & MILLER, *v.* STATE OF WASHINGTON. Supreme Court of Washington. Certiorari denied. *Elwood Hutcheson* and *George W. Wilkins* for petitioners. *Smith Troy,* Attorney General of Washington, for respondent. Reported below: 31 Wash. 2d 739, 199 P. 2d 68.

No. 721. FRANCIS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *George D. Reilly* for petitioner. *Solicitor General Perlman* for the United States. Reported below: 172 F. 2d 619.

Nos. 722 and 723. FRANK ET AL. *v.* WILSON & CO., INC. C. A. 7th Cir. Certiorari denied. *Alex Elson* for petitioners. *Richard C. Winkler* for respondent. *Solicitor General Perlman* and *William S. Tyson* filed a memorandum for the Wage & Hour Administrator, as *amicus curiae,* supporting the petition. Reported below: 172 F. 2d 712.

No. 726. GRANNIS ET AL., ADMINISTRATORS, ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Robert H. Dye* and *Claude C. Pierce, Jr.* for petitioners. *Solicitor General Perlman, Assistant Attorney General Morison, Samuel D. Slade* and *Morton Liftin* for the United States. Reported below: 172 F. 2d 507.

No. 730. ANDERSON *v.* BOWERS, COLLECTOR OF INTERNAL REVENUE. C. A. 4th Cir. Certiorari denied. *J. Davis Kerr* and *Harvey W. Johnson* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack* and *Joseph W. Bishop, Jr.* for respondent. Reported below: 170 F. 2d 676.

No. 731. HUGH SMITH, INC. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. *F. E. Hagler* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack* and *Harry Baum* for respondent. Reported below: 173 F. 2d 224.

No. 732. BECHTEL, EXECUTOR, ET AL. *v.* THATCHER ET AL. Supreme Court of Iowa. Certiorari denied. *Wayne*

*G. Cook* for petitioners. *H. M. Havner* and *Fred A. Ontjes* for respondents. Reported below: 239 Iowa 1298, 31 N. W. 2d 853.

No. 738. DENNY ET UX. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Michael J. Kaine, Jr.* and *Warren E. Miller* for petitioners. *Solicitor General Perlman, Assistant Attorney General Morison, Paul A. Sweeney* and *Morton Hollander* for the United States. Reported below: 171 F. 2d 365.

No. 745. RICHMOND SCREW ANCHOR CO., INC. *v.* UMBACH ET AL. C. A. 7th Cir. Certiorari denied. *Victor E. LaRue* and *Eugene A. Tappy* for petitioner. *Fred Gerlach* for respondents. Reported below: 173 F. 2d 521.

No. 764. GULF OIL CORP. *v.* THE JOHN A. BROWN. C. A. 2d Cir. Certiorari denied. *Chauncey I. Clark* for petitioner. *Paul Speer* for respondent. Reported below: 173 F. 2d 108.

No. 807. DANIELLY *v.* CALIFORNIA ET AL. Supreme Court of California. Certiorari denied. *Ernest Spagnoli* for petitioner. Reported below: 33 Cal. 2d 362, 202 P. 2d 18.

No. 696. ALLEN *v.* LITSINGER ET AL. Supreme Court of Appeals of Virginia. Certiorari denied. *Charles Orlando Pratt* and *John Alvin Croghan* for petitioner. *R. O. Norris* and *Gordon Lewis* for respondents. Reported below: 188 Va. lxv.

No. 708. SONNESEN *v.* PANAMA TRANSPORT CO. Court of Appeals of New York. Certiorari denied. *Jacob Rassner* for petitioner. *Walter X. Connor* and *Vernon Sims Jones* for respondent. *Silas B. Axtell* filed a brief for the

Friends of Andrew Furuseth Legislative Association, as *amicus curiae,* supporting petitioner. Reported below: 298 N. Y. 262, 82 N. E. 2d 569.

No. 338, Misc. GANN *v.* HIATT, WARDEN. C. A. 5th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Perlman, Assistant Attorney General Campbell, Robert S. Erdahl* and *Harold D. Cohen* for respondent. Reported below: 170 F. 2d 473.

No. 380, Misc. WILLIAMS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 171 F. 2d 952.

No. 482, Misc. ADAMS *v.* RAGEN, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 172 F. 2d 693.

No. 485, Misc. CONE *v.* WEST VIRGINIA PULP & PAPER CO. C. A. 4th Cir. Certiorari denied. *H. Wayne Unger* and *W. J. McLeod, Jr.* for petitioner. Reported below: 170 F. 2d 770.

No. 563, Misc. KEYE *v.* ROBINSON, WARDEN. Supreme Court of Illinois. Certiorari denied.

*Rehearing Denied.*

No. 135. UNITED STATES *v.* JONES, RECEIVER; and

No. 198. JONES, RECEIVER, *v.* UNITED STATES, 336 U. S. 641. Rehearing denied. MR. JUSTICE REED and MR. JUSTICE JACKSON took no part in the consideration or decision of this application.

No. 162. EXCEL AUTO RADIATOR CO. *v.* BISHOP & BABCOCK MANUFACTURING CO., 335 U. S. 823. Motion for leave to file second petition for rehearing denied.

No. 355. CALIFORNIA *v.* ZOOK ET AL., 336 U. S. 725. Motion for leave to file petition for rehearing granted, and the petition is denied.

No. 458. CARPENTER *v.* ROHM & HAAS CO., INC., 336 U. S. 904. Motion for leave to file second petition for rehearing denied.

No. 567. STEMMER *v.* NEW YORK; and
No. 568. KRAKOWER *v.* NEW YORK, 336 U. S. 963. Rehearing denied. MR. JUSTICE JACKSON took no part in the consideration or decision of this application.

No. 649. LONGYEAR HOLDING CO. ET AL. *v.* MINNESOTA, 336 U. S. 948. Rehearing denied. MR. JUSTICE BURTON took no part in the consideration or decision of this application.

No. 298. DEFENSE SUPPLIES CORP. ET AL. *v.* LAWRENCE WAREHOUSE CO. ET AL., 336 U. S. 631. Rehearing denied.

No. 417. GRIFFIN *v.* UNITED STATES, 336 U. S. 704. Rehearing denied.

No. 427. WADE *v.* HUNTER, WARDEN, 336 U. S. 684. Rehearing denied.

No. 542. FOUNTAIN *v.* FILSON ET UX., 336 U. S. 681. Rehearing denied.

No. 30, Misc. ILLINOIS EX REL. MARINO *v.* RAGEN, WARDEN, 336 U. S. 969. Rehearing denied.

No. 483, Misc. PHILLIPS *v.* RAGEN, WARDEN, 336 U. S. 965. Rehearing denied.

JUNE 2, 1949.

*Miscellaneous Order.*

No. 655, Misc. McGEE *v.* MISSISSIPPI. Petition for stay of execution of sentence of death denied.

JUNE 6, 1949.

*Per Curiam Decisions.*

No. 786. TABER *v.* STATE BOARD OF REGISTRATION AND EXAMINATION IN DENTISTRY. Appeal from the Supreme Court of New Jersey. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *Irving R. M. Panzer* and *Henry G. Fischer* for appellant. *Theodore D. Parsons,* Attorney General of New Jersey, and *Joseph A. Murphy,* Assistant Deputy Attorney General, for appellee. Reported below: 1 N. J. 351, 63 A. 2d 535.

No. 805. DOLES *v.* METROPOLITAN LIFE INSURANCE CO. Appeal from the Supreme Court of Arkansas. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. 28 U. S. C. § 1257 (2). Treating the papers whereon the appeal was allowed as a petition for writ of certiorari as required by 28 U. S. C. § 2103, certiorari is denied. *P. L. Smith* for appellant. Reported below: 214 Ark. 215, 216 S. W. 2d 382.

*Miscellaneous Orders.*

No. 535, Misc. SAUERWINE *v.* NEW YORK, CHICAGO & ST. LOUIS RAILROAD CO. Motion for leave to file petition for writs of certiorari, prohibition or mandamus denied. *Melvin L. Griffith* and *Francis H. Monek* for petitioner. *Harold A. Smith* for respondent.

No. 570, Misc. MEZICK *v.* WRIGHT, WARDEN;
No. 602, Misc. VOLKMANN *v.* RAGEN, WARDEN;
No. 604, Misc. HALL *v.* RAGEN, WARDEN; and
No. 617, Misc. FOLEY *v.* RAGEN, WARDEN. The motions for leave to file petitions for writs of habeas corpus are denied.

*Certiorari Granted.* (*See also Misc. Nos. 47, 106, 109, 184, 372 and 374, ante, p. 235.*)

No. 486. BOYD *v.* GRAND TRUNK WESTERN RAILROAD CO. Supreme Court of Michigan. Certiorari granted. *Melvin L. Griffith, Francis H. Monek* and *John L. Mechem* for petitioner. *H. Victor Spike* for respondent. Reported below: 321 Mich. 693, 33 N. W. 2d 120.

No. 713. DARR *v.* BURFORD, WARDEN. C. A. 10th Cir. Certiorari granted. *John B. Ogden* for petitioner. Reported below: 172 F. 2d 668.

No. 742. MANUFACTURERS TRUST CO., TRUSTEE, *v.* BECKER ET AL. C. A. 2d Cir. Certiorari granted. *Edward K. Hanlon* for petitioner. *David W. Kahn* for respondents. *Solicitor General Perlman* and *Roger S. Foster* filed a brief for the Securities & Exchange Commission, as *amicus curiae,* supporting the petition. Reported below: 173 F. 2d 944.

No. 746. CREEL ET AL. *v.* LONE STAR DEFENSE CORP. C. A. 5th Cir. Certiorari granted. *C. M. Kennedy* and *Pat Coon* for petitioners. *Otto Atchley* for respondent. Reported below: 173 F. 2d 964.

No. 751. REO MOTORS, INC. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari granted. *James O. Wynn* and *N. Barr Miller* for petitioner. *Solicitor General Perlman* filed a memorandum for respondent. Reported below: 170 F. 2d 1001.

No. 744. COMMISSIONER OF INTERNAL REVENUE *v.* CONNELLY ET UX. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. *Solicitor General Perlman* for petitioner. *Caesar L. Aiello* and *A. Murray Preston* for respondents. Reported below: 84 U. S. App. D. C. 260, 172 F. 2d 877.

*Certiorari Denied.* (*See also No. 805 and No. 535, Misc., supra.*)

No. 672. VLAVIANOS ET AL. *v.* THE CYPRESS ET AL.; and

No. 752. MARYLAND DRYDOCK CO. *v.* VLAVIANOS ET AL. C. A. 4th Cir. Certiorari denied. *I. Duke Avnet* for petitioners in No. 672. *David R. Owen* for the Maryland Drydock Co., petitioner in No. 752 and respondent in No. 672. Reported below: 171 F. 2d 435.

No. 674. WATERMAN STEAMSHIP CORP. *v.* DEAN ET AL.; and

No. 753. DEAN ET AL. *v.* WATERMAN STEAMSHIP CORP. C. A. 4th Cir. Certiorari denied. *Robert S. Erskine* and *Robert W. Williams* for petitioner in No. 674 and respondent in No. 753. *I. Duke Avnet* for petitioners in No. 753 and respondents in No. 674. Reported below: 171 F. 2d 408.

No. 701. COBLEIGH ET AL. *v.* WOODS, HOUSING EXPEDITER. C. A. 1st Cir. Certiorari denied. *Neil Tolman* for petitioners. *Solicitor General Perlman, John R. Benney, Ed Dupree, Hugo V. Prucha* and *Nathan Siegel* for respondent. Reported below: 172 F. 2d 167.

No. 724. KOHINOOR COAL CO. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. *James J. Dougherty* for petitioner. *Solicitor General*

*Perlman, Assistant Attorney General Caudle, Ellis N. Slack, Morton K. Rothschild* and *Joseph W. Bishop, Jr.* for respondent. Reported below: 171 F. 2d 880.

No. 727. TODOROW ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Morris Lavine* for petitioners. *Solicitor General Perlman, Assistant Attorney General Campbell, Robert S. Erdahl* and *Harold D. Cohen* for the United States. Reported below: 173 F. 2d 439.

No. 734. PETERSON *v.* UNITED STATES;

No. 735. NIZNIK *v.* UNITED STATES; and

No. 736. COMODOR *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Hayden C. Covington, Victor F. Schmidt* and *Grover C. Powell* for petitioners. *Solicitor General Perlman, Assistant Attorney General Campbell, Robert S. Erdahl* and *Philip R. Monahan* for the United States. Reported below: 173 F. 2d 111, 328.

No. 737. GIBSON *v.* REYNOLDS ET AL. C. A. 8th Cir. Certiorari denied. *Hayden C. Covington* and *Grover C. Powell* for petitioner. *Solicitor General Perlman, Assistant Attorney General Morison, John R. Benney* and *Paul A. Sweeney* for respondents. Reported below: 172 F. 2d 95.

No. 740. TIBBALS ET AL. *v.* MICA MOUNTAIN MINES, INC. ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 172 F. 2d 449.

No. 747. STANDARD BRANDS, INC. ET AL. *v.* EASTERN SHORE CANNING CO., INC. C. A. 4th Cir. Certiorari denied. *Ellis W. Leavenworth* for petitioners. *George M. Lanning* for respondent. Reported below: 172 F. 2d 144.

No. 765. GRAYSON SHOPS, INC. *v.* STONE. C. A. 2d Cir. Certiorari denied. *David Mackay* for petitioner. *Thomas A. Gaffney* for respondent. Reported below: 173 F. 2d 135.

No. 305, Misc. CHADWICK *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 170 F. 2d 986.

No. 378, Misc. BUTLER *v.* CLEMMER. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Richard L. Tedrow* for petitioner. *Solicitor General Perlman, Assistant Attorney General Campbell, Robert S. Erdahl* and *Joseph M. Howard* for respondent. Reported below: 84 U. S. App. D. C. 58, 171 F. 2d 132.

No. 478, Misc. TODD *v.* TODD. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *M. Edward Buckley, Jr.* for petitioner. Reported below: 84 U. S. App. D. C. 100, 171 F. 2d 143.

No. 489, Misc. BUTLER *v.* PENIX, RECEIVER. C. A. 5th Cir. Certiorari denied. Reported below: 173 F. 2d 761.

No. 558, Misc. COHEN *v.* DECKER ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 170 F. 2d 479.

No. 562, Misc. LUCAS *v.* MOORE, WARDEN. Court of Criminal Appeals of Texas. Certiorari denied.

No. 564, Misc. MOHLER *v.* SMITH, SUPERINTENDENT. Supreme Court of Washington. Certiorari denied.

No. 580, Misc. D'OSTROPH *v.* UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 173 F. 2d 897.

No. 593, Misc. BINKOWSKI *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 594, Misc. CORDTS *v.* ILLINOIS. Circuit Court of St. Clair County, Illinois. Certiorari denied.

No. 595, Misc. ADAMS *v.* NIERSTHEIMER, WARDEN. Supreme Court of Illinois. Certiorari denied.

No. 603, Misc. CANTOO *v.* RAGEN, WARDEN. Circuit Court of Rock Island County, Illinois. Certiorari denied.

No. 624, Misc. MESSINA *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied.

*Rehearing Denied.*

No. 598. HENRY *v.* SMITH, COMMANDING GENERAL, 336 U. S. 968. Rehearing denied.

No. 612. LEISHMAN *v.* RICHARDS & CONOVER CO., 336 U. S. 952. Rehearing denied.

No. 638. CHESAPEAKE & OHIO RAILWAY CO. *v.* MORRIS, 336 U. S. 967. Rehearing denied.

No. 480, Misc. AGNEW *v.* CALIFORNIA, 337 U. S. 909. Rehearing denied.

No. 539, Misc. WILSON *v.* HINMAN ET AL., 336 U. S. 970. Rehearing denied.

JUNE 13, 1949.

*Miscellaneous Orders.*

No. 26. UNITED STATES *v.* KANSAS CITY LIFE INSURANCE CO. This case is ordered restored to the docket for reargument.

No. 299. UNITED STATES *v.* GERLACH LIVE STOCK CO.;
No. 300. UNITED STATES *v.* POTTER;
No. 301. UNITED STATES *v.* ERRECA;
No. 302. UNITED STATES *v.* JAMES J. STEVINSON (A CORPORATION);
No. 303. UNITED STATES *v.* STEVINSON; and
No. 304. UNITED STATES *v.* 3–H SECURITIES CO. These cases are ordered restored to the docket for reargument.

No. 13, Original. UNITED STATES *v.* LOUISIANA, 337 U. S. 902. The petition for rehearing is denied. The objections to the granting of leave to file the complaint are overruled and the State of Louisiana is directed to answer the allegations of the complaint within the time specified in the subpoena, otherwise the plaintiff may proceed *ex parte*. Rule 6, par. 2 and 3. MR. JUSTICE JACKSON took no part in the consideration or disposition of the petition for rehearing. *Bolivar E. Kemp, Jr.*, Attorney General of Louisiana, *John L. Madden*, Assistant Attorney General, *L. H. Perez* and *F. Trowbridge vom Baur* for defendant.

No. 500. UNION NATIONAL BANK *v.* LAMB, 337 U. S. 38. Petition for rehearing and alternative request for modification of the opinion denied.

No. 582, Misc. STEPHENSON *v.* NEW JERSEY;
No. 601, Misc. IN RE GRUETTER;
No. 606, Misc. GIBSON *v.* LAINSON, WARDEN;
No. 607, Misc. ROBERTS *v.* HEINZE, WARDEN; and
No. 619, Misc. JOYNER *v.* WRIGHT, WARDEN. The motions for leave to file petitions for writs of habeas corpus are severally denied.

No. 598, Misc. SHOTKIN ET AL. *v.* DENVER PUBLISHING CO. ET AL.; and

No. 615, Misc. SMITH *v.* WITSELL. Applications denied.

No. 614, Misc. LEMMONS *v.* FOSTER, WARDEN. Motion for leave to file petition for certiorari denied.

No. 633, Misc. HILLIARD *v.* UNDERWOOD, U. S. DISTRICT JUDGE; and

No. 637, Misc. MCINTOSH *v.* STEELE, WARDEN. The motions for leave to file petitions for writs of mandamus are denied.

*Certiorari Granted.*

No. 711. PARKER ET AL. *v.* COUNTY OF LOS ANGELES ET AL.; and

No. 712. STEINER *v.* COUNTY OF LOS ANGELES ET AL. District Court of Appeal, 2d Appellate District, of California. Certiorari granted. *Lee Pressman, A. L. Wirin* and *Fred Okrand* for petitioners. *Harold W. Kennedy* for respondents. Reported below: 88 Cal. App. 2d 481, 199 P. 2d 429.

No. 743. O'DONNELL, ADMINISTRATRIX, *v.* ELGIN, JOLIET & EASTERN RAILWAY CO. C. A. 7th Cir. Certiorari granted. *Joseph D. Ryan* for petitioner. *Harlan L. Hackbert* for respondent. Reported below: 171 F. 2d 973.

No. 762. COLE ET AL. *v.* ARKANSAS. Supreme Court of Arkansas. Certiorari granted. *Arthur J. Goldberg* and *Thomas E. Harris* for petitioners. *Ike Murry,* Attorney General of Arkansas, *Wyatt Cleveland Holland* and *Jeff Duty,* Assistant Attorneys General, for respondent. Reported below: 214 Ark. 387, 216 S. W. 2d 402.

*Certiorari Denied.* (*See also No. 614, Misc., supra.*)

No. 685. MAHONEY *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied. *William G. Fitzpatrick* for petitioner. *Stephen J. Roth,* Attorney General of Michigan, and *Edmund E. Shepherd,* Solicitor General, for respondent. Reported below: 322 Mich. 474, 34 N. W. 2d 15.

No. 689. CARLSON *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Philip M. Baker* and *Charles E. Thompson* for petitioner. *Solicitor General Perlman* and *Benedict P. Cottone* for the Federal Communications Commission; and *Vincent B. Welch* for Louise C. Carlson, respondents. Reported below: 84 U. S. App. D. C. 415, 172 F. 2d 766.

No. 750. AMERICAN SURETY CO. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Cyril Coleman* and *William H. Timbers* for petitioner. *Solicitor General Perlman, Assistant Attorney General Morison* and *Paul A. Sweeney* for the United States. *Alexander M. Heron* filed a brief for the Association of Casualty & Surety Companies, as *amicus curiae,* supporting the petition. Reported below: 172 F. 2d 135.

No. 766. TRAVELERS FIRE INSURANCE CO. ET AL. *v.* RANNEY-DAVIS MERCANTILE CO. C. A. 10th Cir. Certiorari denied. *F. A. Rittenhouse* for petitioners. *W. L. Cunningham* and *D. Arthur Walker* for respondent. Reported below: 173 F. 2d 844.

No. 776. RHODES *v.* METROPOLITAN LIFE INSURANCE CO. C. A. 5th Cir. Certiorari denied. *Fred G. Benton* for petitioner. *Benj. B. Taylor, C. V. Porter, L. W. Brooks* and *Benj. B. Taylor, Jr.* for respondent. Reported below: 172 F. 2d 183.

No. 800. MERCURY PRESS, INC. *v.* DISTRICT OF COLUMBIA. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Herbert G. Pillen* for petitioner. *Vernon E. West, Chester H. Gray* and *George C. Updegraff* for respondent. Reported below: 84 U. S. App. D. C. 203, 173 F. 2d 636.

No. 777. SNYDER *v.* UNITED STATES. Court of Claims. Certiorari denied. Reported below: 113 Ct. Cl. 61, 82 F. Supp. 335.

No. 803. UNITED STATES *v.* 25.406 ACRES OF LAND IN ARLINGTON COUNTY, VIRGINIA, ET AL. C. A. 4th Cir. Certiorari denied. MR. JUSTICE BLACK took no part in the consideration or decision of this application. *Solicitor General Perlman* for the United States. *Francis M. Shea, Warner W. Gardner* and *Gardner L. Boothe* for respondents. Reported below: 172 F. 2d 990.

No. 415, Misc. ROCKOWER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Hancock Griffin, Jr.* for petitioner. *Solicitor General Perlman, Assistant Attorney General Campbell, Robert S. Erdahl* and *Philip R. Monahan* for the United States. Reported below: 171 F. 2d 423.

No. 416, Misc. GRIMALDI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Henry K. Chapman* for petitioner. *Solicitor General Perlman, Assistant Attorney General Campbell, Robert S. Erdahl* and *Philip R. Monahan* for the United States. Reported below: 171 F. 2d 619.

No. 417, Misc. WHELAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Vine H. Smith* for petitioner. *Solicitor General Perlman, Assistant Attorney General*

*Campbell, Robert S. Erdahl* and *Philip R. Monahan* for the United States. Reported below: 171 F. 2d 619.

No. 425, Misc. HASSON *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied.

No. 440, Misc. WILDE *v.* LOUISIANA. Supreme Court of Louisiana. Certiorari denied. Reported below: 214 La. 453, 38 So. 2d 72.

No. 486, Misc. MCAFFEE *v.* CLEMMER, DIRECTOR. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Edward E. O'Neill* for petitioner. *Solicitor General Perlman, Assistant Attorney General Campbell, Robert S. Erdahl* and *Joseph M. Howard* for respondent. Reported below: 84 U. S. App. D. C. 57, 171 F. 2d 131.

No. 557, Misc. GLAZEWSKI *v.* PENNINGTON, SUPERINTENDENT. Supreme Court of Pennsylvania. Certiorari denied. *Leo W. White* for petitioner. *Mitchell Jenkins* for respondent.

No. 576, Misc. NICHOLSON, ADMINISTRATOR, ET AL. *v.* THOMPSON, TRUSTEE. C. A. 6th Cir. Certiorari denied. *William A. McTighe* for petitioners. *Walter P. Armstrong* for respondent. Reported below: 171 F. 2d 295.

No. 583, Misc. DARDEN *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied.

No. 584, Misc. WRIGHT *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied.

No. 600, Misc. SMITH *v.* DUFFY, WARDEN. Supreme Court of California. Certiorari denied.

No. 608, Misc. MACKEY *v.* MARTIN, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 609, Misc. BLAUVELT *v.* JACKSON, WARDEN. Court of Appeals of New York. Certiorari denied. Reported below: See 298 N. Y. 928, 85 N. E. 2d 67.

No. 613, Misc. WRIGHT *v.* RAGEN, WARDEN, ET AL. Circuit Court of Peoria County, Illinois. Certiorari denied.

No. 618, Misc. WINN *v.* CALIFORNIA ET AL. Supreme Court of California. Certiorari denied.

No. 620, Misc. NOTTEBAUM *v.* MAYO, STATE PRISON CUSTODIAN. C. A. 5th Cir. Certiorari denied. Reported below: 173 F. 2d 574.

No. 622, Misc. GOODMAN *v.* SWENSON, WARDEN. Court of Appeals of Maryland. Certiorari denied. Reported below: —— Md. ——, 60 A. 2d 527.

No. 625, Misc. BLAKE *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 632, Misc. FISHER *v.* SWENSON, WARDEN. Court of Appeals of Maryland. Certiorari denied. Reported below: —— Md. ——, 64 A. 2d 124.

No. 636, Misc. SMITH *v.* RAGEN, WARDEN. Supreme Court of Illinois. Certiorari denied.

No. 638, Misc. O'MALLEY *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 644, Misc. CORDTS *v.* RAGEN, WARDEN, ET AL. Circuit Court of St. Clair County, Illinois. Certiorari denied.

*Rehearing Denied.* (*See also No. 13, Original and No. 500, supra.*)

No. 679. KENNEDY *v.* WALKER, WARDEN, 337 U. S. 901. Motion for leave to file petition for rehearing denied.

No. 268. WEBER *v.* UNITED STATES, 335 U. S. 872. Rehearing denied.

No. 272. TERMINIELLO *v.* CHICAGO, 337 U. S. 1. Rehearing denied.

No. 457. HUMPHREY, WARDEN, *v.* SMITH, 336 U. S. 695. Rehearing denied.

No. 647. MOMAND *v.* UNIVERSAL FILM EXCHANGES, INC. ET AL., 336 U. S. 967. Rehearing denied.

No. 648. DEWAR *v.* HUNTER, WARDEN, 337 U. S. 908. Rehearing denied.

No. 379, Misc. IN RE BUSH, 336 U. S. 971. Rehearing denied.

No. 490, Misc. COYLE *v.* CALIFORNIA, 337 U. S. 909. Rehearing denied.

No. 560, Misc. WAKAT *v.* RAGEN, WARDEN, 337 U. S. 909. Rehearing denied.

JUNE 20, 1949.

*Per Curiam Decisions.*

No. 4. LOFTUS *v.* ILLINOIS. Certiorari to the Supreme Court of Illinois. *Per Curiam:* Certiorari was granted in this case, 333 U. S. 831, because of petitioner's serious claim that he was denied the assistance of counsel under circumstances which constitute a disregard of the safeguards to which he was entitled under the Due Process Clause of the Fourteenth Amendment. After hearing argument, we continued the cause to enable the Supreme Court of Illinois to advise us whether its affirmance of petitioner's conviction was intended to rest on an adequate independent State ground or whether decision of the claim under the Fourteenth Amendment was necessary to its judgment inasmuch as it was urged on behalf of Illinois that the constitutional claim was not properly before the Illinois Supreme Court on writ of error, but must be pursued in Illinois by habeas corpus. 334 U. S. 804. That Court's response in *People* v. *Loftus,* 400 Ill. 432, 81 N. E. 2d 495, makes it clear that its judgment rested upon an independent State ground. The writ of certiorari heretofore granted is therefore dismissed. *Henry H. Fowler* for petitioner. *George F. Barrett,* then Attorney General of Illinois, and *William C. Wines,* Assistant Attorney General, for respondent.

No. 102, Misc. THOMPSON *v.* NIERSTHEIMER, WARDEN. On petition for writ of certiorari to the Circuit Court of Randolph County, Illinois. *Per Curiam:* The petition for writ of certiorari is granted. The order denying the petition for habeas corpus is vacated and the cause is remanded to the Circuit Court of Randolph County, Illinois, for consideration of the petition in the light of the opinions of the Supreme Court of Illinois in *People* v. *Loftus,* 400 Ill. 432, 81 N. E. 2d 495; *People* v. *Shoffner,*

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400 Ill. 174, 79 N. E. 2d 200; and *People* v. *Wilson,* 399 Ill. 437, 78 N. E. 2d 514. See *Young* v. *Ragen,* 337 U. S. 235.

No. 847. Gulfstream Park Racing Association, Inc. *v.* Robert L. Weed, Architect, Inc. Appeal from the Supreme Court of Florida. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *W. G. Ward* for appellant. *Thomas H. Anderson* for appellee. Reported below: 39 So. 2d 921.

*Miscellaneous Orders.*

No. 451, Misc. Chaney *v.* United States; and

No. 561, Misc. Hanna *v.* United States. The motions for leave to file petitions for writs of certiorari in these cases are denied. *James J. Laughlin* for petitioner in No. 561, Misc.

No. 612, Misc. Rought *v.* United States District Court for the Western District of Missouri et al. Motion for leave to file petition for writ of mandamus denied.

No. 631, Misc. Miller *v.* Hiatt, Warden;

No. 635, Misc. Krepper *v.* United States;

No. 642, Misc. Roberts *v.* Frisbie, Warden;

No. 653, Misc. Ruthven *v.* Overholser;

No. 661, Misc. McIntosh *v.* Steele, Warden, et al.;

No. 664, Misc. Pullins *v.* Ohio et al.; and

No. 672, Misc. Fincham *v.* Lillard, Sheriff. The motions for leave to file petitions for writs of habeas corpus in these cases are severally denied.

No. 670, Misc. Edwards *v.* Clemmer, Director. Application denied.

No. 773. Estate of Hager et al. *v.* Commissioner of Internal Revenue. Petition for writ of certiorari to the United States Court of Appeals for the Third Circuit dismissed per stipulation of counsel. *Hugo Kohlmann* for petitioner. *Solicitor General Perlman* for respondent. Reported below: 173 F. 2d 613.

*Certiorari Granted.* (*See also No. 102, Misc., supra.*)

No. 789. Federal Power Commission *v.* East Ohio Gas Co. et al. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. Mr. Justice Burton took no part in the consideration or decision of this application. *Solicitor General Perlman* and *Bradford Ross* for petitioner. *Herbert S. Duffy,* Attorney General of Ohio, *Kenneth B. Johnston,* Assistant Attorney General, *William B. Cockley, Walter J. Milde, Wm. A. Dougherty* and *Sturgis Warner* for respondents. Reported below: 84 U. S. App. D. C. 312, 173 F. 2d 429.

No. 801. Wilmette Park District *v.* Campbell, Collector of Internal Revenue. C. A. 7th Cir. Certiorari granted. *Edward R. Johnston* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack* and *Melva M. Graney* for respondent. Reported below: 172 F. 2d 885.

*Certiorari Denied.* (*See also Nos. 451 and 561, Misc., supra.*)

No. 659. Fujino *v.* Clark, Attorney General of the United States. C. A. 9th Cir. Certiorari denied. *J. Garner Anthony* for petitioner. *Solicitor General Perlman, Assistant Attorney General Bazelon* and *James L. Morrisson* for respondent. Reported below: 172 F. 2d 384.

No. 725. CALHOUN ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *William H. Fryer* for petitioners. *Solicitor General Perlman, Assistant Attorney General Campbell, Robert S. Erdahl* and *Philip R. Monahan* for the United States. Reported below: 172 F. 2d 457.

No. 756. ESTATE OF MACMANUS ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. *John J. Sloan* and *Harold Goodman* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack, Morton K. Rothschild* and *Joseph W. Bishop, Jr.* for respondent. Reported below: 172 F. 2d 697.

No. 757. GREAT NORTHERN RAILWAY CO. ET AL. *v.* LEHMAN ET AL. Supreme Court of Minnesota. Certiorari denied. *Edwin C. Matthias, Anthony Kane, James L. Hetland* and *A. Rea Williams* for petitioners. *Bert McMullen* for respondents. Reported below: 227 Minn. 482, 36 N. W. 2d 336.

No. 758. SGAMBATI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Jacob Rassner* for petitioner. *Solicitor General Perlman, Assistant Attorney General Morison* and *Paul A. Sweeney* for the United States. Reported below: 172 F. 2d 297.

No. 759. ROTH, DOING BUSINESS AS PSYCHIC RESEARCH PRESS, *v.* GOLDMAN, POSTMASTER. C. A. 2d Cir. Certiorari denied. Petitioner *pro se. Solicitor General Perlman, Assistant Attorney General Morison, Paul A. Sweeney, John R. Benney* and *Joseph Kovner* for respondent. Reported below: 172 F. 2d 788.

No. 772. NOLAND, TRUSTEE, *v.* WESTOVER, COLLECTOR, UNITED STATES TREASURY DEPARTMENT, ET AL. C. A. 9th

Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Perlman* for respondents. Reported below: 172 F. 2d 614.

No. 774. Pittsburgh & West Virginia Railway Co. *v.* Commissioner of Internal Revenue. C. A. 3d Cir. Certiorari denied. *W. A. Seifert, William R. Spofford* and *Norman D. Keller* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack* and *Hilbert P. Zarky* for respondent. Reported below: 172 F. 2d 1010.

No. 775. Matson Navigation Co. *v.* War Damage Corp. C. A. 9th Cir. Certiorari denied. *Herman Phleger, Gregory A. Harrison* and *Lyman Henry* for petitioner. *Solicitor General Perlman, Assistant Attorney General Morison, Samuel D. Slade* and *Joseph Kovner* for respondent. Reported below: 172 F. 2d 942.

No. 778. Kan *v.* Tsang. C. A. 9th Cir. Certiorari denied. *Gilbert S. Woolworth* for petitioner. *Lemuel H. Matthews* for respondent. Reported below: 173 F. 2d 204.

No. 780. District of Columbia *v.* Smoot Sand & Gravel Corp. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Vernon E. West, Chester H. Gray* and *George C. Updegraff* for petitioner. *David R. Shelton* for respondent. Reported below: 84 U. S. App. D. C. 367, 174 F. 2d 505.

No. 782. Lockard et al. *v.* Los Angeles et al. Supreme Court of California. Certiorari denied. *Albert H. Allen* and *Hyman Goldman* for petitioners. *Ray L. Chesebro* and *Bourke Jones* for respondents. Reported below: 33 Cal. 2d 453, 202 P. 2d 38.

No. 788. LATTA ET AL. *v.* WESTERN INVESTMENT CO. ET AL. C. A. 9th Cir. Certiorari denied. *James D. Meredith* for petitioners. *Stanley A. Weigel, Horace B. Wulff* and *Evan J. Foulds* for respondents. Reported below: 173 F. 2d 99.

No. 790. SALES AFFILIATES, INC. *v.* NATIONAL MINERAL CO., NOW HELENE CURTIS INDUSTRIES, INC. C. A. 7th Cir. Certiorari denied. *Hobart N. Durham* and *George B. Finnegan, Jr.* for petitioner. *Casper W. Ooms* for respondent. Reported below: 172 F. 2d 608.

No. 791. CONTINENTAL CASUALTY CO. *v.* UNITED STATES FOR THE USE OF SCHAEFER, DOING BUSINESS AS CONCRETE CONSTRUCTION CO., ET AL. C. A. 9th Cir. Certiorari denied. *George W. Wilkins* for petitioner. *Cutler W. Halverson* for Schaefer, respondent. Reported below: 173 F. 2d 5.

No. 792. INTERNATIONAL HARVESTER CO. *v.* TROUTMAN, ADMINISTRATRIX. C. A. 6th Cir. Certiorari denied. *Louis Seelbach* for petitioner. *Lawrence S. Grauman* and *Herman Cohen* for respondent. Reported below: 173 F. 2d 895.

No. 794. UNION TRUST CO. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Lucien L. Dunbar* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack, Lee A. Jackson, L. W. Post* and *Joseph W. Bishop, Jr.* for the United States. Reported below: 173 F. 2d 54.

No. 813. PLOUGH *v.* BALTIMORE & OHIO RAILROAD CO.;

No. 814. HANSON, ADMINISTRATRIX, *v.* BALTIMORE & OHIO RAILROAD CO.;

No. 815. VAN SLYKE *v.* BALTIMORE & OHIO RAILROAD Co.; and

No. 816. LYNCH, ADMINISTRATRIX, *v.* BALTIMORE & OHIO RAILROAD Co. C. A. 2d Cir. Certiorari denied. *Frank G. Raichle* for petitioners. *William C. Combs* for respondent. Reported below: 172 F. 2d 396.

No. 819. BERGER, DOING BUSINESS AS BERGER SALES Co., *v.* BRANNAN, SECRETARY OF AGRICULTURE, SUING ON BEHALF OF THE UNITED STATES. C. A. 10th Cir. Certiorari denied. *Byron G. Rogers* for petitioner. Reported below: 172 F. 2d 241.

No. 826. WHETSTONE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Perlman* for the United States.

No. 830. RICCARDI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Frederic M. P. Pearse* for petitioner. *Solicitor General Perlman* for the United States. Reported below: 174 F. 2d 883.

No. 691. PETERSEN ET AL. *v.* CHRIST'S CHURCH OF THE GOLDEN RULE ET AL. C. A. 9th Cir. The motion for leave to withdraw the appearance of Howard B. Crittenden, Jr. as counsel for the petitioners is denied. Certiorari denied. *Howard B. Crittenden, Jr.* for petitioners. Reported below: 170 F. 2d 555.

No. 748. ZIMMERMANN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Coleman Gay* and *Henry H. Brooks* for petitioner. *Solicitor General Perlman* for the United States. Reported below: 171 F. 2d 790.

No. 832. LYONS *v.* CAPITAL TRANSIT CO. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied.

No. 867. UNITED STATES EX REL. SCHIRRMEISTER *v.* WATKINS, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. The petition for writ of certiorari to the United States Court of Appeals for the Second Circuit is denied for the reason that application therefor was not made within the time provided by law. 28 U. S. C. § 2101 (c). *P. Bateman Ennis* for petitioner. *Solicitor General Perlman* for respondent. Reported below: 171 F. 2d 858.

No. 302, Misc. PIPPIN *v.* NIERSTHEIMER, WARDEN. The petition for writ of certiorari to the Supreme Court of Illinois is denied without prejudice to the filing of an application for writ of habeas corpus in any State court of competent jurisdiction. See *Young* v. *Ragen,* 337 U. S. 235. Petitioner *pro se. Ivan A. Elliott,* Attorney General of Illinois, and *William C. Wines,* Assistant Attorney General, for respondent.

No. 359, Misc. KOENIG *v.* SMITH, SUPERINTENDENT. The motion to strike respondent's brief is denied. The petition for writ of certiorari to the Supreme Court of Washington is also denied. Petitioner *pro se. Smith Troy,* Attorney General of the State of Washington, and *C. John Newlands,* Assistant Attorney General, for respondent.

No. 2, Misc. THOMPSON *v.* ILLINOIS. Circuit Court of St. Clair County, Illinois. Certiorari denied. Peti-

tioner *pro se.* *George F. Barrett,* then Attorney General of Illinois, *William C. Wines, James C. Murray* and *Raymond S. Sarnow,* Assistant Attorneys General, for respondent.

No. 10, Misc. THOMPSON *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 373, Misc. BANKS *v.* NIERSTHEIMER, WARDEN, ET AL. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 377, Misc. FERGUSON, TEMPORARY ADMINISTRATOR, ET AL. *v.* FERGUSON. Court of Civil Appeals, 3d Supreme Judicial District, of Texas. Certiorari denied.

No. 414, Misc. THOMAS *v.* MOORE, WARDEN. District Court of Walker County, Texas. Certiorari denied. Petitioner *pro se.* *Price Daniel,* Attorney General of Texas, *Frank Lake,* Assistant Attorney General, and *Joe R. Greenhill,* First Assistant Attorney General, for respondent.

No. 424, Misc. ODDO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Petitioner *pro se.* *Solicitor General Perlman, Assistant Attorney General Campbell, Robert S. Erdahl* and *Philip R. Monahan* for the United States. Reported below: 171 F. 2d 854.

No. 450, Misc. DE NORMAND ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Petitioner *pro se.* *Solicitor General Perlman, Assistant Attorney General Campbell, Robert S. Erdahl* and *Philip R. Monahan* for the United States. Reported below: 171 F. 2d 854.

No. 476, Misc. LOWE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Perlman, Assistant Attorney General Campbell, Robert S. Erdahl* and *Philip R. Monahan* for the United States. Reported below: 173 F. 2d 346.

No. 477, Misc. WAGNER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Perlman, Assistant Attorney General Campbell, Robert S. Erdahl* and *Philip R. Monahan* for the United States. Reported below: 171 F. 2d 354.

No. 484, Misc. FLYNN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Perlman, Assistant Attorney General Campbell* and *Robert S. Erdahl* for the United States. Reported below: 172 F. 2d 12.

No. 491, Misc. BIRTCH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 173 F. 2d 316.

No. 533, Misc. MARION *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 171 F. 2d 185.

No. 540, Misc. PASCAL *v.* BURKE, WARDEN. Supreme Court of Pennsylvania. Certiorari denied.

No. 542, Misc. SHOE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 170 F. 2d 480.

No. 546, Misc. LOWE *v.* HUMPHREY, WARDEN. C. A. 3d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Perlman, Assistant Attorney General Campbell, Robert S. Erdahl* and *Philip R. Monahan* for respondent.

No. 553, Misc. GOULD *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 173 F. 2d 30.

No. 555, Misc. HICKS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *William Alfred Hall, Jr.* for petitioner. *Solicitor General Perlman, Assistant Attorney General Campbell* and *Robert S. Erdahl* for the United States. Reported below: 173 F. 2d 570.

No. 574, Misc. HALEY *v.* OHIO. Supreme Court of Ohio. Certiorari denied. *E. L. Mills* and *Edgar W. Jones* for petitioner. *D. Deane McLaughlin* and *John Rossetti* for respondent. Reported below: 151 Ohio St. 80, 84 N. E. 2d 217.

No. 581, Misc. GAY *v.* FIDELITY UNION TRUST CO., EXECUTOR. Supreme Court of New Jersey. Certiorari denied. Petitioner *pro se*. *Charles Danzig* for respondent. Reported below: 1 N. J. 581, 65 A. 2d 60.

No. 586, Misc. JACKSON *v.* HIATT, WARDEN. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Perlman, Assistant Attorney General Campbell, Robert S. Erdahl* and *Philip R. Monahan* for respondent. Reported below: 173 F. 2d 760.

No. 590, Misc. GARNER ET AL. *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *T. Emmett McKenzie* for petitioners. *Solicitor General Perlman, Assistant Attorney General Campbell, Robert S. Erdahl* and *Harold D. Cohen* for the United States. Reported below: 84 U. S. App. D. C. 361, 174 F. 2d 499.

No. 596, Misc. SKINNER *v.* ROBINSON, WARDEN. Circuit Court of Lee County, Illinois. Certiorari denied.

No. 599, Misc. GODWIN *v.* SMYTH, SUPERINTENDENT. Supreme Court of Appeals of Virginia. Certiorari denied. Reported below: 188 Va. 753, 51 S. E. 2d 230.

No. 605, Misc. FIAMENGO ET AL. *v.* THE SAN FRANCISCO ET AL. C. A. 9th Cir. Certiorari denied. *David A. Fall* for petitioners. *Arch E. Ekdale* for respondents. Reported below: 172 F. 2d 767.

No. 611, Misc. BURCH *v.* KIEREN, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 174 F. 2d 324.

No. 616, Misc. CARTER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 173 F. 2d 685.

No. 621, Misc. RODDA *v.* RODDA. Supreme Court of Oregon. Certiorari denied. Reported below: 185 Ore. 140, 202 P. 2d 638.

No. 623, Misc. ADAMS *v.* HIATT, WARDEN. C. A. 3d Cir. Certiorari denied. *Wm. H. Ramsey* for petitioner. Reported below: 173 F. 2d 896.

No. 626, Misc. HOWELL *v.* UNITED STATES. C. A. 8th and 10th Circuits. Certiorari denied.

No. 627, Misc. LOPER *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied. Reported below: 152 Tex. Cr. Rep. ——, 219 S. W. 2d 81.

No. 628, Misc. REEVES *v.* GEORGIA. Court of Appeals of Georgia. Certiorari denied. *W. A. Bootle* for petitioner. *Eugene Cook,* Attorney General of Georgia, *Claude Shaw,* Deputy Assistant Attorney General, and *J. R. Parham,* Assistant Attorney General, for respondent. Reported below: 78 Ga. App. 702, 50 S. E. 2d 708.

No. 629, Misc. WALLACE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *George J. Danforth* for petitioner. *Solicitor General Perlman, Assistant Attorney General Campbell, Robert S. Erdahl* and *Philip R. Monahan* for the United States. Reported below: 174 F. 2d 112.

No. 630, Misc. STORY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *George J. Danforth* for petitioner. *Solicitor General Perlman, Assistant Attorney General Campbell, Robert S. Erdahl* and *Philip R. Monahan* for the United States. Reported below: 174 F. 2d 120.

No. 639, Misc. FULLER *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 640, Misc. POPE *v.* MAYO, CUSTODIAN. Supreme Court of Florida. Certiorari denied. Reported below: 160 Fla. 788, 39 So. 2d 286.

No. 641, Misc. TABOR *v.* SWENSON, WARDEN. Court of Appeals of Maryland. Certiorari denied. Reported below: —— Md. ——, 66 A. 2d 205.

No. 645, Misc. EDMONDSON *v.* WRIGHT, WARDEN. Court of Appeals of Maryland. Certiorari denied.

No. 646, Misc. TAYLOR *v.* HUDSPETH, WARDEN. Supreme Court of Kansas. Certiorari denied.

No. 647, Misc. SMITH *v.* RAGEN, WARDEN. Supreme Court of Illinois. Certiorari denied.

No. 648, Misc. EDWARDS *v.* HEINZE, WARDEN. Supreme Court of California. Certiorari denied.

No. 649, Misc. DARDEN *v.* RAGEN, WARDEN. Supreme Court of Illinois. Certiorari denied.

No. 650, Misc. CURRENT *v.* HUDSPETH, WARDEN. Supreme Court of Kansas. Certiorari denied.

No. 654, Misc. NOORLANDER *v.* CALIFORNIA. Superior Court for the County of Los Angeles, California. Certiorari denied.

No. 656, Misc. GOODMAN *v.* IOWA. Supreme Court of Iowa. Certiorari denied.

No. 657, Misc. GOODMAN *v.* LAINSON, WARDEN. District Court of Lee County, Iowa. Certiorari denied.

No. 658, Misc. WRIGHT *v.* RAGEN, WARDEN. Supreme Court of Illinois. Certiorari denied.

No. 659, Misc. KRANZ *v.* HUMPHREY, WARDEN. C. A. 3d Cir. Certiorari denied. Reported below: 174 F. 2d 741.

No. 660, Misc. GRYGER *v.* BURKE, WARDEN. Supreme Court of Pennsylvania. Certiorari denied.

No. 662, Misc. PHILLIPS *v.* HUDSPETH, WARDEN. Supreme Court of Kansas. Certiorari denied.

No. 663, Misc. MANCHESTER *v.* CALIFORNIA ET AL. Supreme Court of California. Certiorari denied. Reported below: 33 Cal. 2d 740, 204 P. 2d 881.

No. 665, Misc. WHALEN ET AL. *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 666, Misc. EDELMAN *v.* CALIFORNIA. Appellate Department of the Superior Court of California. Certiorari denied.

No. 667, Misc. CLARK *v.* EIDSON, WARDEN. Supreme Court of Missouri. Certiorari denied.

No. 669, Misc. KIMBREL *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Frederick Bernays Wiener* for petitioner. Reported below: 85 U. S. App. D. C. —, 174 F. 2d 672.

No. 673, Misc. DESSAURE *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. *Franklin H. Williams* and *Thurgood Marshall* for petitioner. Reported below: 299 N. Y. 126, 85 N. E. 2d 900.

No. 674, Misc. HALL *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 675, Misc. TENNANT *v.* RAGEN, WARDEN. Supreme Court of Illinois. Certiorari denied.

No. 676, Misc. MANNING *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 677, Misc. CORDTS *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied.

No. 678, Misc. WILLIAMS *v.* NEW YORK. Supreme Court of New York. Certiorari denied.

No. 679, Misc. MEYER *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied.

No. 680, Misc. WILDE *v.* WYOMING. Supreme Court of Wyoming. Certiorari denied.

*Rehearing Denied.*

No. 197. NATIONAL LABOR RELATIONS BOARD *v.* CROMPTON-HIGHLAND MILLS, INC., 337 U. S. 217. Rehearing denied.

No. 690. SMITH *v.* CALIFORNIA, 336 U. S. 957. Motion for leave to file petition for rehearing denied.

No. 719. KELLY, ADMINISTRATOR, ET AL. *v.* SHAMROCK OIL & GAS CORP., 337 U. S. 917. The motion for an extension of time within which to file petition for rehearing is granted and the petition is denied.

No. 720. THYS ET AL., DOING BUSINESS AS THYS & MILLER, *v.* STATE OF WASHINGTON, 337 U. S. 917. Rehearing denied.

No. 721. FRANCIS *v.* UNITED STATES, 337 U. S. 918. Rehearing denied.

No. 338, Misc. GANN *v.* HIATT, WARDEN, 337 U. S. 920. Rehearing denied.

No. 472, Misc. MACKENNA *v.* NEW YORK, 336 U. S. 969. Rehearing denied.

No. 580, Misc. D'OSTROPH *v.* UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT ET AL., 337 U. S. 926. Rehearing denied.

No. 550, Misc. MORANT *v.* NEW YORK, 337 U. S. 909. Motion for leave to file petition for rehearing denied.

JUNE 27, 1949.

*Per Curiam Decisions.*

No. 43. CENTRAL STATES COOPERATIVES, INC. *v.* WATSON BROS. TRANSPORTATION CO., INC. On petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit. *Per Curiam:* The petition for writ of certiorari is granted. The judgment of the Court of Appeals is vacated and the cause is remanded to that court for further consideration in the light of *National Mutual Ins. Co.* v. *Tidewater Transfer Co.*, 337 U. S. 582. *Thomas G. McBride* and *George E. Billett* for petitioner. *Julius L. Sherwin* and *Theodore R. Sherwin* for respondent. Reported below: 165 F. 2d 392.

No. 493. UNITED STATES GYPSUM CO. *v.* GLANDER, TAX COMMISSIONER. Appeal from the Supreme Court of Ohio. *Per Curiam:* The judgment of the Supreme Court of Ohio is vacated and the cause is remanded to that court in order to enable it to reexamine its decision in the light of *Wheeling Steel Corp.* v. *Glander*, 337 U. S. 562. MR. JUSTICE BLACK dissents. *Charles M. Price* and *Clarence D. Laylin* for appellant. Reported below: 150 Ohio St. 229, 80 N. E. 2d 863.

No. 494. UNITED STATES GYPSUM CO. *v.* GLANDER, TAX COMMISSIONER. Appeal from the Supreme Court of Ohio. *Per Curiam:* Judgment reversed. *Wheeling Steel Corp.* v. *Glander*, 337 U. S. 562. MR. JUSTICE BLACK dissents. *Charles M. Price* and *Clarence D. Laylin* for appellant. Reported below: 150 Ohio St. 229, 80 N. E. 2d 863.

No. 604. AJAX TRUCKING CO., INC. *v.* BROWNE ET AL., CONSTITUTING THE STATE TAX COMMISSION. Appeal from the Court of Appeals of New York. *Per Curiam:* The appeal is dismissed. *Matson Navigation Co.* v. *State*

*Board of Equalization,* 297 U. S. 441. *Sidney Meyers* for appellant. Reported below: 298 N. Y. 736, 83 N. E. 2d 144.

No. 749. GREAT LAKES STEEL CORP. *v.* UNITED STATES ET AL. Appeal from the United States District Court for the Eastern District of Michigan. *Per Curiam:* Judgment reversed. *United States* v. *Interstate Commerce Comm'n,* 337 U. S. 426. MR. JUSTICE FRANKFURTER, MR. JUSTICE JACKSON, and MR. JUSTICE BURTON dissent for reasons stated in the dissenting opinion in *United States* v. *Interstate Commerce Comm'n,* 337 U. S. 426, 444. *Sherwin A. Hill, Edward T. Goodrich, James McEvoy, Jr.* and *Harry D. Fenske* for appellant. *Solicitor General Perlman* for the United States; *Daniel W. Knowlton, Edward M. Reidy* and *Daniel H. Kunkel* for the Interstate Commerce Commission; and *W. T. Pierson* and *Frank H. Cole, Jr.* for the Baltimore & Ohio Railroad Co. et al., appellees. Reported below: 81 F. Supp. 450.

*Miscellaneous Orders.*

No. 12, Original. UNITED STATES *v.* CALIFORNIA. The report of the Special Master is received and ordered filed.

No. 12, Original. UNITED STATES *v.* CALIFORNIA. The order of February 12, 1949, appointing William H. Davis, Esquire, of New York City, Special Master herein is continued and he is directed to proceed with all convenient speed, with respect to the seven coastal segments enumerated in Groups I and II of the Master's Report, to consider: (1) a simplification of the issues; (2) statements of the issues and amendments thereto in the nature of pleadings; (3) the nature and form of evidence proposed to be submitted, including admission of facts and of documents which will avoid unnecessary proof; and report thereon to the Court.

Should the office of Master become vacant during the recess of the Court, THE CHIEF JUSTICE shall have authority to make a new designation which shall have the same effect as if originally made by the Court herein.

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

No. 386. CLARK, ATTORNEY GENERAL, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, *v.* MANUFACTURERS TRUST CO.; and

No. 443. MANUFACTURERS TRUST CO. *v.* CLARK, ATTORNEY GENERAL, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN. The motions for leave to file petitions for rehearing are granted and the petitions for rehearing are granted. The orders entered January 17, 1949, denying certiorari, 335 U. S. 910, are vacated and the petitions for writs of certiorari to the United States Court of Appeals for the Second Circuit are granted. *Solicitor General Perlman* for petitioner in No. 386 and respondent in No. 443. *Lester E. Denonn* and *Henry Landau* for respondents in No. 386 and petitioner in No. 443. Reported below: No. 386, 169 F. 2d 932.

No. 683, Misc. EDGEMAN *v.* OHIO ET AL.; and

No. 689, Misc. BROWN *v.* MINNESOTA. The motions for leave to file petitions for writs of habeas corpus are denied.

No. 686, Misc. IN RE FELSCH. Treating the application in this case as a motion for leave to file a petition for an original writ of habeas corpus, leave to file is denied. THE CHIEF JUSTICE, MR. JUSTICE REED, MR. JUSTICE FRANKFURTER, and MR. JUSTICE BURTON are of the opinion that there is want of jurisdiction. U. S. Constitution, Article III, § 2, Clause 2; see *Ex parte Betz* and companion cases, all 329 U. S. 672 (1946); *Milch* v.

*United States,* 332 U. S. 789 (1947); *Brandt* v. *United States,* 333 U. S. 836 (1948); *In re Eichel,* 333 U. S. 865 (1948); *Everett* v. *Truman,* 334 U. S. 824 (1948). MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, MR. JUSTICE MURPHY, and MR. JUSTICE RUTLEDGE are of the opinion that argument should be heard on the motion for leave to file the petition in order to settle what remedy, if any, the petitioner has. MR. JUSTICE JACKSON took no part in the consideration or decision of this application.

*Certiorari Granted.* (*See also Nos. 43, 386 and 443, supra.*)

No. 436. DENNIS *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted limited to the question whether government employees could properly serve on the jury which tried petitioner. MR. JUSTICE BURTON took no part in the consideration or decision of these applications. *Earl Dickerson* and *Harry Sacher* for petitioner. *Solicitor General Perlman, Robert S. Erdahl* and *Beatrice Rosenberg* for the United States. *Arthur G. Silverman* filed a brief for the National Lawyers Guild, as *amicus curiae,* supporting the petition. Reported below: 84 U. S. App. D. C. 31, 171 F. 2d 986.

No. 452. GRAHAM ET AL. *v.* BROTHERHOOD OF LOCOMOTIVE FIREMEN & ENGINEMEN. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. The motion of petitioners to vacate the stay and to reinstate the injunction is denied. *Joseph L. Rauh, Jr., Irving J. Levy* and *Henry Epstein* for petitioners. *Lester P. Schoene, Milton Kramer, Harold C. Heiss* and *Russell B. Day* for respondent. *Solicitor General Perlman* and *Robert L. Stern* filed a brief for the United States, as *amicus curiae,* supporting the petition. Reported below: 84 U. S. App. D. C. 67, 175 F. 2d 802.

No. 783. SINCLAIR *v.* UNITED STATES. C. A. 3d Cir. Certiorari granted. *David Berger* for petitioner. *Solicitor General Perlman, Assistant Attorney General Campbell, Robert S. Erdahl* and *Israel Convisser* for the United States. Reported below: 174 F. 2d 933.

No. 787. MANNING, COLLECTOR OF INTERNAL REVENUE, *v.* SEELEY TUBE & BOX CO. C. A. 3d Cir. Certiorari granted. *Solicitor General Perlman* for petitioner. *Nathan Bilder* and *George G. Tyler* for respondent. Reported below: 172 F. 2d 77.

No. 809. AARON ET AL. *v.* FORD, BACON & DAVIS, INC. C. A. 8th Cir. Certiorari granted. *Paul E. Talley, Charles H. Earl, Cooper Jacoway* and *June P. Wooten* for petitioners. *Grover T. Owens* and *E. L. McHaney, Jr.* for respondent. *Solicitor General Perlman* and *William S. Tyson* filed a brief for the United States, as *amicus curiae,* supporting the petition. Reported below: 174 F. 2d 730.

No. 817. UNITED STATES EX REL. WILLUMEIT *v.* WATKINS, DISTRICT DIRECTOR, IMMIGRATION & NATURALIZATION SERVICE. C. A. 2d Cir. Certiorari granted. *William Dean Embree* for petitioner. *Solicitor General Perlman* for respondent. Reported below: 171 F. 2d 773.

No. 260. UNITED STATES EX REL. EICHENLAUB *v.* WATKINS, DISTRICT DIRECTOR OF IMMIGRATION & NATURALIZATION. The order entered November 15, 1948, denying certiorari, 335 U. S. 867, is vacated. The petition for writ of certiorari to the United States Court of Appeals for the Second Circuit is granted. *Charles E. Wallington* for petitioner. *Solicitor General Perlman, Robert S. Erdahl* and *Josephine H. Klein* for respondent. Reported below: 167 F. 2d 659.

*Certiorari Denied.*

No. 71. FONG ET AL. *v.* SUPERIOR COURT OF WASHINGTON FOR KING COUNTY ET AL. Supreme Court of Washington. Certiorari denied. *John J. Kennett* for petitioners. Reported below: 29 Wash. 2d 601, 188 P. 2d 125.

No. 178. UNITED STATES EX REL. SUTTON *v.* MULCAHY, UNITED STATES MARSHAL, ET AL. C. A. 2d Cir. Certiorari denied. *Burton B. Turkus* for petitioner. *George A. Ferris* for respondents. Reported below: 169 F. 2d 94.

No. 391. A. F. WAGNER IRON WORKS ET AL. *v.* WAR ASSETS ADMINISTRATION ET AL. C. A. 7th Cir. Certiorari denied. *Harold W. Norman* for petitioners. *Solicitor General Perlman, Assistant Attorney General Morison, Paul A. Sweeney* and *Alvin O. West* for respondents.

No. 509. KOHL *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 8th Cir. Certiorari denied. *Tyrrell M. Ingersoll* and *Charles T. Akre* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack* and *Harry Baum* for respondent. Reported below: 170 F. 2d 531.

No. 525. MOORE *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 4th Cir. Certiorari denied. *Walter H. Liebman* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack* and *Harry Baum* for respondent. Reported below: 170 F. 2d 191.

No. 641. BECKER *v.* VIRGINIA. Supreme Court of Appeals of Virginia. Certiorari denied. *Thomas H. Willcox* and *Harry H. Kanter* for petitioner. Reported below: 188 Va. lxv.

No. 675. POLIZIO *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. *Edward H. Levine* for petitioner. *Howard R. Lonergan* for respondent. Reported below: 298 N. Y. 814, 83 N. E. 2d 861.

No. 703. STINNETT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *George E. Allen* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, James M. McInerney* and *Ellis N. Slack* for the United States. Reported below: 173 F. 2d 129.

No. 779. PATERNO ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Anthony A. Calandra* for petitioners. *Solicitor General Perlman, Assistant Attorney General Campbell, Robert S. Erdahl* and *Andrew F. Oehmann* for the United States. Reported below: 173 F. 2d 757.

No. 781. DUNCAN, TRANSFEREE, *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. *J. B. Lewright* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack, Lee A. Jackson* and *Irving I. Axelrad* for respondent. Reported below: 173 F. 2d 218.

No. 784. CAMPBELL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Benj. B. Taylor, C. V. Porter, L. W. Brooks* and *Benj. B. Taylor, Jr.* for petitioner. *Solicitor General Perlman, Assistant Attorney General Morison, Paul A. Sweeney* and *Morton Hollander* for the United States. Reported below: 172 F. 2d 500.

No. 795. FAINBLATT *v.* COMMISSIONER OF INTERNAL REVENUE; and

No. 796. FAINBLATT *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. *Mark H. Johnson* for petitioners. *Solicitor General Perlman, As-*

*sistant Attorney General Caudle, Ellis N. Slack, Lee A. Jackson* and *Morton K. Rothschild* for respondent. Reported below: 172 F. 2d 389.

No. 799. GRAYLYN BAINBRIDGE CORP. *v.* WOODS, HOUSING EXPEDITER. C. A. 8th Cir. Certiorari denied. *William G. Boatright* for petitioner. *Solicitor General Perlman, John R. Benney, Ed Dupree, Hugo V. Prucha* and *Nathan Siegel* for respondent. Reported below: 173 F. 2d 790.

No. 804. MISSOURI-KANSAS-TEXAS RAILROAD CO. *v.* UNITED STATES EX REL. DEAVERS. C. A. 5th Cir. Certiorari denied. *C. S. Burg, M. E. Clinton, Dan Moody* and *J. B. Robertson* for petitioner. *Solicitor General Perlman, Newell A. Clapp* and *Samuel D. Slade* for respondent. Reported below: 171 F. 2d 961.

No. 810. CARTER OIL CO. *v.* RAMSEY ET AL. C. A. 7th Cir. Certiorari denied. *William M. Acton* for petitioner. *Charles Wham* for respondents. Reported below: 172 F. 2d 622.

No. 818. FARMAKIS *v.* FARMAKIS ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *David Rein* for petitioner. *Solicitor General Perlman* for the United States; and *Warren E. Miller* and *David S. Allshouse* for Farmakis, respondents. Reported below: 84 U. S. App. D. C. 297, 172 F. 2d 291.

No. 845. EISLER *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *David Rein, Abraham J. Isserman, Carol King* and *Joseph Forer* for petitioner. *Solicitor General Perlman* for the United States. Reported below: 84 U. S. App. D. C. 404, 176 F. 2d 21.

No. 860. EMPIRE PACKING CO. ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Michael F. Mulcahy* and *Henry W. Dieringer* for petitioners. *Solicitor General Perlman* for the United States. Reported below: 174 F. 2d 16.

No. 877. KEATING *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Maurice J. Walsh* for petitioner. *Solicitor General Perlman* for the United States.

No. 520. COMMISSIONER OF INTERNAL REVENUE *v.* HARTZ. C. A. 8th Cir. Certiorari denied. MR. JUSTICE BLACK is of the opinion the petition should be granted. *Solicitor General Perlman* for petitioner. *Donald B. Smith* for respondent. Reported below: 170 F. 2d 313.

No. 843. FITZ SIMONS & CONNELL DREDGE & DOCK CO. *v.* MULLEN; and

No. 844. FITZ SIMONS & CONNELL DREDGE & DOCK CO. *v.* SAVELA. C. A. 7th Cir. Certiorari denied. *Edward B. Hayes* for petitioner. *Irving Breakstone* for respondents. Reported below: 172 F. 2d 601.

No. 186, Misc. PALARDY *v.* AMERICAN-HAWAIIAN STEAMSHIP CO. C. A. 3d Cir. Certiorari denied. *Abraham E. Freedman* for petitioner. *Thomas E. Byrne, Jr.* for respondent. *Abraham M. Fisch* filed a brief for the International Longshoremen's Association, as *amicus curiae,* supporting the petition. Reported below: 169 F. 2d 619.

No. 291, Misc. AIRD *v.* WEYERHAEUSER STEAMSHIP CO. C. A. 3d Cir. Certiorari denied. *Abraham E. Freedman* for petitioner. *Thomas E. Byrne, Jr.* for respondent. Reported below: 169 F. 2d 606.

No. 634, Misc. THOMAS *v.* FURNESS (PACIFIC) LIMITED ET AL. C. A. 9th Cir. Certiorari denied. *Herbert Resner* for petitioner. *Farnham P. Griffiths* for respondents. Reported below: 171 F. 2d 434.

No. 651, Misc. MCDONALD *v.* SWOPE, WARDEN. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Perlman* for respondent. Reported below: 173 F. 2d 852.

No. 671, Misc. MCCORMICK *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 681, Misc. HINTON *v.* REID, SUPERINTENDENT. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *T. Emmett McKenzie* for petitioner.

No. 682, Misc. BRAMBLE *v.* CALIFORNIA ET AL. Supreme Court of California. Certiorari denied.

No. 684, Misc. WESTBROOK *v.* RAGEN, WARDEN. Circuit Court of Christian County, Illinois. Certiorari denied.

No. 685, Misc. MAIMONE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 687, Misc. KAMROWSKI *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 688, Misc. BASSINGER *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 403 Ill. 108, 85 N. E. 2d 758.

No. 690, Misc. HOLDERFIELD *v.* RAGEN, WARDEN. Circuit Court of Franklin County, Illinois. Certiorari denied.

No. 691, Misc. UNITED STATES EX REL. ROONEY ET AL. *v.* RAGEN, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 173 F. 2d 668.

No. 692, Misc. COLLINS *v.* DUFFY, WARDEN. Supreme Court of California. Certiorari denied.

*Rehearing Granted.* (*See Nos. 386 and 443, supra.*)

*Rehearing Denied.*

No. 156. DONOVAN *v.* QUEENSBORO CORPORATION ET AL.; and

No. 49, Misc. DONOVAN *v.* QUEENSBORO CORPORATION ET AL., 335 U. S. 804. Motion for leave to file petition for rehearing denied.

No. 513. BURNHAM CHEMICAL CO. *v.* BORAX CONSOLIDATED, LTD. ET AL., 336 U. S. 924. The motion for an extension of time within which to file a second petition for rehearing is denied.

No. 647. MOMAND *v.* UNIVERSAL FILM EXCHANGES, INC. ET AL., 336 U. S. 967. Second petition for rehearing denied.

No. 671. WILLIAMS *v.* NEW YORK, 337 U. S. 241. Petition for rehearing and motion for a stay of mandate denied.

No. 708. SONNESEN *v.* PANAMA TRANSPORT CO., 337 U. S. 919. The motion to enlarge the time to file petition for rehearing is denied.

No. 805. DOLES *v.* METROPOLITAN LIFE INSURANCE Co., 337 U. S. 922. Rehearing denied.

No. 425, Misc. HASSON *v.* UNITED STATES, 337 U. S. 932. Rehearing denied.

No. 437, Misc. TATE *v.* CALIFORNIA, 337 U. S. 903. Rehearing denied.

No. 489, Misc. BUTLER *v.* PENIX, RECEIVER, 337 U. S. 926. Rehearing denied.

## STATEMENT SHOWING THE NUMBER OF CASES FILED, DISPOSED OF, AND REMAINING ON DOCKETS, AT CONCLUSION OF OCTOBER TERMS—1946, 1947, AND 1948

| | ORIGINAL | | | APPELLATE | | | MISCELLANEOUS | | | TOTALS | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Terms | 1946 | 1947 | 1948 | 1946 | 1947 | 1948 | 1946 | 1947 | 1948 | 1946 | 1947 | 1948 |
| Number of cases on dockets | 12 | 12 | 14 | 1,512 | 879 | 889 | 154 | 579 | 702 | 1,678 | 1,470 | 1,605 |
| Number disposed of during terms | 0 | 0 | 1 | 1,366 | 772 | 747 | 154 | 567 | 686 | 1,520 | 1,339 | 1,434 |
| Number remaining on dockets | 12 | 12 | 13 | 146 | 107 | 142 | 0 | 12 | 16 | 158 | 131 | 171 |

| | TERMS | | | | TERMS | | |
|---|---|---|---|---|---|---|---|
| | 1946 | 1947 | 1948 | | 1946 | 1947 | 1948 |
| Distribution of cases disposed of during terms: | | | | Distribution of cases remaining on dockets: | | | |
| Original cases | 0 | 0 | 1 | Original cases | 12 | 12 | 13 |
| Appellate cases on merits | 260 | 217 | 224 | Appellate cases on merits | 95 | 61 | 76 |
| Petitions for certiorari | 1,106 | 555 | 523 | Petitions for certiorari | 51 | 46 | 66 |
| Miscellaneous docket applications | 154 | 567 | 686 | Miscellaneous docket applications | 0 | 12 | 16 |

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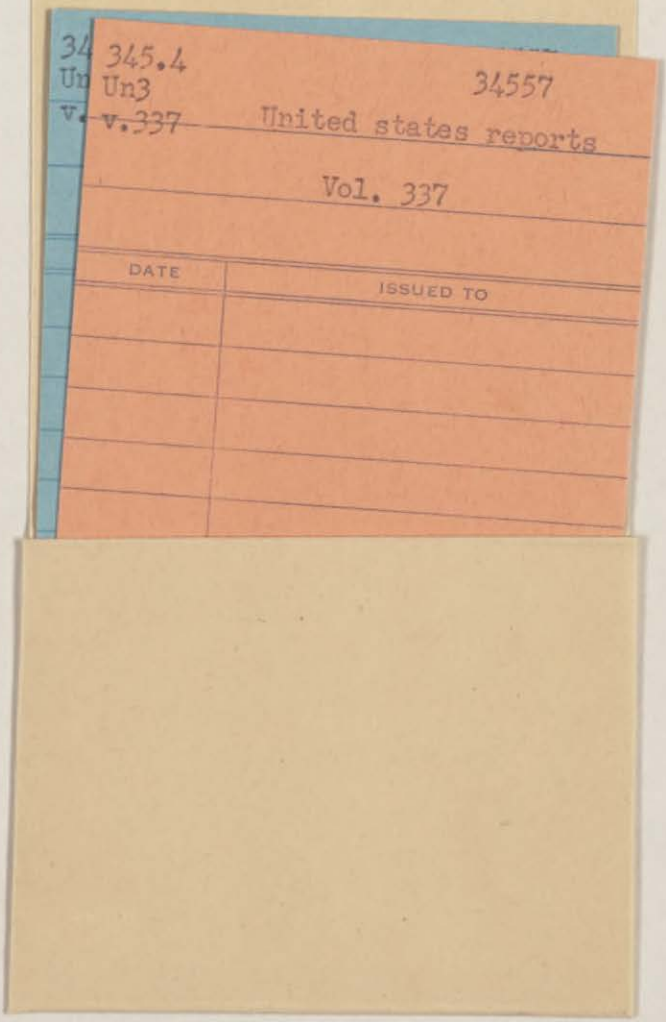

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