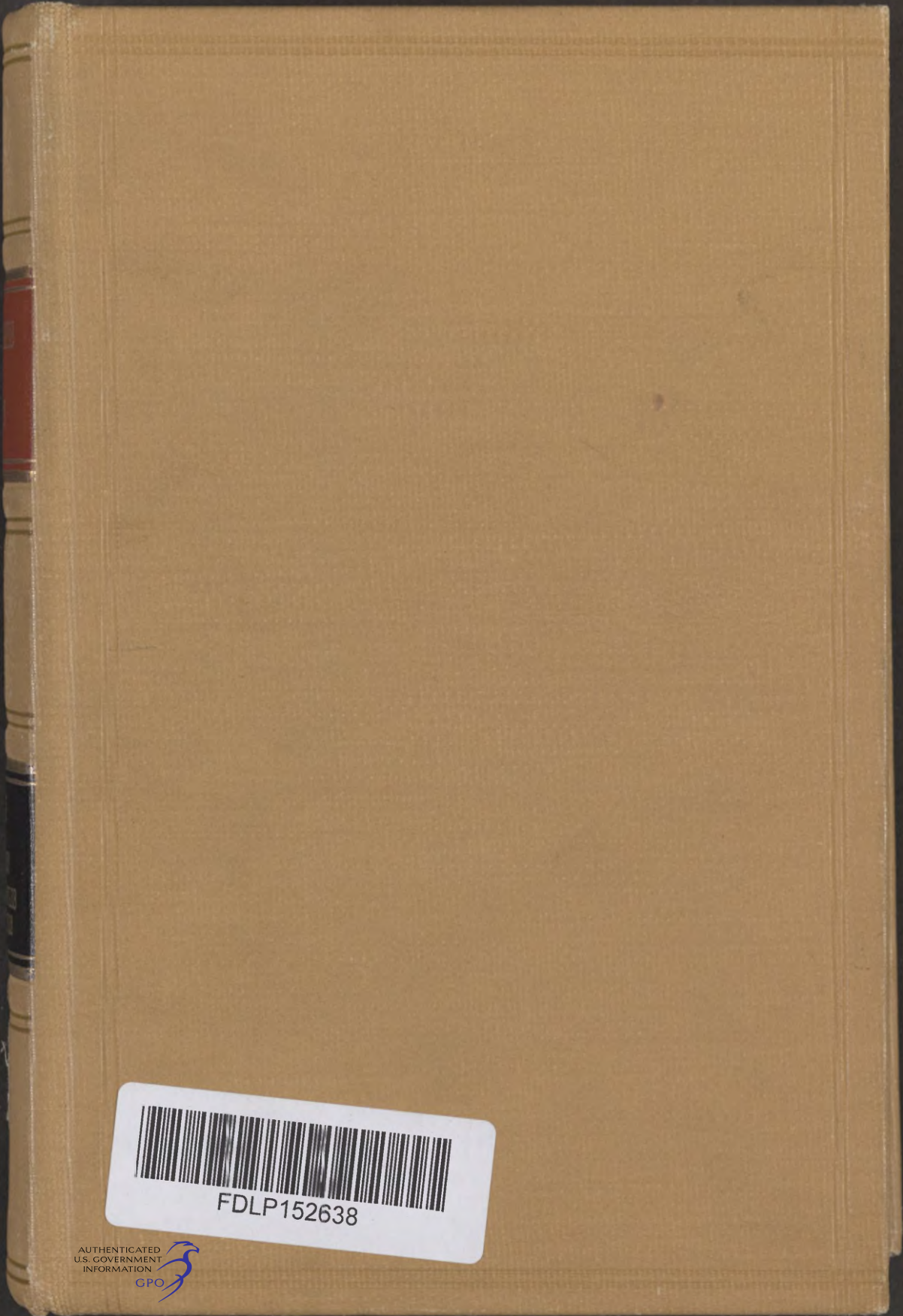

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UNITED STATES REPORTS

VOLUME 341

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1950

FROM APRIL 9 THROUGH JUNE 4, 1951
(END OF TERM)

WALTER WYATT
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ERRATUM.

339 U. S. 939, line 5: "520" should be "532".

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS.

FRED M. VINSON, Chief Justice.
HUGO L. BLACK, Associate Justice.
STANLEY REED, Associate Justice.
FELIX FRANKFURTER, Associate Justice.
WILLIAM O. DOUGLAS, Associate Justice.
ROBERT H. JACKSON, Associate Justice.
HAROLD H. BURTON, Associate Justice.
TOM C. CLARK, Associate Justice.
SHERMAN MINTON, Associate Justice.

J. HOWARD McGRATH, Attorney General.
PHILIP B. PERLMAN, Solicitor General.
CHARLES ELMORE CROPLEY, Clerk.
WALTER WYATT, Reporter.
THOMAS ENNALLS WAGGAMAN, Marshal.
HELEN NEWMAN, Librarian.

21304

SUPREME COURT OF THE UNITED STATES.

ALLOTMENT OF JUSTICES.

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, section 42, and that such allotment be entered of record, viz:

For the District of Columbia Circuit, FRED M. VINSON, Chief Justice.

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, SHERMAN MINTON, Associate Justice.

For the Eighth Circuit, TOM C. CLARK, Associate Justice.

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

For the Tenth Circuit, TOM C. CLARK, Associate Justice.

October 14, 1949.

(For next previous allotment, see 337 U. S. p. IV.)

PROCEEDINGS IN THE SUPREME COURT OF THE UNITED STATES

In Memory of Mr. Justice Rutledge[1]

TUESDAY, APRIL 10, 1951

Present: MR. CHIEF JUSTICE VINSON, MR. JUSTICE BLACK, MR. JUSTICE REED, MR. JUSTICE FRANKFURTER, MR. JUSTICE DOUGLAS, MR. JUSTICE JACKSON, MR. JUSTICE BURTON, MR. JUSTICE CLARK, and MR. JUSTICE MINTON.

MR. SOLICITOR GENERAL PERLMAN addressed the Court as follows:

At a meeting of members of the Bar of the Supreme Court, held this morning,[2] resolutions expressing their profound sorrow at the death of Justice Wiley Rutledge were offered by a committee, of which the late Roscoe Anderson, Esquire, was Chairman.[3] Addresses were made

[1] Mr. Justice Rutledge died at York, Maine, on September 10, 1949; funeral services were held in All Souls Unitarian Church, Washington, D. C., on September 14, 1949. See 338 U. S. pp. III–IV, VII.

[2] The Committee on Arrangements for the meeting of the Bar consisted of Solicitor General Philip B. Perlman, Chairman, Chief Justice D. Lawrence Groner, Mr. Jacob M. Lashly, Mr. Joseph O'Meara, Jr., Mr. Seymour H. Person, Mr. Luther Ely Smith, and Mr. Robert L. Stearns.

[3] The Committee on Resolutions consisted of Mr. Roscoe Anderson, Chairman, Mr. Albert S. Abel, Mr. Mark Edwin Andrews, Mr. Clay R. Apple, Mr. Thurman W. Arnold, Judge Walter M. Bastian, Mr. Francis Biddle, Mr. James Crawford Biggs, Mr. Walter Percy Bordwell, Mr. Victor Brudney, Mr. Wm. Marshall Bullitt, Mr. James F. Byrnes, Mr. Ernest Ray Campbell, Mr. Emanuel Celler, Mr. Oscar L. Chapman, Mr. R. Walston Chubb, Mr. Clark M. Clifford, Mr. Homer S. Cummings, Mr. John W. Davis, Judge Henry W. Edgerton, Mr. Sam Elson, Judge Charles Fahy, Mr. John P. Frank, Mr. Robert

to the Bar by Professor W. Willard Wirtz of the Northwestern University School of Law, Judge Charles E. Clark of the United States Court of Appeals for the Second Circuit, and Professor Ralph F. Fuchs of the University of Indiana School of Law.[4] The resolutions, adopted unanimously, are as follows:

RESOLUTIONS

Mr. Justice Rutledge died on September 10, 1949. The members of the Bar of this Court have met in the Supreme Court Building on Tuesday, April 10, 1951, to record their respect for him and their heartfelt appreciation for his contribution to the law and life of our Nation.

Wiley Blount Rutledge was born on July 20, 1894, in the small Ohio River town of Cloverport, Kentucky. He grew to manhood in the heart of America. In many respects his life's history exemplifies the fundamental soundness of our American democratic beliefs.

The first six years of his life were spent in Cloverport. At the end of that time, the family moved to Asheville, North Carolina, where his father, a circuit-riding Baptist

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Elliott Freer, Mr. Arthur J. Freund, Mr. A. B. Frey, Mr. William L. Frierson, Mr. George K. Gardner, Mr. Bernard C. Gavit, Mr. Walter Gellhorn, Mr. Richard S. Gibbs, Mr. Melvin C. Goss, Mr. John Raeburn Green, Mr. William G. Hale, Mr. W. Glen Harlan, Mr. Fowler V. Harper, Mr. Abraham J. Harris, Mr. Dudley I. Hutchinson, Mr. Harold L. Ickes, Mr. Charles V. Imlay, Mr. Mason Ladd, Miss Edna Lingreen, Mr. Douglas B. Maggs, Mr. J. Keith Mann, Mr. W. Howard Mann, Mr. Thurgood Marshall, Mr. Philip Mechem, Mr. Justin Miller, Mr. Clarence Morris, Mr. George Maurice Morris, Chief Judge Orie L. Phillips, Mr. Louis H. Pollak, Mr. Harry L. Shniderman, Judge Robert W. Steele, Chief Judge Harold M. Stephens, Mr. John Paul Stevens, Mr. John R. Stockham, Judge Kimbrough Stone, Mr. Stanley L. Temko, Mr. Philip W. Tone, Mr. Herbert Wechsler, Mr. Carl C. Wheaton, Mr. Lowell White, Mrs. Mabel Walker Willebrandt, and Mr. Richard F. Wolfson.

[4] It is understood that these addresses will be published privately in a memorial volume to be prepared under the supervision of Mr. Charles Elmore Cropley, Clerk of this Court.

minister, had been called to a church. Later the family moved back to Kentucky and then, in order to be near better schools, they moved to Maryville, Tennessee. For five years young Wiley Rutledge attended Maryville College, where he majored in the classics. Here, his interest in the classics assumed a personal aspect which transcended academic study. One of his teachers of Greek was attractive, gracious, young Annabel Person. He courted and won her heart, and they later became man and wife on August 28, 1917. Of this marriage came three children: Mary Lou, Jean Ann, and Neal.

Meanwhile, however, young Rutledge transferred for the last year of his undergraduate work to the University of Wisconsin, where he majored in chemistry and received his B. A. degree in 1914.

He then became interested in law but was confronted with the stark necessity of financing his legal education by his own efforts. Eight years passed and there were many interruptions before Wiley Rutledge obtained his LL. B. degree from the University of Colorado. In the interim he taught commercial subjects at the Bloomington, Indiana, High School while concurrently studying law at Indiana University, and he also taught school at Connersville, Indiana. During this period of intense work he became the victim of an attack of tuberculosis, necessitating a year's rest at Asheville, North Carolina. He then served as secretary to the Board of Education at Albuquerque, New Mexico, for two years. In 1920, he moved to Boulder, Colorado, where he again resumed the arduous task of concurrently teaching in the public schools and studying law. His LL. B. degree was finally obtained in 1922. After two years of private practice at Boulder, he became a member of the University of Colorado Law Faculty. This was the beginning of an eminently successful career as law teacher and law school administrator, a career which contributed richly to the sound development of legal education in the Midwest.

In 1926, he became a member of the faculty of Washington University School of Law in St. Louis, Missouri, becoming acting Dean of that School of Law in 1930, and Dean from 1931 to 1935. From 1935 to 1939, he was Dean of the College of Law of the State University of Iowa. During his stay in Missouri and Iowa, he served as a commissioner of the National Conference of Commissioners on Uniform State Laws.

As a teacher of law he had the happy faculty of arousing the interest and latent talents of his students, and of stimulating their best efforts. He was especially attracted by young people and his sincere and genuine interest in his students was rewarded by their warm and abiding affection. Throughout the late world war, in spite of the increasing cares and burdens of his judicial office, he found time to carry on a thoughtful and extensive correspondence, frequently in longhand, with former students stationed throughout the world in the various branches of the armed services, and these students felt free to write to him for inspiration, encouragement, and advice. To his former students he was always, in spite of his exalted position, still a good friend and adviser.

In April, 1939, President Roosevelt appointed him Associate Justice of the United States Court of Appeals for the District of Columbia, on which Court he served until 1943, when the President nominated him to the Supreme Court. This nomination was confirmed by the Senate, with only one Senator raising any question with respect to the appointment. On February 15, 1943, Mr. Justice Rutledge was inducted to the Court. He died at the age of fifty-five on September 10, 1949, in York, Maine.

There is the bare chronological history of Wiley Rutledge's life. While it tells a good deal about him as a man, it leaves untold the nature of his spirit and of his faith.

Wiley Rutledge loved people. He believed deeply in the dignity and worth of the individual. This was no

theoretical or abstract philosophical concept to him; it was a matter of daily living. During the years of his development in the Midwest, Wiley Rutledge learned well the beliefs, hopes, fears, thoughts, emotions, disappointments, pleasures, ambitions, and labors of people of all walks of life. He constantly and frequently sought the company of other people. He enjoyed nothing more than having an evening with a group of friends in his home where the warmth of his hospitality afforded his guests a privilege long to be remembered. The universality of his interest in people was demonstrated by his attendance not only at meetings of the American, State, and Local Bar Associations, but also at gatherings of numerous civic and professional groups, Rotarians, and Masons. He sought associations with all kinds of people whose life stories and opinions he liked to hear informally. Wiley Rutledge wanted to hear what others were thinking, what they believed. He was a man of merry heart and cheerful countenance. He had the faculty of generating sincere discussion without himself dominating the group. He listened well and he understood. Having understanding, he had wisdom.

He knew that men must be free, yet he knew also that there must be order. Long ago, he realized that freedom and order have the capacity for destroying each other. Without both, neither freedom nor order can long endure. Wiley Rutledge believed that man can accommodate freedom and order through the medium of justice. He stated his beliefs simply:

". . . I believe in abstract justice, though I cannot define it. But in any legal sense I believe in it only as the source from which conceptions of concrete and legally relevant justice arise. I believe in concrete justice, in particular justice, and in the possibility of its growth and expansion. I believe in it as the end of legal institutions and in them as the means by which it may be achieved. I believe too in the growth of the law and in

this as the only means for making reconciliation between the conflicting forces and conceptions, separately considered, of order and freedom. Only thus may right accommodations in social living and the maintenance of stable, just social relationships be fulfilled." [Rutledge, A Declaration of Legal Faith, p. 17.]

As a judge, Wiley Rutledge boldly applied this simple creed to the intricate problems presented to both the Supreme Court and the Court of Appeals. Perhaps he was most widely known and is most vividly remembered for his staunch position in the protection of individual civil liberties. He was convinced that there is an irreducible number of liberties which occupy a preferred position. He was as adamant as the Rocky Mountains he loved so well in his belief that these liberties especially must be protected if man is to remain free. He insisted that the preferred position of the indispensable freedoms secured by the First Amendment gives them "a sanctity and a sanction not permitting dubious intrusions." To him this was a matter of principle necessary to assure the vitality of our Nation, irrespective of the character of the individual involved in any particular case. Thus, he would protect the right of a labor organizer to address an audience without first being required to procure a license. He would similarly protect the right of an employer to talk to his employees. He would be certain that even "a thoroughgoing Nazi," whose ideas he undoubtedly despised, be given due process. While he recognized the value and necessity of the administrative process in today's complex life, he would readily strike down administrative action which had not provided due process of law.

One reason Mr. Justice Rutledge is always associated with civil liberties is the dramatic circumstances surrounding his entrance on the Supreme Court. On February 15, 1943, the day he was inducted to the Court, the Court announced that it was granting rehearings in

three cases. One of those cases was *Jones* v. *Opelika.*[1] On June 8, 1942, the Court, by a 5 to 4 decision, had upheld as constitutional a municipal licensing ordinance as applied to the distribution of religious tracts by members of Jehovah's Witnesses. Upon retirement of one of the justices from the Court, on the rehearing, the Court in a 5 to 4 decision vacated the prior judgment and found the ordinance abridged freedom of press and restrained the free exercise of religion. Mr. Justice Rutledge cast his vote as one of the new majority.

The emphasis on Mr. Justice Rutledge's concern for civil liberties also arose from his practice of facing facts squarely. He always stated his position straightforwardly. This was true whether he was writing the opinion of the Court, a concurring or a dissenting opinion. As noted by the New York Times, some of the questions he met head-on were of "a nature that might have tempted another judge to express his dissenting views in a manner calculated to dodge the issue. This Justice Rutledge never did." A memorable example of this straightforwardness was his dissenting opinion in *In re Yamashita.*[2] Mr. Justice Rutledge was loath to be a dissenter in that case, but his deep conviction that due process of law, as he understood it, could not be abandoned forced him to dissent. It was with great tribulation, yet with a profound sense of rightness, that Wiley Rutledge wrote:

"More is at stake than General Yamashita's fate. There could be no possible sympathy for him if he is guilty of the atrocities for which his death is sought. But there can be and should be justice administered according to law. . . . It is not too early, it is never too early, for the nation steadfastly to follow its great constitutional traditions, none older or more universally pro-

[1] 319 U. S. 103.

[2] 327 U. S. 1.

tective against unbridled power than due process of law in the trial and punishment of men, that is, of all men, whether citizens, aliens, alien enemies or enemy belligerents. It can become too late."

If the facts in a particular case revealed that a person was, in substance, being denied due process of law, Mr. Justice Rutledge would incisively condemn the procedure which permitted such denial. This is well illustrated in his concurring opinion in *Marino* v. *Ragen*.[3] There, he found that men convicted in violation of their constitutional rights in Illinois were confronted by a "procedural labyrinth . . . made up entirely of blind alleys." To him, due process required that such men have an adequate opportunity to be heard in court. He said: "This opportunity is not adequate so long as they are required to ride the Illinois merry-go-round of *habeas corpus, coram nobis,* and writ of error before getting a hearing in a federal court."

He firmly believed that the "main end of our society" and of our Constitution is the securing and perpetuating of individual freedom. As he recognized in his concurring opinion in *In re Oliver*,[4] the Bill of Rights does restrict state authority in the invasion of personal freedom and such restriction is sometimes inconvenient to the authority. Yet, the collapse of liberty in Europe in recent years emphatically demonstrated to Mr. Justice Rutledge that "it is both wiser and safer to put up with whatever inconveniences that charter creates than to run the risk of losing its hard-won guaranties by dubious, if also more convenient, substitutions imported from alien traditions."

The boldness with which Mr. Justice Rutledge took his stand on basic individual liberties has tended to overshadow, temporarily at least, other great contributions

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[3] 332 U. S. 561.

[4] 333 U. S. 257.

which he made to the law. Wiley Rutledge was particularly fond of the word "accommodation." He used that word much more frequently than it is ordinarily used today. It was a word commonly used, sometimes in a colloquial fashion, by the people of the Midwest during the time Wiley Rutledge was growing up there. He used it in the several facets of its meaning. To him this word meant "To adjust, reconcile, to compose, settle, to bring to harmony or agreement." To him this word meant "To minister convenience to; to aid, speed, facilitate." To him it meant "To furnish something requisite or convenient; to equip, supply, provide, to do what is necessary to meet felt requirements." After first securing indispensable individual liberties, the primary function of the law was, to him, a matter of accommodation. He cast labels aside and sought the practical operation, actual or potential, of judicial action upon any set of facts. To him, the greatest value of the commerce clause of the Constitution was that it has enabled the Courts to make the essential "accommodation between nation and states." He thought the problem of justice is to find the right accommodation in that "never-ending process of accommodating freedom to law and law to freedom."

Mr. Justice Rutledge might well be called the law's great accommodator because he skillfully plied his ability to achieve significant accommodations. This is readily apparent in his opinions involving the application of the commerce clause, and its role in enabling the accommodation of state and federal interests, in such cases as *Prudential Insurance Co.* v. *Benjamin*,[5] *Robertson* v. *California*,[6] *Aero Mayflower Transit Co.* v. *Board of Railroad Commissioners*,[7] and *Freeman* v. *Hewit*.[8]

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[5] 328 U. S. 408.
[6] 328 U. S. 440.
[7] 332 U. S. 495.
[8] 329 U. S. 249.

There were times when he had to decide the point of accommodation between individual liberties and the requirements of society. One such case was *Brinegar* v. *United States*[9] which involved a claim that there was unreasonable search and seizure where police officers had, without a warrant, stopped the accused while he was traveling on the highway and seized some liquor he was transporting. Under the facts of that case, Mr. Justice Rutledge found that the officers had probable cause for so acting. He said: "Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability. The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating these often opposing interests. Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice."

In this process of accommodation, Mr. Justice Rutledge respected the acts of the legislative bodies of the Nation, both Federal and State, as expressions of the people as to what laws were desirable to meet felt requirements. He was prone to find acts of the legislature valid unless they invaded some indispensable liberty. Moreover, he endeavored to apply and construe statutes in a workable manner and in the spirit in which they were enacted. He abhorred the use of dogmatic logistics in the construction and interpretation of statutes. Instead, he scrutinized the particular facts and the concrete consequences so that considerations of policy were brought into the open.

It was his belief in the potentialities of man to make accommodations that led Wiley Rutledge to have faith in the principle of federalism. He advocated ardently

[9] 338 U. S. 160.

the federal principle as a possible solution to the world dilemma of today. Indeed, he believed that federalism offers the only hope for the survival of democracy in our time.

Wiley Rutledge was a careful and thorough scholar. He brought to the Court sound legal knowledge in a wide range of legal subjects. His opinions were documented, meticulously and fully. Perhaps some of his opinions are lengthy and discursive but he wrote so that those who read would know what went through his mind in reaching his decisions. Sometimes, he disclosed what he had considered and had rejected and why he had done so. He did not want any potentially relevant fact or principle of law to go unconsidered. He was willing to expose his reasoning to the test of the future, for he knew that reason is the life of the law; he knew that, too often, legal rules outlive the reasons which bring them into being.

A man of hearty good humor with an engaging twinkle in his eye, Wiley Rutledge was a fine human being who lived life fully. He had courage that manifested itself in gentleness. He had wisdom that expressed itself in simplicity. He had integrity that disclosed itself in modesty. He had a faith that saw beyond the partial fact. While he knew that we could not establish a perfect way of life, he accepted the challenge of our fathers to make our Nation a more perfect union. He had faith in the future and trust in life. He confidently believed in the capacity of men to live and work together, to resolve their differences and to create and maintain a framework for existence in which they could find a satisfying, if not a perfect, way of life. His own life was a testament to this belief. He demonstrated the validity and the practical soundness of his beliefs. Wiley Rutledge has given those of us who remain a heritage of faith.

It is accordingly—

Resolved, That we, the Bar of the Supreme Court of the United States, express our deep sorrow at the death

of Mr. Justice Wiley Rutledge and our thankfulness for the contributions which he made to our profession and toward making our Nation a more perfect union.

Resolved, That the Solicitor General of the United States be asked to present this resolution to the Court; that the Attorney General of the United States be asked to request that it be accepted by the Court and inscribed upon its permanent records; and that copies of this resolution be forwarded to the widow and children of Mr. Justice Rutledge.

Mr. Attorney General McGrath addressed the Court as follows:

May it please the Court: It has been related by a close personal friend of the late Wiley Rutledge that he received consideration as a possible nominee to fill three vacancies on this bench—and that on each of those occasions he was, characteristically, supporting another man for the appointment.[1] To ignore his own superlative qualities, and to speak out on behalf of another whom he thought better qualified, was a typical course of conduct for the jurist in honor of whose memory the Bar of this Court gathered together this morning. The career of Wiley Rutledge was marked by the humility of the truly great man.

A short seven years, from 1943 to 1949, constitute the whole period that the late Justice Rutledge occupied a seat on this bench, and a single decade embraces the full span of his service in the judiciary. Most of his professional life, after a brief period of private practice in Boulder, Colorado, was spent in the academic field. There, as teacher and as Dean, he served at the University of Colorado, Washington University of Saint Louis, and the University of Iowa. Throughout his all-too-short

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[1] Irving Brant, *Mr. Justice Rutledge—The Man* (1950), 25 Ind. L. J. 424, 434–438.

life, his humility, all the more profound in that its bearer was unconscious of its rarity among his fellow men, characterized his every action.

But there never was any suggestion of servility, or of any moral or intellectual dependence upon others. On the contrary, he viewed himself as a self-respecting man among men, with a philosophy that was egalitarian in every sense. This was his own, a modest, view. To others, his courage and independence of thought, his ability and his intellectual capacity, and especially his determination to do his best at any task, was enormous.

Wiley Rutledge was humble rather as Lincoln was humble, with the humility of one who recognizes that the spark of divinity has been implanted in equal measure in every man. He felt deeply, I think, that every individual, irrespective of his ancestry, his color, his religious beliefs, or his endowments personal or material, was entitled to the basic respect of his fellows and of society. He was profoundly aware of that measure of human dignity which is given to each of us, and equally to each among us.

Together with these fundamental attributes of the late Justice's character, was a deep feeling of sympathy with humanity. This manifested itself in an eager friendliness, and in the fullest enjoyment of human companionship. Students, colleagues, friends—all seemed to find comfort and counsel in his company. Each one who needed or desired the attention or guidance of this man found the way open to his affection and his interest. He loved humanity, and he found time for many human beings to share in his life.

It seems to me that this open-handed friendliness toward his fellow men was closely related to another aspect of the late Justice's philosophy. All of us who have grown to mature years have had frequent occasion to realize the truth of the observation that a man's essential character is revealed by his deeds. In the case of Justice

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Rutledge, the humility, friendliness, and generosity which I have attempted to describe were evidences of a living philosophy, of a morality in action. Justice Rutledge lived as he thought and felt. The respect he felt for others he also accorded to himself, and felt no need or wish to dissemble or to conceal. Toward mankind in general, and for every human being in particular, he could not help but evidence a true tolerance, so basic to his personality that he seemed not even cognizant of its presence there. And this was, I think, one of the foundation stones on which rested his conduct as a judge.

For he was one who did not think in absolutes; to him it seemed rather that the nature of man in society required the constant application of change and adjustment. Always he seemed to be thinking that the constant need is for balance, for the mutual accommodation of each interest with others, to the maximum extent possible. No interest, generally speaking, was considered by him as existing alone, in a moral or legal vacuum, with all others disregarded. On the contrary, Wiley Rutledge felt that truth lay in another direction, in the composition of inconsistent interests, and in the balancing of opposing forces. He believed this process of accommodation, constantly in flux because of the unceasing change in society itself, was of the utmost importance to proper legal and moral thought and conduct. It permeated his thinking and his actions, both on and off the bench.

Recognizing inevitable human fallibility, and yet ever cognizant of the heavy obligations weighing on him as one having a share in making decisions from whose consequences there was no appeal, Justice Rutledge could satisfy his conscience in the discharge of his obligations only by contributing his best and fullest efforts to the decision of every case. It was not in him to dispose of any question on the basis of summary consideration, relying on others to bear the brunt of the work. His zeal

for rendering the best service that lay in him was coupled with the unassumed modesty that refuses to allow its own imperfections the generous understanding it accords the imperfections of others. This complicated his task, and made each new problem result in an increasing depletion of his strength and physical stamina. He gave, literally, of himself until, finally, he had expended the whole treasure of his vitality. I cannot believe, even if it had been given him to peer through the mists that veil the future, and to see in advance the exhaustion toward which he was moving, that Wiley Rutledge would have altered his course by a single point of his moral compass toward a safer haven. It was not his way to give less than all he could.

I cannot let this occasion pass without reference to the effect of positions that Justice Rutledge took on the issues that came before this Court during his tenure. Fundamental among all our basic tenets, in his view, were the individual liberties of the Bill of Rights and the Fourteenth Amendment, and of these he valued the freedom of communication in particular. ". . . the preferred place given in our scheme," he remarked in his opinion for this Court in *Thomas* v. *Collins*,[2] "to the great, the indispensable democratic freedoms secured by the First Amendment . . . gives these liberties a sanctity and a sanction not permitting dubious intrusions." And he meant to cherish these great rights not as a mere academic shibboleth, unrelated to practical considerations, but as a means of urging others to act. For to Wiley Rutledge, the law had life. Our basic constitutional guarantees, he insisted, were—

". . . a charter for government, not for an institution of learning. 'Free trade in ideas' means free trade in the opportunity to persuade to action, not merely to describe facts." [3]

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[2] 323 U. S. 516, 530 (1945).

[3] *Id.* at p. 537.

In *In re Oliver,* he declared his heartfelt belief that the Bill of Rights is not "a strait jacket of Eighteenth Century procedures," but is "a basic charter of personal liberty." [4]

His sensitivity to issues wherein these protections might be compromised was extraordinary, and events gave him the opportunity to contribute staunchly to their defense. His perspicacity in discerning the basic danger to religious freedom in *Busey* v. *District of Columbia,*[5] which involved a tax on the sale of religious printed matter on the public streets by members of Jehovah's Witnesses, has been attested to by one of his brethren on the United States Court of Appeals for the District of Columbia.[6] The dramatic circumstances in which he was instrumental in bringing about a reversal of this Court's first decision in *Jones* v. *Opelika,*[7] and its companion cases, is too well known for comment here. His opinions in the *Everson* [8] and *McCollum* [9] cases testify to his devotion to the principle of separation of church and state.

But his views were by no means doctrinaire. This very devotion to freedom of religion, for instance, was qualified by his recognition of the special responsibilities of a State toward young children, in *Prince* v. *Massachusetts.*[10]

The importance of judicial procedure in the rendition of justice was fully appreciated by Justice Rutledge, and he was consistently scrupulous in insisting on the right of

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[4] *In re Oliver,* 333 U. S. 257, 280 (1948).

[5] 75 U. S. App. D. C. 352, 129 F. 2d 24 (1942), cert. granted, 319 U. S. 735 (1943), judgment vacated, 319 U. S. 579 (1943).

[6] Judge Henry W. Edgerton, *Mr. Justice Rutledge* (1949), 63 Harv. L. Rev. 293, 295.

[7] *Jones* v. *Opelika,* 316 U. S. 584 (1942), rehearing granted, 318 U. S. 796 (1943), judgment vacated, 319 U. S. 103, 105 (1943).

[8] *Everson* v. *Board of Education,* 330 U. S. 1, 28–74 (1947).

[9] *McCollum* v. *Board of Education,* 333 U. S. 203 (1948).

[10] 321 U. S. 158 (1944).

an accused to the established safeguards of a fair trial. He found intolerable any departure from those protections, and spoke out boldly in their defense. The repulsion he felt, for instance, at the procedure governing the trial and conviction of the Japanese General Yamashita, called forth an eloquent dissent. He inferred that the opinion of the majority meant that they considered the requirements of due process not to apply to this accused, and wrote:

". . . I cannot believe in the face of this record that the petitioner has had the fair trial our Constitution and laws command. Because I cannot reconcile what has occurred with their measure, I am forced to speak. At bottom my concern is that we shall not forsake in any case, whether Yamashita's or another's, the basic standards of trial which, among other guaranties, the nation fought to keep; . . . and that this Court shall not fail in its part under the Constitution to see that these things do not happen." [11]

Justice Rutledge stood immovably for the proposition that an accused is absolutely entitled to the meticulous observation of essentially fair procedures. "In some respects," he said in his *United Mine Workers* [12] dissent, "matters of procedure constitute the very essence of ordered liberty under the Constitution." In the *Kotteakos* case, he declared that—

". . . our Government is not one of mere convenience or efficiency. It too has a stake, with every citizen, in his being afforded our historic individual protections, including those surrounding criminal trials." [13]

He felt strongly that the procedures by which fundamental rights were assured to those accused of crime should be clear, effective, and readily available. In his

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[11] *In re Yamashita,* 327 U. S. 1, 42 (1946).

[12] *United States* v. *United Mine Workers,* 330 U. S. 258, 363 (1947).

[13] *Kotteakos* v. *United States,* 328 U. S. 750, 773 (1946).

concurring opinion in *Marino* v. *Ragen*,[14] he protested vigorously against the "procedural labyrinth" which he felt made the choice of remedy within one jurisdiction so complex that the accused's right was for practical purposes actually denied. "One who does not know until the end of litigation what his procedural rights in trial are, or may have been," he asserted, "has no such rights." [15] To him, as he himself put it, "the elemental protections thrown about the citizen charged with crime," which "secure fair play to the guilty and vindication for the innocent," ranked equal in importance with "the great liberties of speech and the press . . . [and] religious freedom." [16]

In the last analysis, it is the intangible heritage that a man leaves behind him that constitutes his truly enduring monument. The faith of Wiley Rutledge lay, he said, in "law, freedom, and justice." [17] It is a faith to which all of us, in good conscience, can repair.

Therefore, may it please the Court: On behalf of the Bar of this Court, who speak in this matter for all the lawyers in our land, I move that the Resolutions adopted unanimously by the Bar of this Court in memory of the late Justice Wiley Rutledge be accepted by the Court and that, together with the chronicle of these proceedings, they be spread upon the permanent records of this Court.

THE CHIEF JUSTICE said:

Mr. Attorney General: I accept with deep personal appreciation the Resolutions which have been proffered. The portrayal of Wiley Blount Rutledge's career, which you have done so well, makes it easier to understand and appreciate his contribution to this Court and our Nation.

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[14] 332 U. S. 561, 563, 567 (1947).

[15] *United States* v. *United Mine Workers*, 330 U. S. 258, 374 (1947).

[16] *Yakus* v. *United States*, 321 U. S. 414, 487–488 (1944).

[17] Wiley Rutledge, *A Declaration of Legal Faith* (1947), p. 18.

At a Memorial Service held soon after the death of him whom we honor today, it was said that "he won both love and esteem in equal and overflowing measure." The wisdom of that statement has been indicated by your Resolutions, which contain throughout, the golden threads of love, respect and honor.

Though Wiley Rutledge attained far greater national prominence in his later years as a judge, the influence of his own personality and character during his teaching years was a powerful force upon all whom he touched. His students and his colleagues will esteem the memory of Wiley Rutledge as that of a great teacher. He taught ably the substantive matter which is described in the syllabi of courses in catalogues. But, his niche in the hall of great teachers will be due to his ability to bring home to his students the essentials of truth and humanity. Characteristic, I think, of his constant search for the basic values of society is the question he posed: "Of what use is the law if it does not meet human needs?" As a teacher, he was able to come into close contact with people, to impart to them his own principles of democratic living, his own sense of right and wrong. These years played a great part in the development of his love for his fellow men, and his awareness of their character, their aims, and their problems.

President Roosevelt appointed him to the United States Court of Appeals for the District of Columbia in 1939. It is said that he assumed this post reluctantly, in part because of his innate humility; in part because of his unwillingness to leave those associations which had become so dear to him; and in part because he feared his own effectiveness would be diluted as a judge, rather than as a teacher. Fortunately for those of us who shared his companionship after he came to the bench, his humility and his reluctance did not prevail.

My own acquaintance with Wiley Rutledge commenced when he took his seat on the Court of Appeals. That

friendship is one which I shall ever cherish. It was one of the sweetest, truest friendships I have ever encountered. His graciousness, his good humor, his simplicity, his patience—to name but a few of his endearing traits—brought a fresh breeze to the Court and made lighter its burden.

The problems of the Court of Appeals proved peculiarly suited to Wiley Rutledge's talents. Like the late Justice Cardozo, he derived much satisfaction and renown from his treatment of problems which are usually the concern of the state courts. One of the unique functions of the United States Court of Appeals for the District of Columbia is to deal with local law, with the common law of torts, contracts, wills and other problems, at times removed from the social and political matters with which this Court is faced. These questions require scholarship, intimate familiarity with everyday problems, and a willingness to adapt traditional forms to modern requirements. All these attributes Wiley Rutledge possessed to the maximum. His training had been that of scholarship itself. His attitude was that of the progressive and forward-looking judge. His philosophy placed him in harmony with those who sought solutions to the problems of daily living in a complex society. And, while a judge on the Court of Appeals, he manifested that concern for individual rights and freedom of thought, speech and religion which was to bring him great tribute.

Upon his appointment to this Court in 1943, Wiley Rutledge brought with him a wealth of academic experience, a faith in the law as the means by which freedom and justice are to be attained, and a background of judicial technique. The years which he served on this Court are too fresh in memory to warrant a detailing at this time of the struggles and problems which concerned it. His own stand on these problems is equally well known. Less familiar, perhaps, is the fact that every case was for Wiley Rutledge an emotional challenge. Every case required, not only the complete research of

authority and precedent his opinions demonstrate, but also a struggle with his inner self to determine whether the result "felt" right. Since the law is the means by which society moves forward and achieves freedom and justice for its people, every decision necessitates an analysis of the consequences upon the individuals concerned and the democracy in which we live. The answers to his questions never came easily. His understanding of the law as a fluid thing did not allow of the fast answer, the summary disposition. Nor was he reluctant to speak out of his difficulties in reaching solutions. The Court has been faced with many a problem which Wiley Rutledge had already forecast and discussed in a concurrence or dissent of his own. His opinions show the result of his struggles. Detailed and comprehensively researched, they indicate the physical and emotional strain which they caused him. It may be that his thoroughness and complete soul-searching in every case contributed to his leaving us in his prime. The very factors which made Wiley Rutledge a great man made him a great judge.

In 1947 he published his "Declaration of Legal Faith." In it, he analyzed the Commerce Clause of the Federal Constitution, which he termed a "federal device." He conceived the Commerce Clause as the means by which a unique balance between the states and the Federal Government is achieved—on the one hand preventing concentrated authority in any single place from sapping the lifeblood of the people; on the other hand, by preventing "Balkanization," giving them sufficient power to develop their own energies and abilities. His philosophy of the relations between the state and Federal Government, so clearly articulated in this short work, found expression in many of the cases which treated the various aspects of this general problem. Your Resolutions have mentioned his approach to these issues, and I shall not reiterate. It is well to bear in mind, however, in analyzing Wiley Rutledge's opinions in this field, that to him the Commerce Clause was not the measure, but the means

by which the proper federal-state balance was to be achieved.

This little treatise indicated, in an introductory chapter, his views in another field in which he attained renown. This was his position in cases involving the problems of governmental regulation of speech, press and religion, and of criminal procedures.

In your Resolutions, you referred to the decisive vote he cast in *Jones* v. *Opelika.* This is but one example of the leading role he played in the vindication of what he felt were those human values which could not be transcended by governmental authority. The opinions in which he gave voice to those convictions are fresh in the memory. Still clear and distinct is the memory of his dissent in *In re Yamashita,* an opinion which I always have felt expressed his democratic philosophy in his most eloquent and persuasive style. Whatever may be history's decision on the merits of his position, no one can read his words without admiration and, perhaps, a touch of awe at his unqualified faith in the Anglo-American system of jurisprudence which is our heritage.

Faith was the essence of Wiley Rutledge. He himself said that the choice which nations and men must make as to what is valid and true, must be at the last "intuitive, must be felt." What was right for him had to be not only logically and analytically right—it had to be intuitively right.

Cases involving this conflict between individual and governmental action received a substantial portion of this Court's attention during the period Wiley Rutledge was an Associate Justice. To state that he was one of the most outspoken and consistent defenders of individual and group rights is to do no more than to redefine that faith I have attempted to outline. On many occasions, he wrote for the majority of this Court. In others, a majority felt that other interests or considerations were paramount in the particular case before the Court. But,

whether his opinion became the law or fell into dissent, each of his determinations was an honest, conscientious judgment, consistent with his instinctive sense of right and wrong. Regardless of the divergence in opinion, no colleague ever had doubt that Wiley Rutledge believed he was right.

Many men who have been possessed of dogged determination or a fiery belief in what they conceived to be the right have been transformed in their personalities into cross-grained, narrow fanatics, who will not listen to the views of others. It is to the glory of Wiley Rutledge that his faith and his purpose never warped his relationships with others. Whether positions coincided or diverged made no difference in the warmth of his friendship. The spiritual goodness of his person remained a constant.

His home was what a home should be. His wife, son and two daughters are testimonials and exhibits to the beauty of his character and the concrete manner in which he practiced those ideals be expressed so consistently. As a teacher, judge, father and husband, Wiley Rutledge was a supreme advocate, by his very example, of the way of life his faith bade him follow.

In the introduction to his "Declaration of Legal Faith," he stated: "I believe in law. At the same time I believe in freedom. And I know that each of these things may destroy the other. But I know too that, without both, neither can long endure." Wiley Rutledge's life was devoted to an attempt to effect an accommodation between freedom and law, to conjoin freedom and justice with law. If aims alone were the measure of a man, he would be listed among the great of our Nation. But his implementation of those aims, his own career and influence, prove that his greatness extended beyond mere aims. His spirit and character will ever remain a noble point in the history of this Court.

Let the Resolutions be spread upon the minutes of this Court.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1950.

UNITED STATES *v.* ALLIED OIL CORP. ET AL.

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

No. 364. Argued March 6, 1951.—Decided April 9, 1951.

1. In actions brought by the Administrator under § 205 (e) of the Emergency Price Control Act of 1942 to recover damages from sellers who sold commodities at overceiling prices, which actions were pending when price controls were terminated, the substitution of the United States (rather than the Administrator's successor) as the party plaintiff was authorized by Executive Orders Nos. 9841 and 9842. Pp. 2–4.
2. Such authorization was within the power of the President. Pp. 4–5.

183 F. 2d 453, reversed.

Orders of the District Court dismissing the actions in these cases as abated were affirmed by the Court of Appeals. 183 F. 2d 453. This Court granted certiorari. 340 U. S. 895. *Reversed,* p. 5.

Robert W. Ginnane argued the cause for the United States. With him on the brief were *Solicitor General Perlman, Acting Assistant Attorney General Clapp, Paul A. Sweeney* and *Melvin Richter.*

Thomas J. Downs and *Theodore R. Sherwin* argued the cause for respondents. With them on the brief were *Julius L. Sherwin, Michael F. Mulcahy* and *Henry W. Dieringer.*

MR. JUSTICE BLACK delivered the opinion of the Court.

Section 205 (e) of the Emergency Price Control Act of 1942, as amended, authorized the Price Administrator under certain circumstances to institute damage actions against sellers of commodities who charged more than prescribed ceiling prices.[1] Pursuant to this section, the consolidated cases now before us were brought in the District Court by the Administrator in his own name "for and on behalf of the United States," and were properly pending there on April 23, 1947.[2] On that day the President, in connection with the termination of price controls, promulgated Executive Orders Nos. 9841 and 9842:[3] No. 9841, among other things, transferred various price administration functions to the Secretary of Commerce; No. 9842, so far as here material, authorized the Attorney General to conduct certain § 205 (e) litigation "in the name of the United States or otherwise as permitted by law . . . ." In view of these orders the Attorney General promptly moved to substitute the United States as party plaintiff in the present proceedings. Although the district judge granted the motion, he dismissed the complaints in 1950 on the ground that there had been an

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[1] 56 Stat. 33, as amended, 58 Stat. 640, 50 U. S. C. App. § 925 (e): "If . . . the buyer either fails to institute an action . . . within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the Administrator may institute such action on behalf of the United States . . . ."

[2] Actually, one of these six consolidated actions was instituted "for and on behalf of the United States" in the name of Philip B. Fleming, Administrator of the Office of Temporary Controls after he had become the successor to the Price Administrator. On April 23, 1947, all six suits were properly pending in Fleming's name. See *Fleming* v. *Mohawk Co.*, 331 U. S. 111, 113–119. The manner in which he became the successor of the Price Administrator is detailed by the Court of Appeals in its opinion below. *United States* v. *Allied Oil Corp.*, 183 F. 2d 453.

[3] 12 Fed. Reg. 2645, 2646.

improper substitution because the suits could not be maintained in the name of the United States.[4] The Court of Appeals affirmed. 183 F. 2d 453. It held that the President in his Executive Orders did not intend to authorize conduct of § 205 (e) actions in the name of the United States. A belief that the President had no power to do so led the court to this conclusion. To resolve the conflict between the decision and those from other circuits,[5] we granted certiorari. 340 U. S. 895.

We hold that it was error to construe the Executive Orders as not allowing maintenance of these suits in the name of the United States. It is true that Order No. 9841 which transferred various OPA functions to the Secretary of Commerce empowered the Secretary to "institute, maintain, or defend *in his own name* civil proceedings in any court . . ., relating to the matters transferred to him, including any such proceedings pending on the effective date of the transfer . . . ." (Emphasis added.)[6] But this provision demonstrates no purpose to

[4] The ruling was that the Secretary of Commerce was the real party-in-interest plaintiff and that the actions had abated for failure to substitute the Secretary within six months as required by Rule 25 (d), Fed. Rules Civ. Proc.

[5] *Fleming* v. *Goodwin,* 165 F. 2d 334; *United States* v. *Koike,* 164 F. 2d 155; *Northwestern Lbr. & Shingle Co.* v. *United States,* 170 F. 2d 692.

[6] Executive Order No. 9841, § 402 provides: "Functions under the Emergency Price Control Act of 1942, as amended, transferred under the provisions of this order shall be deemed to include authority on the part of each officer to whom such functions are transferred hereunder to institute, maintain, or defend in his own name civil proceedings in any court (including the Emergency Court of Appeals), relating to the matters transferred to him, including any such proceedings pending on the effective date of the transfer of any such function under this order. The provisions of this paragraph shall be subject to the provisions of the Executive order entitled 'Conduct of Certain Litigation Arising under Wartime Legislation,' [Order No. 9842] issued on the date of this order . . . ."

vest exclusive power in the Secretary to maintain all § 205 (e) enforcement actions. By its express terms it is made subject to Executive Order 9842[7] which directs the Attorney General to "coordinate, conduct, initiate, maintain or defend" litigation against violators of price control "in the name of the United States or otherwise as permitted by law . . . ."[8] All interested government agencies have construed the two orders together as authorizing the Attorney General to carry on § 205 (e) enforcement cases and to do so in the name of the United States. The Emergency Court of Appeals and other courts of appeal have taken the same view.[9] We believe that such a reading of the orders is the most reasonable construction of the language employed.

The substitution of the United States in these cases therefore was proper unless, as the Court of Appeals thought, the President lacked power to authorize it. The view below was that § 205 (e) of the Price Control Act permitted enforcement suits to be brought only in the name of the Price Administrator, or, when the bulk of his duties were transferred to the Secretary of Commerce, in the name of the latter. Such a conclusion, however, is certainly not compelled by the section which provides

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[7] See Executive Order No. 9841, § 402, note 6, *supra*.

[8] Executive Order No. 9842 provides: "1. The Attorney General is authorized and directed, in the name of the United States or otherwise as permitted by law, to coordinate, conduct, initiate, maintain or defend:

. . . . . .

"(b) Litigation against violators of regulations, schedules or orders relating to maximum prices pertaining to any commodity which has been removed from price control . . . ."

Price controls had been lifted on the commodities involved in the present actions prior to the promulgation of Executive Orders Nos. 9841 and 9842.

[9] *Hal-Mar Dress Co.* v. *Clark*, 165 F. 2d 222, and cases cited note 5, *supra*.

merely for the bringing of actions by "the Administrator . . . on behalf of the United States . . . ." There can be no question but that the President as a step in the winding-up process had power to transfer any or all of the price administration functions to the Attorney General. *Fleming* v. *Mohawk Co.*, 331 U. S. 111, 113–119. Accordingly, Executive Order 9842 could lawfully delegate the control and direction of the present actions to that official. Moreover, nothing in § 205 (e) prevents the Attorney General, who is customarily charged with representing the Government's interests in court, from following his normal procedure of maintaining enforcement suits in the name of the United States itself.[10] No unfairness to the defendants will result. Regardless of captions, the issues in these cases could not change and the real party-in-interest plaintiff has always been the same. Cf. *United States* v. *Remund,* 330 U. S. 539, 542–543. The handling of this litigation in the name of the United States is a fair and orderly method for carrying out the congressional mandate to wind up the OPA affairs. These cases should not have been dismissed.[11]

Reversed.

MR. JUSTICE DOUGLAS and MR. JUSTICE CLARK took no part in the consideration or decision of this case.

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[10] Cf. *United States* v. *California,* 332 U. S. 19, 27–28; *United States* v. *San Jacinto Tin Co.*, 125 U. S. 273, 279.

[11] Respondents have contended in their brief that by virtue of 28 U. S. C. § 2105 the orders of the District Court dismissing these actions as abated were not subject to review. This contention is untenable in view of the recent decision in *Snyder* v. *Buck,* 340 U. S. 15, 21–22.

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AMERICAN FIRE & CASUALTY CO. *v.* FINN.

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

No. 252. Argued December 7, 1950.—Decided April 9, 1951.

In a suit brought in a Texas court by a resident of that State to recover for a loss by fire, the complaint named as defendants two foreign insurance companies (one of which is the petitioner here) and a resident agent of the companies. The single wrong for which relief was sought was the failure to compensate for the loss, and the three defendants were joined because of uncertainty as to who was liable. After September 1, 1948, petitioner removed the case to the Federal District Court, which rendered judgment against petitioner and absolved the other defendants. Petitioner thereafter moved to vacate the judgment and to remand the case to the state court. *Held:*

1. In the light of the allegations of the complaint in this case, separate and independent causes of action were not stated; and, under 28 U. S. C. § 1441 (c), there was no right of removal of the case from the state court to the federal court. Pp. 9–16.

(a) In adopting the "separate and independent claim or cause of action" test for removability, 28 U. S. C. § 1441 (c) (1948), Congress intended to avoid the difficulties experienced in determining the meaning of the former provision of 28 U. S. C. § 71 and to limit removal from state courts. Pp. 9–10.

(b) A separable controversy is no longer an adequate ground for removal unless it also constitutes a "separate and independent claim or cause of action." Pp. 11–12.

(c) The phrase "cause of action," as used in § 1441, must be given a meaning which will accomplish the congressional purpose of limiting and simplifying removal. Pp. 12–13.

(d) Where a plaintiff seeks relief for a single wrong, arising from an interlocked series of transactions, there is no "separate and independent claim or cause of action" under 28 U. S. C. § 1441 (c). Pp. 13–14.

2. Because of the presence of a citizen of Texas on each side, the District Court would not have had original jurisdiction of this suit, either as stated in the complaint or in the posture of the case at the time of judgment. Therefore, the judgment of the District Court must be vacated. Pp. 16–19.

(a) To permit a federal trial court to enter judgment in a case removed without right from a state court where the federal court could not have original jurisdiction of the suit, even in its posture at the time of judgment, would by the act of the parties work a wrongful extension of federal jurisdiction and give district courts power that Congress has denied them. Pp. 17–18.

181 F. 2d 845, reversed.

In a suit removed by petitioner from a state court, the District Court entered judgment against petitioner. The District Court's denial of petitioner's subsequent motion to vacate the judgment and remand the case to the state court was affirmed by the Court of Appeals. 181 F. 2d 845. This Court granted certiorari. 340 U. S. 849. *Reversed and remanded,* p. 19.

David Bland argued the cause for petitioner. With him on the brief were *M. L. Cook* and *Austin Y. Bryan, Jr.*

Bailey P. Loftin argued the cause and filed a brief for respondent.

MR. JUSTICE REED delivered the opinion of the Court.

These proceedings present for determination the proper federal rule to be followed on a motion by a defendant to vacate a United States District Court judgment, obtained by a plaintiff after removal from a state court by defendant, and to remand the suit to the state court. Petitioner, the movant, urges that 28 U. S. C. § 1441 did not permit this removal and therefore the District Court was without jurisdiction to render the judgment which respondent, the plaintiff below, seeks to retain. The issue arose in this way:

Petitioner, the American Fire and Casualty Company, a Florida corporation, and its codefendant, the Indiana Lumbermens Mutual Insurance Company, an Indiana corporation, removed, in accordance with 28 U. S. C. § 1446, a suit brought by respondent Finn in a Texas state court against the two corporations and an individual,

Reiss, local agent of both corporations and a resident of Texas. The suit was for a fire loss on Texas property suffered by respondent, a resident of Texas. Respondent tried to have the case remanded before trial but was unsuccessful. After special issues were found by the jury, judgment was entered against petitioner for the amount of insurance claimed and costs, and in favor of the other two defendants. The District Court denied the motion to vacate the judgment and the Court of Appeals affirmed. 181 F. 2d 845. The latter court concluded there were causes of action against the foreign insurance companies "separate and independent" from that stated against the resident individual. Since the causes against the companies would have been removable if sued on alone, the entire suit was removable. 28 U. S. C. § 1441 (c). That ruling required consideration of the changes concerning removal made by § 1441 (c), which superseded 28 U. S. C. (1946 ed.) § 71. The Court of Appeals said:

> "The difference, if any, between separable controversies under the old statute and separate and independent claims under the new one is in degree, not in kind. It is difficult to distinguish between the two concepts, but it is not necessary to attempt it in a case like this, which would be removable under either statute." 181 F. 2d 846.

Consideration of the ruling on the motion to vacate the judgment requires a determination of whether the suit contained separate and independent causes of action under § 1441 (c), and, if the conclusion is that it did not, a ruling on the effect of a judgment after a removal without right, initiated by the party against whom the judgment was ultimately rendered. As prompt, economical and sound administration of justice depends to a large degree upon definite and finally accepted principles governing important areas of litigation, such as the respective jurisdictions of federal and state courts, we granted cer-

tiorari. 340 U. S. 849. See also *Mayflower Industries* v. *Thor Corporation,* 184 F. 2d 537; *Bentley* v. *Halliburton Oil Well Cementing Co.,* 174 F. 2d 788.

I.

The removal took place after September 1, 1948, the effective date of the revision of the laws relating to judicial procedure. 62 Stat. 992. The former provision governing removal, 28 U. S. C. (1946 ed.) § 71, read:

> "And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the district court of the United States for the proper district."

The new section, 28 U. S. C. § 1441 (c), states:

> "(c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise nonremovable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction."

One purpose of Congress in adopting the "separate and independent claim or cause of action" test for removability by § 1441 (c) of the 1948 revision in lieu of the provision for removal of 28 U. S. C. (1946 ed.) § 71, was by simplification to avoid the difficulties experienced in determining the meaning of that provision.[1] Another and im-

[1] See Reviser's Notes with H. R. Rep. No. 308, 80th Cong., 1st Sess., April 25, 1947, to accompany the revision bill, H. R. 3214. (U. S. C., Cong. Serv., for Title 28, 1948, pp. 1697, 1699, 1855.) The Reviser's Note is reprinted at 28 U. S. C. § 1441. See *United States* v. *National City Lines,* 337 U. S. 78, 81.

portant purpose was to limit removal from state courts.[2] Section 71 allowed removal when a controversy was wholly between citizens of different states and fully determinable between them. Such a controversy was said to be "separable." The difficulties inherent in old § 71 show plainly in the majority and concurring opinions in *Pullman Co.* v. *Jenkins,* 305 U. S. 534, 542. See Note, 41 Harv. L. Rev. 1048. Often plaintiffs in state actions joined other state residents as defendants with out-of-state defendants so that removable controversies wholly between citizens of different states would not be pleaded. The effort frequently failed, see *Pullman Co.* v. *Jenkins,* at 538, and removal was allowed. Our consideration of the meaning and effect of 28 U. S. C. § 1441 (c) should be carried out in the light of the congressional intention. Cf. *Pullman Co.* v. *Jenkins, supra,* at 547; *Phillips* v. *United States,* 312 U. S. 246, 250.

The Congress, in the revision, carried out its purpose to abridge the right of removal.[3] Under the former provi-

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[2] 28 U. S. C. § 1441, Reviser's Note:

"Subsection (c) permits the removal of a separate cause of action but not of a separable controversy unless it constitutes a separate and independent claim or cause of action within the original jurisdiction of United States District Courts. In this respect it will somewhat decrease the volume of Federal litigation."

Congress had enacted other restrictions on removal in special acts such as the Federal Employers' Liability Act. 28 U. S. C. (1946 ed.) § 71; 28 U. S. C. § 1445.

[3] Care was taken to maintain opportunity for state trial of non-federal matters.

28 U. S. C. § 1441, Reviser's Note:

"Rules 18, 20, and 23 of the Federal Rules of Civil Procedure permit the most liberal joinder of parties, claims, and remedies in civil actions. Therefore there will be no procedural difficulty occasioned by the removal of the entire action. Conversely, if the court so desires, it may remand to the State court all nonremovable matters." See *McFadden* v. *Grace Line,* 82 F. Supp. 494.

sion, 28 U. S. C. (1946 ed.) § 71, separable controversies authorized removal of the suit. "Controversy" had long been associated in legal thinking with "case." It covered all disputes that might come before federal courts for adjudication. In § 71 the removable "controversy" was interpreted as any possible separate suit that a litigant might properly bring in a federal court so long as it was wholly between citizens of different states. So, before the revision, when a suit in a state court had such a separable federally cognizable controversy, the entire suit might be removed to the federal court.[4]

A separable controversy is no longer an adequate ground for removal unless it also constitutes a separate and independent claim or cause of action. Compare *Barney* v. *Latham,* 103 U. S. 205, 212, with the revised § 1441. Congress has authorized removal now under § 1441 (c) only when there is a separate and independent claim or

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[4] *Barney* v. *Latham,* 103 U. S. 205, is a good illustration. This Court held that there were separable controversies in a state court suit against a local corporation and nonresident individuals for an accounting on land sales. One group of sales was by the nonresidents before conveyance to the corporation; the other by the corporation after conveyance.

See also *Pullman Co.* v. *Jenkins,* 305 U. S. 534. There a suit was instituted in a California court for damages for a conductor's death caused by a drunken Pullman passenger. The defendants were the passenger (a Californian), the railroad (a Kentucky corporation, allegedly negligent for letting the passenger pass its gates), the Pullman Company (an Illinois corporation), and its porter (a Californian), the latter two allegedly negligent for letting the passenger on the Pullman. Had the porter not been a Californian, the Pullman Company could have removed on the ground of a separable controversy because no facts were alleged as to other defendants' negligence upon which its liability could be predicated. P. 539. "[A]ll persons interested in a separable controversy must be able to remove." Discussed in Moore's Commentary on the U. S. Judicial Code, p. 247.

cause of action.[5] Of course, "separate cause of action" restricts removal more than "separable controversy." In a suit covering multiple parties or issues based on a single claim, there may be only one cause of action and yet be separable controversies.[6] The addition of the word "independent" gives emphasis to congressional intention to require more complete disassociation between the federally cognizable proceedings and those cognizable only in state courts before allowing removal.

The effectiveness of the restrictive policy of Congress against removal depends upon the meaning ascribed to "separate and independent . . . cause of action." § 1441. Although "controversy" and "cause of action" are treated as synonymous by the courts in situations where the present considerations are absent,[7] here it is obvious different concepts are involved.[8] We are not unmindful that the phrase "cause of action" has many meanings.[9] To accomplish its purpose of limiting and simplifying removal, Congress used the phrase "cause of action" in an accepted meaning to obtain that result. By interpretation we should not defeat that purpose.

In a suit turning on the meaning of "cause of action," this Court announced an accepted description. *Balti-*

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[5] We think the "claim" set out in a petition states the facts upon which the "cause of action" rests. For the purpose of removal, the words cover the same allegations.

Since the *Pullman* case and the *Barney* case do not contain separate and independent causes of action, they would not now be removable under 28 U. S. C. § 1441.

[6] See note 4, *supra.*

[7] *E. g., Tolbert* v. *Jackson,* 99 F. 2d 513, 514 (a valuable case); *Des Moines Elevator & Grain Co.* v. *Underwriters' Grain Assn.,* 63 F. 2d 103; *Nichols* v. *Chesapeake & Ohio R. Co.,* 195 F. 913.

[8] See note 1, *supra.*

[9] *United States* v. *Memphis Cotton Oil Co.,* 288 U. S. 62, 67–69; *Bemis Bro. Bag Co.* v. *United States,* 289 U. S. 28, 33; *Hurn* v. *Oursler,* 289 U. S. 238, 247.

more S. S. Co. v. *Phillips,* 274 U. S. 316.[10] This Court said, p. 321:

> "Upon principle, it is perfectly plain that the respondent suffered but one actionable wrong and was entitled to but one recovery, whether his injury was due to one or the other of several distinct acts of alleged negligence or to a combination of some or all of them. In either view, there would be but a single wrongful invasion of a single primary right of the plaintiff, namely, the right of bodily safety, whether the acts constituting such invasion were one or many, simple or complex.
>
> "A cause of action does not consist of facts, but of the unlawful violation of a right which the facts show."

See *Magnolia Petroleum Co.* v. *Hunt,* 320 U. S. 430, 443.[11] Considering the previous history of "separable controversy," the broad meaning of "cause of action," and the

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[10] There a sailor filed a libel in admiralty and recovered for negligence in failing to provide a safe place to work, in failing to use reasonable care to avoid striking libellant, for unseaworthiness, incompetency of officers and failure to instruct plaintiff, an inexperienced sailor, in his duties. Later he sought further damages for the same accident, for negligence of officers and employees in the operation of the vessel. Recovery was denied in the second suit on the ground that it was the same cause of action as the first.

[11] In *Chase Securities Corp.* v. *Donaldson,* 325 U. S. 304, 311, we accepted a like state rule: "The state courts seem to have treated the complaint as setting up several bases for a single common-law cause of action in tort which had been remanded for retrial at the time the new statute was enacted. We must regard it in that same light." So in *Hurn* v. *Oursler,* 289 U. S. 238, 246: "The bill alleges the violation of a single right, namely, the right to protection of the copyrighted play. And it is this violation which constitutes the cause of action. Indeed, the claims of infringement and unfair competition so precisely rest upon identical facts as to be little more than the equivalent of different epithets to characterize the same group of cir-

congressional purpose in the revision resulting in 28 U. S. C. § 1441 (c), we conclude that where there is a single wrong to plaintiff, for which relief is sought, arising from an interlocked series of transactions, there is no separate and independent claim or cause of action under § 1441 (c).[12]

In making this determination we look to the plaintiff's pleading, which controls. *Pullman Co.* v. *Jenkins,* 305 U. S. 534, 538.[13] The single wrong for which relief is sought is the failure to pay compensation for the loss on the property. Liability lay among three parties, but it was uncertain which one was responsible. Therefore, all were joined as defendants in one petition. First, facts were stated that made the petitioner, American Fire and Casualty Company, liable. It was alleged that the company, through its agent Reiss, insured the property destroyed for the amount claimed, that Reiss gave plaintiff credit for the premium, controlled her insurance, agreed to keep the property insured at all times. She further

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cumstances. The primary relief sought is an injunction to put an end to an essentially single wrong, however differently characterized, not to enjoin distinct wrongs constituting the basis for independent causes of action." See *Behrens* v. *Skelly,* 173 F. 2d 715, 719; *Cope* v. *Anderson,* 331 U. S. 461, 466.

[12] See a discussion of cause of action in code pleading. Clark on Code Pleading (2d ed.), 137 *et seq.*

[13] Moore's Commentary on the U. S. Judicial Code, *supra,* pp. 251–252: "But where the plaintiff joins two or more defendants to recover damages for one injury, and even though he charges them with joint and several liability or only several liability, or charges them with liability in the alternative, there is no joinder of separate and independent causes of action within the meaning of § 1441 (c). At most a separable controversy is presented where several or alternative liability is alleged, and is no longer the basis for removal." Compare the opinion in *Bentley* v. *Halliburton Oil Well Cementing Co.,* 81 F. Supp. 323, with the reversing opinion in 174 F. 2d 788.

alleged that the Company issued the policy but Reiss retained the document in his possession and refused to deliver it after the fire. Then followed a prayer for judgment against the Company.

The next portion of the complaint stated, in the alternative, an obligation by the Indiana Lumbermens Insurance Company to pay the same loss. The policy with Lumbermens was attached as an exhibit, and allegations concerning Reiss similar to those in the first portion were made. A second prayer was added for recovery against Lumbermens.

The last portion of the complaint, alternative to both the preceding, alleged that Reiss, American Fire and Casualty Company and Indiana Lumbermens Insurance Company were jointly and severally liable for the loss. Reiss was said to be plaintiff's insurance broker, responsible for keeping her house insured. Plaintiff alleged Reiss insured her property with Lumbermens and never notified her of any cancellation or expiration. Reiss was alleged to have agreed later to insure her property with American, to have promised after the fire to deliver the policy, to have failed to make the promised delivery. She claimed that Reiss was responsible for "anything that results in the defeat of her recovery on either one of said policies" and that he was "the direct cause of the condition, of said insurance, and the proximate cause of all of plaintiff's troubles and confusion." The pleader then asserted:

> "That such acts and conduct on the part of said Joe Reiss as agent for the said two insurance companies, renders said Joe Reiss, agent, the Joe Reiss Insurance Agency and the American Fire and Casualty Insurance Company of Orlando, Florida, and the Indiana Lumbermens Mutual Insurance Company of Indianapolis, Indiana, jointly and severally

> liable for the full amount of the damages that plaintiff has suffered by reason of said fire in the amount of Five Thousand Dollars."

The petition concluded with a prayer for joint and several judgment against all three defendants, based on the third set of allegations.

The past history of removal of "separable" controversies, the effort of Congress to create a surer test, and the intention of Congress to restrict the right of removal leads us to the conclusion that separate and independent causes of action are not stated. The facts in each portion of the complaint involve Reiss, the damage comes from a single incident. The allegations in which Reiss is a defendant involve substantially the same facts and transactions as do the allegations in the first portion of the complaint against the foreign insurance companies. It cannot be said that there are separate and independent claims for relief as § 1441 (c) requires. Therefore, we conclude there was no right to removal.

II.

There are cases which uphold judgments in the district courts even though there was no right to removal.[14] In those cases the federal trial court would have had original jurisdiction of the controversy had it been brought in the federal court in the posture it had at the time of the actual trial of the cause or of the entry of the judgment. That is, if the litigation had been initiated in the federal court on the issues and between the parties that comprised the case at the time of trial or judgment, the federal court would have had cognizance of the case. This circum-

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[14] *Baggs* v. *Martin,* 179 U. S. 206; *Toledo, St. L. & W. R. Co.* v. *Perenchio,* 205 F. 472; *Handley-Mack Co.* v. *Godchaux Sugar Co.,* 2 F. 2d 435; *Bailey* v. *Texas Co.,* 47 F. 2d 153.

stance was relied upon as the foundation of the holdings.[15] The defendant who had removed the action was held to be estopped from protesting that there was no right to removal. Since the federal court could have had jurisdiction originally, the estoppel did not endow it with a jurisdiction it could not possess.

In this case, however, the District Court would not have had original jurisdiction of the suit, as first stated in the complaint, because of the presence on each side of a citizen of Texas. 28 U. S. C. § 1332. The posture of this case even at the time of judgment also barred federal jurisdiction. A Texas citizen was and remained a party defendant. The trial court judgment, after decreeing recovery against American Fire and Casualty Company on the jury's verdict, added, over American's objection,

> "It Is Further Ordered, Adjudged and Decreed that the Plaintiff take nothing as against Defendants, Indiana Lumbermens Mutual Insurance Company and Joe Reiss, individually and doing business as the Joe Reiss Insurance Agency, and that such Defendants go hence without day with their costs."

By this decree the merits of the litigation against Reiss were finally adjudicated.[16] The request of respondent to dismiss Reiss after the judgment was not acted upon by the trial court.

The jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation or by

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[15] *E. g.*, in *Baggs* v. *Martin*, 179 U. S. 206, the federal court had jurisdiction over the property in the hands of the receiver and it was not a proceeding wherein "mere consent, or even voluntary action by the parties, . . . [conferred] jurisdiction upon a court which would not have possessed it without such consent or action." P. 209.

[16] See *Burton-Lingo Co.* v. *Lay*, 142 S. W. 2d 448; *Spann Brothers Auto Supply Co.* v. *Miles*, 135 S. W. 2d 1016, 1017.

prior action or consent of the parties.[17] To permit a federal trial court to enter a judgment in a case removed without right from a state court where the federal court could not have original jurisdiction of the suit even in the posture it had at the time of judgment, would by the act of the parties work a wrongful extension of federal jurisdiction and give district courts power the Congress has denied them.

The judgment of the Court of Appeals must be reversed and the cause remanded to the District Court with directions to vacate the judgment entered and, if no further steps are taken by any party to affect its jurisdiction,[18]

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[17] *People's Bank* v. *Calhoun,* 102 U. S. 256, 260–261: "It needs no citation of authorities to show that the mere consent of parties cannot confer upon a court of the United States the jurisdiction to hear and decide a case. If this were once conceded, the Federal courts would become the common resort of persons who have no right, either under the Constitution or the laws of the United States, to litigate in those courts."

Mansfield, C. & L. M. R. Co. v. *Swan,* 111 U. S. 379, 383, quoting with approval an excerpt from the dissent in the *Dred Scott Case:* "It is true . . . as a general rule, that the court will not allow a party to rely on anything as cause for reversing a judgment, which was for his advantage. In this, we follow an ancient rule of the common law. But so careful was that law of the preservation of the course of its courts, that it made an exception out of that general rule, and allowed a party to assign for error that which was for his advantage, if it were a departure by the court itself from its settled course of procedure."

Also see, *e. g., Wabash R. Co.* v. *Barbour,* 73 F. 513, 516; *Capron* v. *Van Noorden,* 2 Cranch 126.

[18] Issues not raised in the records or briefs are not passed upon, such as the propriety of the District Court's allowing, after vacation of judgment, a motion to dismiss Reiss, the resident defendant; or the associated problem: whether, if such a dismissal is allowed, a new judgment can be entered on the old verdict without a new trial. These questions and like matters are for the consideration and deci-

to remand the case to the District Court of Harris County, Texas, with costs against petitioner. *Tennessee* v. *Union & Planters' Bank,* 152 U. S. 454, 464.

It is so ordered.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK and MR. JUSTICE MINTON concur, dissenting.

I think petitioner, having asked for and obtained the removal of the case to the Federal District Court, and having lost its case in that court, is now estopped from having it remanded to the state court.

Mere irregularity in the removal may be waived where the suit might originally have been brought in the Federal District Court. *Baggs* v. *Martin,* 179 U. S. 206.[1] That was a suit against a receiver which could have been instituted in the federal court. It was removed there by the receiver and judgment rendered against him. The court did not stop to inquire whether there had been a compliance with the removal provisions, holding that under those circumstances it did not lie in the mouth of the receiver to deny the jurisdiction he had sought. And see *Toledo, St. L. & W. R. Co.* v. *Perenchio,* 205 F. 472; *Handley-Mack Co.* v. *Godchaux Sugar Co.,* 2 F. 2d 435, 437; *Bailey* v. *Texas Co.,* 47 F. 2d 153, 155.

The suit against petitioner could have been brought originally in the Federal District Court, since there was diversity of citizenship and the claim under the fire insurance policy was over $3,000. The requirements of diversity of citizenship and jurisdictional amount may not,

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sion of the District Court. See, *e. g., Dollar S. S. Lines* v. *Merz,* 68 F. 2d 594; *International Ladies' Garment Workers' Union* v. *Donnelly Garment Co.,* 121 F. 2d 561.

[1] As noted in *Bailey* v. *Texas Co.,* 47 F. 2d 153, 155, *Baggs* v. *Martin* displaces the view earlier expressed by the Court in *Torrence* v. *Shedd,* 144 U. S. 527, and *Martin* v. *Snyder,* 148 U. S. 663.

of course, be waived. But a different provision of the statute is involved here. It is § 1441 (c) of the Judicial Code which reads:

> "Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction." 28 U. S. C. § 1441 (c).

The argument is that the suit against Reiss, the individual defendant, could not be removed since both he and the plaintiff were residents of Texas, and that the suits against the two nonresident corporations could not be removed because the claim asserted against them was not "separate and independent."

But the judgment sought to be reviewed here was rendered by the District Court only against petitioner who could have been sued there originally [2] and who invoked the jurisdiction of the District Court. As the court observed in the closely analogous case of *Bailey* v. *Texas Co., supra,* p. 155, "the resulting situation is equivalent to initiating an action in the District Court in which the defendant appears." [3] I think it is abusive of the interests of justice when the challenge now made is raised

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[2] We have here no joint liability between a nonresident defendant and a resident defendant, as was the situation in *Chicago, B. & Q. R. Co.* v. *Willard,* 220 U. S. 413, 418. And see *Alabama Southern R. Co.* v. *Thompson,* 200 U. S. 206; *Rupp* v. *Wheeling & L. E. R. Co.,* 121 F. 825. The remedy sought against Reiss was alternative to the remedy sought against petitioner.

[3] In that case the parties who could not have been brought to the District Court by removal were after removal dismissed out of the case and judgment was rendered against a defendant who could have been sued in the District Court.

to the dignity of a jurisdictional question. Any requirement of § 1441 (c) that was not met in this case rose to no level higher than an irregularity, so far as petitioner is concerned. Both Reiss and the other nonresident defendant have been dismissed from the case. The only judgment before the Court is one which satisfies the requirements of original jurisdiction. Petitioner—the one who invoked federal jurisdiction and as a result suffered the consequences of this judgment—should not now be heard to complain. *Baggs* v. *Martin, supra,* should govern this case.

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WEST VIRGINIA EX REL. DYER ET AL. *v.* SIMS, STATE AUDITOR.

CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA.

No. 147. Argued December 5, 1950.—Decided April 9, 1951.

With the consent of Congress under the Compact Clause of the Federal Constitution, West Virginia and seven other States entered into a Compact to control pollution in the Ohio River system. They created a Commission consisting of representatives of each of the eight States and the United States, and agreed to delegate certain powers to it and to appropriate funds for its administrative expenses. The West Virginia Legislature approved the Compact and appropriated funds to defray West Virginia's share of the expenses. In a mandamus proceeding to compel the State Auditor to issue a warrant for payment of these expenses, the State Supreme Court denied relief. It found that the state legislation constituted an unlawful delegation of legislative power and violated the debt limitation provision of Art. X, § 4 of the State Constitution. *Held:*

1. This Court has final power to pass upon the meaning and validity of compacts between states. P. 28.

2. An agreement entered into between states by those who alone have political authority to speak for a state cannot be nullified unilaterally, or given final meaning by any organ of one of the contracting states. P. 28.

3. This Court is free to examine determinations of law by state courts where an interstate compact brings in issue the rights of other states and the United States. *Kentucky* v. *Indiana,* 281 U. S. 163; *Hinderlider* v. *La Plata Co.,* 304 U. S. 92. Pp. 28–30.

4. The fact that the questions as to the Compact are before this Court on a writ of certiorari rather than by way of an original action brought by a state does not affect the power of this Court to decide those questions. P. 30.

5. West Virginia had authority under her Constitution to enter into a Compact which involves only such delegation of power to an interstate agency as the Ohio River Compact presents. Pp. 30–32.

6. The obligation of the State under the Compact is not in conflict with the debt limitation provision of Art. X, § 4 of the State Constitution. P. 32.

134 W. Va. ——, 58 S. E. 2d 766, reversed.

In a mandamus proceeding, the Supreme Court of Appeals of West Virginia held that state legislation authorizing the State's participation in a Compact with other States violated the State Constitution. 134 W. Va. ——, 58 S. E. 2d 766. This Court granted certiorari. 340 U. S. 807. *Reversed and remanded,* p. 32.

John B. Hollister argued the cause for petitioners. With him on the brief were *William C. Marland,* Attorney General of West Virginia, *Thomas J. Gillooly,* Assistant Attorney General, and *Leonard A. Weakley.*

Charles C. Wise, Jr. argued the cause and filed a brief for respondent.

Briefs of *amici curiae* supporting petitioners were filed on behalf of the United States by *Solicitor General Perlman, Oscar H. Davis, Alanson W. Willcox* and *Gladys A. Harrison;* on behalf of the States of Illinois by *Ivan A. Elliott,* Attorney General, and *Lucien S. Field* and *William C. Wines,* Assistant Attorneys General, Indiana by *J. Emmett McManamon,* Attorney General, Kentucky by *A. E. Funk,* Attorney General, and *Squire N. Williams, Jr.,* Assistant Attorney General, New York by *Nathaniel L. Goldstein,* Attorney General, Ohio by *Herbert S. Duffy,* Attorney General, *William C. Bryant,* Chief Counsel to the Attorney General, and *W. H. Annat* and *Hugh A. Sherer,* Assistant Attorneys General, and Pennsylvania by *Charles J. Margiotti,* then Attorney General, *M. Vashti Burr,* Deputy Attorney General, and *Harry F. Stambaugh;* and on behalf of the State of Pennsylvania by *Charles J. Margiotti,* then Attorney General, *M. Vashti Burr,* Deputy Attorney General, and *Harry F. Stambaugh.*

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

After extended negotiations eight States entered into a Compact to control pollution in the Ohio River system. See Ohio River Valley Water Sanitation Compact, 54 Stat. 752. Illinois, Indiana, Kentucky, New York, Ohio, Pennsylvania, Virginia and West Virginia recognized that they were faced with one of the problems of government that are defined by natural rather than political boundaries. Accordingly, they pledged themselves to cooperate in maintaining waters in the Ohio River basin in a sanitary condition through the administrative mechanism of the Ohio River Valley Water Sanitation Commission, consisting of three members from each State and three representing the United States.

The heart of the Compact is Article VI. This provides that sewage discharged into boundary streams or streams flowing from one State into another "shall be so treated, within a time reasonable for the construction of the necessary works, as to provide for substantially complete removal of settleable solids, and the removal of not less than forty-five per cent (45%) of the total suspended solids; provided that, in order to protect the public health or to preserve the waters for other legitimate purposes, . . . in specific instances such higher degree of treatment shall be used as may be determined to be necessary by the Commission after investigation, due notice and hearing." Industrial wastes are to be treated "to such degree as may be determined to be necessary by the Commission after investigation, due notice and hearing." Sewage and industrial wastes discharged into streams located wholly within one State are to be treated "to that extent, if any, which may be necessary to maintain such waters in a sanitary and satisfactory condition at least equal to the condition of the waters of the interstate stream immediately above the confluence."

Article IX provides that the Commission may, after notice and hearing, issue orders for compliance enforceable in the State and federal courts. It further provides: "No such order shall go into effect unless and until it receives the assent of at least a majority of the commissioners from each of not less than a majority of the signatory States; and no such order upon a municipality, corporation, person or entity in any State shall go into effect unless and until it receives the assent of not less than a majority of the commissioners from such state."

By Article X the States also agree "to appropriate for the salaries, office and other administrative expenses, their proper proportion of the annual budget as determined by the Commission and approved by the Governors of the signatory States . . . ."

The present controversy arose because of conflicting views between officials of West Virginia regarding the responsibility of West Virginia under the Compact.

The Legislature of that State ratified and approved the Compact on March 11, 1939. W. Va. Acts 1939, c. 38. Congress gave its consent on July 11, 1940, 54 Stat. 752, and upon adoption by all the signatory States the Compact was formally executed by the Governor of West Virginia on June 30, 1948. At its 1949 session the West Virginia Legislature appropriated $12,250 as the State's contribution to the expenses of the Commission for the fiscal year beginning July 1, 1949. W. Va. Acts 1949, c. 9, Item 93. Respondent Sims, the auditor of the State, refused to issue a warrant upon its treasury for payment of this appropriation. To compel him to issue it, the West Virginia Commissioners to the Compact Commission and the members of the West Virginia State Water Commission instituted this original mandamus proceeding in the Supreme Court of Appeals of West Virginia. The court denied relief on the merits, 134 W. Va. ——, 58 S. E. 2d 766, and we brought the case here,

340 U. S. 807, because questions of obviously important public interest are raised.

The West Virginia court found that the "sole question" before it was the validity of the Act of 1939 approving West Virginia's adherence to the Compact. It found that Act invalid in that (1) the Compact was deemed to delegate West Virginia's police power to other States and to the Federal Government, and (2) it was deemed to bind future legislatures to make appropriations for the continued activities of the Sanitation Commission and thus to violate Art. X, § 4 of the West Virginia Constitution.

Briefs filed on behalf of the United States and other States, as *amici,* invite the Court to consider far-reaching issues relating to the Compact Clause of the United States Constitution. Art. I, § 10, cl. 3. The United States urges that the Compact be so read as to allow any signatory State to withdraw from its obligations at any time. Pennsylvania, Ohio, Indiana, Illinois, Kentucky and New York contend that the Compact Clause precludes any State from limiting its power to enter into a compact to which Congress has consented. We must not be tempted by these inviting vistas. We need not go beyond the issues on which the West Virginia court found the Compact not binding on that State. That these are issues which give this Court jurisdiction to review the State court proceeding, 28 U. S. C. § 1257, needs no discussion after *Delaware River Comm'n* v. *Colburn,* 310 U. S. 419, 427.

Control of pollution in interstate streams might, on occasion, be an appropriate subject for national legislation. Compare *Oklahoma* v. *Atkinson Co.,* 313 U. S. 508. But, with prescience, the Framers left the States free to settle regional controversies in diverse ways. Solution of the problem underlying this case may be attempted directly by the affected States through contentious litigation before this Court. *Missouri* v. *Illinois,* 180 U. S. 208, 200 U. S. 496; *New York* v. *New Jersey,* 256 U. S. 296. Adju-

dication here of conflicting State interests affecting stream pollution does not rest upon the law of a particular State. This Court decides such controversies according to "principles it must have power to declare." *Missouri* v. *Illinois, supra,* 200 U. S. at 519. But the delicacy of interstate relationships and the inherent limitations upon this Court's ability to deal with multifarious local problems have naturally led to exacting standards of judicial intervention and have inhibited the formulation of a code for dealing with such controversies. As Mr. Justice Holmes put it: "Before this court ought to intervene the case should be of serious magnitude, clearly and fully proved, and the principle to be applied should be one which the court is prepared deliberately to maintain against all considerations on the other side." *Missouri* v. *Illinois, supra,* 200 U. S. at 521.

Indeed, so awkward and unsatisfactory is the available litigious solution for these problems that this Court deemed it appropriate to emphasize the practical constitutional alternative provided by the Compact Clause. Experience led us to suggest that a problem such as that involved here is "more likely to be wisely solved by coöperative study and by conference and mutual concession on the part of representatives of the States so vitally interested in it than by proceedings in any court however constituted." *New York* v. *New Jersey, supra,* at 313. The suggestion has had fruitful response.

The growing interdependence of regional interests, calling for regional adjustments, has brought extensive use of compacts. A compact is more than a supple device for dealing with interests confined within a region. That it is also a means of safeguarding the national interest is well illustrated in the Compact now under review. Not only was congressional consent required, as for all compacts; direct participation by the Federal Government was pro-

vided in the President's appointment of three members of the Compact Commission. Art. IV; Art. XI, § 3.

But a compact is after all a legal document. Though the circumstances of its drafting are likely to assure great care and deliberation, all avoidance of disputes as to scope and meaning is not within human gift. Just as this Court has power to settle disputes between States where there is no compact, it must have final power to pass upon the meaning and validity of compacts. It requires no elaborate argument to reject the suggestion that an agreement solemnly entered into between States by those who alone have political authority to speak for a State can be unilaterally nullified, or given final meaning by an organ of one of the contracting States. A State cannot be its own ultimate judge in a controversy with a sister State. To determine the nature and scope of obligations as between States, whether they arise through the legislative means of compact or the "federal common law" governing interstate controversies (*Hinderlider* v. *La Plata Co.*, 304 U. S. 92, 110), is the function and duty of the Supreme Court of the Nation. Of course every deference will be shown to what the highest court of a State deems to be the law and policy of its State, particularly when recondite or unique features of local law are urged. Deference is one thing; submission to a State's own determination of whether it has undertaken an obligation, what that obligation is, and whether it conflicts with a disability of the State to undertake it is quite another.

The Supreme Court of Appeals of the State of West Virginia is, for exclusively State purposes, the ultimate tribunal in construing the meaning of her Constitution. Two prior decisions of this Court make clear, however, that we are free to examine determinations of law by State courts in the limited field where a compact brings in issue the rights of other States and the United States.

Kentucky v. *Indiana,* 281 U. S. 163, dealt with a compact to build a bridge across the Ohio River. In an original action brought before this Court, Indiana defended on the ground that she should not be compelled to perform until the Indiana courts decided, in a pending case, whether her officials had been authorized to enter into the compact. Mr. Chief Justice Hughes, speaking for a unanimous Court, dismissed the argument: "Where the States themselves are before this Court for the determination of a controversy between them, neither can determine their rights *inter sese,* and this Court must pass upon every question essential to such a determination, although local legislation and questions of state authorization may be involved. *Virginia* v. *West Virginia,* 11 Wall. 39, 56; 220 U. S. 1, 28. A decision in the present instance by the state court would not determine the controversy here." 281 U. S. at 176–177.

In reaching this conclusion the Chief Justice could hardly avoid analogizing the situation to that where a question is raised whether a State has impaired the obligation of a contract. "It has frequently been held that when a question is suitably raised whether the law of a State has impaired the obligation of a contract, in violation of the constitutional provision, this Court must determine for itself whether a contract exists, what are its obligations, and whether they have been impaired by the legislation of the State. While this Court always examines with appropriate respect the decisions of state courts bearing upon such questions, such decisions do not detract from the responsibility of this Court in reaching its own conclusions as to the contract, its obligations and impairment, for otherwise the constitutional guaranty could not properly be enforced. *Larson* v. *South Dakota,* 278 U. S. 429, 433, and cases there cited." 281 U. S. at 176. And see *Indiana ex rel. Anderson* v. *Brand,* 303 U. S. 95, 100.

Hinderlider v. *La Plata Co., supra,* is the second of these cases. It also makes clear, if authority be needed, that the fact the compact questions reach us on a writ of certiorari rather than by way of an original action brought by a State does not affect the power of this Court. In the *Hinderlider* case, an action was brought in the Colorado courts to enjoin performance of a compact between Colorado and New Mexico concerning water rights in the La Plata River. The State court held that the compact was invalid because it affected appropriation rights guaranteed by the Colorado State Constitution. 101 Colo. 73, 70 P. 2d 849; see also 93 Colo. 128, 25 P. 2d 187. Mr. Justice Brandeis, likewise speaking for a unanimous Court, held that the relative claims of New Mexico and Colorado citizens could be determined by compact and reversed the decision of the State court.

The issue in the *Hinderlider* case was whether the Colorado Legislature had authority, under the State Constitution, to enter into a compact which affected the water rights of her citizens. The issue before us is whether the West Virginia Legislature had authority, under her Constitution, to enter into a compact which involves delegation of power to an interstate agency and an agreement to appropriate funds for the administrative expenses of the agency.

That a legislature may delegate to an administrative body the power to make rules and decide particular cases is one of the axioms of modern government. The West Virginia court does not challenge the general proposition but objects to the delegation here involved because it is to a body outside the State and because its Legislature may not be free, at any time, to withdraw the power delegated. We are not here concerned, and so need not deal, with specific language in a State constitution requiring that the State settle its problems with other States without delegating power to an interstate agency. What

is involved is the conventional grant of legislative power. We find nothing in that to indicate that West Virginia may not solve a problem such as the control of river pollution by compact and by the delegation, if such it be, necessary to effectuate such solution by compact. If this Court, in the exercise of its original jurisdiction, were to enter a decree requiring West Virginia to abate pollution of interstate streams, that decree would bind the State. The West Virginia Legislature would have no part in determining the State's obligation. The State Legislature could not alter it; it could not disregard it, as West Virginia on another occasion so creditably recognized. The obligation would be fixed by this Court on the basis of a master's report. Here, the State has bound itself to control pollution by the more effective means of an agreement with other States. The Compact involves a reasonable and carefully limited delegation of power to an interstate agency. Nothing in its Constitution suggests that, in dealing with the problem dealt with by the Compact, West Virginia must wait for the answer to be dictated by this Court after harassing and unsatisfactory litigation.

What Mr. Justice Brandeis said of the Colorado court decision in *Hinderlider* v. *La Plata Co., supra,* applies to the decision of the West Virginia court: "It ignores the history and order of development of the two means provided by the Constitution for adjusting interstate controversies. The compact—the legislative means—adapts to our Union of sovereign States the age-old treaty-making power of independent sovereign nations. Adjustment by compact without a judicial or quasi-judicial determination of existing rights had been practiced in the Colonies, was practiced by the States before the adoption of the Constitution, and had been extensively practiced in the United States for nearly half a century before this Court first applied the judicial means in settling the boundary dispute in

Rhode Island v. *Massachusetts*, 12 Pet. 657, 723–25." 304 U. S. at 104.

The State court also held that the Compact is in conflict with Art. X, § 4, of the State Constitution and for that reason is not binding on West Virginia. This section provides:

> "No debt shall be contracted by this State, except to meet casual deficits in the revenue, to redeem a previous liability of the State, to suppress insurrection, repel invasion, or defend the State in time of war; but the payment of any liability, other than that for the ordinary expenses of the State, shall be equally distributed over a period of at least twenty years."

The Compact was evidently drawn with great care to meet the problem of debt limitation in light of this section and similar restrictive provisions in the constitutions of other States. Although, under Art. X of the Compact, the States agree to appropriate funds for administrative expenses, the annual budget must be approved by the Governors of the signatory States. In addition, Article V provides: "The Commission shall not incur any obligations of any kind prior to the making of appropriations adequate to meet the same; nor shall the Commission pledge the credit of any of the signatory States, except by and with the authority of the legislature thereof." In view of these provisions, we conclude that the obligation of the State under the Compact is not in conflict with Art. X, § 4 of the State Constitution.

Reversed and remanded.

MR. JUSTICE BLACK concurs in the result.

MR. JUSTICE REED, concurring.

I concur in the judgment of the Court but disagree with the assertion of power by this Court to interpret the meaning of the West Virginia Constitution. This Court

must accept the State court's interpretation of its own Constitution unless it is prepared to say that the interpretation is a palpable evasion to avoid a federal rule.[1]

There is no problem concerning the binding effect upon this Court of state court interpretation of state law, under the Compact Clause such as there is under the clause against impairing the Obligation of Contracts.[2] Under the latter clause, this Court, in order to determine whether the subsequent state law, constitutional or statutory, impairs the federal prohibition against impairment of contracts, has asserted power to construe for itself the disputed agreement, to decide whether it is a contract, and to interpret the subsequent state statute to decide whether it impairs that contract.[3] Even then we accept state court conclusions unless "manifestly wrong."[4] Examination here, under the Contract Clause, is to enforce the federal provision against impairment and is made only to decide whether under the Contract Clause there is a contract and whether it is impaired.[5] This Court thus adjudges whether state action has violated the Federal Contract Clause. It does not decide the meaning of a state statute as applied to a state appropriation.

Under the Compact Clause, however, the federal questions are the execution, validity and meaning of federally approved state compacts.[6] The interpretation of the meaning of the compact controls over a state's application of its own law through the Supremacy Clause and not by any implied federal power to construe state law.

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[1] *Union Pac. R. Co.* v. *Public Service Comm'n,* 248 U. S. 67.

[2] U. S. Constitution, Art. I, § 10.

[3] *Appleby* v. *City of New York,* 271 U. S. 364, 380; *King Mfg. Co.* v. *Augusta,* 277 U. S. 100, 114; *Coombes* v. *Getz,* 285 U. S. 434, 441.

[4] *Hale* v. *State Board,* 302 U. S. 95, 101.

[5] *Coolidge* v. *Long,* 282 U. S. 582, 597.

[6] *Delaware River Joint Toll Bridge Comm'n* v. *Colburn,* 310 U. S. 419, 428, where it is said, "Hence we address ourselves to the language of the Compact." And see the last paragraph of that opinion.

West Virginia adjudges her execution of the compact is invalid as a delegation of state police power and as a creation of debt beyond her constitutional powers. Since the Constitution provided the compact for adjusting interstate relations, compacts may be enforced despite otherwise valid state restrictions on state action.

This, I think, was the basis of our holding in *Hinderlider* v. *La Plata Co.*, 304 U. S. 92. The Supreme Court of Colorado held that compact invalid because it was an executive abandonment by Colorado of a citizen's previously acquired water rights, pp. 104 and 108. But we concluded:

> "Whether the apportionment of the water of an interstate stream be made by compact between the upper and lower States with the consent of Congress or by a decree of this Court, the apportionment is binding upon the citizens of each State and all water claimants, even where the State had granted the water rights before it entered into the compact." P. 106.

For that conclusion reliance was placed upon *Rhode Island* v. *Massachusetts*, 12 Pet. 657, 725, where this Court, speaking of compacts, said:

> "By this surrender of the power, which before the adoption of the constitution was vested in every state, of settling these contested boundaries, as in the plenitude of their sovereignty they might; they could settle them neither by war, or in peace, by treaty, compact or agreement, without the permission of the new legislative power which the states brought into existence by their respective and several grants in conventions of the people. If congress consented, then the states were in this respect restored to their original inherent sovereignty; such consent being the sole limitation imposed by the constitution, when

> given, left the states as they were before . . . whereby their compacts became of binding force, and finally settled the boundary between them; operating with the same effect as a treaty between sovereign powers."

I would uphold the validity of the compact and reverse the judgment of West Virginia refusing mandamus, with direction to that court to enter a judgment not inconsistent with an opinion based upon the Supremacy Clause.

MR. JUSTICE JACKSON, concurring.

West Virginia officials induced sister States to contract with her and Congress to consent to the Compact. She now attempts to read herself out of this interstate Compact by reading into her Constitution a limitation upon the powers of her Governor and Legislature to contract.

West Virginia, for internal affairs, is free to interpret her own Constitution as she will. But if the compact system is to have vitality and integrity, she may not raise an issue of *ultra vires,* decide it, and release herself from an interstate obligation. The legal consequences which flow from the formal participation in a compact consented to by Congress is a federal question for this Court.

West Virginia points to no provision of her Constitution which we can say was clear notice or fair warning to Congress or other States of any defect in her authority to enter into this Compact. It is a power inherent in sovereignty limited only to the extent that congressional consent is required. *Rhode Island* v. *Massachusetts,* 12 Pet. 657, 725; *Poole* v. *Fleeger,* 11 Pet. 185, 209. Whatever she now says her Constitution means, she may not apply retroactively that interpretation to place an unforeseeable construction upon what the other States to this Compact were entitled to believe was a fully authorized act.

Estoppel is not often to be invoked against a government. But West Virginia assumed a contractual obligation with equals by permission of another government that is sovereign in the field. After Congress and sister States had been induced to alter their positions and bind themselves to terms of a covenant, West Virginia should be estopped from repudiating her act. For this reason, I consider that whatever interpretation she may put on the generalities of her Constitution, she is bound by the Compact, and on that basis I concur in the judgment.

ROBERTSON, PRESIDENT OF THE ARMY REVIEW BOARD, *v.* CHAMBERS.

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

No. 295. Argued March 1, 1951.—Decided April 9, 1951.

Upon review under § 302 (a) of the Servicemen's Readjustment Act of 1944 of a decision of the Army Retiring Board discharging an officer for physical disability without pay, the Army Disability Review Board may consider, as part of the officer's "service records," medical reports of the Veterans' Administration on the officer's subsequent medical history, which records had been transmitted to the Army and incorporated in its files. Pp. 37–40.
87 U. S. App. D. C. 91, 183 F. 2d 144, reversed.

The case is stated in the opinion. *Reversed,* p. 40.

Oscar H. Davis argued the cause for petitioner. With him on the brief were *Solicitor General Perlman, Acting Assistant Attorney General Clapp, Samuel D. Slade* and *Morton Hollander.*

H. Russell Bishop argued the cause and filed a brief for respondent.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Respondent, a former captain in the Army, was honorably discharged for physical disability and without retirement pay, as the result of a decision by an Army Retiring Board. Respondent applied to the Army Disability Review Board for review of that action. The Review Board held that respondent was not entitled to retirement pay. Respondent, having requested a rehearing, was allowed to examine the record on which the rehearing would be based. He discovered that the record contained certain

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medical reports of the Veterans' Administration concerning his condition. Respondent requested the Review Board to remove those reports from the record. The Review Board refused. Respondent thereupon instituted this mandamus proceeding seeking a mandatory injunction directing the President of the Review Board to exclude those reports from the record. The District Court dismissed the complaint. The Court of Appeals reversed. 87 U. S. App. D. C. 91, 183 F. 2d 144. The case is here on certiorari. 340 U. S. 889.

The principal question relates to the provision in § 302 (a) of the Servicemen's Readjustment Act of 1944, 58 Stat. 287, 59 Stat. 623, 38 U. S. C. § 693i (a), which describes the scope of review by the Review Board as follows: "Such review shall be based upon all available service records relating to the officer requesting such review, and such other evidence as may be presented by such officer." Respondent contends that the term "service records" means the record of the service which the military man has rendered from the time of his entry into the service until his discharge. That was the view of the Court of Appeals. We, however, think otherwise.

Section 302 (a) grants the Review Board "the same powers as exercised by, or vested in, the board whose findings and decision are being reviewed." That board is the Retiring Board which R. S. § 1248, 10 U. S. C. § 963, says may "inquire into and determine the facts touching the nature and occasion of the disability of any officer who appears to be incapable of performing the duties of his office, and shall have such powers of a court-martial and of a court of inquiry as may be necessary for that purpose."

These powers of the Retiring Board have been given a wide reach, so that the nature and cause of the disability may be ascertained. Their broad character will not, of

course, override the specific provision of § 302 (a) to the effect that the "review shall be based upon all available service records," etc. But the nature of the powers granted under R. S. § 1248 has relevance to the arguments pressed on us for and against reading "service records" narrowly.

The powers granted the Retiring Board have been construed by the regulations in a liberal fashion, not in a narrow and stifling way. Thus the Adjutant General is required to furnish the board with the "originals or certified copies of the complete medical history, and of all other official records affecting the health and physical condition of the officer." [1] The oral examination of the officer is granted for the purpose "of making full discovery of all facts as to his condition." [2] These hearings are not contests; they are inquiries concerning disability. The purpose is to get at the truth of the matter.[3]

The medical history following the retirement will often be of great importance to the Review Board, since the statute of limitations which governs review is a long one. Requests for review may be made within 15 years after the retirement or after June 22, 1944, whichever is the later. § 302 (b). Medical history may therefore be highly pertinent to the inquiry. Plainly the officer is granted authority under § 302 (a) to introduce such evidence; and it is certain he will do so if it is favorable. We hesitate at a construction of the statute which forecloses the Army from considering the evidence when it

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[1] Army Reg. 605–250, Mar. 28, 1944, par. 3a.

[2] *Id.* at par. 21.

[3] The regulations governing the Disability Review Board have incorporated this broad construction of the powers granted. Thus the Adjutant General is to provide that Board with "all available Department of the Army and/or other records pertaining to the health and physical condition of the applicant." 32 CFR § 581.1 (a) (2) (iii). And see note 4, *infra.*

is unfavorable.[4] Yet that would be the result if we construed "service records" narrowly. We think it would be more in harmony with the nature of the procedure, the purpose of the inquiry, and the powers granted the Review Board to construe "service records" broadly enough to include these medical reports.

The reports in issue were official government reports transmitted to the Army and incorporated in that department's files. They therefore became a part of the record of the officer pertaining to his service. We conclude that they are "service records" within the meaning of § 302 (a).

Reversed.

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[4] The regulations promulgated to govern Disability Review Board proceedings have not restricted the inquiry by such a cramped construction. They authorize the Board "to receive additional evidence bearing on the causes and service-connection of [the disability]" without limitation. 32 CFR § 581.1 (a) (1) (iii). Indeed they empower the Board to make its own physical examination of the retired officer at the time of the hearing. 32 CFR § 581.1 (b) (2) (v).

MOSER *v.* UNITED STATES.

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

No. 301. Argued March 7, 1951.—Decided April 9, 1951.

The Treaty of 1850 between the United States and Switzerland provides that citizens of one country residing in the other "shall be free from personal military service." Section 3 (a) of the Selective Training and Service Act of 1940, as amended, provided for the exemption of neutral aliens from service in the land or naval forces of the United States, with the proviso that one who claimed exemption should thereafter be barred from becoming a citizen of the United States. Petitioner, a Swiss national, applied for and obtained exemption from service in the land or naval forces of the United States. *Held:* Under the circumstances detailed in the opinion, he was not debarred from United States citizenship. Pp. 42–47.

(a) As a matter of law, the Act imposed a valid condition on petitioner's claim of exemption from military service. Pp. 45–46.

(b) Petitioner did not knowingly and intentionally waive his rights to citizenship. Considering all the circumstances of the case, elementary fairness would require nothing less than an intelligent waiver to debar petitioner from citizenship. Pp. 46–47.

182 F. 2d 734, reversed.

An order of the District Court admitting petitioner to citizenship, 85 F. Supp. 683, was reversed by the Court of Appeals. 182 F. 2d 734. This Court granted certiorari. 340 U. S. 910. *Reversed,* p. 47.

Jack Wasserman and *Morris E. Vogel* argued the cause and filed a brief for petitioner.

Stanley M. Silverberg argued the cause for the United States. With him on the brief were *Solicitor General Perlman, Assistant Attorney General McInerney* and *J. F. Bishop.*

MR. JUSTICE MINTON delivered the opinion of the Court.

Petitioner, a native of Switzerland, was admitted to citizenship by the United States District Court for the Eastern District of New York on July 21, 1949.[1] The Court of Appeals reversed,[2] holding that petitioner was debarred from citizenship because he had claimed exemption from military service as a neutral alien during World War II. Important questions concerning the effect of treaty and statute upon the privilege of aliens to acquire citizenship are involved, and we granted certiorari.[3]

Petitioner first entered the United States in 1937. After a trip to Switzerland in 1940 for service in the Swiss Army, in which he held a commission, he returned to this country and married a United States citizen. He and his wife have three children, all born here.

Article II of the Treaty of 1850[4] between the United States and Switzerland provides that

> "The citizens of one of the two countries, residing or established in the other, shall be free from personal military service . . . ."

Petitioner registered under Selective Service in 1940 and was classified III–A, based on dependency. When, on January 11, 1944, his Local Board in New York City reclassified him I–A, available for service, he sought the aid of the Legation of Switzerland in securing his deferment in accordance with the Treaty of 1850. At that time § 3 (a) of the Selective Training and Service Act of 1940, as amended,[5] provided for the exemption of neutral

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[1] 85 F. Supp. 683.

[2] 182 F. 2d 734.

[3] 340 U. S. 910.

[4] 11 Stat. 587, 589.

[5] Section 3 (a) of the Act, 54 Stat. 885, as amended, 55 Stat. 845, 50 U. S. C. App. § 303 (a), provided in part:

"Except as otherwise provided in this Act, every male citizen of

aliens from military service, with the proviso that one who claimed exemption should thereafter be debarred from becoming a citizen of the United States. Petitioner, however, advised the Local Board that he had taken steps with the Swiss Legation "to be released unconditionally" from service under the Treaty.

Upon receiving petitioner's request for assistance, the Swiss Legation in Washington requested the Department of State that he be given an "unconditional release" from liability for service, "in conformity with" the Treaty. The Department referred the request to the Selective Service System, which replied that the Local Board had been instructed to inform petitioner that he might obtain a Revised Form 301 from the Swiss Legation to be used in claiming exemption. Selective Service Headquarters in Washington did so instruct the Director of Selective Service for New York City. On February 18, 1944, the Swiss Legation wrote petitioner that it had requested the Department of State to exempt him "in accordance with the provisions of Art. II, of the Treaty . . . ." The letter continued:

> "We are forwarding to you, herewith, two copies of DSS Form 301, *revised,* which kindly execute and file immediately with your Local Board. This action on your part is necessary in order to complete the exemption procedure; your Local Board, in accordance with

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the United States, and every other male person residing in the United States . . . shall be liable for training and service in the land or naval forces of the United States: *Provided,* That any citizen or subject of a neutral country shall be relieved from liability for training and service under this Act if, prior to his induction into the land or naval forces, he has made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President, but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States . . . ."

Selective Service regulations, as amended, will then classify you in Class IV–C.

"Please note that, through filing of DSS Form 301, revised, you will not waive your right to apply for American citizenship papers. The final decision regarding your naturalization will remain solely with the competent Naturalization Courts."

The Legation's emphasis in referring to "Form 301, *revised*" is not without significance. The pertinent regulations promulgated by the President [6] provided that to claim exemption an alien should file with his Local Board Form 301, which became known as DSS 301, "Application by Alien for Relief from Military Service." Above the signature line on this form there appeared the statement, in obvious reference to the proviso of § 3 (a): "I understand that the making of this application to be relieved from such liability will debar me from becoming a citizen of the United States." But shortly after § 3 (a) of the Act was amended to the content with which we here deal,[7] the Swiss Legation had protested to the Department of State that it was inconsistent with the treaty rights of Swiss citizens. And the Department had hastened to assure the Legation that the Government had no intention of abrogating treaty rights or privileges of Swiss nationals. The State Department, in conjunction with Selective Service Headquarters and the Swiss Legation, had then negotiated agreement upon a Revised Form 301 which omitted the waiver quoted above and stated simply: "I hereby apply for relief from liability for training and service in the land or naval forces of the United States." A footnote of the revised form quoted pertinent parts of § 3 (a).

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[6] 32 CFR, 1943 Cum. Supp., § 622.43.

[7] See 55 Stat. 845; note 5, *supra*.

It was under these circumstances that petitioner signed a Revised Form 301 on February 26, 1944, and was classified IV–C by his Local Board. The Court of Appeals has accepted, as do we, the finding of the District Court that petitioner signed the application for exemption believing that he was not thereby precluded from citizenship, and that had he known claiming exemption would debar him from citizenship, he would not have claimed it, but would have elected to serve in the armed forces.

Is petitioner debarred from citizenship by reason of the claimed exemption?

The Treaty of 1850 with Switzerland was in full force in 1940 when the Selective Training and Service Act was passed. Standing alone, the Treaty provided for exemption of Swiss citizens from military service of the United States, and if that were all, petitioner would have been entitled to unqualified exemption. Section 3 (a) of the Act, while recognizing the immunity of citizens of neutral countries from service in our armed forces,[8] imposed the condition that neutral aliens residing here who claimed such immunity would be debarred from citizenship. That the statute unquestionably imposed a condition on exemption not found in the Treaty does not mean they are inconsistent. Not doubting that a treaty may be modified by a subsequent act of Congress,[9] it is not necessary to invoke such authority here, for we find in this congressionally imposed limitation on citizenship nothing inconsistent with the purposes and subject matter of the Treaty. The Treaty makes no provision respecting citizenship. On the contrary, it expressly provides that the privileges guaranteed by each country to resident citizens of the other "shall not extend to the exercise of political

[8] 4 Moore International Law Digest 52–53, 61.

[9] *Clark* v. *Allen,* 331 U. S. 503, 508–509; *Pigeon River Co.* v. *Cox,* 291 U. S. 138, 160; *Head Money Cases,* 112 U. S. 580, 597–599. Cf. *Cook* v. *United States,* 228 U. S. 102, 120.

rights." [10] The qualifications for and limitations on the acquisition of United States citizenship are a political matter [11] which the Treaty did not presume to cover.

Thus, as a matter of law, the statute imposed a valid condition on the claim of a neutral alien for exemption; petitioner had a choice of exemption and no citizenship, or no exemption and citizenship.

But as we have already indicated, before petitioner signed the application for exemption, he had asserted a right to exemption without debarment from citizenship. In response to the claims of petitioner and others, and in apparent acquiescence, our Department of State had arranged for a revised procedure in claiming exemption. The express waiver of citizenship had been deleted. Petitioner had sought information and guidance from the highest authority to which he could turn, and was advised to sign Revised Form 301. He was led to believe that he would not thereby lose his rights to citizenship. If he had known otherwise he would not have claimed exemption. In justifiable reliance on this advice he signed the papers sent to him by the Legation.

We do not overlook the fact that the Revised Form 301 contained a footnote reference to the statutory provision, and that the Legation wrote petitioner, "you will not waive your right to apply for American citizenship papers." The footnote might have given pause to a trained lawyer. A lawyer might have speculated on the possible innuendoes in the use of the phrase "right to apply," as opposed to "right to obtain." But these are minor distractions in a total setting which understandably lulled *this* petitioner into misconception of the legal consequences of applying for exemption.

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[10] 11 Stat. 587, 588.

[11] U. S. Const., Art. I, § 8, cl. 4; *United States* v. *Macintosh*, 283 U. S. 605, 615; *United States* v. *Schwimmer*, 279 U. S. 644, 649; *Zartarian* v. *Billings*, 204 U. S. 170, 175.

Nor did petitioner sign one thing and claim another, as in *Savorgnan* v. *United States,* 338 U. S. 491. Since the Revised Form 301 contained no waiver, what he signed was entirely consistent with what he believed and claimed.

There is no need to evalulate these circumstances on the basis of any estoppel of the Government or the power of the Swiss Legation to bind the United States by its advice to petitioner. Petitioner did not knowingly and intentionally waive his rights to citizenship. In fact, because of the misleading circumstances of this case, he never had an opportunity to make an intelligent election between the diametrically opposed courses required as a matter of strict law. Considering all the circumstances of the case, we think that to bar petitioner, nothing less than an intelligent waiver is required by elementary fairness. *Johnson* v. *United States,* 318 U. S. 189, 197. To hold otherwise would be to entrap petitioner.

The judgment of the Court of Appeals is

Reversed.

MR. JUSTICE DOUGLAS concurs in the result.

MR. JUSTICE BLACK and MR. JUSTICE FRANKFURTER agree with the Court's decision and opinion that Moser did not waive his rights of citizenship. Questions regarding the scope of the Treaty of 1850 and the bearing of the Selective Service Act of 1940 on the Treaty are therefore not reached and should not be considered.

UNITED STATES *v.* ALCEA BAND OF TILLAMOOKS ET AL.

CERTIORARI TO THE COURT OF CLAIMS.

No. 281. Argued March 2, 1951.—Decided April 9, 1951.

In determining the amount of compensation to which respondents were entitled after the decision of this Court in *United States* v. *Alcea Band of Tillamooks*, 329 U. S. 40, the Court of Claims entered judgment for the value of the lands as of 1855 plus interest from that date. *Held:* The award of interest was erroneous, since recovery was not grounded on a taking under the Fifth Amendment and the relevant statute contains no provision expressly authorizing an award of interest. Pp. 48–49.

115 Ct. Cl. 463, 87 F. Supp. 938, reversed.

Solicitor General Perlman argued the cause for the United States. With him on the brief were *Assistant Attorney General Vanech, Stanley M. Silverberg, Roger P. Marquis, Fred W. Smith* and *Marvin J. Sonosky.*

L. A. Gravelle and *Edward F. Howrey* argued the cause for respondents. With them on the brief were *Douglas Whitlock* and *John G. Mullen.*

PER CURIAM.

The facts leading to this controversy are fully set forth in *United States* v. *Alcea Band of Tillamooks*, 329 U. S. 40 (1946), where this Court affirmed a judgment of the Court of Claims that certain named Indian tribes "are entitled to recover" compensation for the taking of original Indian title by the United States in 1855. The amount of recovery was reserved expressly for the further proceedings which are before the Court in this case. After the affirmance, the Court of Claims heard evidence on the amount of recovery and entered a judgment for the value of the lands as of 1855 plus interest from that

date. 115 Ct. Cl. 463, 87 F. Supp. 938. We granted certiorari limited to the question presented by the award of interest. 340 U. S. 873 (1950).

It is the "traditional rule" that interest on claims against the United States cannot be recovered in the absence of an express provision to the contrary in the relevant statute or contract. 28 U. S. C. (Supp. III) § 2516 (a). *United States* v. *Thayer-West Point Hotel Co.,* 329 U. S. 585, 588 (1947), and cases cited therein. This rule precludes an award of interest even though a statute should direct an award of "just compensation" for a particular taking. *United States* v. *Goltra,* 312 U. S. 203 (1941). The only exception arises when the taking entitles the claimant to just compensation under the Fifth Amendment. Only in such cases does the award of compensation include interest. *Seaboard Air Line R. Co.* v. *United States,* 261 U. S. 299 (1923); *United States* v. *Thayer-West Point Hotel Co., supra.*

Looking to the former opinions in this case, we find that none of them expressed the view that recovery was grounded on a taking under the Fifth Amendment. And, since the applicable jurisdictional Act, 49 Stat. 801 (1935), contains no provision authorizing an award of interest, such award must be

Reversed.

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

SHEPHERD ET AL. *v.* FLORIDA.

CERTIORARI TO THE SUPREME COURT OF FLORIDA.

No. 420. Argued March 9, 1951.—Decided April 9, 1951.

A judgment of the Supreme Court of Florida affirming the conviction of the petitioners for rape, against a claim of denial of rights under the Fourteenth Amendment, is here reversed on the authority of *Cassell* v. *Texas*, 339 U. S. 282.

46 So. 2d 880, reversed.

Franklin H. Williams and *Robert L. Carter* argued the cause for petitioners. With them on the brief were *Alex Akerman, Jr.* and *Thurgood Marshall.*

Reeves Bowen, Assistant Attorney General of Florida, argued the cause for respondent. With him on the brief were *Richard W. Ervin,* Attorney General, and *Howard S. Bailey,* Assistant Attorney General.

PER CURIAM.

The judgment is reversed. *Cassell* v. *Texas,* 339 U. S. 282.

MR. JUSTICE JACKSON, whom MR. JUSTICE FRANKFURTER joins, concurring in the result.

On the 16th of July, 1949, a seventeen-year-old white girl in Lake County, Florida, reported that she had been raped, at the point of a pistol, by four Negroes. Six days later petitioners were indicted and, beginning September 1, were tried for the offense, convicted without recommendation of mercy, and sentenced to death.[1] The Supreme Court of Florida, in reviewing evidence of guilt,

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[1] A recommendation of mercy was made as to defendant Charles Greenlee, a minor, and he does not appeal. The fourth suspect, Ernest Thomas, was killed resisting arrest.

said, "As we study the testimony, the only question presented here is which set of witnesses would the jury believe, that is, the State's witnesses or the testimony as given by the defendant-appellants." [2]

But prejudicial influences outside the courtroom, becoming all too typical of a highly publicized trial, were brought to bear on this jury with such force that the conclusion is inescapable that these defendants were prejudged as guilty and the trial was but a legal gesture to register a verdict already dictated by the press and the public opinion which it generated.

Newspapers published as a fact, and attributed the information to the sheriff, that these defendants had confessed. No one, including the sheriff, repudiated the story.[3] Witnesses and persons called as jurors said they had read or heard of this statement. However, no confession was offered at the trial. The only rational explanations for its nonproduction in court are that the story was false or that the confession was obtained under circumstances which made it inadmissible or its use inexpedient.[4]

If the prosecutor in the courtroom had told the jury that the accused had confessed but did not offer to prove the confession, the court would undoubtedly have de-

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[2] 46 So. 2d 880, 885.

[3] An editor, explaining the source of a statement in an article in his paper that all three Negroes had confessed, said: "[T]he information is based on articles in the various daily papers, and personal conversations I had with people generally. . . . [I]f articles appear in those papers that have stood the test two or three days without denial or correction, based on my previous experience as an editor, I assume them to be true. The article you called my attention to appeared to the best of my recollection in a number of daily papers and was not denied for a period of three days. I don't think they were ever denied."

[4] The defense offered, and the court rejected as completely irrelevant and immaterial, evidence of brutal, inhuman beatings of defendants by state officers in whose custody they were held.

cleared a mistrial and cited the attorney for contempt. If a confession had been offered in court, the defendant would have had the right to be confronted by the persons who claimed to have witnessed it, to cross-examine them, and to contradict their testimony. If the court had allowed an involuntary confession to be placed before the jury, we would not hesitate to consider it a denial of due process of law and reverse. When such events take place in the courtroom, defendant's counsel can meet them with evidence, arguments, and requests for instructions, and can at least preserve his objections on the record.

But neither counsel nor court can control the admission of evidence if unproven, and probably unprovable, "confessions" are put before the jury by newspapers and radio. Rights of the defendant to be confronted by witnesses against him and to cross-examine them are thereby circumvented. It is hard to imagine a more prejudicial influence than a press release by the officer of the court charged with defendants' custody stating that they had confessed, and here just such a statement, unsworn to, unseen, uncross-examined and uncontradicted, was conveyed by the press to the jury.

This Court has recently gone a long way to disable a trial judge from dealing with press interference with the trial process, *Craig* v. *Harney*, 331 U. S. 367; *Pennekamp* v. *Florida*, 328 U. S. 331; *Bridges* v. *California*, 314 U. S. 252, though it is to be noted that none of these cases involved a trial by jury. And the Court, by strict construction of an Act of Congress, has held not to be contemptuous any kind of interference unless it takes place in the immediate presence of the court, *Nye* v. *United States*, 313 U. S. 33, the last place where a well-calculated obstruction of justice would be attempted. No doubt this trial judge felt helpless to give the accused any real protection against this out-of-court campaign to convict. But if freedoms of press are so abused as to make fair

trial in the locality impossible, the judicial process must be protected by removing the trial to a forum beyond its probable influence. Newspapers, in the enjoyment of their constitutional rights, may not deprive accused persons of their right to fair trial. These convictions, accompanied by such events, do not meet any civilized conception of due process of law. That alone is sufficient, to my mind, to warrant reversal.

But that is not all. Of course, such a crime stirred deep feeling and was exploited to the limit by the press. These defendants were first taken to the county jail of Lake County. A mob gathered and demanded that defendants be turned over to it. By order of court, they were quickly transferred for safekeeping to the state prison, where they remained until about two weeks before the trial. Meanwhile, a mob burned the home of defendant Shepherd's father and mother and two other Negro houses. Negroes were removed from the community to prevent their being lynched. The National Guard was called out on July 17 and 18 and, on July 19, the 116th Field Artillery was summoned from Tampa. The Negroes of the community abandoned their homes and fled.

Every detail of these passion-arousing events was reported by the press under such headlines as, "Night Riders Burn Lake Negro Homes" and "Flames From Negro Homes Light Night Sky in Lake County." These and many other articles were highly prejudicial, including a cartoon published at the time of the grand jury, picturing four electric chairs and headed, "No Compromise—Supreme Penalty."

Counsel for defendants made two motions, one to defer the trial until the passion had died out and the other for a change of venue. These were denied. The Supreme Court of Florida, in affirming the conviction, observed that "The inflamed public sentiment was against the crime

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with which the appellants were charged rather than defendants' race." [5] Such an estimate seems more charitable than realistic, and I cannot agree that the prejudice had subsided at the time of trial.

The trial judge, anxious to assure as fair a trial as possible under the circumstances, was evidently concerned about violence at the trial. He promulgated special rules which limited the number of visitors to those that could be seated, allowed no one to stand or loiter in hallways, stairways, and parts of the courthouse for thirty minutes before court convened and after it recessed, closed the elevators except to officers of the court or individuals to whom the sheriff gave special permit, required each person entering the courtroom to submit to search, prohibited any person from taking a "valise, satchel, bag, basket, bottle, jar, jug, bucket, package, bundle, or other such item" to the courtroom floor of the courthouse, allowed crutches, canes and walking sticks only after inspection by the sheriff showed them to be necessary aids, prohibited demonstrations of any nature and made various other regulations, all of which the sheriff was charged to enforce and to that end was authorized to employ such number of deputies as might be necessary. Such precautions, however commendable, show the reaction that the atmosphere which permeated the trial created in the mind of the trial judge.

The situation presented by this record is not different, in essentials, from that which was found a denial of due process in *Moore* v. *Dempsey,* 261 U. S. 86. Under these circumstances, for the Court to reverse these convictions upon the sole ground that the method of jury selection discriminated against the Negro race, is to stress the trivial and ignore the important. While this record discloses discrimination which under normal cir-

[5] 46 So. 2d at 883.

cumstances might be prejudicial, this trial took place under conditions and was accompanied by events which would deny defendants a fair trial before any kind of jury. I do not see, as a practical matter, how any Negro on the jury would have dared to cause a disagreement or acquittal. The only chance these Negroes had of acquittal would have been in the courage and decency of some sturdy and forthright white person of sufficient standing to face and live down the odium among his white neighbors that such a vote, if required, would have brought. To me, the technical question of discrimination in the jury selection has only theoretical importance. The case presents one of the best examples of one of the worst menaces to American justice. It is on that ground that I would reverse.

GERENDE *v.* BOARD OF SUPERVISORS OF ELECTIONS OF BALTIMORE.

APPEAL FROM THE COURT OF APPEALS OF MARYLAND.

No. 577. Argued April 9, 1951.—Decided April 12, 1951.

A decision by the highest court of Maryland upholding the validity of a Maryland law, construed as requiring that, in order for a candidate for public office in that State to obtain a place on the ballot, he must make oath that he is not engaged "in one way or another in the attempt to overthrow the government *by force or violence*," and that he is not knowingly a member of an organization engaged in such an attempt, is here affirmed on the understanding that an affidavit in those terms fully satisfies the requirement. Pp. 56–57.

— Md. —, 78 A. 2d 660, affirmed.

I. Duke Avnet and *William H. Murphy* argued the cause for appellant. With them on the brief were *Harold Buchman* and *Mitchell A. Dubow.*

Hall Hammond, Attorney General of Maryland, and *J. Edgar Harvey,* Deputy Attorney General, argued the cause and filed a brief for appellees.

PER CURIAM.

This is an appeal from a decision of the Court of Appeals of the State of Maryland the effect of which is to deny the appellant a place on the ballot for a municipal election in the City of Baltimore on the ground that she has refused to file an affidavit required by state law. Md. Laws 1949, c. 86, § 15. — Md. —, 78 A. 2d 660. The scope of the state law was passed on in *Shub* v. *Simpson,* — Md. —, 76 A. 2d 332. We read this decision to hold that to obtain a place on a Maryland ballot a candidate need only make oath that he is not a person who is engaged "in one way or another in the attempt

to overthrow the government *by force or violence*," and that he is not knowingly a member of an organization engaged in such an attempt. — Md. at —, 76 A. 2d at 338. At the bar of this Court the Attorney General of the State of Maryland declared that he would advise the proper authorities to accept an affidavit in these terms as satisfying in full the statutory requirement. Under these circumstances and with this understanding, the judgment of the Maryland Court of Appeals is

Affirmed.

MR. JUSTICE REED concurs in the result.

UNITED STATES *v.* WILLIAMS ET AL.

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

No. 134. Argued January 8, 1951.—Decided April 23, 1951.

In a prosecution for violation of what is now 18 U. S. C. § 242, arising out of the alleged beating of persons to coerce confessions, and for conspiracy against Fourteenth Amendment rights of citizens in alleged violation of what is now 18 U. S. C. § 241, appellee Williams was convicted and the other three appellees were acquitted of the substantive offenses, and the jury was unable to agree on a verdict on the conspiracy counts. Appellees were reindicted for the conspiracy and were convicted; but, on appeal, the Court of Appeals reversed and ordered the indictment quashed on the ground that § 241 does not embrace Fourteenth Amendment rights. An indictment of appellees under 18 U. S. C. § 1621 for perjury in the first trial, charging Williams with falsely testifying that he had not beaten the victims, and charging the other appellees with falsely testifying that they had not seen Williams beating the victims, was dismissed by the District Court. *Held:*

1. The conviction of Williams on the charge of beating the victims did not bar, as double jeopardy, his prosecution for perjury in testifying falsely that he had not beaten them. P. 62.

2. That the other appellees had been acquitted of the substantive offense of aiding and abetting Williams in abusing the victims did not bar, on the ground of *res judicata*, their subsequent prosecution for perjury in testifying that they had not seen Williams beating them. *Sealfon* v. *United States*, 332 U. S. 575, distinguished. Pp. 63–65.

3. Testifying falsely in the first trial on the conspiracy charges constituted perjury under 18 U. S. C. § 1621, even though on appeal it was determined that the later indictment for conspiracy was defective. Pp. 65–69.

(a) In the trial of the first conspiracy charges the District Court had jurisdiction of the subject matter (an alleged violation of a federal conspiracy statute) and of the parties, and therefore was a "competent tribunal" within the requirement of the perjury statute. Pp. 65–66.

(b) The circumstance that ultimately it is determined on appeal that the indictment is defective does not affect the jurisdiction of the trial court to determine the case presented by the indictment. P. 66.

(c) Where the court in the proceedings in which the alleged perjury occurred had jurisdiction to render judgment on the merits in those proceedings, defects developed *dehors* the record or in the procedure, sufficient to invalidate any judgment on review, do not bar a conviction for perjury. Pp. 67–69.

93 F. Supp. 922, reversed.

The District Court dismissed an indictment of appellees for perjury under 18 U. S. C. § 1621. 93 F. Supp. 922. On direct appeal to this Court under 18 U. S. C. § 3731, *reversed,* p. 69.

Philip Elman argued the cause for the United States. With him on the brief were *Solicitor General Perlman, Assistant Attorney General McInerney, Robert S. Erdahl* and *Philip R. Monahan.*

Ernest E. Roberts and *John D. Marsh* argued the cause for appellees. *Bart A. Riley* was on the brief for Williams, *Mr. Roberts* for Yuhas, and *Mr. Marsh* for Ford et al., appellees.

Mr. Justice Reed delivered the opinion of the Court.

The United States appeals from an order of the United States District Court for the Southern District of Florida dismissing an indictment against the appellees here. 18 U. S. C. § 3731. That indictment, 18 U. S. C. § 1621, charged each appellee with the crime of perjury while testifying in a prior criminal trial. The former trial was on charges of using "third degree" methods to force confessions from prisoners.

In that prior trial, six defendants—the four appellees and two others not here involved—were prosecuted under an indictment, four counts of which charged them, 18

U. S. C. (1946 ed.) § 51, now 18 U. S. C. § 241, with conspiring "to injure, oppress, threaten, and intimidate [under color of state law, four citizens of the United States] in the free exercise and enjoyment of the rights and privileges secured . . . and protected by the Fourteenth Amendment. . . ." [1]

The other four counts of the indictment, 18 U. S. C. (1946 ed.) § 52, now 18 U. S. C. § 242, charged that Williams, Bombaci, Ford, and another not here involved, as police officers acting under state laws, committed substantive crimes by subjecting four persons to deprivation of certain "of the rights, privileges and immunities secured . . . and protected by the Fourteenth Amendment," [2] and that Yuhas and another wilfully aided and abetted in the commission of these substantive offenses.

In the prior trial, during which this indictment charges perjury was committed, Williams was found guilty by a jury of the substantive offenses. His conviction is affirmed today. See No. 365, *Williams* v. *United States, post,* p. 97. The jury found Bombaci and Ford not guilty of these offenses and Yuhas not guilty of aiding and abetting in the commission of these offenses. However, the jury was unable to agree on a verdict as to the four counts which charged conspiracy. Later a new in-

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[1] The indictment specified the following "rights and privileges":

". . . the right and privilege not to be deprived of liberty without due process of law, the right and privilege to be secure in his person while in the custody of the State of Florida, the right and privilege not to be subjected to punishment without due process of law, the right and privilege to be immune, while in the custody of persons acting under color of the laws of the State of Florida, from illegal assault and battery by any person exercising the authority of said State, and the right and privilege to be tried by due process of law and if found guilty to be sentenced and punished in accordance with the laws of the State of Florida; . . . ."

[2] The specific "rights and privileges" are the same as those listed in note 1.

dictment was presented which framed once again the conspiracy charges, and this time the appellees in this case were found guilty. The perjury charges now before us are not based on the proceedings in the second conspiracy trial. On appeal from the conviction in the second trial, and before the trial for perjury, the Court of Appeals quashed the conspiracy indictment and reversed. So far as here important, the basis for the reversal was that § 241 did not apply to the general rights extended to all persons by the Fourteenth Amendment. 179 F. 2d 644, 648. This Court, today, affirms the Court of Appeals. No. 26, *United States* v. *Williams,* decided today, *post,* p. 70.

In dismissing the indictment in the case now before us, the District Court held, 93 F. Supp. 922, that since Williams had been convicted in the first trial of the substantive counts based upon his beating certain victims, to convict Williams of perjury for testifying that he had not beaten the victims—which is the gist of the perjury indictment against Williams—would constitute double jeopardy.

The District Court further reasoned that the jury's finding that Yuhas, Ford and Bombaci had not been guilty of the substantive offenses in the first trial, was a determination of their innocence "whether as principals or accessories," and therefore none of the three could be found guilty of the charge made by the perjury indictment: testifying falsely that they had not seen or observed Williams beating the victims.

Finally, the District Court reasoned that since the later indictment which repeated the conspiracy charges had been quashed on appeal, there was no jurisdiction to try the defendants on the conspiracy counts in the first criminal trial, and therefore the perjury counts based on the conspiracy counts in the prior case were bad.

The United States in its appeal urges that the District Court erred in all three grounds for quashing the perjury

indictment. The federal perjury statute, 18 U. S. C. § 1621, reads as follows:

> "Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both."

Its terms cover parties as well as other witnesses. If any incident or judgment of a former trial bars a prosecution for perjury under § 1621, that effect must be imported into the perjury trial by a legal rule distinct from the statute.

I. *Former Jeopardy.*—The conviction of Williams, at a former trial, for beating certain victims is not former or double jeopardy. Obviously perjury at a former trial is not the same offense as the substantive offense, under 18 U. S. C. § 242, of depriving a person of constitutional rights under color of law. "It is only an identity of offenses which is fatal." *Pinkerton* v. *United States,* 328 U. S. 640, 644, and cases cited. The trial court does not cite any authority for a contrary position, and appellees concede that the ground for dismissal cannot be sustained. It would be no service to the administration of justice to enlarge the conception of former jeopardy to afford a defendant immunity from prosecution for perjury while giving testimony in his own defense. Appellees' brief treats Williams' conviction as grounds for estoppel or *res judicata.*

II. *Res Judicata.*—Though former jeopardy by trial for the substantive crimes is not available as a defense against this perjury indictment, it could be that acquittal on the substantive charges would operate "to conclude those matters in issue which the verdict determined though the offenses be different." *Sealfon* v. *United States,* 332 U. S. 575, 578.

Petitioner in the *Sealfon* case was acquitted of a conspiracy charge of defrauding the United States of its governmental function of conserving and rationing sugar. One item of evidence was a letter to an alleged co-conspirator said to furnish a basis for getting sugar illegally. On another indictment for uttering false invoices for the same sugar involved in the conspiracy, Sealfon moved to quash on the ground of *res judicata.* The motion was denied and Sealfon was convicted. The test of the soundness of the motion was whether the "verdict in the conspiracy trial was a determination favorable to petitioner of the facts essential to conviction of the substantive offense." P. 578. We thought the acquittal of conspiracy determined that Sealfon did not conspire with Greenberg, the only alleged co-conspirator. Admittedly Sealfon wrote a certain letter. "As we read the records of the two trials, petitioner could be convicted of either offense only on proof that he wrote the letter pursuant to an agreement with Greenberg." P. 580. The core of the two cases was the same. As the first trial cleared him of sending the letter pursuant to a corrupt agreement, that fact was *res judicata.* A like basis for *res judicata* does not exist here.

Ford and Bombaci were acquitted in the former trial on all counts charging substantive crimes. Yuhas was charged and acquitted of aiding and abetting. We shall assume with the District Court that Ford and Bombaci were acquitted also of that charge. 18 U. S. C. § 2 (a). In essence the first prosecution was for arrest and abuse

through beatings by police officers Williams, Ford and Bombaci, acting under the laws of Florida, with Yuhas aiding and abetting. The perjury charged in this present indictment, allegedly committed at that former trial in which all except Williams were acquitted of the substantive offenses, is that the three acquitted men testified falsely that they had not seen Williams abuse the prisoner. The trial court thought that "Whether they had seen or observed Williams beat the victims was a part and parcel of the charge against them in the substantive counts" of abuse and aiding and abetting the abuse. *Ehrlich* v. *United States,* 145 F. 2d 693, was cited.[3] 93 F. Supp. 922.

We do not think the facts bring any of these defendants within the protection of *res judicata,* as recently expounded in *Sealfon.* Aiding and abetting means to assist the perpetrator of the crime.[4] The substantive former

[3] In the *Ehrlich* case an acquittal of a charge of violation of the Price Control Act, 50 U. S. C. App. § 901 *et seq.*, by collecting more than the sale bills for meat showed was held to bar a perjury charge that Ehrlich had sworn falsely that he had not received any payment for any sale at a price in excess of that shown on the sales slips. It was held that the plea in bar of the second prosecution was good on the ground that the allegedly perjurious words were the basis of the former crime charged and therefore the acquittal barred the perjury prosecution.

A number of other cases are cited in appellees' brief. They support the rule that an acquittal on facts essential to conviction on the subsequent charge bars a later prosecution. None deal with the situation of Williams who was convicted on the prior trial of abuse under 18 U. S. C. § 242. He can, of course, claim no bar against prosecution on a theory of estoppel since the facts in the former trial, if applicable to the subsequent one, were found against him. The cases are: *United States* v. *De Angelo,* 138 F. 2d 466; *United States* v. *Butler,* 38 F. 498; *Chitwood* v. *United States,* 178 F. 442; *Allen* v. *United States,* 194 F. 664; *Youngblood* v. *United States,* 266 F. 795; *Kuskulis* v. *United States,* 37 F. 2d 241.

[4] To be present at a crime is not evidence of guilt as an aider or abettor. *Hicks* v. *United States,* 150 U. S. 442, 447, 450. Cf. *United States* v. *Di Re,* 332 U. S. 581, 587; 12 A. L. R. 279. The instructions

charge against appellees here was abuse of a prisoner by police officers under color of state law. An acquittal of such a crime or of aiding and abetting was certainly not a determination that Ford, Bombaci or Yuhas did not see Williams assaulting the prisoners.

III. The counts in this indictment which charge that perjury was committed in the first conspiracy trial rely on the same facts to prove the perjury as are detailed above to support the counts of the indictment which charge perjury in the trial of the substantive counts. The trial court in the present case dismissed the counts for perjury committed in the first trial of the conspiracy charge for a different reason than it gave for dismissal of the other perjury counts. In the first trial no verdict was reached by the jury on the conspiracy counts. The trial court in this case, however, relying upon the determination of the Fifth Circuit in the second conspiracy trial, *Williams* v. *United States,* 179 F. 2d 644 (now affirmed here, No. 26, *United States* v. *Williams, post,* p. 70, decided today), ruled that the former conspiracy indictment did not state an offense, and consequently perjury could not have been committed. The court said it reached this conclusion because the court that tried the conspiracy indictment had "no jurisdiction." Evidently, the trial court was led to this conclusion by the requirement of the perjury statute, 18 U. S. C. § 1621, that there must be a "competent tribunal" before a false statement is perjurious.

The charge in the conspiracy counts that the appellees, police officers and others, conspired to abuse a prisoner in their hands was based on 18 U. S. C. § 241. The District Court had jurisdiction of offenses against the laws of

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at the trial of the substantive crimes followed this rule. *E. g.,* "I can't make it too emphatic to you, gentlemen, that mere presence when a crime is committed is, of course, not sufficient to render one guilty as aider or abettor."

the United States. 18 U. S. C. § 3231.[5] Hence, it had jurisdiction of the subject matter, to wit, an alleged violation of a federal conspiracy statute, and, of course, of the persons charged. This made the trial take place before "a competent tribunal": a court authorized to render judgment on the indictment. The circumstance that ultimately it is determined on appeal that the indictment is defective does not affect the jurisdiction of the trial court to determine the case presented by the indictment.

This was held as to a civil proceeding in *Bell* v. *Hood,* 327 U. S. 678. In that case, a suit in a federal district court for damages against federal officers for violation of plaintiff's rights to due process in arrest and freedom from unreasonable search and seizure under the Fourth and Fifth Amendments was held to give the district court jurisdiction sufficient to call for judgment on the merits, even though that judgment should dismiss the complaint for failure to state a cause of action. P. 682. "Jurisdiction is the power to decide a justiciable controversy, and includes questions of law as well as of fact." *Binderup* v. *Pathe Exchange,* 263 U. S. 291, 305. Even the unconstitutionality of the statute under which the proceeding is brought does not oust a court of jurisdiction. *Chicot County District* v. *Baxter State Bank,* 308 U. S. 371, 376. See also *Stoll* v. *Gottlieb,* 305 U. S. 165; *M'Cormick* v. *Sullivant,* 10 Wheat. 192.

It is true that there are certain essential facts that must exist to give any power to a court. *Noble* v. *Union River Logging R. Co.,* 147 U. S. 165, 173. As the existence of those facts are so plainly necessary, *e. g.* process, examples of decisions are rare. Absence of such facts makes the

[5] "The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.

"Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof."

proceedings a nullity. Such a case was *Kalb* v. *Feuerstein,* 308 U. S. 433. We there held that the Federal Government, in the exercise of its plenary power over bankruptcy, had ousted state courts of all independent power over farmer bankrupts. Therefore any subsequent orders in the state courts were void. Pp. 440–444. In a criminal case we have said that a person convicted by a court without jurisdiction over the place of the crime could be released from restraint by habeas corpus where there were exceptional circumstances such as a conflict of jurisdiction between the state and the Federal Government. *Bowen* v. *Johnston,* 306 U. S. 19, 27. The kind of judicial controversies presented for adjudication in the cases cited above in this paragraph were not cognizable by the respective courts. It is absence of such basic facts of jurisdiction that has led courts to say that false testimony in the proceedings is not punishable as perjury. Where perjury charges arise from alleged false statements by the defendant in former trials, whether in that former trial he was also a defendant or only a witness, the same distinctions appear. Where the court of the first trial had no jurisdiction of the kind of judicial controversies presented for adjudication, a number of courts have held that false testimony in those proceedings is not punishable as perjury.[6] So in a case where the court had general jurisdiction of the kind of prosecution, larceny less than felony, but not of the particular proceeding, larceny as a felony, there was no perjury. *Johnson* v. *State,* 58 Ga. 397. But where the court in the trial where the alleged perjury occurred had jurisdiction to render judgment on the merits in those proceedings, defects developed *dehors* the record [7] or in the procedure, sufficient to invalidate any

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[6] *E. g., Collins* v. *State,* 78 Ala. 433; *Paine's Case,* Yel. 111, 80 Eng. Rep. 76 [1792].

[7] 82 A. L. R. 1138.

judgment on review,[8] do not make a subsequent conviction for perjury in the former trial impossible.

One can find inconsistent and indeed conflicting rulings among the cases, even from the same jurisdictions, perhaps attributable to the use of the word "jurisdiction" in the heterogeneous situations that occur. The line is narrow and often wavering between errors in the proceedings and lack of jurisdiction. Wharton, Criminal Law (12th ed.), § 1538. Here, however, we have a federal statute enacted in an effort to keep the course of justice free from the pollution of perjury. We have a court empowered to take cognizance of the crime of perjury and decide the issues under that statute. The effect of the alleged false testimony could not result in a miscarriage of justice in this case but the federal statute against perjury is not directed so much at its effects as at its perpetration; at the probable wrong done the administration of justice by false testimony. That statute has led federal courts to uphold charges of perjury despite arguments that the federal court at the trial affected by the perjury could not enter a valid judgment due to lack of diversity jurisdiction,[9] or due to the unconstitutionality of the statute out of which the perjury proceedings arose.[10]

Where a federal court has power, as here, to proceed to a determination on the merits, that is jurisdiction of the proceedings. The District Court has such jurisdiction.[11] Though the trial court or an appellate court may

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[8] 82 A. L. R. 1137.

[9] *West* v. *United States,* 258 F. 413, 416.

[10] *Boehm* v. *United States,* 123 F. 2d 791, 809. Cf. *Kay* v. *United States,* 303 U. S. 1, 6; *Howat* v. *Kansas,* 258 U. S. 181, 186, 189; *Blair* v. *United States,* 250 U. S. 273; *United States* v. *United Mine Workers,* 330 U. S. 258, 289–295.

[11] The validity of § 241 has been repeatedly upheld. *E. g., United States* v. *Mosley,* 238 U. S. 383, 386; *Logan* v. *United States,* 144 U. S. 263, 293; *Ex parte Yarbrough,* 110 U. S. 651, 667.

conclude that the statute is wholly unconstitutional, or that the facts stated in the indictment do not constitute a crime or are not proven, it has proceeded with jurisdiction and false testimony before it under oath is perjury.

Reversed.

MR. JUSTICE BLACK and MR. JUSTICE FRANKFURTER dissent.

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UNITED STATES *v.* WILLIAMS ET AL.

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

No. 26. Argued January 8, 1951.—Decided April 23, 1951.

After one of the respondents had been convicted and the others acquitted of substantive offenses under what is now 18 U. S. C. § 242—*i. e.*, beating or aiding and abetting the beating of certain suspects until they confessed to a theft—they were convicted in the Federal District Court for a violation of what is now 18 U. S. C. § 241. The indictment arose out of the same facts and alleged that, "acting under the laws of . . . Florida," they "conspired to injure . . . a citizen of the United States and of the State of Florida, in the free exercise and enjoyment of the rights and privileges secured to him and protected by the Fourteenth Amendment." The Court of Appeals reversed their conviction on this conspiracy indictment. *Held:* The judgment of the Court of Appeals is affirmed. P. 82.

(a) MR. JUSTICE FRANKFURTER, joined by THE CHIEF JUSTICE, MR. JUSTICE JACKSON and MR. JUSTICE MINTON, was of the opinion that § 241 only covers conduct which interferes with rights arising from the substantive powers of the Federal Government, and that including an allegation that the defendants acted under color of state law in an indictment under § 241 does not extend the protection of the section to rights which the Federal Constitution merely guarantees against abridgment by the states. Pp. 71–82.

(b) MR. JUSTICE BLACK concurred in the result on the ground that trial under this conspiracy indictment was barred by the principle of *res judicata*. Pp. 85–86.

179 F. 2d 644, affirmed.

MR. JUSTICE DOUGLAS, joined by MR. JUSTICE REED, MR. JUSTICE BURTON and MR. JUSTICE CLARK, dissented. P. 87.

A conviction of respondents for violation of what is now 18 U. S. C. § 241 was reversed by the Court of Appeals. 179 F. 2d 644. This Court granted certiorari. 340 U. S. 849. *Affirmed*, p. 82.

Philip Elman argued the cause for the United States. With him on the brief were *Solicitor General Perlman, Assistant Attorney General McInerney* and *Sydney Brodie.*

John D. Marsh argued the cause for Ford, appellee, and filed a brief for Ford et al., appellees. With him on the brief was *Bart A. Riley* for Williams, appellee.

MR. JUSTICE FRANKFURTER announced the judgment of the Court and an opinion in which THE CHIEF JUSTICE, MR. JUSTICE JACKSON and MR. JUSTICE MINTON joined.

In 1947 a Florida corporation employed a detective agency to investigate thefts of its property. The inquiry was conducted by one Williams, the head of the agency, and among the participants were two of his employees and a member of the Miami police force detailed to assist in the investigation. Certain of the company's employees fell under suspicion; and Williams and his collaborators, without arresting the suspects, took them one by one to a shack on the company's premises. There the investigators subjected them to the familiar "third-degree" which, after blows, kicks, threats, and prolonged exposure to a brilliant light, yielded "confessions."

Williams and the other three were thereupon indicted for violation of §§ 19 and 20 of the Criminal Code of the United States. 18 U. S. C. (1946 ed.) §§ 51 and 52, now 18 U. S. C. §§ 241 and 242. Williams was convicted under § 20, the indictment alleging that he "wilfully, under color of the laws, statutes, ordinances, regulations and customs of the State of Florida . . . subjected . . . an inhabitant of the State of Florida, to deprivation of the rights, privileges and immunities secured to him and protected by the Fourteenth Amendment . . . ." This conviction is reviewed in No. 365, *post,* p. 97, also decided this day. The other defendants were acquitted of the charges under § 20, and as to all defendants a

mistrial was declared under § 19. This outcome of the indictment under §§ 19 and 20 was followed by a new indictment against the four defendants under § 19. The indictment alleged that "acting under the laws of the State of Florida" the defendants "conspired to injure . . . a citizen of the United States and of the State of Florida, in the free exercise and enjoyment of the rights and privileges secured to him and protected by the Fourteenth Amendment . . . ." This time all the defendants were convicted; but on appeal the Court of Appeals for the Fifth Circuit reversed. It held that in the conspiracy provision of § 19 "the Congress had in mind the federal rights and privileges which appertain to citizens as such and not the general rights extended to all persons by the clause of the Fourteenth Amendment." 179 F. 2d 644, 648. In the alternative, the court concluded that a broader construction of § 19 would render it void for indefiniteness, and that there was error in the judge's charge as well as in the exclusion of evidence of the prior acquittal of three of the defendants. Together with Nos. 134 and 365 of this Term, the other two cases growing out of the same affair, we brought the case here because important questions in the administration of civil rights legislation are raised. 340 U. S. 849.

The alternative grounds for the decision of the Court of Appeals need not be considered, for we agree that § 241 (to use the current designation for what was § 19 of the Criminal Code) does not reach the conduct laid as an offense in the prosecution here. This is not because we deny the power of Congress to enforce by appropriate criminal sanction every right guaranteed by the Due Process Clause of the Fourteenth Amendment; nor is it because we fully accept the course of reasoning of the court below. We base our decision on the history of § 241, its text and context, the statutory framework in which it stands, its practical and judicial application—controlling

elements in construing a federal criminal provision that affects the wise adjustment between State responsibility and national control of essentially local affairs. The elements all converge in one direction. They lead us to hold that § 241 only covers conduct which interferes with rights arising from the substantive powers of the Federal Government.

What is now known as § 241 originated as § 6 of the Act of May 31, 1870, 16 Stat. 140. That statute was entitled "An Act to enforce the Right of Citizens of the United States to vote in the several States of this Union, and for other Purposes." In furtherance of its chief end of assuring the right of Negroes to vote, it provided in §§ 2 and 3 that it should be a misdemeanor for any "person or officer" wrongfully to fail in a duty imposed on him by State law to perform or permit performance of acts necessary to registering or voting. In § 4 interference with elections by private persons was made a similar offense. In the course of passage through Congress several sections were added which had a larger purpose. One of them, § 17, was derived from the Civil Rights Act of 1866, 14 Stat. 27, and was designed to "secure to all persons the equal protection of the laws." [1] It imposed imprisonment up to one year and a fine up to one thousand dollars on

> "any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by the last preceding section of this act, or to different punishment, pains, or penalties on account of such person being an alien, or by reason of his color or race, than is prescribed for the punishment of citizens . . . ." 16 Stat. 140, 144.

[1] See the remarks of Senator Stewart at the time he proposed the amendment, Cong. Globe, 41st Cong., 2d Sess. 3480 (1870).

Through successive revisions it has become § 242, the application of which to the facts before us is considered in No. 365, *post*, p. 97.

Another of the broader provisions is the section which is our immediate concern. This was its original form:

> "SEC. 6. *And be it further enacted,* That if two or more persons shall band or conspire together, or go in disguise upon the public highway, or upon the premises of another, with intent to violate any provision of this act, or to injure, oppress, threaten, or intimidate any citizen with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States, or because of his having exercised the same, such persons shall be held guilty of felony, and, on conviction thereof, shall be fined or imprisoned, or both, at the discretion of the court,—the fine not to exceed five thousand dollars, and the imprisonment not to exceed ten years,—and shall, moreover, be thereafter ineligible to, and disabled from holding, any office or place of honor, profit, or trust created by the Constitution or laws of the United States." 16 Stat. 140, 141.

The dominant conditions of the Reconstruction Period were not conducive to the enactment of carefully considered and coherent legislation. Strong post-war feeling caused inadequate deliberation and led to loose and careless phrasing of laws relating to the new political issues. The sections before us are no exception. Although enacted together, they were proposed by different sponsors and hastily adopted. They received little attention in debate. While the discussion of the bill as a whole fills about 100 pages of the Congressional Globe, only two or three related to § 6, and these are in good part

a record of complaint that the section was inadequately considered or understood.[2]

Nevertheless some conclusions are warranted. The first is that interference with civil rights by State officers was dealt with fully by § 17 of the Act. Three years before its enactment Congress had passed the first general conspiracy statute. Act of March 2, 1867, § 30, 14 Stat. 484; R. S. § 5440; now 18 U. S. C. § 371. This provision, in conjunction with § 17, reached conspiracies under color of State law to deprive persons of rights guaranteed

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[2] Sections 2, 3, and 4 appeared in the bill as it was first introduced into the Senate. Cong. Globe, 41st Cong., 2d Sess. 3480 (1870). Section 17 was proposed by Senator Stewart at the outset of the debate. *Ibid.* Section 6 was subsequently proposed by Senator Pool. *Id.*, 3612.

The debate of the Senate, which considered the Act as in Committee of the Whole, is found between pp. 3479 and 3808 of the Congressional Globe. Illustrative of the discussion of the consideration given the Act are these remarks of Senator Casserly:

"One of the worst provisions of the bill as it passed this body and as it went to the committee of conference, was a provision which escaped the notice of nearly every one of the minority of this body, and I verily believe of a very considerable portion of the majority of the Senators in this body. I refer to those provisions which were taken out of a bill for the enforcement of the fourteenth amendment.

"Now, is it a fit thing that legislation of that importance should go through the American Congress unknown to those members who had taken the greatest interest in informing themselves, as well as to that large body of other members whose right it was to know upon what they were voting? . . . I shall not undertake to show how far the course of the majority, in forcing the Senate bill through to a final vote at a midnight session of unusual duration, without the least public demand or exigency for such a proceeding, contributed to such a result; how far it contributed to the making, to the enacting into a law of provisions which were not supposed or understood by a considerable portion of the body to be in the bill that was before it." *Id.*, 3759. See also the remarks of Senators Thurman and Stewart, *id.*, 3672, 3808. The House devoted very little attention to the Act. See *id.*, 1812, 3503, 3853, 3871.

by the Fourteenth Amendment. No other provision of the Act of 1870 was necessary for that purpose.

The second conclusion is that if language is to carry any meaning at all it must be clear that the principal purpose of § 6, unlike § 17, was to reach private action rather than officers of a State acting under its authority. Men who "go in disguise upon the public highway, or upon the premises of another" are not likely to be acting in official capacities. The history of the times—the lawless activities of private bands, of which the Klan was the most conspicuous—explains why Congress dealt with both State disregard of the new constitutional prohibitions and private lawlessness.[3] The sponsor of § 6 in the Senate made explicit that the purpose of his amendment was to control private conduct.[4]

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[3] The depth of feeling which the lawlessness of the period evoked is reflected in the letter of Chief Justice Thomas Ruffin to his son, July 8, 1869. See 4 Hamilton, The Papers of Thomas Ruffin, 225.

[4] In introducing the provisions Senator Pool said,

"There are, Mr. President, various ways in which the right secured by the fifteenth amendment may be abridged by citizens in a State. If a State should undertake by positive enactment, as I have said, to abridge the right of suffrage, the courts of the country would prevent it; and I find that in section two of the bill which has been proposed as a substitute by the Judiciary Committee of the Senate provision is made for cases where officers charged with registration or officers charged with the assessment of taxes and with making the proper entries in connection therewith, shall refuse the right to register or to pay taxes to a citizen. . . . But, sir, individuals may prevent the exercise of the right of suffrage; individuals may prevent the enjoyment of other rights which are conferred upon the citizen by the fourteenth amendment, as well as trespass upon the right conferred by the fifteenth. Not only citizens, but organizations of citizens, conspiracies, may be and are, as we are told, in some of the States formed for that purpose." *Id.*, 3611.

The only other pertinent remarks of the Senator are these:

"I believe that the United States has the right, and that it is an incumbent duty upon it, to go into the States to enforce the rights of the citizens against all who attempt to infringe upon those rights

These two conclusions strongly suggest a third: that the rights which § 6 protects are those which Congress can beyond doubt constitutionally secure against interference by private individuals. Decisions of this Court have established that this category includes rights which arise from the relationship of the individual and the Federal Government. The right of citizens to vote in congressional elections, for instance, may obviously be protected by Congress from individual as well as from State interference. *Ex parte Yarbrough,* 110 U. S. 651. On the other hand, we have consistently held that the category of rights which Congress may constitutionally protect from interference by private persons excludes those rights which the Constitution merely guarantees from interference by a State. Thus we held that an individual's interest in receiving a fair trial in State courts cannot be constitutionally vindicated by federal prosecution of private persons. *United States* v. *Powell,* 212 U. S. 564; accord, *Hodges* v. *United States,* 203 U. S. 1; *United*

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when they are recognized and secured by the Constitution of the country. . . .

"Mr. President, the liberty of a citizen of the United States, the prerogatives, the rights, and the immunities of American citizenship, should not be and cannot be safely left to the mere caprice of States either in the passage of laws or in the withholding of that protection which any emergency may require. If a State by omission neglects to give to every citizen within its borders a free, fair, and full exercise and enjoyment of his rights it is the duty of the United States Government to go into the State, and by its strong arm to see that he does have the full and free enjoyment of those rights." *Id.,* 3613.

In both these passages the Senator states clearly that his proposals are intended to be applicable to private persons. In neither does he indicate distinctly the nature of the rights which § 6 is to protect. The phrase "rights which are conferred upon the citizen by the fourteenth amendment" does not necessarily refer to interests guaranteed by the Amendment against State action. It may be relevant only to the new federal rights created by the Amendment through conferring citizenship on persons not previously entitled to it.

States v. *Wheeler,* 254 U. S. 281. The distinction which these decisions draw between rights that flow from the substantive powers of the Federal Government and may clearly be protected from private interference, and interests which the Constitution only guarantees from interference by States, is a familiar one in American law. See, *e. g., Strauder* v. *West Virginia,* 100 U. S. 303, 310.

To construe § 6 so as to protect interests not arising from the relationship of the individual with the Federal Government, but only guaranteed by the Constitution from interference by the States, would make its scope duplicate the coverage of § 17 and the general conspiracy clause. That this is not in fact what Congress desired is confirmed by further examination of the text of the statute. Full allowance for hasty draftsmanship cannot obscure clear indications from the text that the category of interests protected by § 6 does not include the rights against State action secured by § 17.

Thus, when Congress wished to protect from State action interests guaranteed by the Fourteenth Amendment, it described them in § 17 as rights "secured or protected" by the Constitution. But in § 6 the narrower phrase "granted or secured" is used to define the interests protected from interference by individuals. When Congress wanted to reach action by State officers, the explicit reference in § 17 to "color" of State law demonstrates that Congress knew how to make this purpose known. Similarly, reference in §§ 2 and 3 to "persons or officers" indicates that Congress was able explicitly to draft a section applicable to persons acting in private and official capacities alike. In contrast, § 6 was made applicable simply to "persons." Nothing in its terms indicates that color of State law was to be relevant to prosecution under it.[5]

[5] The position of § 6 in the statute as well as its phraseology indicates that it was not intended to be a companion to § 17, and to punish conspiracies wherever that section prohibited the substantive

To find this significance in the text of the Act of 1870 is not to give undue weight to differences in phraseology appearing in the statute. For the text of these sections has been considered by Congress not once but five times. Some minor changes of phraseology were made in the course of the successive revisions. But neither the Revised Statutes of 1874–1878, nor the Criminal Code of 1909, nor the 1926 codification in the United States Code, nor the 1948 revision of the Criminal Code, indicates either in text or reviser's commentary any change in substance. The continuity of meaning is indicated in the Appendix to this opinion, *post,* p. 83.

In three of the revisions, furthermore, Congress had before it a consistent course of decisions of this Court indicating that § 6—now § 241—was in practice interpreted only to protect rights arising from the existence and powers of the Federal Government. The pattern was established by *United States* v. *Cruikshank,* 92 U. S. 542. The defendants were indicted for conspiring to deprive some Negro citizens of rights secured by the Constitution. This Court affirmed the decision of the Circuit Court arresting judgment entered on a verdict of guilty. It found that counts alleging interference with rights secured by the First, Second, Fourteenth and Fifteenth Amendments were objectionable because the rights asserted were not "granted or secured by the constitution or laws of the United States" within the meaning of the statute. 92 U. S. at 551. The pattern set by this case has never been departed from.

Ex parte Yarbrough, 110 U. S. 651, was the first of seven decisions in which the Court held or assumed that the

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offense. It is likewise clear that § 6 was not intended to apply the provisions of § 17 to private persons in the sense that § 4 supplements §§ 2 and 3. The location of § 6 in the statute to the contrary confirms that its purpose and coverage are distinct from the other provisions of the law.

right to vote in federal elections was protected by this legislation because it was a right "granted or secured" by the Constitution or laws of the United States. *Guinn* v. *United States,* 238 U. S. 347; *United States* v. *Mosley,* 238 U. S. 383; and *United States* v. *Saylor,* 322 U. S. 385, held that interference by private persons with the right to vote in general elections for members of Congress is an offense under § 241; in *United States* v. *Classic,* 313 U. S. 299, the statute was found applicable to the Louisiana system of primary elections for Congress.[6]

In *United States* v. *Waddell,* 112 U. S. 76, interference with the right to establish a claim under the Homestead Acts brought the offender within § 241. The right did not pertain to United States citizenship; but since it was "wholly dependent upon the act of Congress," obstructing its exercise came "within the purview of the statute and of the constitutional power of Congress to make such statute." 112 U. S. at 79, 80. Similarly, the Court has held that assault upon a citizen in the custody of a United States marshal is a violation of the statute, *Logan* v. *United States,* 144 U. S. 263. And so, a citizen may not be denied the right to inform on violation of federal laws. *In re Quarles,* 158 U. S. 532; *Motes* v. *United States,* 178 U. S. 458.

Contrariwise, we have held that conspiracies to force citizens to give up their jobs or compel them to move out of a State are not within the terms of the statute. *Hodges* v. *United States,* 203 U. S. 1; *United States* v. *Wheeler,* 254 U. S. 281. And in *United States* v. *Powell,* 212 U. S. 564, we held that participants in a mob which seized a

[6] The two other decisions involving elections found the indictments wanting because what was charged was not deemed to constitute an effective interference with the exercise of a voter's federal franchise. *United States* v. *Gradwell,* 243 U. S. 476; *United States* v. *Bathgate,* 246 U. S. 220.

Negro from the custody of the local sheriff and lynched him were not indictable under § 241.[7]

In none of these decisions was the precise issue before us decided, for in none was it alleged that the defendants acted under color of State law. But the validity of a conviction under § 241 depends on the scope of that section, which cannot be expanded by the draftsman of an indictment. The uses to which a statute has been put are strong evidence of the ends it was intended to serve. In this instance the decisions buttress what common sense and a spontaneous reading of the statute independently make clear, and give added significance to repeated reenactment without substantial change.[8] All the evidence points to the same conclusion: that § 241 applies only to interfer-

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[7] *Baldwin* v. *Franks,* 120 U. S. 678, held that a conspiracy to drive aliens from their homes is not an offense under the statute, since it is expressly limited to interference with citizens. In three other decisions of this Court the section was involved, but no question pertinent to the issues now before us was decided. *United States* v. *Mason,* 213 U. S. 115; *O'Sullivan* v. *Felix,* 233 U. S. 318; *Pennsylvania System Federation* v. *Pennsylvania R. Co.,* 267 U. S. 203.

[8] It is worth noting that count 1 of the indictment in *Screws* v. *United States,* 325 U. S. 91, laid a charge under § 51 (now § 241) similar to the indictment now here for review. There was a demurrer to that indictment on the ground that § 51 did not afford a legal basis for such a charge. The argument advanced by the Government to support count 1 was substantially the argument the Government now makes in this case. The demurrer was sustained and the Government did not challenge the District Court's interpretation of § 51, although the Criminal Appeals Act of 1907, 34 Stat. 1246, 18 U. S. C. (1946 ed.) § 682, now 18 U. S. C. § 3731, enabled the Government to secure review of that construction here.

In a few early cases this section was applied in lower courts to rights not arising from the relation of the victim to the Federal Government. See *United States* v. *Hall,* 26 Fed. Cas. 79; *United States* v. *Mall,* 26 Fed. Cas. 1147; *Ex parte Riggins,* 134 F. 404. Since in none of these decisions was it alleged that the defendants acted under color of State law, each is plainly inconsistent with subsequent decisions of this Court. They also run counter even to the arguments adduced in support of the conviction here.

ence with rights which arise from the relation of the victim and the Federal Government, and not to interference by State officers with rights which the Federal Government merely guarantees from abridgment by the States.

To reject this evidence and hold the indictment valid under § 241 not only involves a new, distorting construction of an old statute. It also makes for redundancy and confusion and raises some needless constitutional problems. For if we assume that a conspiracy such as that described here is under color of State law, it can be reached under § 242 and the general conspiracy statute. Indeed, the defendants before us were indicted and tried for violation of § 242; the conviction of one of them under that section is before us in No. 365, *post,* p. 97. Unlike § 242, the section now before us is not qualified by the requirement that the defendants have acted "willfully," and the very specialized content attributed to that word was found essential to sustaining § 242 in *Screws* v. *United States,* 325 U. S. 91. Nor does the defined crime have as an ingredient that the conspiracy be under color of State law. Criminal statutes should be given the meaning their language most obviously invites. Their scope should not be extended to conduct not clearly within their terms.

We therefore hold that including an allegation that the defendants acted under color of State law in an indictment under § 241 does not extend the protection of the section to rights which the Federal Constitution merely guarantees against abridgment by the States. Since under this interpretation of the statute the indictment must fall, the judgment of the court below is

Affirmed.

[For opinion of MR. JUSTICE BLACK, concurring in the result, see *post,* p. 85.]

[For dissenting opinion of MR. JUSTICE DOUGLAS, joined by MR. JUSTICE REED, MR. JUSTICE BURTON and MR. JUSTICE CLARK, see *post,* p. 87.]

Criminal Civil Rights Legislation: Comparative Table of Successive Phraseology

Material deleted by next subsequent revision shown in brackets. Material added or substituted in revision shown in italics

Act of April 9, 1866, 14 Stat. 27	Act of May 31, 1870, 16 Stat. 141, 144	Revised Statutes of 1874–1878	Criminal Code of 1909, 35 Stat. 1092	United States Code, 1926 Codification, 44 Stat. 462, now 1946 ed.	Title 18, United States Code, as revised in 1948
	SEC. 6. *And be it further enacted,* That if two or more persons [shall band or] conspire [together], or go in disguise upon the [public] highway, or upon the premises of another, with intent to [violate any provision of this act, or to] injure, oppress, threaten, or intimidate any citizen with intent to prevent or hinder his free exercise and enjoyment of any right or privilege [granted or] secured to him by the Constitution or laws of the United States, or because of his having exercised the same, such persons [shall be held guilty of felony, and, on conviction thereof,] shall be fined or imprisoned, [or both, at the discretion of the court,]—the fine not to exceed five thousand dollars, and the imprisonment not to exceed ten years,—and shall, moreover, be thereafter ineligible to, and disabled from holding, any office or place of honor, profit, or trust created by the Constitution or laws of the United States.[1]	SEC. 5508. If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or if two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured, they shall be fined not more than five thousand dollars *and* imprisoned not more than ten years; and shall, moreover, be thereafter ineligible to any office, or place of honor, profit, or trust created by the Constitution or laws of the United States.[1]	SEC. 19. If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same, or if two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured, they shall be fined not more than five thousand dollars and imprisoned not more than ten years, and shall, moreover, be thereafter ineligible to any office, or place of honor, profit, or trust created by the Constitution or laws of the United States.	Section 51. Conspiracy to injure persons in exercise of civil rights.—If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same, or if two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured, they shall be fined not more than $5,000 and imprisoned not more than ten years, [and shall, moreover, be thereafter ineligible to any office, or place of honor, profit, or trust created by the Constitution or laws of the United States].	§ 241. Conspiracy against rights of citizens If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured— They shall be fined not more than $5,000 *or* imprisoned not more than ten years, *or both.*
SEC. 2. *And be it further enacted,* That any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by this act, or to different punishment, pains, or penalties on account of such person [having at any time been held in a condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, or] by reason of his color or race, than is prescribed for the punishment of white persons, shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by fine not exceeding one thousand dollars, or imprisonment not exceeding one year, or both, in the discretion of the court.	SEC. 17. *And be it further enacted,* That any person who, under color of any law, statute, ordinance, regulation, or custom, [shall] subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by *the last preceding section of* this act, or to different punishment, pains, or penalties on account of such person *being an alien, or* by reason of his color or race, than is prescribed for the punishment of *citizens,* shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by fine not exceeding one thousand dollars, or imprisonment not exceeding one year, or both, [in the discretion of the court].[2]	SEC. 5510. *Every* person who, under color of any law, statute, ordinance, regulation, or custom, subjects, or causes to be subjected, any inhabitant of any State or Territory to the deprivation of any rights, *privileges, or immunities,* secured or protected by *the Constitution and laws of the United States,* or to different punishments, pains, or penalties, on account of such *inhabitant* being an alien, or by reason of his color or race, than *are* prescribed for the punishment of citizens, shall be punished by *a* fine of not *more than* one thousand dollars, or *by* imprisonment not *more than* one year, or *by* both.	SEC. 20. *Whoever,* under color of any law, statute, ordinance, regulation, or custom, *willfully* subjects, or causes to be subjected, any inhabitant of any State, Territory, *or District* to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be *fined* not more than one thousand dollars, or *imprisoned* not more than one year, or both.	§ 52. Depriving citizens of civil rights under color of State laws.—Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects, [or causes to be subjected,] any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000, or imprisoned not more than one year, or both.	§ 242. Deprivation of rights under color of law Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution *or* laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

[1] Because of the rearrangement and simplification of the clauses of § 6 in the Revision of 1874–1878, certain changes cannot conveniently be shown by brackets and italics. They are immaterial.

[2] The rights referred to in the preceding section are "to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens [and to] be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and none other." § 16, 16 Stat. 144.

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MR. JUSTICE BLACK, concurring in the result.

This is one of three prosecutions of respondents Williams, Ford, Bombaci and Perry arising out of their alleged conduct in brutally coercing confessions from certain persons suspected of theft. The first prosecution was under an indictment charging respondents and two other defendants not now before us with violation of the substantive offense and conspiracy sections of the Civil Rights Act. 18 U. S. C. (1946 ed.) §§ 51, 52, now 18 U. S. C. §§ 241, 242. That trial resulted in conviction of respondent Williams and acquittal of the other five on the substantive counts; a mistrial was declared as to all defendants on the conspiracy counts.[1] Shortly thereafter two new indictments were returned: One again charged the six defendants with the same conspiracy; the other charged four of them with having committed perjury during their first trial.[2] On the second trial for conspiracy all were convicted and it is these convictions of respondents that we review in the present case.

I am convinced from the records before us that the principle of *res judicata* should have barred the Government from trying respondents on this second indictment for conspiracy. In the first trial the judge instructed the jury to convict on the substantive counts all defendants who either committed that crime or aided, abetted, assisted, counseled, encouraged, commanded, induced, procured or incited any other person to do so. Acquittal of

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[1] Williams' conviction on the substantive counts is reviewed in *Williams* v. *United States*, 341 U. S. 97, decided today.

[2] The indictment charging respondents Williams, Ford and Bombaci (and one defendant not before us in the present case) with perjury is reviewed today in *United States* v. *Williams*, 341 U. S. 58. Respondents have claimed that because of the pending perjury charges the defendants refrained from testifying in the present trial for conspiracy.

the five defendants was, therefore, a final determination that they had done none of these things, or, in effect, that they had nothing to do with the commission of the substantive offense itself. The principle of *res judicata* of course precludes a relitigation of the same factual issues in any subsequent trial. *Sealfon* v. *United States,* 332 U. S. 575. This being true, the broad scope of the facts found adversely to the Government in the first trial barred a conviction of the five defendants upon the second trial because there is no evidence that they conspired except insofar as the unlawful agreement can be inferred from their having participated in some way in the substantive crime. Consequently, the conspiracy convictions cannot stand as to respondents Ford, Bombaci and Perry, these three being among those previously found not guilty of the substantive charge.

Nor should the conspiracy conviction of respondent Williams stand under these circumstances. The indictment did not allege and there was no evidence to suggest that he conspired with anyone other than the five named defendants. As a result, when the Government was precluded by *res judicata* from proving the guilt of any of Williams' alleged co-conspirators, the *basis* of the conspiracy charge as to Williams was necessarily removed since one person obviously cannot conspire with himself. Cf. *Morrison* v. *California,* 291 U. S. 82, 93; *Feder* v. *United States,* 257 F. 694; see also the cases collected in 72 A. L. R. 1180, 1186–1187; 97 A. L. R. 1312, 1313, 1316–1317.

Because, for the foregoing reasons, I believe the conspiracy convictions of respondents must fail, I find it unnecessary to determine whether 18 U. S. C. (1946 ed.) § 51, now 18 U. S. C. (1946 ed., Supp. III) § 241, as applied, is too vague and uncertain in scope to be consistent with the Fifth Amendment.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE REED, MR. JUSTICE BURTON, and MR. JUSTICE CLARK concur, dissenting.

Sections 19 and 20 of the Criminal Code, now 18 U. S. C. §§ 241 and 242, are companion sections designed for the protection of great rights won after the Nation's most critical internal conflict. Section 19 covers conspiracies; § 20, substantive offenses. Section 19 protects the "citizen"; § 20 the "inhabitant." The sanction of § 19 extends to "any right or privilege secured" to the citizen "by the Constitution or laws of the United States"; the sanction of § 20 to "any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States." [1]

Mr. Justice Rutledge in *Screws* v. *United States,* 325 U. S. 91, 119, wrote that in spite of the difference in word-

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[1] Section 19 of the Criminal Code, 18 U. S. C. (1946 ed.) § 51, provided: "If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same, or if two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured, they shall be fined not more than $5,000 and imprisoned not more than ten years, and shall, moreover, be thereafter ineligible to any office, or place of honor, profit, or trust created by the Constitution or laws of the United States."

Section 20 of the Criminal Code, 18 U. S. C. (1946 ed.) § 52, provided: "Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects, or causes to be subjected, any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000, or imprisoned not more than one year, or both."

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ing of §§ 19 and 20 there are "no differences in the basic rights guarded. Each protects in a different way the rights and privileges secured to individuals by the Constitution." One would indeed have to strain hard at words to find any difference of substance between "any right or privilege secured" by the Constitution or laws of the United States (§ 19) and "any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States" (§ 20). If § 20 embraces a broader range of rights than § 19, it must be because it includes "immunities" as well as "rights" and "privileges" and "protects" them as well as "secures" them. When no major difference between §§ 19 and 20 is apparent from the words themselves, it is strange to hear it said that though § 20 extends to rights guaranteed against state action by the Fourteenth Amendment, § 19 is limited to rights which the Federal Government can secure against invasion by private persons. The division of powers between State and Nation is so inherent in our republican form of government and so well established throughout our history that if Congress had desired to draw a distinction along that line, it is hard to imagine that it would not have made its purpose clear in the language used.[2]

It is true that §§ 19 and 20 have different origins. Section 20 came into the law as § 2 of the Act of April 7, 1866, 14 Stat. 27, while § 19 first appeared as § 6 of the

[2] The suggestion that the general conspiracy statute, § 30 of the Act of March 2, 1867, 14 Stat. 484, enacted three years before § 19, was adequate to reach conspiracies under color of state law to deprive persons of Fourteenth Amendment rights and that therefore the inclusion of such rights in § 19 was not necessary bears little weight. The general conspiracy statute as originally enacted carried a penalty of not less than $1,000 and not more than $10,000 and imprisonment not exceeding 2 years. Section 19 has from the beginning carried a more severe penalty—not more than $5,000 and imprisonment not to exceed 10 years. Moreover, § 19 at the time of its enactment carried a further penalty: the persons convicted were disabled from

Act of May 31, 1870, 16 Stat. 141. We reviewed the history of § 20 in *Screws* v. *United States,* 325 U. S. 91, 98–100. The legislative history makes plain that § 20 was an antidiscrimination measure designed to protect Negroes in their newly won rights. It was enacted before the Fourteenth Amendment became effective. But after that date it was reenacted as § 17 of the Act of May 31, 1870, 16 Stat. 144; and in 1874 the prohibition against "the deprivation of any rights, privileges, or immunities, secured or protected by the Constitution and laws of the United States" was introduced. R. S. § 5510. From this history there can be no doubt, as we stated in *Screws* v. *United States, supra,* p. 100, that § 20 is "one of the sanctions to the great rights which the Fourteenth Amendment was designed to secure." If that be true—if "rights, privileges, or immunities secured or protected by the Constitution and laws of the United States" as used in § 20 are not restricted to rights which the Federal Government can secure against interference by private persons—it is difficult to understand why "any right or privilege secured to him by the Constitution or laws of the United States," as used in § 19, is so restricted.

It is true that a part of the purpose of § 19 (which, as I have said, originated as § 6 of the Act of May 31, 1870, 16 Stat. 141) was to give sanction to the right to vote which was guaranteed by the Fifteenth Amendment, recently adopted. That is made plain from the congressional debates. Cong. Globe, Pt. 4, 41st Cong., 2d Sess., pp. 3607 *et seq.* Yet the rights which § 19 protected were not confined to voting rights; and one who reads the legislative history finds no trace of a suggestion that the

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holding "any office or place of honor, profit, or trust created by the Constitution or laws of the United States." Act of May 31, 1870, § 6, 16 Stat. 141. The penalty of the general conspiracy statute has only recently been increased. See 18 U. S. C. (1946 ed., Supp. III) § 371, reviser's note.

broadening of the language of § 19 to include "any right or privilege secured" by the Constitution or laws of the United States was aimed only at those rights "secured" by the Federal Government against invasion by private persons.

The distinction now urged has not been noticed by students of the period. Thus Flack, in Adoption of the Fourteenth Amendment (1908), p. 223, wrote, "The bill as passed by the Houses was signed by the President May 31, 1870, and so became a law, and was, therefore, the first law for the enforcement of the Fourteenth and Fifteenth Amendments." And see Mr. Justice Roberts in *Hague* v. *C. I. O.*, 307 U. S. 496, 510. If the drastic restriction now proposed for § 19 had been part of the architectural scheme for the Act of May 31, 1870, it is difficult to imagine that some trace of the purpose would not have been left in the legislative history. What we find points indeed the other way. Senator Pool of North Carolina, who introduced the section from which § 19 evolved, indicated that it was his purpose to extend the protection of the new provision to the Fourteenth as well as to the Fifteenth Amendment.[3] It has, indeed,

[3] After discussing the Thirteenth, Fourteenth, and Fifteenth Amendments he said, "I believe that we have a perfect right under the Constitution of the United States, not only under these three amendments, but under the general scope and features and spirit of the Constitution itself, to go into any of these States for the purpose of protecting and securing liberty. I admit that when you go there for the purpose of restraining liberty, you can go only under delegated powers in express terms; but to go into the States for the purpose of securing and protecting the liberty of the citizen and the rights and immunities of American citizenship is in accordance with the spirit and whole object of the formation of the Union and the national Government.

"There are, Mr. President, various ways in which the right secured by the fifteenth amendment may be abridged by citizens in a State. . . . I believe the language of the Senate bill is sufficiently large

long been assumed that § 19 had a coverage broad enough to include all constitutional rights. Thus in *United States* v. *Mosley,* 238 U. S. 383, 387, Mr. Justice Holmes

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and comprehensive to embrace any other class of officers that might be charged with any act that was necessary to enable a citizen to perform any prerequisite to voting. But, sir, individuals may prevent the exercise of the right of suffrage; individuals may prevent the enjoyment of other rights which are conferred upon the citizen by the fourteenth amendment, as well as trespass upon the right conferred by the fifteenth. Not only citizens, but organizations of citizens, conspiracies, may be and are, as we are told, in some of the States formed for that purpose. I see in the fourth section of the Senate bill a provision for cases where citizens by threats, intimidation, bribery, or otherwise prevent, delay, or hinder the exercise of this right; but there is nothing here that strikes at organizations of individuals, at conspiracies for that purpose. . . .

. . . . . .

"That the United States Government has the right to go into the States and enforce the fourteenth and the fifteenth amendments is, in my judgment, perfectly clear, by appropriate legislation that shall bear upon individuals. I cannot see that it would be possible for appropriate legislation to be resorted to except as applicable to individuals who violate or attempt to violate these provisions. Certainly we cannot legislate here against States. As I said a few moments ago, it is upon individuals that we must press our legislation. It matters not whether those individuals be officers or whether they are acting upon their own responsibility; whether they are acting singly or in organizations. If there is to be appropriate legislation at all, it must be that which applies to individuals.

. . . . . .

"Mr. President, the liberty of a citizen of the United States, the prerogatives, the rights, and the immunities of American citizenship, should not be and cannot be safely left to the mere caprice of States either in the passage of laws or in the withholding of that protection which any emergency may require. If a State by omission neglects to give to every citizen within its borders a free, fair, and full exercise and enjoyment of his rights it is the duty of the United States Government to go into the State, and by its strong arm to see that he does have the full and free enjoyment of those rights." Cong. Globe, 41st Cong., 2d Sess., pp. 3611, 3613.

observed that § 19 "dealt with Federal rights and with all Federal rights."

There is no decision, prior to that of the Court of Appeals in this case, which is opposed to that view. Fourteenth Amendment rights have sometimes been asserted under § 19 and denied by the Court. That was true in *United States* v. *Cruikshank,* 92 U. S. 542. But the denial had nothing to do with the issues in the present case. The Fourteenth Amendment protects the individual against *state action,* not against wrongs done by *individuals.* See *Civil Rights Cases,* 109 U. S. 3; *Shelley* v. *Kraemer,* 334 U. S. 1. The *Cruikshank* case, like others,[4] involved wrongful action by *individuals* who did not act for a state nor under color of state authority. As the Court in the *Cruikshank* case said, "The fourteenth amendment prohibits a State from denying to any person within its jurisdiction the equal protection of the laws; but this provision does not, any more than the one which precedes it . . . add any thing to the rights which one citizen has under the Constitution against another." 92 U. S. at pp. 554–555. There is implicit in this holding, as Mr. Justice Rutledge observed in the *Screws* case, *supra,* p. 125, note 22, that wrongful action by state officials would bring the case within § 19. For the Court in the *Cruikshank* case stated, "The only obligation resting upon the United States is to see that the States do not deny the right. This the amendment guarantees, but no more. The power of the national government is limited to the enforcement of this guaranty."

Section 19 has in fact been applied to the protection of rights under the Fourteenth Amendment. See *United States* v. *Hall,* 26 Fed. Cas. 79; *United States* v. *Mall,* 26

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[4] See *Hodges* v. *United States,* 203 U. S. 1, 14; *United States* v. *Powell,* 151 F. 648, aff'd, 212 U. S. 564; *United States* v. *Wheeler,* 254 U. S. 281, 298.

Fed. Cas. 1147; *Ex parte Riggins,* 134 F. 404, writ dismissed, 199 U. S. 547. Those attempts which failed did so not because § 19 was construed to have too narrow a scope, but because the action complained of was *individual* action, not *state* action. See, *e. g., United States* v. *Powell,* 151 F. 648, aff'd, 212 U. S. 564; *Powe* v. *United States,* 109 F. 2d 147.

While it is true, as Mr. Justice Rutledge stated in the *Screws* case, that there is no difference between §§ 19 and 20 so far as the "basic rights guarded" are concerned, the coverage of the two sections is not coterminous. The difference is not merely in the fact that § 19 covers conspiracies and § 20 substantive offenses. Section 20 extends only to those who act "under color" of law, while § 19 reaches "two or more persons" who conspire to injure any citizen in the enjoyment of any right or privilege secured to him by the Constitution, etc. The reach of § 20 over deprivations of rights protected from invasion by private persons is therefore in this one respect less than that of § 19. But that is no comfort to respondents in the present case. It certainly cannot be doubted that state officers, or those acting under color of state law, who conspire to wring confessions from an accused by force and violence, are included in "two or more persons" within the meaning of § 19. As we hold in No. 365, *Williams* v. *United States, post,* p. 97, decided this day, such an act deprives the accused of the kind of trial which the Fourteenth Amendment guarantees. He is therefore denied the enjoyment of that right, within the meaning of § 19.

In *Screws* v. *United States, supra,* we relieved § 20 of the risk of unconstitutionality by reason of vagueness. We held that "a requirement of a specific intent to deprive a person of a federal right made definite by decision or other rule of law saves the Act from any charge of unconstitutionality on the grounds of vagueness." 325 U. S. at

p. 103. The same analysis does like service here, as evidenced both by the construction of § 19 and the charge to the jury in this case.

A conspiracy by definition is a criminal agreement for a specific venture. It is "a partnership in crime." *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 253. As stated by Mr. Justice Holmes in *Frohwerk* v. *United States*, 249 U. S. 204, 209, an "intent to accomplish an object cannot be alleged more clearly than by stating that parties conspired to accomplish it." The trial court in its charge to the jury followed the ruling in the *Screws* case and gave precise application to this concept in avoidance of any claim of unconstitutionality of § 19 on the grounds of vagueness. The court, after explaining to the jury what rights, enumerated in the indictment, were guaranteed under the Fourteenth Amendment, gave numerous charges on the element of intent. The following is typical:

> "In order to convict under this indictment, it is necessary for the jury to find that the defendants had in mind the specific purpose of depriving the complaining witnesses of those rights guaranteed them under the Fourteenth Amendment to the Constitution of the United States, which are enumerated in the indictment, while acting under color of the laws of the State of Florida.
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> "The proof, if any, of a general intent to do the complaining witnesses a wrong is not sufficient, but a specific intent to deprive them of a Constitutional right, as the object of the conspiracy, if any, is a burden the law casts upon the Government. In considering whether the defendants had such specific intent, you may take into consideration all the circumstances of the case in the light of the evidence as it has been developed."

In view of the nature of the conspiracy and charge to the jury in the instant case, it would be incongruous to strike § 19 down on the grounds of vagueness and yet sustain § 20 as we did in the *Screws* case.

The defense of *res judicata* is based on the acquittal of five of the respondents for violation of § 20—the substantive offense. It is argued that there is no evidence that the five conspired except insofar as the unlawful agreement can be inferred from their having participated in some way in the substantive crime. It is further argued that acquittal on the substantive counts was a determination that the five had nothing to do with the commission of the substantive offense. The conclusion therefore is that their conviction of the conspiracy entailed a relitigation, in violation of the principles of *Sealfon* v. *United States,* 332 U. S. 575, of the factual issues involved in the prior trial.

The argument, however, is too facile for the facts.

First. The substantive crime was one of aiding and abetting. That offense has "a broader application" than conspiracy. "It makes a defendant a principal when he consciously shares in any criminal act whether or not there is a conspiracy." *Nye & Nissen* v. *United States,* 336 U. S. 613, 620. Respondents may have conspired to do the act without actually aiding in its commission. In other words, the crimes are different.

Second. In the *Sealfon* case the jury's acquittal of the first offense necessarily constituted a rejection of the only evidence presented at the second trial and upon which conviction of the record offense depended. That was not true here. The acquittals on the substantive charges by no means established that the jury rejected all the evidence against the defendants. For example, the acquittals of the substantive offense may have been on the ground that the evidence showed no giving of actual aid to Williams when he obtained the confessions by force and violence.

The evidence, though insufficient to show that the five participated in the execution of the project, could nonetheless make overwhelmingly clear that they were members of the conspiracy that conceived it.

The links that tied respondents to the conspiracy are therefore not necessarily those that the jury rejected in the earlier trial. Accordingly the rule of *Sealfon* v. *United States, supra,* has no application.

WILLIAMS *v.* UNITED STATES.

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

No. 365. Argued January 8, 1951.—Decided April 23, 1951.

1. A special police officer who, in his official capacity, by use of force and violence, obtains a confession from a person suspected of crime may be prosecuted under what is now 18 U. S. C. § 242, which makes it an offense for any person, under color of law, willfully to subject any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States. Pp. 98–104.
2. Petitioner, a private detective who held a special police officer's card issued by the City of Miami, Fla., and had taken an oath and qualified as a special police officer, was employed by a business corporation to ascertain the identity of thieves who had been stealing its property. Showing his badge and accompanied by a regular policeman, he beat certain suspects and thereby obtained confessions. *Held:* On the record in this case, petitioner was acting "under color" of law within the meaning of § 242, or at least the jury could properly so find. Pp. 99–100.
3. As applied, under the facts of this case, to the denial of rights under the Due Process Clause of the Fourteenth Amendment, § 242 is not void for vagueness. Pp. 100–102.
4. Where police take matters into their own hands, seize victims, and beat them until they confess, they deprive the victims of rights under the Constitution. P. 101.
5. In view of the terms of the indictment, as interpreted by the instructions to the jury, it cannot be said that any issue of vagueness of § 242, as construed and applied, is present in this case. Pp. 102–104.

179 F. 2d 656, affirmed.

Petitioner was convicted of a violation of what is now 18 U. S. C. § 242. The Court of Appeals affirmed. 179 F. 2d 656. This Court granted certiorari. 340 U. S. 850. *Affirmed,* p. 104.

Bart A. Riley submitted on brief for petitioner.

Philip Elman argued the cause for the United States. With him on the brief were *Solicitor General Perlman, Assistant Attorney General McInerney* and *Sydney Brodie.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The question in this case is whether a special police officer who in his official capacity subjects a person suspected of crime to force and violence in order to obtain a confession may be prosecuted under § 20 of the Criminal Code, 18 U. S. C. (1946 ed.) § 52, now 18 U. S. C. § 242.

Section 20 provides in pertinent part:

> "Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects, or causes to be subjected, any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States . . . shall be fined not more than $1,000, or imprisoned not more than one year, or both."

The facts are these: The Lindsley Lumber Co. suffered numerous thefts and hired petitioner, who operated a detective agency, to ascertain the identity of the thieves. Petitioner held a special police officer's card issued by the City of Miami, Florida, and had taken an oath and qualified as a special police officer. Petitioner and others over a period of three days took four men to a paint shack on the company's premises and used brutal methods to obtain a confession from each of them. A rubber hose, a pistol, a blunt instrument, a sash cord and other implements were used in the project. One man was forced to look at a bright light for fifteen minutes; when he was blinded, he was repeatedly hit with a rubber hose

and a sash cord and finally knocked to the floor. Another was knocked from a chair and hit in the stomach again and again. He was put back in the chair and the procedure was repeated. One was backed against the wall and jammed in the chest with a club. Each was beaten, threatened, and unmercifully punished for several hours until he confessed. One Ford, a policeman, was sent by his superior to lend authority to the proceedings. And petitioner, who committed the assaults, went about flashing his badge.

The indictment charged among other things that petitioner acting under color of law used force to make each victim confess to his guilt and implicate others, and that the victims were denied the right to be tried by due process of law and if found guilty to be sentenced and punished in accordance with the laws of the state. Petitioner was found guilty by a jury under instructions which conformed with the rulings of the Court in *Screws* v. *United States,* 325 U. S. 91. The Court of Appeals affirmed. 179 F. 2d 656. The case, which is a companion to No. 26, *United States* v. *Williams, ante,* p. 70, and No. 134, *United States* v. *Williams, ante,* p. 58, decided this day, is here on certiorari. 340 U. S. 850.

We think it clear that petitioner was acting "under color" of law within the meaning of § 20, or at least that the jury could properly so find. We interpreted this phrase of § 20 in *United States* v. *Classic,* 313 U. S. 299, 326, "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law." And see *Screws* v. *United States, supra,* 107–111. It is common practice, as we noted in *Labor Board* v. *Jones & Laughlin Co.,* 331 U. S. 416, 429, for private guards or detectives to be vested with policemen's powers. We know from the record that that is the policy of Miami, Florida. Moreover, this was an investi-

gation conducted under the aegis of the State, as evidenced by the fact that a regular police officer was detailed to attend it. We need go no further to conclude that the lower court, to whom we give deference on local law matters, see *Gardner* v. *New Jersey,* 329 U. S. 565, 583, was correct in holding that petitioner was no mere interloper but had a semblance of policeman's power from Florida. There was, therefore, evidence that he acted under authority of Florida law; and the manner of his conduct of the interrogations makes clear that he was asserting the authority granted him and not acting in the role of a private person. In any event, the charge to the jury drew the line between official and unofficial conduct which we explored in *Screws* v. *United States, supra,* 111, and gave petitioner all of the protection which "color of" law as used in § 20 offers.

The main contention is that the application of § 20 so as to sustain a conviction for obtaining a confession by use of force and violence is unconstitutional. The argument is the one that a clear majority of the Court rejected in *Screws* v. *United States,* and runs as follows:

Criminal statutes must have an ascertainable standard of guilt or they fall for vagueness. See *United States* v. *Cohen Grocery Co.,* 255 U. S. 81; *Winters* v. *New York,* 333 U. S. 507. Section 20, it is argued, lacks the necessary specificity when rights under the Due Process Clause of the Fourteenth Amendment are involved. We are pointed to the course of decisions by this Court under the Due Process Clause as proof of the vague and fluid standard for "rights, privileges, or immunities secured or protected by the Constitution" as used in § 20. We are referred to decisions where we have been closely divided on whether state action violated due process. More specifically we are cited many instances where the Court has been conspicuously in disagreement on the illegal char-

acter of confessions under the Due Process Clause. If the Court cannot agree as to what confessions violate the Fourteenth Amendment, how can one who risks criminal prosecutions for his acts be sure of the standard? Thus it is sought to show that police officers such as petitioner walk on ground far too treacherous for criminal responsibility.

Many criminal statutes might be extended to circumstances so extreme as to make their application unconstitutional. Conversely, as we held in *Screws* v. *United States,* a close construction will often save an act from vagueness that is fatal. The present case is as good an illustration as any. It is as plain as a pikestaff that the present confessions would not be allowed in evidence whatever the school of thought concerning the scope and meaning of the Due Process Clause. This is the classic use of force to make a man testify against himself. The result is as plain as if the rack, the wheel, and the thumb screw—the ancient methods of securing evidence by torture (*Brown* v. *Mississippi,* 297 U. S. 278, 285–286; *Chambers* v. *Florida,* 309 U. S. 227, 237)—were used to compel the confession. Some day the application of § 20 to less obvious methods of coercion may be presented and doubts as to the adequacy of the standard of guilt may be presented. There may be a similar doubt when an officer is tried under § 20 for beating a man to death. That was a doubt stirred in the *Screws* case; and it was the reason we held that the purpose must be plain, the deprivation of the constitutional right willful. But where police take matters in their own hands, seize victims, beat and pound them until they confess, there cannot be the slightest doubt that the police have deprived the victim of a right under the Constitution. It is the right of the accused to be tried by a legally constituted court, not by a kangaroo court. Hence when officers wring confessions from the accused

by force and violence, they violate some of the most fundamental, basic, and well-established constitutional rights which every citizen enjoys. Petitioner and his associates acted willfully and purposely; their aim was precisely to deny the protection that the Constitution affords.* It was an arrogant and brutal deprivation of rights which the Constitution specifically guarantees. Section 20 would be denied the high service for which it was designed if rights so palpably plain were denied its protection. Only casuistry could make vague and nebulous what our constitutional scheme makes so clear and specific.

An effort, however, is made to free Williams by an extremely technical construction of the indictment and charge, so as to condemn the application of § 20 on the grounds of vagueness.

The indictment charged that petitioners deprived designated persons of rights and privileges secured to them by the Fourteenth Amendment. These deprivations were defined in the indictment to include "illegal" assault and battery. But the meaning of these rights in the context of the indictment was plain, viz. *immunity from the use*

*The trial judge charged in part on this phase of the case: "The law denies to anyone acting under color of law, statute, ordinance, regulation or custom the right to try a person by ordeal; that is, for the officer himself to inflict such punishment upon the person as he thinks the person should receive. Now in determining whether this requisite of willful intent was present in this case as to these counts, you gentlemen are entitled to consider all the attendant circumstances; the malice, if any, of the defendants toward these men; the weapon used in the assault, if any; and the character and duration of the investigation, if any, of the assault, if any, and the time and manner in which it was carried out. All these facts and circumstances may be taken into consideration from the evidence that has been submitted for the purpose of determining whether the acts of the defendants were willful and for the deliberate and willful purpose of depriving these men of their Constitutional rights to be tried by a jury just like everyone else."

of force and violence to obtain a confession. Thus count 2 of the indictment charges that the Fourteenth Amendment rights of one Purnell were violated in the following respects:

> ". . . the right and privilege not to be deprived of liberty without due process of law, the right and privilege to be secure in his person while in the custody of the State of Florida, the right and privilege not to be subjected to punishment without due process of law, the right and privilege to be immune, while in the custody of persons acting under color of the laws of the State of Florida, from illegal assault and battery by any person exercising the authority of said State, and the right and privilege to be tried by due process of law and if found guilty to be sentenced and punished in accordance with the laws of the State of Florida; that is to say, on or about the 28th day of March, 1947, the defendants arrested and detained and caused to be arrested and detained the said Frank J. Purnell, Jr., and brought and caused him to be brought to and into a certain building sometimes called a shack on the premises of the Lindsley Lumber Co., at or near 3810 N. W. 17th Avenue, in said City of Miami, Florida, and did there detain the said Frank J. Purnell, Jr., and while he was so detained the defendants did then and there illegally strike, bruise, batter, beat, assault and torture the said Frank J. Purnell, Jr., in order illegally to coerce and force the said Frank J. Purnell, Jr., to make an admission and confession of his guilt in connection with the alleged theft of personal property, alleged to be the property of said Lindsley Lumber Co., and in order illegally to coerce and force the said Frank J. Purnell, Jr., to name and accuse other persons as participants in alleged thefts of personal

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property, alleged to be the property of the said Lindsley Lumber Co., and for the purpose of imposing illegal summary punishment upon the said Frank J. Purnell, Jr."

The trial judge in his charge to the jury summarized Count 2 as meaning that the defendants beat Purnell "for the purpose of forcing him to make a confession and for the purpose of imposing illegal summary punishment upon him." He further made clear that the defendants were "not here on trial for a violation of any law of the State of Florida for assault" nor "for assault under any laws of the United States." There cannot be the slightest doubt from the reading of the indictment and charge as a whole that the defendants were charged with and tried for one of the most brutal deprivations of constitutional rights that can be imagined. It therefore strains at technicalities to say that any issue of vagueness of § 20 as construed and applied is present in the case. Our concern is to see that substantial justice is done, not to search the record for possible errors which will defeat the great purpose of Congress in enacting § 20.

Affirmed.

MR. JUSTICE BLACK dissents.

MR. JUSTICE FRANKFURTER, MR. JUSTICE JACKSON and MR. JUSTICE MINTON, dissenting.

Experience in the effort to apply the doctrine of *Screws* v. *United States,* 325 U. S. 91, leads MR. JUSTICE FRANKFURTER, MR. JUSTICE JACKSON and MR. JUSTICE MINTON to dissent for the reasons set forth in dissent in that case.

CALIFORNIA STATE AUTOMOBILE ASSOCIATION INTER-INSURANCE BUREAU *v.* MALONEY, INSURANCE COMMISSIONER.

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

No. 310. Argued March 8, 1951.—Decided April 23, 1951.

The California Compulsory Assigned Risk Law requires all insurers transacting liability insurance in the State to participate in a plan for the equitable apportionment among them of those applicants for automobile liability insurance who are in good faith entitled to such insurance (to enable them to retain drivers' licenses) but are unable to procure it through ordinary methods. Uninsurable risks are excluded from the plan, policies issued may be limited to coverages of $5,000–$10,000, and premiums commensurate with abnormal risks may be charged. Appellant is an unincorporated association engaged in writing reciprocal liability insurance solely for members of an automobile club having a selected membership, and the plan would require it to write insurance for nonmembers of the club who are poor risks. *Held:* As applied to appellant, the statute does not violate the Due Process Clause of the Fourteenth Amendment. Pp. 106–111.

96 Cal. App. 2d 876, 216 P. 2d 882, affirmed.

A California court sustained the California Compulsory Assigned Risk Law, Cal. Stat. 1947, c. 39, p. 525, as amended, against a claim that it violated the Due Process Clause of the Fourteenth Amendment. 96 Cal. App. 2d 876, 216 P. 2d 882. On appeal to this Court, *affirmed,* p. 111.

Moses Lasky argued the cause for appellant. With him on the brief were *Maurice E. Harrison* and *Herman Phleger.*

Harold B. Haas, Deputy Attorney General of California, argued the cause for appellee. With him on the brief were *Edmund G. Brown,* Attorney General, and *T. A.*

Westphal, Jr., Deputy Attorney General. *Fred N. Howser,* then Attorney General, was with *Mr. Haas* and *Mr. Westphal* on a motion to dismiss or affirm.

Nathaniel L. Goldstein, Attorney General, *Wendell P. Brown,* Solicitor General, and *John C. Crary, Jr.,* Assistant Attorney General, filed a brief for the State of New York, as *amicus curiae,* supporting appellee.

Mr. Justice Douglas delivered the opinion of the Court.

Appellant is an unincorporated association which the California District Court of Appeal analogizes to a mutual insurance corporation. The details of its organization and operation are not important here. It is supervised by the Insurance Commissioner of California, like other insurance companies doing a liability insurance business. It was formed to write automobile insurance to a select group of members at a lower cost than the then prevailing rate. A California law requiring proof of financial responsibility from certain people before issuing them a license to drive a car, provides that a person who does not pay a judgment of $100 or more arising out of an automobile accident has his driver's license suspended, and the suspension can be lifted only by paying the judgment and establishing his ability to pay claims arising from future accidents. That ability to pay may be established by proof that the person is insured, by posting a surety bond, or by deposit of $11,000 in cash. Cal. Vehicle Code, 1943, §§ 410, 414. Another law requires operators of trucks for hire to supply such evidence of financial responsibility before they may get permits to operate trucks. Cal. Stat. 1935, c. 312.

One result of these laws was to make it impossible for a large number of drivers—classified as poor risks by the insurance companies and not possessing enough resources

to get a surety bond or to make the cash deposit—to receive drivers' licenses to operate motor vehicles. Some of these people were poor risks, others were not. Many hardship cases developed among people who were dependent on the use of the highways for a living. There was a proposal that California go into the insurance business and insure these and other risks. The insurance companies countered by adopting a voluntary assigned risk plan under which all automobile insurance companies doing business in California undertook to insure some, though not all, of the groups unable to obtain insurance. This plan, approved by California's Insurance Department, provided for the allocation of applicants to the subscribing insurers in proportion to the amount of automobile insurance written by each in the preceding year.

The voluntary plan did not reach all applicants. Moreover, appellant withdrew from it, causing the other insurers to be reluctant to continue it. Thereupon the legislature enacted the Compulsory Assigned Risk Law. Cal. Stat. 1947, c. 39, p. 525, as amended, c. 1205. It provides that the Insurance Commissioner shall approve "a reasonable plan for the equitable apportionment" among insurers of applicants for automobile insurance "who are in good faith [1] entitled to but are unable to procure such insurance through ordinary methods." Cal. Ins. Code, 1947, § 11620. It is mandatory on all insurers to subscribe to the plan. *Id.* §§ 11625, 11626.

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[1] Under the plan approved by the Commissioner, Cal. Administrative Code, 1947, Tit. 10, §§ 2400–2498, there are several categories of people excluded. Those excluded cover a wide range. The following are illustrative: those convicted more than once, within three years of application, of manslaughter or negligent homicide resulting from operation of the vehicle; those convicted more than twice, in the same three-year period, of driving while intoxicated or under the influence of liquor; those addicted to use of drugs. § 2431.

The plan approved by the Commissioner was objectionable to appellant, who refused to subscribe to it. The Commissioner, acting pursuant to authority granted him, suspended appellant's permit to transact automobile liability insurance in California. Appellant contested the suspension in the California courts. The District Court of Appeal sustained the act against the claim that it violated the Due Process Clause of the Fourteenth Amendment. 96 Cal. App. 2d 876, 216 P. 2d 882. A petition for hearing was denied by the Supreme Court. The case is here on appeal. 28 U. S. C. § 1257 (2).

Appellant assails the constitutionality of the Act under the Due Process Clause of the Fourteenth Amendment on the following grounds: it commands insurers to enter into contracts and to incur liabilities against their will; it forces on insurers contracts that have abnormal risks and from which financial loss may be expected; it requires appellant to alter its type of business from a cooperative with a select membership to a venture insuring members of the general public.

Appellant in support of its contentions presses *Michigan Commission* v. *Duke*, 266 U. S. 570, and *Frost Trucking Co.* v. *Railroad Comm'n*, 271 U. S. 583, on us. Those cases held that private carriers by motor vehicle could not consistently with Due Process be converted into public carriers by legislative fiat nor be allowed to use the public highways only on condition that they become common carriers. We put those cases to one side. To be sure, appellant is required to insure members of a different group than the select one it voluntarily undertook to serve. But there are important restrictions on the financial commitments incident to the broadened undertaking. We were advised on the argument that the premiums chargeable can be commensurate with the greater risks of the new business. Confiscation is therefore not a factor in the case. Moreover, the California statute provides

for an equitable apportionment of the assigned risks among all insurers, not that appellant serve all comers. Furthermore, uninsurable risks are eliminated from the plan; and policies issued may provide limited coverage of $5,000–$10,000.

The case in its broadest reach is one in which the state requires in the public interest each member of a business to assume a *pro rata* share of a burden which modern conditions have made incident to the business. It is therefore not unlike *Noble State Bank* v. *Haskell,* 219 U. S. 104, which sustained a state law assessing each state bank for the creation of a depositors' guaranty fund. What was there said about the police power—that it "extends to all the great public needs" and may be utilized in aid of what the legislative judgment deems necessary to the public welfare (p. 111)—is peculiarly apt when the business of insurance is involved—a business to which the government has long had a "special relation." [2] See *Os-*

[2] State regulation of the insurance business has been upheld in a wide variety of circumstances against the claim that the law violated the Due Process Clause of the Fourteenth Amendment: See *Hooper* v. *California,* 155 U. S. 648, requirement of license and bond; *Orient Insurance Co.* v. *Daggs,* 172 U. S. 557, fixing recovery at insured value; *Nutting* v. *Massachusetts,* 183 U. S. 553, license and deposit of security; *Carroll* v. *Greenwich Insurance Co.,* 199 U. S. 401, prohibition of combinations or agreements between companies; *Northwestern Life Ins. Co.* v. *Riggs,* 203 U. S. 243, limitation of defenses; *Whitfield* v. *Aetna Life Ins. Co.,* 205 U. S. 489, same; *German Alliance Ins. Co.* v. *Hale,* 219 U. S. 307, statutory penalty against rate-fixing combinations; *German Alliance Ins. Co.* v. *Lewis,* 233 U. S. 389, rate regulations; *Mountain Timber Co.* v. *Washington,* 243 U. S. 219, workmen's compensation act; *La Tourette* v. *McMaster,* 248 U. S. 465, licensing of brokers; *National Union Fire Ins. Co.* v. *Wanberg,* 260 U. S. 71, limiting the time for rejection of hail insurance policies; *Merchants Mutual Automobile Ins. Co.* v. *Smart,* 267 U. S. 126, regulation of liability under indemnity policies; *Aetna Insurance Co.* v. *Hyde,* 275 U. S. 440, rate regulations; *O'Gorman & Young* v. *Hartford Fire Ins. Co.,* 282 U. S. 251, regulation of agents' commissions;

born v. *Ozlin,* 310 U. S. 53, 65, 66. Here, as in the banking field, the power of the state is broad enough to take over the whole business, leaving no part for private enterprise. *Mountain Timber Co.* v. *Washington,* 243 U. S. 219; *Osborn* v. *Ozlin, supra,* p. 66. The state may therefore hold its hand on condition that local needs be serviced by the business. *Osborn* v. *Ozlin, supra,* was such a case; it sustained on that theory Virginia's law requiring Virginia residents to have a share in writing casualty and surety risks in Virginia. The principle of *Osborn* v. *Ozlin* now presses for recognition in a situation as acute as any with which the states have had to deal. Highway accidents with their train of property and personal injuries are notoriously important problems in every community. Clearing the highways of irresponsible drivers, devising ways and means for making sure that compensation is awarded the innocent victims, and yet managing a scheme which leaves the highways open for the livelihood of the deserving are problems that have taxed the ingenuity of law makers and administrators.

Whether California's program is wise or unwise is not our concern. See *Olsen* v. *Nebraska,* 313 U. S. 236; *Lincoln Union* v. *Northwestern Co.,* 335 U. S. 525. The problem is a local one on which views will vary. We cannot say California went beyond permissible limits when it made the liability insurance business accept insurable risks which circumstances barred from insurance

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Hardware Dealers Mutual Fire Ins. Co. v. *Glidden Co.,* 284 U. S. 151, prescribing compulsory arbitration provisions; *Life & Casualty Ins. Co.* v. *McCray,* 291 U. S. 566, additional recovery for failure to pay on demand; *Osborn* v. *Ozlin,* 310 U. S. 53, requiring participation by resident agents; *Hoopeston Canning Co.* v. *Cullen,* 318 U. S. 313, regulation of reciprocal insurance associations; *State Farm Mutual Automobile Ins. Co.* v. *Duel,* 324 U. S. 154, reserve requirements; *Robertson* v. *California,* 328 U. S. 440, licensing of brokers; *Daniel* v. *Family Security Life Ins. Co.,* 336 U. S. 220, separation of life insurance and undertaking businesses.

and hence from the highways. Appellant's business may of course be less prosperous as a result of the regulation. That diminution in value, however, has never mounted to the dignity of a taking in the constitutional sense. See *Noble State Bank* v. *Haskell, supra,* p. 110; *Block* v. *Hirsh,* 256 U. S. 135, 155.

Affirmed.

Mr. Justice Black would dismiss the appeal on the ground that the constitutional questions are frivolous.

WOODWARD *v.* UNITED STATES ET AL.

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

No. 476. Argued April 11, 1951.—Decided April 23, 1951.

A brother by adoption is a permissible beneficiary under § 602 (g) of the National Service Life Insurance Act of 1940. Pp. 112–113. 185 F. 2d 134, reversed.

Claude T. Wood argued the cause for petitioner. With him on the brief was *Louren G. Davidson.*

Solicitor General Perlman, Assistant Attorney General Baldridge, John R. Benney, Paul A. Sweeney and *Herman Marcuse* submitted on brief for the United States, respondent.

Flavius B. Freeman argued the cause for Haizlip, respondent. With him on the brief was *Jean Paul Bradshaw.*

PER CURIAM.

Petitioner brought this action against the United States to secure the proceeds of a National Service Life Insurance Policy taken out by Evelyn Haizlip, a member of the Women's Army Corps. Before insured's death in 1945, petitioner, described by insured as her "brother," had been designated as beneficiary. The husband of the insured was interpleaded as a conflicting claimant. If petitioner, who was insured's brother by virtue of an adoption decree, is not within the permissible class of beneficiaries under § 602 (g) of the National Service Life Insurance Act of 1940,* the husband is entitled to the proceeds in this case.

*"The insurance shall be payable only to a widow, widower, child . . . , parent, brother or sister of the insured. The insured

The Court of Appeals affirmed the District Court which had held that an adopted brother was not a permissible beneficiary under § 602 (g). 185 F. 2d 134 (C. A. 8th Cir. 1950). See also the prior opinion of that court in this proceeding, 167 F. 2d 774 (C. A. 8th Cir. 1948). The Court of Appeals for the Third Circuit had reached a directly contrary conclusion under similar circumstances. *Carpenter* v. *United States,* 168 F. 2d 369 (C. A. 3d Cir. 1948). Our grant of certiorari was limited to the question whether a brother by adoption is within the permissible class of beneficiaries under § 602 (g) of the National Service Life Insurance Act of 1940. 340 U. S. 929 (1951).

We have examined the Act, its legislative history and related statutory provisions and have considered the various inferences drawn from the legislative materials by counsel. The short of the matter is that Congress has not expressed itself in regard to the question before us. In resolving the conflict of decisions, we must determine whether the word "brother," as used in this federal statute, restricts the policyholder's choice of beneficiaries to brothers of the blood. We are persuaded by the policy against drawing such a distinction in the family relationship. Contemporaneous legal treatment of adopted children as though born into the family is a manifestation of that policy. See *Carpenter* v. *United States, supra; McDonald* v. *United States,* 91 F. Supp. 163 (D. C. D. Mass. 1950). Consequently, we hold that a brother by adoption is a permissible beneficiary under § 602 (g) of the National Service Life Insurance Act of 1940.

Reversed.

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shall have the right to designate the beneficiary or beneficiaries of the insurance, but only within the classes herein provided, ..." 54 Stat. 1008, 1010, as amended, 38 U. S. C. § 802 (g).

UNITED STATES *v.* PEWEE COAL CO., INC.

CERTIORARI TO THE COURT OF CLAIMS.

No. 168. Argued January 2–3, 1951.—Decided April 30, 1951.

Respondent is a coal mine operator whose property was seized and operated by the United States during a temporary period in 1943 to avert a nationwide strike of miners. Respondent sued in the Court of Claims to recover under the Fifth Amendment for the total operating losses sustained during that period. The Court of Claims awarded respondent judgment for only that portion of the operating loss (viz., increased wage payments made in accordance with a War Labor Board order) which the court found was attributable to government operation of the mine. Respondent did not seek review here; certiorari was granted on the petition of the Government. *Held:*

1. Under the circumstances, there was a "taking" of respondent's property, which entitled respondent to recover compensation under the Fifth Amendment. Pp. 115–117.

2. The judgment of the Court of Claims awarding compensation for that portion of the operating loss which it found attributable to government operation is affirmed. Pp. 117–119.

115 Ct. Cl. 626, 88 F. Supp. 426, affirmed.

In a suit by respondent to recover compensation for an alleged taking of its property, the Court of Claims awarded judgment for respondent, but in less than the amount claimed. 115 Ct. Cl. 626, 88 F. Supp. 426. On the petition of the Government, this Court granted certiorari. 340 U. S. 808. *Affirmed,* p. 119.

Oscar H. Davis argued the cause for the United States. With him on the brief were *Solicitor General Perlman, Acting Assistant Attorney General Clapp, Paul A. Sweeney* and *Melvin Richter.*

Burr Tracy Ansell argued the cause and filed a brief for respondent.

MR. JUSTICE BLACK delivered the judgment of the Court and an opinion in which MR. JUSTICE FRANKFURTER, MR. JUSTICE DOUGLAS, and MR. JUSTICE JACKSON joined.

Respondent, Pewee Coal Co., Inc., is a coal mine operator whose property was allegedly possessed and operated by the United States from May 1 to October 12, 1943, to avert a nation-wide strike of miners. Pewee brought this action in the Court of Claims to recover under the Fifth Amendment[1] for the total operating losses sustained during that period. After considering the evidence, the court held that there had been a "taking" entitling Pewee to compensation. It found the total operating loss to be $36,128.96, but rendered judgment for only $2,241.26, this amount being the portion of the operating loss which the court found attributable to Government operation of the mine. 115 Ct. Cl. 626, 88 F. Supp. 426. Pewee did not seek review here. We granted the Government's petition for certiorari[2] in which two questions are presented: (1) Was there such a taking of Pewee's property as to justify compensation under the Fifth Amendment? (2) If there was, does the record support the award of $2,241.26?

First. We agree with the Court of Claims that there was a "taking" requiring the Government to pay Pewee. The facts upon which this conclusion rests are set out in the findings and opinion below and need not be repeated in detail here. See 115 Ct. Cl. 626. The following are sufficient to show the general picture: On May 1, 1943, the President issued Executive Order 9340, 8 Fed. Reg. 5695, directing the Secretary of Interior ". . . to take immediate possession, so far as may be necessary

[1] ". . . nor shall private property be taken for public use, without just compensation." U. S. Const., Amend. V.

[2] 340 U. S. 808.

or desirable, of any and all mines producing coal in which a strike or stoppage has occurred or is threatened, . . . and to operate or arrange for the operation of such mines . . . ." On the same day, the Secretary issued an "Order for Taking Possession" of most of the Nation's mines, including Pewee's. 8 Fed. Reg. 5767. To convince the operators, miners and public that the United States was taking possession for the bona fide purpose of operating the mines, the Government formally and ceremoniously proclaimed that such was its intention. It required mine officials to agree to conduct operations as agents for the Government; required the American flag to be flown at every mine; required placards reading "United States Property!" to be posted on the premises; and appealed to the miners to dig coal for the United States as a public duty. Under these circumstances and in view of the other facts which were found, it should not and will not be assumed that the seizure of the mines was a mere sham or pretense to accomplish some unexpressed governmental purpose instead of being the proclaimed actual taking of possession and control. In *United States* v. *United Mine Workers,* 330 U. S. 258, there had been a government seizure of the mines under presidential and secretarial orders, which, insofar as here material, were substantially the same as those issued in the present case. We rejected the contention of the mine workers that "the Government's role in administering the bituminous coal mines [was] for the most part fictional and for the remainder nominal only." [3] We treated that seizure as making the mines governmental facilities "in as complete a sense as if the Government held full title and ownership." *Id.,* at 284–285. It follows almost as

[3] Brief for United Mine Workers of America and John L. Lewis, p. 32, *United States* v. *United Mine Workers,* 330 U. S. 258.

a matter of course from our holding in *United Mine Workers* that the Government here "took" Pewee's property and became engaged in the mining business.[4]

Second. Having taken Pewee's property, the United States became liable under the Constitution to pay just compensation. Ordinarily, fair compensation for a temporary possession of a business enterprise is the reasonable value of the property's use. See *Kimball Laundry Co.* v. *United States,* 338 U. S. 1; *United States* v. *General Motors Corp.,* 323 U. S. 373. But in the present case, there is no need to consider the difficult problems inherent in fixing the value of the use of a going concern because Pewee neither claimed such compensation nor proved the amount. It proceeded on the ground that the Fifth Amendment requires the United States to bear operating losses incurred during the period the Government operates private property in the name of the public without the owner's consent. We believe that this contention expresses a correct general principle which under the circumstances of this case supports the judgment for $2,241.26.

Like any private person or corporation, the United States normally is entitled to the profits from, and must bear the losses of, business operations which it conducts. When a private business is possessed and operated for public use, no reason appears to justify imposition of

[4] The case of *Marion & Rye Valley R. Co.* v. *United States,* 270 U. S. 280, is cited by the Government as supporting its view that there was no "taking" here. In that case, however, the Court had "no occasion to determine whether in law the President took possession and assumed control" of a railroad. Instead, it dealt with the problem on the assumption that there was a "taking" and proceeded to decision on the finding that the railroad "was not subjected by the Government to pecuniary loss." This decision cannot be accepted as controlling the present case since whether there is a "taking" must be determined in light of the particular facts and circumstances involved.

losses sustained on the person from whom the property was seized. This is conceptually distinct from the Government's obligation to pay fair compensation for property taken, although in cases raising the issue, the Government's profit and loss experience may well be one factor involved in computing reasonable compensation for a temporary taking. Of course, there might be an express or implied agreement between the parties that the Government should not receive operating profits nor bear the losses, in which event the general principle would be inapplicable. But the possibility that such an agreement existed in the present case may be disposed of quickly. Pewee's failure to seek review here makes it unnecessary to consider whether the company consented to bear the disallowed and major portion of the losses sustained during the period of governmental control. And there is no indication that Pewee expressly or impliedly agreed to assume the loss of $2,241.26 which the court found mainly attributable to increased wage payments made to comply with a War Labor Board decision.

Where losses resulting from operation of property taken must be borne by the Government, it makes no difference that the losses are caused in whole or in part by compliance with administrative regulations requiring additional wages to be paid. With or without a War Labor Board order, when the Government increased the wages of the miners whom it employed, it thereby incurred the expense. Moreover, it is immaterial that governmental operation resulted in a smaller loss than Pewee would have sustained if there had been no seizure of the mines. Whatever might have been Pewee's losses had it been left free to exercise its own business judgment, the crucial fact is that the Government chose to intervene by taking possession and operating control. By doing so, it became the proprietor and, in the absence of con-

trary arrangements, was entitled to the benefits and subject to the liabilities which that status involves.

The judgment of the Court of Claims is

Affirmed.

MR. JUSTICE REED, concurring.

I agree that in this case there was a "taking" by eminent domain that requires the Government to pay just compensation to the owner of the property for its use. However, it is impossible for me to accept the view that the "taking" in this case requires the United States to bear all operating losses during the period it controls the property without the owner's consent or agreement. Such a view would lead to disastrous consequences where properties necessarily taken for the benefit of the Nation have a long record of operating losses, *e. g.,* certain railroads, coal mines, or television broadcasting stations. The question of who bears such losses is not, I think, "conceptually distinct" from the question of just compensation. Losses or profits on the temporary operation after the declaration or judgment of taking are factors to be taken into consideration in determining what is just compensation to the owner.

This is a temporary taking. The relatively new technique of temporary taking by eminent domain is a most useful administrative device: many properties, such as laundries, or coal mines, or railroads, may be subjected to public operation only for a short time to meet war or emergency needs, and can then be returned to their owners. However, the use of the temporary taking has spawned a host of difficult problems, *e. g., United States* v. *General Motors Corp.,* 323 U. S. 373; *United States* v. *Petty Motor Co.,* 327 U. S. 372; *Kimball Laundry Co.* v. *United States,* 338 U. S. 1, especially in the fixing of the just compensation. Market value, despite its difficulties, provides a fairly acceptable test for just compensation when the property is taken absolutely. See

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United States v. *Miller,* 317 U. S. 369; *United States* v. *John J. Felin & Co.,* 334 U. S. 624; *United States* v. *Toronto Navigation Co.,* 338 U. S. 396; *United States* v. *Commodities Trading Corp.,* 339 U. S. 121. But in the temporary taking of operating properties, *e. g., Marion & Rye Valley R. Co.* v. *United States,* 270 U. S. 280; *United States* v. *United Mine Workers of America,* 330 U. S. 258, market value is too uncertain a measure to have any practical significance. The rental value for a fully functioning railroad for an uncertain period is an unknowable quantity. This led to a government guarantee of earnings in the First World War, 40 Stat. 451. Cf. *United States* v. *Westinghouse Electric & Mfg. Co.,* 339 U. S. 261. The most reasonable solution is to award compensation to the owner as determined by a court under all the circumstances of the particular case.

Temporary takings can assume various forms. There may be a taking in which the owners are ousted from operation, their business suspended, and the property devoted to new uses. *United States* v. *General Motors Corp.,* 323 U. S. 373; *United States* v. *Petty Motor Co.,* 327 U. S. 372; *Kimball Laundry Co.* v. *United States,* 338 U. S. 1. A second kind of taking is where, as here, the Government, for public safety or the protection of the public welfare, "takes" the property in the sense of assuming the responsibility of its direction and employment for national purposes, leaving the actual operations in the hands of its owners as government officials appointed to conduct its affairs with the assets and equipment of the controlled company. Examples are the operation of railroads, motor carriers, or coal mines. *Marion & Rye Valley R. Co.* v. *United States,* 270 U. S. 280; *United States* v. *United Mine Workers of America,* 330 U. S. 258.

When, in a temporary taking, no agreement is reached with the owners, the courts must determine what pay-

ments the Government must make. Whatever the nature of the "taking," the test should be the constitutional requirement of "just compensation." However, there is no inflexible requirement that the same incidents must be used in each application of the test.

So far as the second kind of temporary "taking" is concerned, the Government's supervision of a losing business for a temporary emergency ought not to place upon the Government the burden of the losses incurred during that supervision unless the losses were incurred by governmental acts, *e. g.,* if the business would not have been conducted at all but for the Government, or if extra losses over what would have been otherwise sustained were occasioned by Government operations. Where the owner's losses are what they would have been without the "taking," the owner has suffered no loss or damage for which compensation is due. Cf. *Marion & Rye Valley R. Co.* v. *United States,* 270 U. S. 280. The measure of just compensation has always been the loss to the owner, not the loss or gain to the Government. *Boston Chamber of Commerce* v. *Boston,* 217 U. S. 189, 195.

Here the Court of Claims has correctly applied these principles in a case of a losing operation in a temporary taking. It has found that a certain sum was expended without legal or business necessity so to do. This sum was the extra allowance paid at the direction of the United States under a certain War Labor Board recommendation that had no legal sanction. 50 U. S. C. App. § 1507; E. O. 9017, 3 CFR, 1943 Cum. Supp., 1075. I would not overturn its finding in this case and would therefore affirm.

MR. JUSTICE BURTON, with whom THE CHIEF JUSTICE, MR. JUSTICE CLARK and MR. JUSTICE MINTON concur, dissenting.

I agree that there was a "taking" of the mining property from May 1 to October 12, 1943, but I find no

ground for allowing the respondent to recover the sum here sought as compensation for such taking.

This case is within the principle stated in *Marion & R. V. R. Co.* v. *United States,* 270 U. S. 280, 282, as follows: "[E]ven if there was technically a taking, the judgment for defendant was right. Nothing was recoverable as just compensation, because nothing of value was taken from the company; and it was not subjected by the Government to pecuniary loss. Nominal damages are not recoverable in the Court of Claims."

Here there is no showing by the company of any rental value due it as compensation for the Government's possession of its properties. There is no showing that anything of compensable value was taken by the Government from the company, or that the Government subjected the company to any pecuniary loss. The dissenting judge in the Court of Claims pointed out that—

> "This extra expense consisted of an increased vacation allowance to the plaintiff's workmen, and the refund to them of occupational charges like rentals on mine lamps. The court has not found that the plaintiff [company] could have operated its mine without making the concessions directed by the War Labor Board, nor has it found what the losses to the plaintiff would have been if the Government had not intervened and the strike had continued. I think that the court is not justified in awarding the plaintiff the amount of these expenditures when it does not and, I think, could not, find that the plaintiff was, in fact, financially harmed by the Government's acts." 115 Ct. Cl. at 678–679, 88 F. Supp. at 431.

Accordingly, I would reverse the judgment of the Court of Claims and allow no recovery by the respondent.

Syllabus.

JOINT ANTI-FASCIST REFUGEE COMMITTEE *v.* McGRATH, ATTORNEY GENERAL, ET AL.

NO. 8. CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.*

Argued October 11, 1950.—Decided April 30, 1951.

Purporting to act under Part III, § 3 of Executive Order No. 9835, the Attorney General, without notice or hearing, designated the three petitioner organizations as Communist in a list furnished to the Loyalty Review Board for use in connection with determinations of disloyalty of government employees. The Board disseminated the list to all departments and agencies of the Government. Petitioners sued for declaratory judgments and injunctive relief. They alleged that their organizations were engaged in charitable or civic activities or in the business of fraternal insurance; all three implied an attitude of cooperation and helpfulness, rather than one of hostility or disloyalty toward the United States; and two expressly alleged that their respective organizations were not within any classification listed in Part III, § 3 of the Order. Petitioners further alleged that the actions of the Attorney General and the Board greatly hampered their activities and deprived them of rights in violation of the Constitution; that the Executive Order violates the First, Fifth, Ninth, and Tenth Amendments to the Constitution; that § 9A of the Hatch Act, as construed and applied, is void; and that petitioners were suffering irreparable injury and had no adequate remedy at law. The District Court granted motions to dismiss the complaints for failure to state claims upon which relief could be granted. The Court of Appeals affirmed. *Held:* The judgments are reversed and the cases are remanded to the District Court with instructions to deny the motions that the complaints be dismissed for failure to state claims upon which relief could be granted. Pp. 124–125, 142.

85 U. S. App. D. C. 255, 177 F. 2d 79; 86 U. S. App. D. C. 287, 182 F. 2d 368, reversed.

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*Together with No. 7, *National Council of American-Soviet Friendship, Inc. et al.* v. *McGrath, Attorney General, et al.;* and No. 71, *International Workers Order, Inc. et al.* v. *McGrath, Attorney General, et al.*, also on certiorari to the same court.

For the opinions of the Justices constituting the majority of the Court, see:

Opinion of MR. JUSTICE BURTON, joined by MR. JUSTICE DOUGLAS, pp. 124–142.

Opinion of MR. JUSTICE BLACK, pp. 142–149.

Opinion of MR. JUSTICE FRANKFURTER, pp. 149–174.

Opinion of MR. JUSTICE DOUGLAS, pp. 174–183.

Opinion of MR. JUSTICE JACKSON, pp. 183–187.

For the dissenting opinion of MR. JUSTICE REED, joined by THE CHIEF JUSTICE and MR. JUSTICE MINTON, see pp. 187–213.

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

The cases are stated in the opinion of MR. JUSTICE BURTON, pp. 130–135. *Reversed and remanded,* p. 142.

O. John Rogge and *Benedict Wolf* argued the cause for petitioner in No. 8. With them on the brief was *Murray A. Gordon.*

David Rein argued the cause for petitioners in No. 7. With him on the brief were *Abraham J. Isserman* and *Joseph Forer.*

Allan R. Rosenberg argued the cause and filed a brief for petitioners in No. 71.

Solicitor General Perlman argued the cause for respondents. With him on the briefs were *Assistant Attorney General Morison, James L. Morrisson* and *Samuel D. Slade.*

MR. JUSTICE BURTON announced the judgment of the Court and delivered the following opinion, in which MR. JUSTICE DOUGLAS joins:

In each of these cases the same issue is raised by the dismissal of a complaint for its failure to state a claim upon which relief can be granted. That issue is whether, in the face of the facts alleged in the complaint and therefore admitted by the motion to dismiss, the At-

torney General of the United States has authority to include the complaining organization in a list of organizations designated by him as Communist and furnished by him to the Loyalty Review Board of the United States Civil Service Commission. He claims to derive authority to do this from the following provisions in Part III, § 3, of Executive Order No. 9835, issued by the President, March 21, 1947:

> "PART III—RESPONSIBILITIES OF CIVIL SERVICE COMMISSION
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> . . . . . .
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> "3. The Loyalty Review Board shall currently be furnished by the Department of Justice the name of each foreign or domestic organization, association, movement, group or combination of persons which the Attorney General, after appropriate investigation and determination, designates as totalitarian, fascist, communist or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny others their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means.
>
> "a. The Loyalty Review Board shall disseminate such information to all departments and agencies." 3 CFR, 1947 Supp., pp. 129, 131, 12 Fed. Reg. 1935, 1938.

The respective complaints describe the complaining organizations as engaged in charitable or civic activities or in the business of fraternal insurance. Each implies an attitude of cooperation and helpfulness, rather than one of hostility or disloyalty, on the part of the organization toward the United States. Two of the complaints deny expressly that the organization is within any classification specified in Part III, § 3, of the order.

For the reasons hereinafter stated, we conclude that, *if the allegations of the complaints are taken as true* (as they must be on the motions to dismiss), the Executive Order does not authorize the Attorney General to furnish the Loyalty Review Board with a list containing such a designation as he gave to each of these organizations without other justification. Under such circumstances his own admissions render his designations patently arbitrary because they are contrary to the alleged and uncontroverted facts constituting the entire record before us. The complaining organizations have not been afforded any opportunity to substantiate their allegations, but at this stage of the proceedings the Attorney General has chosen not to deny their allegations and has not otherwise placed them in issue.

Whatever may be his authority to designate these organizations as Communist upon undisclosed facts in his possession, he has not chosen to limit himself to that authorization. By his present procedure he has claimed authority so to designate them upon the very facts alleged by them in their own complaints. Self-serving or not, those allegations do not state facts from which alone a reasonable determination can be derived that the organizations are Communist. To defend such a designation of them, on the basis of the complaints alone, is an assertion of Presidential authority so to designate an organization at the option of the Attorney General without reliance upon either disclosed or undisclosed facts supplying a reasonable basis for the determination. It is that, and only that outer limit of the authority of the Attorney General that is now before us.

At least since 1939, increasing concern has been expressed, in and out of Congress, as to the possible presence in the employ of the Government of persons disloyal to it. This is reflected in the legislation, reports and executive orders culminating in Executive Order No.

9835.[1] That order announced the President's Employees Loyalty Program in the Executive Branch of the Government. It states that both "maximum protection must be afforded the United States against infiltration of disloyal persons into the ranks of its employees, and equal protection from unfounded accusations of disloyalty must be afforded the loyal employees of the Government: . . . ." It provides for the Loyalty Review Board and sets up a standard for refusals of and removals from employment on grounds relating to loyalty. It outlines the use to be made in that connection of the list of organizations to be furnished by the Attorney General.[2] The

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[1] *E. g.*, § 9A of the Hatch Political Activity Act, August 2, 1939, 53 Stat. 1148, 5 U. S. C. (1946 ed., Supp. III) § 118j; Smith Act, June 28, 1940, 54 Stat. 670, now 18 U. S. C. (1946 ed., Supp. III) §§ 2385, 2387; Voorhis Anti-Propaganda Act, October 17, 1940, 54 Stat. 1201, now 18 U. S. C. (1946 ed., Supp. III) § 2386; many appropriation act riders barring the use of funds to pay "any person who advocates, or who is a member of an organization that advocates, the overthrow of the Government of the United States by force or violence: . . ." such as that at 55 Stat. 42; Exec. Order No. 9300, "Establishing the Interdepartmental Committee to Consider Cases of Subversive Activity on the Part of Federal Employees," February 5, 1943, 3 CFR, 1943 Cum. Supp., p. 1252, 8 Fed. Reg. 1701; and Exec. Order No. 9806, "Establishing the President's Temporary Commission on Employee Loyalty," November 25, 1946, 3 CFR, 1946 Supp., p. 183, 11 Fed. Reg. 13863. See also, *United States* v. *Lovett*, 328 U. S. 303, 308–313. A later expression of congressional policy appears in Title I (the Subversive Activities Control Act of 1950) of the Internal Security Act of 1950 (the McCarran Act) of September 23, 1950, 64 Stat. 987. This requires any "Communist-action organization" or "Communist-front organization" to register with the Attorney General (§ 7) and provides for hearings before a newly created "Subversive Activities Control Board" (§§ 12, 13).

[2] "PART V—STANDARDS

"1. The standard for the refusal of employment or the removal from employment in an executive department or agency on grounds relating to loyalty shall be that, on all the evidence, reasonable grounds

organizations to be designated on that list are not limited to those having federal employees in their memberships. They may even exclude such employees from membership. Accordingly, the impact of the Attorney General's list is by no means limited to persons who are subject to the Employees Loyalty Program.

The Attorney General included each of the complaining organizations in the list he furnished to the Loyalty Review Board November 24, 1947. That list was disseminated by the Board to all departments and agencies of the United States December 4, 1947. 13 Fed. Reg. 1473.[3] The complaints allege that such action resulted

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exist for belief that the person involved is disloyal to the Government of the United States.

"2. Activities and associations of an applicant or employee which may be considered in connection with the determination of disloyalty may include one or more of the following:

. . . . . .

"f. Membership in, affiliation with or sympathetic association with any foreign or domestic organization, association, movement, group or combination of persons, designated by the Attorney General as totalitarian, fascist, communist, or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means." 3 CFR, 1947 Supp., p. 132, 12 Fed. Reg. 1938.

[3] As published in the Federal Register, March 20, 1948, the list includes two groups. The first group contains none of the present complainants. The Attorney General explains that that group "is reported as having been previously named as subversive by the Department of Justice and as having been previously disseminated among the Government agencies for use in connection with consideration of employee loyalty under Executive Order No. 9300, issued February 5, 1943 . . . ." 13 Fed. Reg. 1473. The second group includes each of the complaining organizations. The Attorney General lists this group, with the first, under the general heading "Appendix A—List of Organizations Designated by the Attorney General Pursuant to

in nationwide publicity and caused the injuries to the complaining organizations which are detailed later. September 17, 1948, during the pendency of the instant cases but before action upon the appeals in any of them, "the Attorney General furnished the Loyalty Review Board with a consolidated list containing the names of all of the organizations previously designated by him as within Executive Order 9835, segregated according to the classifications enumerated in section 3, Part III, on the basis of dominant characteristics." [4] He enumerated six classifications and classified the three complaining organizations as "Communist." [5]

Executive Order No. 9835." 5 CFR, 1949, c. II, Pt. 210, pp. 199–201, 13 Fed. Reg. 1471, 1473. He then places the second group under the following subheading: "Under Part III, section 3, of Executive Order No. 9835, the following additional organizations are designated: . . . ." *Id.*, at 201, 13 Fed. Reg. 1473.

[4] 13 Fed. Reg. 6137–6138. This classification was disseminated to all departments and agencies September 21, 1948, and the classified list was published October 21, 1948, as an amendment to 5 CFR, 1949, c. II, Pt. 210, pp. 200–202, 203–205.

[5] The six classifications were: "Totalitarian," "Fascist," "Communist," "Subversive," "Organizations Which Have 'Adopted a Policy of Advocating or Approving the Commission of Acts of Force and Violence to Deny Others Their Rights Under the Constitution of the United States,' " and "Organizations Which 'Seek to Alter the Form of Government of the United States by Unconstitutional Means.' " 5 CFR, 1949, c. II, Pt. 210, pp. 203–205, 13 Fed. Reg. 6137–6138.

The Attorney General also explained that—

"Applying the elementary rule of statutory construction, each of these classifications must be taken to be independent and mutually exclusive of the others. It may well be that a designated organization, by reason of origin, leadership, control, purposes, policies or activities, alone or in combination, may fall within more than one of the specified classifications. In such cases a reasonable interpretation of the Executive order would seem to require that designation be predicated upon its dominant characteristics rather than extended to include all other classifications possible on the basis of what may be subordinate attributes of the group. In classifying the designated

The instant cases originated in the District Court for the District of Columbia and come here after affirmance by the Court of Appeals. We granted certiorari because of the importance of the issues and their relation to the Employees Loyalty Program. No. 8, 339 U. S. 910; No. 7, 339 U. S. 956; No. 71, 340 U. S. 805.

No. 8.—THE REFUGEE COMMITTEE CASE

The complainant is the Joint Anti-Fascist Refugee Committee, an unincorporated association in the City and State of New York. It is the petitioner here. The defendants in the original action were the Attorney General, Tom C. Clark, and the members of the Loyalty Review Board. J. Howard McGrath has been substituted as the Attorney General and he and the members of that Board are the respondents here.

The following statement, based on the allegations of the complaint, summarizes the situation before us: The complainant is "a charitable organization engaged in relief work" which carried on its relief activities from 1942 to 1946 under a license from the President's War Relief Control Board. Thereafter, it voluntarily submitted its program, budgets and audits for inspection by the Advisory Committee on Voluntary Foreign Aid of the United States Government. Since its inception, it has, through voluntary contributions, raised and disbursed funds for the benefit of anti-Fascist refugees who assisted the Government of Spain against its overthrow by force and violence. The organization's aims and purposes "are to raise, administer and distribute funds for the relief and rehabilitation of Spanish Republicans in exile and other

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organizations the Attorney General has been guided by this policy. Accordingly, it should not be assumed that an organization's dominant characteristic is its only characteristic." *Id.*, at 203, 13 Fed. Reg. 6137.

anti-fascist refugees who fought in the war against Franco." [6]

It has disbursed $1,011,448 in cash, and $217,903 in kind, for the relief of anti-Fascist refugees and their families. This relief has included money, food, shelter, educational facilities, medical treatment and supplies, and clothing to recipients in 11 countries, including the United States. The acts of the Attorney General and the Loyalty Review Board, purporting to be taken by them under authority of the Executive Order, have seriously and irreparably impaired, and will continue to so impair, the reputation of the organization and the moral support and good will of the American people necessary for the continuance of its charitable activities. Upon information and belief, these acts have caused many contributors, especially present and prospective civil servants, to reduce or discontinue their contributions to the organization; members and participants in its activities have been "vilified and subjected to public shame, disgrace, ridicule and obloquy . . ." thereby inflicting upon it economic injury and discouraging participation in its activities; it has been hampered in securing meeting places; and many people have refused to take part in its fund-raising activities.

This complaint does not contain an express denial that the complaining organization is within the classifications

[6] The complaint adds that—

"Before the end of the war in Europe, this relief consisted of: (1) the release and assistance of those of the aforesaid refugees who were in concentration camps in Vichy France, North Africa and other countries; (2) transportation and asylum for those of the aforesaid refugees in flight; (3) direct relief and aid, to those of the aforesaid refugees requiring help, through the Red Cross and other international agencies. At the present time, the Joint Anti-Fascist Refugee Committee relief work is principally devoted to aiding those Spanish Republican refugees, and other anti-fascist refugees who fought against Franco, located in France and Mexico."

named in Part III, § 3, of Executive Order No. 9835. It does, however, state that the actions of the Attorney General and the Loyalty Review Board which are complained of are unauthorized and without warrant in law and amount to a deprivation of the complainant's rights in violation of the Constitution; that Executive Order No. 9835, on its face and as construed and applied, violates the First, Fifth, Ninth and Tenth Amendments to the Constitution of the United States and that § 9A of the Hatch Act, 53 Stat. 1148, 5 U. S. C. (1946 ed., Supp. III) § 118j, insofar as it purports to authorize the instant application of the order, is void.[7] It asks for declaratory and injunctive relief, alleging that the complaining organization is suffering irreparable loss and that no adequate remedy is available to it except through the equity powers of the District Court. That court granted a motion to dismiss the complaint for its failure to state a claim upon which relief could be granted and denied the complainant's motion for a preliminary injunction.[8] The Court of Appeals affirmed, one judge dissenting. 85 U. S. App. D. C. 255, 177 F. 2d 79.

No. 7.—THE NATIONAL COUNCIL CASE

In this case the court below relied upon its decision in the *Refugee Committee* case and reached the same result, *per curiam* (unreported). Except as indicated below in our summary of the facts alleged, this case, for our purposes, is like the first. The complainants, who are the

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[7] Executive Order No. 9835 purports to rest, in part, upon the authority of § 9A of the Hatch Act. 3 CFR, 1947 Supp., p. 129, 12 Fed. Reg. 1935.

[8] In this case, unlike the others, the complainant asked that a three-judge District Court be convened, pursuant to 28 U. S. C. (1946 ed.) § 380a, now part of 28 U. S. C. (1946 ed., Supp. III) §§ 2281–2284. The District Court, however, dismissed the complaint without convening such a court.

petitioners here, are the National Council of American-Soviet Friendship, Inc., a New York nonprofit membership corporation, organized in 1943; the Denver Council of American-Soviet Friendship, a Colorado unincorporated association and local affiliate of the National Council; and six individual officers and directors of one or the other of these organizations. The purpose of the National Council "is to strengthen friendly relations between the United States and the Union of Soviet Socialist Republics by disseminating to the American people educational material regarding the Soviet Union, by developing cultural relations between the peoples of the two nations, and by combatting anti-Soviet propaganda designed to disrupt friendly relations between the peoples of these nations and to divide the United Nations." The complaint alleges that all of the complainants are seriously and irreparably injured in their capacity to conduct the National Council's educational, cultural and fund-raising program, and that the individual complainants have suffered personal losses such as the removal of one from an assistant rectorship of a church, the loss by another of a teaching position, and numerous cancellations of lecturing and professional engagements. The complaint expressly states that—

> "In all its activities the NATIONAL COUNCIL has sought to further the best interests of the American people by lawful, peaceful and constitutional means. It has never in any way engaged in any conduct or activity which provides any basis for it to be designated as 'totalitarian, fascist, communist or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny others their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means.' "

No. 71.—THE INTERNATIONAL WORKERS CASE

The complaining organization, which is the petitioner here, is a fraternal benefit society, organized in 1930 as a corporation under the Insurance Law of the State of New York, operating for the mutual benefit of its members and their beneficiaries and not for profit. It is licensed and operates in the District of Columbia and several states; its purposes are comparable to those of fraternal benefit societies in general; it operates under a lodge system and has a representative form of government; at the time of the promulgation of the Department of Justice list it had 185,000 members, including employees of the Federal Government and of various states and municipalities; it provided life insurance protection for its membership exceeding $120,000,000; its activities have been the subject of administrative and judicial proceedings in addition to those before the insurance departments of the states in which it functions, and, as a result of such proceedings, "the purposes and activities of the order have been held to be free from any illegal or improper taint . . . ."[9] Among the allegations of damage, made upon information and belief, the complaint states that,

[9] The complaint also alleges in Part IV:

"8. The purpose, objectives and activities of the Order are in no sense subversive. The Order is not an organization within the meaning of Part III, section 3 of Executive Order No. 9835, and it has not adopted a policy of advocating or approving the commission of acts of force or violence, or to deny other persons the rights under the Constitution or as seeking to alter the form of government by unconstitutional means, but on the contrary, the Order is opposed to the commission of acts of force or violence, fights against the denial of rights to any person, and is opposed to the altering of our form of government by any illegal or unconstitutional means. The Order is dedicated to the democratic ideals and traditions of the United States and the principles of freedom and equality embodied in the Constitution."

solely as a result of the respondents' acts, there have been instituted against the order and its members a multiplicity of administrative proceedings, including those to rescind licenses, franchises, or tax exemptions, or to impede the naturalization of its members. Because of respondents' acts, many such members, especially present and prospective civil servants, have resigned or withdrawn from membership in the order, and many potential members have declined to join it.[10]

The second amended complaint was dismissed by the District Court, 88 F. Supp. 873. That judgment was affirmed by the Court of Appeals, one judge dissenting. 86 U. S. App. D. C. 287, 182 F. 2d 368.

If, upon the allegations in any of these complaints, it had appeared that the acts of the respondents, from which relief was sought, were authorized by the President under his Executive Order No. 9835, the case would have bristled with constitutional issues. On that basis the complaint would have raised questions as to the justiciability and

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[10] The complaint attacks the constitutionality of § 9A of the Hatch Act but does not ask for the convening of a three-judge District Court.

In this case, A. L. Drayton, as a member of the order and a civil employee of the United States, sought permission from the District Court to intervene under Rule 24 (b) of the Federal Rules of Civil Procedure and to have added as defendants three members of the Loyalty Review Board of the Post Office Department. His motion was denied and his appeal from that denial dismissed. The respondents now advise us that, in a separate proceeding, he appealed to the Loyalty Review Board from a decision adverse to his loyalty, with the result that such decision has been reversed and that he has returned to duty. While he has not withdrawn his appeal from the denial of his motion to intervene, we find no reason to review the discretion exercised by the District Court in denying that motion. *Allen Calculators* v. *National Cash Register Co.*, 322 U. S. 137; see 4 Moore's Federal Practice (2d ed. 1950) 62–64.

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merit of claims based upon the First, Fifth, Ninth and Tenth Amendments to the Constitution. It is our obligation, however, not to reach those issues unless the allegations before us squarely present them. See *United States* v. *Lovett,* 328 U. S. 303, 320. Cf. *United Public Workers* v. *Mitchell,* 330 U. S. 75; *Myers* v. *United States,* 272 U. S. 52.

The Executive Order contains no express or implied attempt to confer power on anyone to act arbitrarily or capriciously—even assuming a constitutional power to do so. The order includes in the purposes of the President's program not only the protection of the United States against disloyal employees but the "equal protection" of loyal employees against unfounded accusations of disloyalty. 3 CFR, 1947 Supp., p. 129, 12 Fed. Reg. 1935. The standards stated for refusal of and removal from employment require that "on all the evidence, reasonable grounds [shall] exist for belief that the person involved is disloyal . . . ." *Id.,* at 132, 12 Fed. Reg. 1938. Obviously it would be contrary to the purpose of that order to place on a list to be disseminated under the Loyalty Program any designation of an organization that was patently arbitrary and contrary to the uncontroverted material facts. The order contains the express requirement that each designation of an organization by the Attorney General on such a list shall be made only after an "appropriate . . . determination" as prescribed in Part III, § 3. An "appropriate" governmental "determination" must be the result of a process of reasoning. It cannot be an arbitrary fiat contrary to the known facts. This is inherent in the meaning of "determination." It is implicit in a government of laws and not of men. Where an act of an official plainly falls outside of the scope of his authority, he does not make that act legal by doing it and then invoking the doctrine of administrative construction to cover it.

It remains, therefore, for us to decide whether, *on the face of these complaints,* the Attorney General is acting within his authority in furnishing the Loyalty Review Board with a designation of the complaining organizations either as "Communist" or as within any other classification of Part III, § 3, of the order. In the *National Council* and *International Workers* cases, the complaining organization is alleged not only to be a civic or insurance organization, apparently above reproach from the point of view of loyalty to the United States, but it is also declared to be one that is not within any classification listed in Part III, § 3, of the order. In the *Refugee Committee* case, the negative allegations are omitted but the affirmative allegations are incompatible with the inclusion of the complaining organization within any of the designated classifications. The inclusion of any of the complaining organizations in the designated list solely on the facts alleged in the respective complaints, which must be the basis for our decision here, is therefore an arbitrary and unauthorized act. In the two cases where the complaint specifically alleges the factual absence of any basis for the designation, and the respondents' motion admits that allegation, the designation is necessarily contrary to the record. The situation is comparable to one which would be created if the Attorney General, under like circumstances, were to designate the American National Red Cross as a Communist organization. Accepting as common knowledge the charitable and loyal status of that organization, there is no doubt that, in the absence of any contrary claim asserted against it, the Executive Order does not authorize its inclusion by the Attorney General as a "Communist" organization or as coming within any of the other classifications named in Part III, § 3, of the order.

Since we find that the conduct ascribed to the Attorney General by the complaints is patently arbitrary, the defer-

ence ordinarily due administrative construction of an administrative order is not sufficient to bring his alleged conduct within the authority conferred by Executive Order No. 9835. The doctrine of administrative construction never has been carried so far as to permit administrative discretion to run riot. If applied to this case and compounded with the assumption that the President's Executive Order was drafted for him by his Attorney General, the conclusion would rest upon the premise that the Attorney General has attempted to delegate to himself the power to act arbitrarily. We cannot impute such an attempt to the Nation's highest law enforcement officer any more than we can to its President.

In thus emphasizing an outer limit to what can be considered an authorized designation of an organization under the order, the instant cases serve a valuable purpose. They demonstrate that the order does not authorize, much less direct, the exercise of any such absolute power as would permit the inclusion in the Attorney General's list of a designation that is patently arbitrary or contrary to fact.[11]

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[11] The designation of these organizations was not preceded by any administrative hearing. The organizations received no notice that they were to be listed, had no opportunity to present evidence on their own behalf and were not informed of the evidence on which the designations rest. See *Chin Yow* v. *United States*, 208 U. S. 8.

We have noted the following recitals made by the Attorney General in describing his standard procedure in the preparation of his lists:

"After the issuance of Executive Order No. 9835 by the President, the Department of Justice compiled all available data with respect to the type of organization to be dealt with under that order. The investigative reports of the Federal Bureau of Investigation concerning such organizations were correlated. Memoranda on each such organization were prepared by attorneys of the Department. The list of organizations contained herein has been certified to the Board by the Attorney General on the basis of recommendations of attorneys of the Department as reviewed by the Solicitor General, the As-

When the acts of the Attorney General and of the members of the Loyalty Review Board are stripped of the Presidential authorization claimed for them by the respondents, they stand, on the face of these complaints, as unauthorized publications of admittedly unfounded designations of the complaining organizations as "Communist." Their effect is to cripple the functioning and damage the reputation of those organizations in their respective communities and in the nation. The complaints, on that basis, sufficiently charge that such acts violate each complaining organization's common-law right to be free from defamation. "A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." Restatement, Torts, § 559.[12]

These complaints do not raise the question of the personal liability of public officials for money damages caused by their ultra vires acts. See *Spalding* v. *Vilas,*

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sistant Attorneys General, and the Assistant Solicitor General, and subsequent careful study of all by the Attorney General." 5 CFR, 1949, c. II, Pt. 210, pp. 199–200, 13 Fed. Reg. 1471.

These recitals, however, relate to the mechanics used rather than to the appropriateness of the determination or the justification for the respective designations. They fall short of disclosing that there has been such an administrative hearing as would offset the admissions of the specific allegations of the complaints which are inherent in the respondents' motions to dismiss. See Fed. Rules Civ. Proc., 12 (b) and 56 (c), and *Reagan* v. *Farmers' Loan & Trust Co.,* 154 U. S. 362, 401–402.

We have treated the designation of an organization by the Attorney General in his list as including his furnishing of that list to the Loyalty Review Board with knowledge of that Board's obligation to disseminate it to all departments and agencies of the Government.

[12] As an illustration of the meaning of § 559, the Restatement suggests:

"2. A writes in a letter to B that C is a member of the Ku Klux Klan. B lives in a community in which a substantial number of the

161 U. S. 483. They ask only for declaratory and injunctive relief striking the names of the designated organizations from the Attorney General's published list and, as far as practicable, correcting the public records.

The respondents are not immune from such a proceeding. Only recently, this Court recognized that "the action of an officer of the sovereign (be it holding, taking or otherwise legally affecting the plaintiff's property) can be regarded as so 'illegal' as to permit a suit for specific relief against the officer as an individual . . . if it is not within the officer's statutory powers or, if within those powers . . . if the powers, or their exercise in the particular case, are constitutionally void." *Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U. S. 682, 701–702. The same is true here, where the acts complained of are beyond the officer's authority under the Executive Order.[13]

Finally, the standing of the petitioners to bring these suits is clear.[14] The touchstone to justiciability is injury

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citizens regard this organization as a discreditable one. A has defamed C."

See also, *Spanel* v. *Pegler*, 160 F. 2d 619 (C. A. 7th Cir.); *Wright* v. *Farm Journal*, 158 F. 2d 976 (C. A. 2d Cir.); *Grant* v. *Reader's Digest Assn.*, 151 F. 2d 733 (C. A. 2d Cir.); *Mencher* v. *Chesley*, 297 N. Y. 94, 75 N. E. 2d 257; Prosser, Handbook of the Law of Torts, § 91; 171 A. L. R. 709–710, Note.

[13] We do not reach either the validity of the Employees Loyalty Program or the effect of the respondents' acts in furnishing and disseminating a comparable list in any instance where such acts are within the authority purportedly granted by the Executive Order. Cf. *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 289–292; *United States* v. *Butler*, 297 U. S. 1, 68–78; *Linder* v. *United States*, 268 U. S. 5, 17; *M'Culloch* v. *Maryland*, 4 Wheat. 316, 423.

[14] Rule 17 (b) of the Federal Rules of Civil Procedure gives unincorporated associations the right to sue in their own names for the enforcement of rights existing under the Constitution or laws of the United States. And see Restatement, Torts, § 561 (2) and Comment

to a legally protected right [15] and the right of a bona fide charitable organization to carry on its work, free from defamatory statements of the kind discussed, is such a right.

It is unrealistic to contend that because the respondents gave no orders directly to the petitioners to change their course of conduct, relief cannot be granted against what the respondents actually did. We long have granted relief to parties whose legal rights have been violated by unlawful public action, although such action made no direct demands upon them. *Columbia Broadcasting System* v. *United States,* 316 U. S. 407; *Pierce* v. *Society of Sisters,* 268 U. S. 510; *Buchanan* v. *Warley,* 245 U. S. 60; *Truax* v. *Raich,* 239 U. S. 33.[16] The complaints here amply allege past and impending serious damages caused by the actions of which the petitioners complain.

Nothing we have said purports to adjudicate the truth of petitioners' allegations that they are not in fact communistic. We have assumed that the designations made by the Attorney General are arbitrary because we are compelled to make that assumption by his motions to dismiss the complaints. Whether the complaining organizations are in fact communistic or whether the Attorney General possesses information from which he could rea-

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b thereon. See also, *N. Y. Society for Suppression of Vice* v. *McFadden Publications,* 260 N. Y. 167, 183 N. E. 284; cf. *Pullman Co.* v. *Local Union No. 2928,* 152 F. 2d 493 (C. A. 7th Cir.).

[15] *Utah Fuel Co.* v. *National Bituminous Coal Comm'n,* 306 U. S. 56; *Shields* v. *Utah Idaho Central R. Co.,* 305 U. S. 177; *Philadelphia Co.* v. *Stimson,* 223 U. S. 605.

[16] *United States* v. *Los Angeles & S. L. R. Co.,* 273 U. S. 299, 309–310, does not prescribe a contrary course. In that case we held that the Interstate Commerce Commission order fixing a rate base could not be attacked by a bill in equity when the base could be challenged in subsequent proceedings fixing the rate. No comparable alternative relief is available here.

sonably find them to be so must await determination by the District Court upon remand.

For these reasons, we find it necessary to reverse the judgments of the Court of Appeals in the respective cases and to remand each case to the District Court with instructions to deny the respondents' motion that the complaint be dismissed for failure to state a claim upon which relief can be granted.

Reversed and remanded.

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

MR. JUSTICE BLACK, concurring.

Without notice or hearing and under color of the President's Executive Order No. 9835, the Attorney General found petitioners guilty of harboring treasonable opinions and designs, officially branded them as Communists, and promulgated his findings and conclusions for particular use as evidence against government employees suspected of disloyalty. In the present climate of public opinion it appears certain that the Attorney General's much publicized findings, regardless of their truth or falsity, are the practical equivalents of confiscation and death sentences for any blacklisted organization not possessing extraordinary financial, political or religious prestige and influence. The Government not only defends the power of the Attorney General to pronounce such deadly edicts but also argues that individuals or groups so condemned have no standing to seek redress in the courts, even though a fair judicial hearing might conclusively demonstrate their loyalty. My basic reasons for rejecting these and other contentions of the Government are in summary the following:

(1) I agree with MR. JUSTICE BURTON that petitioners have standing to sue for the reason among others that they have a right to conduct their admittedly legitimate political, charitable and business operations free from unjustified governmental defamation. Otherwise, executive officers could act lawlessly with impunity. And, assuming that the President may constitutionally authorize the promulgation of the Attorney General's list, I further agree with MR. JUSTICE BURTON that this Court should not attribute to the President a purpose to vest in a cabinet officer the power to destroy political, social, religious or business organizations by "arbitrary fiat," and thus the methods employed by the Attorney General exceed his authority under Executive Order No. 9835.

(2) Assuming, though I deny, that the Constitution permits the executive officially to determine, list and publicize individuals and groups as traitors and public enemies, I agree with MR. JUSTICE FRANKFURTER that the Due Process Clause of the Fifth Amendment would bar such condemnation without notice and a fair hearing. My views previously expressed under similar circumstances are relevant here. *E. g.*, dissenting opinion in *Ludecke* v. *Watkins,* 335 U. S. 160, 173; and see *In re Oliver,* 333 U. S. 257.

(3) More fundamentally, however, in my judgment the executive has no constitutional authority, with or without a hearing, officially to prepare and publish the lists challenged by petitioners. In the first place, the system adopted effectively punishes many organizations and their members merely because of their political beliefs and utterances, and to this extent smacks of a most evil type of censorship. This cannot be reconciled with the First Amendment as I interpret it. See my dissent in *American Communications Assn.* v. *Douds,* 339 U. S. 382, 445. Moreover, officially prepared and proclaimed govern-

mental blacklists possess almost every quality of bills of attainder, the use of which was from the beginning forbidden to both national and state governments. U. S. Const., Art. I, §§ 9, 10. It is true that the classic bill of attainder was a condemnation by the legislature following investigation by that body, see *United States* v. *Lovett*, 328 U. S. 303, while in the present case the Attorney General performed the official tasks. But I cannot believe that the authors of the Constitution, who outlawed the bill of attainder, inadvertently endowed the executive with power to engage in the same tyrannical practices that had made the bill such an odious institution.[1]

There is argument that executive power to issue these pseudo-bills of attainder can be implied from the undoubted power of the Government to hire and discharge employees and to protect itself against treasonable individuals or organizations.[2] Our basic law, however, wisely

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[1] In November 1794, there was introduced in Congress a resolution of public disapproval of certain "self-created Democratic societies" thought to be responsible for stirring up the people to insurrection. Madison opposed the resolution, apparently believing that if it were enacted it would be a bill of attainder. His views in this regard are reported as follows: "It is in vain to say that this indiscriminate censure is no punishment. If it falls on classes, or individuals, it will be a severe punishment. . . . Is not this proposition, if voted, a vote of attainder?" 4 Annals of Cong. 934 (1794).

[2] But compare Madison in Federalist Paper No. 42: "As treason may be committed against the United States, the authority of the United States ought to be enabled to punish it. But as new-fangled and artificial treasons have been the great engines by which violent factions, the natural offspring of free governments, have usually wreaked their alternate malignity on each other, the Convention have, with great judgment, opposed a barrier to this peculiar danger, by inserting a Constitutional definition of the crime, fixing the proof necessary for conviction of it, and restraining the Congress, even in punishing it, from extending the consequences of guilt beyond the person of its author."

withheld authority for resort to executive investigations, condemnations and blacklists as a substitute for imposition of legal types of penalties by courts following trial and conviction in accordance with procedural safeguards of the Bill of Rights.[3]

In this day when prejudice, hate and fear are constantly invoked to justify irresponsible smears and persecution of persons even faintly suspected of entertaining unpopular views, it may be futile to suggest that the cause of internal security would be fostered, not hurt, by faithful adherence to our constitutional guarantees of individual liberty. Nevertheless, since prejudice manifests itself in much the same way in every age and country and since what has happened before can happen again, it surely should not be amiss to call attention to what has occurred when dominant governmental groups have been left free to give uncontrolled rein to their prejudices against unorthodox minorities. As specific illustration, I am adding as an appendix Macaulay's account of a parliamentary proscription which took place when popular prejudice was high; this is only one out of many similar

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[3] One purpose of the Attorney General's blacklist under Executive Order 9835 is for use as evidence against government employees tried for disloyalty before loyalty boards acting under the same Executive Order. Proof of membership in a blacklisted organization, or of association with its members, can weigh heavily against a government employee's loyalty. Thus an employee may lose his job because of the Attorney General's secret and *ex parte* action. This is well illustrated in the case of *Bailey* v. *Richardson*, 341 U. S. 918, decided today by an equally divided Court. The Loyalty Board's finding against Miss Bailey appears to have rested in part on her supposed association with such organizations and in part on secret unsworn hearsay statements communicated to the Board by anonymous informers. Judge Edgerton's dissenting opinion demonstrates how the entire loyalty program grossly deprives government employees of the benefits of constitutional safeguards. *Bailey* v. *Richardson*, 86 U. S. App. D. C. 248, 182 F. 2d 46, 66.

instances that readily can be found.[4] Memories of such events were fresh in the minds of the founders when they forbade the use of the bill of attainder.

APPENDIX TO OPINION OF MR. JUSTICE BLACK.

James II, the last Stuart king of England, was driven from his throne in 1688 by William of Orange. After a brief sojourn at Saint Germains in France, James landed in Ireland where he was supported by those Irish Catholics who had suffered greatly at the hands of the English Protestant colonists. One of his first official acts was to call an Irish Parliament which enacted the bill of attainder described by the historian Macaulay as follows:

". . . [the Commons] respected no prerogative, however ancient, however legitimate, however salutary, if they apprehended that [James II] might use it to protect the race which they abhorred. They were not satisfied till they had extorted his reluctant consent to a portentous law, a law without a parallel in the history of civilised countries, the great Act of Attainder.

"A list was framed containing between two and three thousand names. At the top was half the peerage of Ireland. Then came baronets, knights, clergymen, squires, merchants, yeomen, artisans, women, children. No investigation was made. Any member who wished to rid himself of a creditor, a rival, a private enemy, gave in the name to the clerk at the table, and it was generally inserted without discussion. The only debate of which any account has come down to us related to the Earl of Strafford. He had friends in the House who ventured to offer something in his favour. But a few words from

[4] The Appendix is an illustration of persecution of Protestants by Catholics. For instances of persecution of Catholics by Protestants, see my dissenting opinion in *American Communications Assn.* v. *Douds,* 339 U. S. 382, 445, particularly notes 3, 4 and 7.

Simon Luttrell settled the question. 'I have,' he said, 'heard the King say some hard things of that lord.' This was thought sufficient, and the name of Strafford stands fifth in the long table of the proscribed.

"Days were fixed before which those whose names were on the list were required to surrender themselves to such justice as was then administered to English Protestants in Dublin. If a proscribed person was in Ireland, he must surrender himself by the tenth of August. If he had left Ireland since the fifth of November 1688, he must surrender himself by the first of September. If he had left Ireland before the fifth of November 1688, he must surrender himself by the first of October. If he failed to appear by the appointed day, he was to be hanged, drawn, and quartered without a trial, and his property was to be confiscated. It might be physically impossible for him to deliver himself up within the time fixed by the Act. He might be bedridden. He might be in the West Indies. He might be in prison. Indeed there notoriously were such cases. Among the attainted Lords was Mountjoy. He had been induced by the villany of Tyrconnel to trust himself at Saint Germains: he had been thrown into the Bastile: he was still lying there; and the Irish parliament was not ashamed to enact that, unless he could, within a few weeks, make his escape from his cell, and present himself at Dublin, he should be put to death.

"As it was not even pretended that there had been any inquiry into the guilt of those who were thus proscribed, as not a single one among them had been heard in his own defence, and as it was certain that it would be physically impossible for many of them to surrender themselves in time, it was clear that nothing but a large exercise of the royal prerogative of mercy could prevent the perpetration of iniquities so horrible that no precedent could be found for them even in the lamentable history of the

troubles of Ireland. The Commons therefore determined that the royal prerogative of mercy should be limited. Several regulations were devised for the purpose of making the passing of pardons difficult and costly: and finally it was enacted that every pardon granted by his Majesty, after the end of November 1689, to any of the many hundreds of persons who had been sentenced to death without a trial, should be absolutely void and of none effect. Sir Richard Nagle came in state to the bar of the Lords and presented the bill with a speech worthy of the occasion. 'Many of the persons here attainted,' said he, 'have been proved traitors by such evidence as satisfies us. As to the rest we have followed common fame.'

"With such reckless barbarity was the list framed that fanatical royalists, who were, at that very time, hazarding their property, their liberty, their lives, in the cause of James, were not secure from proscription. The most learned man of whom the Jacobite party could boast was Henry Dodwell, Camdenian Professor in the University of Oxford. In the cause of hereditary monarchy he shrank from no sacrifice and from no danger. It was about him that William [of Orange] uttered those memorable words: 'He has set his heart on being a martyr; and I have set mine on disappointing him.' But James was more cruel to friends than William to foes. Dodwell was a Protestant: he had some property in Connaught: these crimes were sufficient; and he was set down in the long roll of those who were doomed to the gallows and the quartering block.

"That James would give his assent to a bill which took from him the power of pardoning, seemed to many persons impossible. . . . He might also have seen that the right course was the wise course. Had he, on this great occasion, had the spirit to declare that he would not shed the blood of the innocent, and that, even as respected the guilty, he would not divest himself of the power of tem-

pering judgment with mercy, he would have regained more hearts in England than he would have lost in Ireland. But it was ever his fate to resist where he should have yielded, and to yield where he should have resisted. The most wicked of all laws received his sanction; and it is but a very small extenuation of his guilt that his sanction was somewhat reluctantly given.

"That nothing might be wanting to the completeness of this great crime, extreme care was taken to prevent the persons who were attainted from knowing that they were attainted, till the day of grace fixed in the Act was passed. The roll of names was not published, but kept carefully locked up in Fitton's closet. Some Protestants, who still adhered to the cause of James, but who were anxious to know whether any of their friends or relations had been proscribed, tried hard to obtain a sight of the list; but solicitation, remonstrance, even bribery, proved vain. Not a single copy got abroad till it was too late for any of the thousands who had been condemned without a trial to obtain a pardon.

". . . That the colonists, when they had won the victory, grossly abused it, that their legislation was, during many years, unjust and tyrannical, is most true. But it is not less true that they never quite came up to the atrocious example set by their vanquished enemy during his short tenure of power."

3 Macaulay, History of England from the Accession of James the Second (London, 1855), 216–220. (Footnotes appearing in the original have been omitted.)

MR. JUSTICE FRANKFURTER, concurring.

The more issues of law are inescapably entangled in political controversies, especially those that touch the passions of the day, the more the Court is under duty to dispose of a controversy within the narrowest confines

that intellectual integrity permits. And so I sympathize with the endeavor of my brother BURTON to decide these cases on a ground as limited as that which has commended itself to him. Unfortunately, I am unable to read the pleadings as he does. Therefore I must face up to larger issues. But in a case raising delicate constitutional questions it is particularly incumbent first to satisfy the threshold inquiry whether we have any business to decide the case at all. Is there, in short, a litigant before us who has a claim presented in a form and under conditions "appropriate for judicial determination"? *Aetna Life Ins. Co.* v. *Haworth,* 300 U. S. 227, 240.

I.

Limitation on "the judicial Power of the United States" is expressed by the requirement that a litigant must have "standing to sue" or, more comprehensively, that a federal court may entertain a controversy only if it is "justiciable." Both characterizations mean that a court will not decide a question unless the nature of the action challenged, the kind of injury inflicted, and the relationship between the parties are such that judicial determination is consonant with what was, generally speaking, the business of the Colonial courts and the courts of Westminster when the Constitution was framed. The jurisdiction of the federal courts can be invoked only under circumstances which to the expert feel of lawyers constitute a "case or controversy." The scope and consequences of the review with which the judiciary is entrusted over executive and legislative action require us to observe these bounds fastidiously. (See the course of decisions beginning with *Hayburn's Case,* 2 Dall. 409, through *Parker* v. *Los Angeles County,* 338 U. S. 327.) These generalities have had myriad applications. Each application, even to a situation not directly pertinent to what

is before us, reflects considerations relevant to decision here. I shall confine my inquiry, however, by limiting it to suits seeking relief from governmental action.

(1) The simplest application of the concept of "standing" is to situations in which there is no real controversy between the parties. Regard for the separation of powers, see *Muskrat* v. *United States,* 219 U. S. 346, and for the importance to correct decision of adequate presentation of issues by clashing interests, see *Chicago & G. T. R. Co.* v. *Wellman,* 143 U. S. 339, restricts the courts of the United States to issues presented in an adversary manner. A petitioner does not have standing to sue unless he is "interested in and affected adversely by the decision" of which he seeks review. His "interest must be of a personal and not of an official nature." *Braxton County Court* v. *West Virginia,* 208 U. S. 192, 197; see also *Massachusetts* v. *Mellon,* 262 U. S. 447. The interest must not be wholly negligible, as that of a taxpayer of the Federal Government is considered to be, *Frothingham* v. *Mellon,* 262 U. S. 447; cf. *Crampton* v. *Zabriskie,* 101 U. S. 601. A litigant must show more than that "he suffers in some indefinite way in common with people generally." *Frothingham* v. *Mellon, supra,* at 488.

Adverse personal interest, even of such an indirect sort as arises from competition, is ordinarily sufficient to meet constitutional standards of justiciability. The courts may therefore by statute be given jurisdiction over claims based on such interests. *Federal Communications Comm'n* v. *Sanders Radio Station,* 309 U. S. 470; cf. *Interstate Commerce Comm'n* v. *Oregon-Washington R. Co.,* 288 U. S. 14.

(2) To require a court to intervene in the absence of a statute, however, either on constitutional grounds or in the exercise of inherent equitable powers, something more than adverse personal interest is needed. This additional element is usually defined in terms which assume the an-

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swer. It is said that the injury must be "a wrong which directly results in the violation of a legal right." *Alabama Power Co.* v. *Ickes,* 302 U. S. 464, 479. Or that the controversy "must be definite and concrete, touching the legal relations of parties having adverse legal interests." *Aetna Life Ins. Co.* v. *Haworth, supra,* 300 U. S. at 240–241. These terms have meaning only when contained by the facts to which they have been applied. In seeking to determine whether in the case before us the standards they reflect are met, therefore, we must go to the decisions. They show that the existence of "legal" injury has turned on the answer to one or more of these questions: (a) Will the action challenged at any time substantially affect the "legal" interests of any person? (b) Does the action challenged affect the petitioner with sufficient "directness"? (c) Is the action challenged sufficiently "final"? Since each of these questions itself contains a word of art, we must look to experience to find their meaning.

(a) *Will the action challenged at any time substantially affect the "legal" interests of any person?* A litigant ordinarily has standing to challenge governmental action of a sort that, if taken by a private person, would create a right of action cognizable by the courts. *United States* v. *Lee,* 106 U. S. 196.[1] Or standing may be based on an interest created by the Constitution or a statute. *E. g., Parker* v. *Fleming,* 329 U. S. 531; *Coleman* v. *Miller,* 307 U. S. 433; cf. *Bell* v. *Hood,* 327 U. S. 678. But if no comparable common-law right exists and no such constitutional or statutory interest has been created, relief is not available judicially. Thus, at least unless capricious discrimination is asserted, there is no protected interest in contracting with the Government. A litigant therefore has no stand-

[1] The decisions are collected in the dissenting opinion in *Larson* v. *Domestic & Foreign Corp.,* 337 U. S. 682, 705.

ing to object that an official has misinterpreted his instructions in requiring a particular clause to be included in a contract. *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113. Similarly, a determination whether the Government is within its powers in distributing electric power may be of enormous financial consequence to a private power company, but it has no standing to raise the issue. *Tennessee Power Co.* v. *T. V. A.*, 306 U. S. 118; cf. *Alabama Power Co.* v. *Ickes*, 302 U. S. 464. The common law does not recognize an interest in freedom from honest competition; a court will give protection from competition by the Government, therefore, only when the Constitution or a statute creates such a right.

(b) *Does the action challenged affect petitioner with sufficient "directness"?* Frequently governmental action directly affects the legal interests of some person, and causes only a consequential detriment to another. Whether the person consequentially harmed can challenge the action is said to depend on the "directness" of the impact of the action on him. A shipper has no standing to attack a rate not applicable to him but merely affecting his previous competitive advantage over shippers subject to the rate. *Hines Trustees* v. *United States*, 263 U. S. 143, 148; *Sprunt & Son* v. *United States*, 281 U. S. 249, 255, 257. When those consequentially affected may resort to an administrative agency charged with their protection, courts are especially reluctant to give them "standing" to claim judicial review. See *Atlanta* v. *Ickes*, 308 U. S. 517; cf. *Associated Industries* v. *Ickes*, 134 F. 2d 694.[2]

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[2] A statute may of course confer standing even in this situation. *Federal Communications Comm'n* v. *Sanders Radio Station*, 309 U. S. 470; *Columbia System* v. *United States*, 316 U. S. 407; cf. *Youngstown Co.* v. *United States*, 295 U. S. 476; *Stark* v. *Wickard*, 321 U. S. 288.

But it is not always true that only the person immediately affected can challenge the action. The fact that an advantageous relationship is terminable at will does not prevent a litigant from asserting that improper interference with it gives him "standing" to assert a right of action. *Hitchman Coal & Coke Co.* v. *Mitchell,* 245 U. S. 229. On this principle an alien employee was allowed to challenge a State law requiring his employer to discharge all but a specified proportion of alien employees, *Truax* v. *Raich,* 239 U. S. 33, and a private school to enjoin enforcement of a statute requiring parents to send their children to public schools, *Pierce* v. *Society of Sisters,* 268 U. S. 510. The likelihood that the interests of the petitioner will be adequately protected by the person directly affected is a relevant consideration, compare *Columbia System* v. *United States,* 316 U. S. 407, 423–424, with *Schenley Corp.* v. *United States,* 326 U. S. 432, 435, as is, probably, the nature of the relationship involved. See *Davis & Farnum Mfg. Co.* v. *Los Angeles,* 189 U. S. 207, 220; *Truax* v. *Raich,* 239 U. S. 33, 38–39.[3]

(c) *Is the action challenged sufficiently final?* Although a litigant is the person most directly affected by the challenged action of the Government, he may not have "standing" to raise his objections in a court if the action has not, as it were, come to rest.[4] Courts do not

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[3] The *Davis & Farnum* case held that a subcontractor did not have standing to enjoin a municipal ordinance which prohibited a construction project in violation of a right of the owner of the land on which it was to be built. The Court held that the petitioner had no legal interest in the controversy, since his interest was only "indirect."

[4] Government action is "final" in the sense here involved when at no future time will its impact on the petitioner become more conclusive, definite, or substantial. "Finality" is also employed in a different sense with which we are not here concerned, in reference to judicial action not subject to subsequent revisory executive or legislative action. Cf. *United States* v. *Ferreira,* 13 How. 40.

review issues, especially constitutional issues, until they have to. See *Parker* v. *Los Angeles County, supra,* and see Brandeis, J., concurring in *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288, 341. In part, this practice reflects the tradition that courts, having final power, can exercise it most wisely by restricting themselves to situations in which decision is necessary. In part, it is founded on the practical wisdom of not coming prematurely or needlessly in conflict with the executive or legislature. See *Rochester Tel. Corp.* v. *United States,* 307 U. S. 125, 130–131. Controversies, therefore, are often held nonjusticiable "[w]here the action sought to be reviewed may have the effect of forbidding or compelling conduct on the part of the person seeking to review it, but only if some further action is taken by the Commission." *Rochester Tel. Corp.* v. *United States, supra,* at 129; and see *Chicago & S. Air Lines* v. *Waterman S. S. Corp.,* 333 U. S. 103. There is no "standing" to challenge a preliminary administrative determination, although the determination itself causes some detriment to the litigant. *United States* v. *Los Angeles & S. L. R. Co.,* 273 U. S. 299; cf. *Ex parte Williams,* 277 U. S. 267. Nor does the reservation of authority to act to a petitioner's detriment entitle him to challenge the reservation when it is conceded that the authority will be exercised only on a contingency which appears not to be imminent. *Eccles* v. *Peoples Bank,* 333 U. S. 426. Lack of finality also explains the decision in *Standard Scale Co.* v. *Farrell,* 249 U. S. 571. There the Court was faced by an advisory "specification" of characteristics desirable in ordinary measuring scales. The specification could be enforced only by independent local officers' withholding their approval of the equipment. Justiciability was denied.[5]

[5] The Court expressed the decision in terms of the nonlegislative character of the specification. But since the validity of the specification could be determined in an action for injunction or mandamus

"Finality" is not, however, a principle inflexibly applied. If the ultimate impact of the challenged action on the petitioner is sufficiently probable and not too distant, and if the procedure by which that ultimate action may be questioned is too onerous or hazardous, "standing" is given to challenge the action at a preliminary stage. *Terrace* v. *Thompson,* 263 U. S. 197; *Santa Fe Pac. R. Co.* v. *Lane,* 244 U. S. 492; see *Waite* v. *Macy,* 246 U. S. 606. It is well settled that equity will enjoin enforcement of criminal statutes found to be unconstitutional "when it is found to be essential to the protection of the property rights, as to which the jurisdiction of a court of equity has been invoked." *E. g., Philadelphia Co.* v. *Stimson,* 223 U. S. 605, 621.[6] And if the determination challenged creates a status which enforces a course of conduct through penal sanctions, a litigant need not subject himself to the penalties to challenge the determination. *La Crosse Tel. Corp.* v. *Wisconsin Board,* 336 U. S. 18; *Shields* v. *Utah Idaho R. Co.,* 305 U. S. 177.

(3) Whether "justiciability" exists, therefore, has most often turned on evaluating both the appropriateness of the issues for decision by courts and the hardship of denying judicial relief. This explains the inference to be drawn from the cases that "standing" to challenge official action is more apt to exist when that action is not within the scope of official authority than when the objection to the administrative decision goes only to its correctness. See *United States* v. *Los Angeles & S. L. R. Co.,* 273 U. S. 299, 314–315; *Pennsylvania R. Co.* v. *Labor Board,* 261

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against the local officers, the decision does not establish that final administrative action is immune from review because it is not legislative in form.

[6] See also decisions treating as "justiciable" bills to enjoin regulations which create duties immediately enforceable by imposition of penalties. *Assigned Car Cases,* 274 U. S. 564; *United States* v. *Baltimore & O. R. Co.,* 293 U. S. 454.

U. S. 72; *Ex parte Williams,* 277 U. S. 267, 271.[7] The objection to judicial restraint of an unauthorized exercise of powers is not weighty.[8]

II.

The injury asserted in the cases at bar does not fall into any familiar category. Petitioner in No. 8, the Joint Anti-Fascist Refugee Committee, is, according to its complaint, an unincorporated association engaged in relief work on behalf of Spanish Republican refugees.

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[7] In the *Los Angeles* case the Court thus supported its conclusion that the bill was not justiciable under general equity powers: "The investigation was undertaken in aid of the legislative purpose of regulation. In conducting the investigation, and in making the report, the Commission performed a service specifically delegated and prescribed by Congress. Its conclusions, if erroneous in law, may be disregarded. But neither its utterances, nor its processes of reasoning, as distinguished from its acts, are a subject for injunction." 273 U. S. at 314–315. *Pennsylvania R. Co.* v. *Labor Board,* 261 U. S. 72, was a bill to enjoin the Railroad Labor Board from publishing that the petitioner had violated its decision. Decisions of the Board were not legally enforceable; and the Court therefore concluded that they violated "no legal or equitable right of the complaining company." 261 U. S. at 85. The Court considered at length, however, the company's argument that the Board had been given no jurisdiction to decide the particular issue involved. That it found it necessary to decide this issue against the company on the merits indicates that it thought a stronger case for standing would have been presented had the decision been beyond the Board's authority. In *Ex parte Williams,* 277 U. S. at 271, there is a suggestion that a litigant may have standing to enjoin a tax assessment when the challenge is to the validity of the statute authorizing the assessment, although there would be no standing to challenge the assessment on the ground that it denied equal protection of the laws.

[8] Compare the decisions which hold that certain executive officers are not liable in suits for damages for erroneous or even malicious conduct in office, so long as they are acting within the scope of the authority given them. *Spalding* v. *Vilas,* 161 U. S. 483; *Gregoire* v. *Biddle,* 177 F. 2d 579.

Since its inception it has distributed relief totaling $1,229,351; currently it is committed to regular monthly remittances of $5,400. Its revenues have been obtained from public contributions, garnered largely at meetings and social functions. The National Council of American-Soviet Friendship, petitioner in No. 7, is a nonprofit membership corporation whose purpose is alleged to be to strengthen friendly relations between the United States and the Soviet Union by developing cultural relations "between the peoples of the two nations" and by disseminating in this country educational materials about Russia. It has obtained its funds through public appeals and through collections at meetings. Petitioner in No. 71 is the International Workers Order. Its complaint states that it is a fraternal benefit society, comprising over 1,800 lodges, with assets totaling approximately $5,000,000. Its members pay dues for the general expenses of the Order, and many of them make additional contributions for life, sickness and disability insurance. In addition to its insurance activities, the Order "attempts to encourage the preservation of the cultural heritages and artistic values developed . . . by the peoples of the different countries of the world and brought with them to the United States."

In November, 1947, each of these organizations was included in the list of groups designated by the Attorney General as within the provisions of Executive Order No. 9835, the President's Loyalty Order. The list was disseminated to all departments and agencies of the Government. Six months later, each was with more particularity labeled "communist." Each alleges substantial injury as a consequence. Publicity and meeting places have become difficult for the Refugee Committee and the Council to obtain. The federal tax exemptions of all three organizations have been revoked; licenses necessary to solicitation of funds have been denied the

Refugee Committee; and the New York Superintendent of Insurance has begun proceedings, in which a representative of the Attorney General of the United States has appeared, for dissolution of the Order. Most important, each of the organizations asserts that it has lost supporters and members, especially from present or prospective federal employees. Claiming that the injury is irreparable, each asks for relief by way of a declaratory judgment and an injunction.

The novelty of the injuries described in these petitions does not alter the fact that they present the characteristics which have in the past led this Court to recognize justiciability. They are unlike claims which the courts have hitherto found incompatible with the judicial process. No lack of finality can be urged. Designation works an immediate substantial harm to the reputations of petitioners. The threat which it carries for those members who are, or propose to become, federal employees makes it not a finicky or tenuous claim to object to the interference with their opportunities to retain or secure such employees as members. The membership relation is as substantial as that protected in *Truax* v. *Raich* and *Pierce* v. *Society of Sisters, supra.* And it is at least doubtful that the members could or would adequately present the organizations' objections to the designation provisions of the Order.

Only on the ground that the organizations assert no interest protected in analogous situations at common law, by statute, or by the Constitution, therefore, can plausible challenge to their "standing" here be made. But the reasons which made an exercise of judicial power inappropriate in *Perkins* v. *Lukens Steel Co., Tennessee Power Co.* v. *T. V. A.,* and *Alabama Power Co.* v. *Ickes, supra,* are not apposite here. There the injuries were such that, had they not been inflicted by the Government, they clearly could not have been redressed. In *Perkins* v. *Lukens*

Steel Co., it was not asserted that the authority under which the Government acted was invalid; only the correctness of an interpretation of a statute in the course of the exercise of an admitted power was challenged. In the *Power* cases protection from competition was sought; but the thrust of the law is to preserve competition, not to give protection from it. The action there challenged, furthermore, was not directed at named individuals. Here, on the other hand, petitioners seek to challenge governmental action stigmatizing them individually. They object, not to a particular erroneous application of a valid power, but to the validity of the regulation authorizing the action. They point to two types of injury, each of a sort which, were it not for principles of governmental immunity, would be clearly actionable at common law.

This controversy is therefore amenable to the judicial process.[9] Its justiciability does not depend solely on the fact that the action challenged is defamatory. Not every injury inflicted by a defamatory statement of a government officer can be redressed in court. On the balance of all considerations, the exercise here of judicial power accords with traditional canons for access to courts without inroads on the effective conduct of government.

III.

This brings us to the merits of the claims before the Court. Petitioners are organizations which, on the face of the record, are engaged solely in charitable or insurance activities. They have been designated "communist" by the Attorney General of the United States. This desig-

[9] A Denver affiliate of the National Council, joined as petitioner in No. 7, has standing identical with its parent. The individual petitioners in that suit, however, have as officers of the Council an interest which is too remote to justify finding the issues justiciable as to them.

nation imposes no legal sanction on these organizations other than that it serves as evidence in ridding the Government of persons reasonably suspected of disloyalty. It would be blindness, however, not to recognize that in the conditions of our time such designation drastically restricts the organizations, if it does not proscribe them. Potential members, contributors or beneficiaries of listed organizations may well be influenced by use of the designation, for instance, as ground for rejection of applications for commissions in the armed forces or for permits for meetings in the auditoriums of public housing projects. Compare Act of April 3, 1948, § 110 (c), 62 Stat. 143, 22 U. S. C. (Supp. III) § 1508 (c). Yet, designation has been made without notice, without disclosure of any reasons justifying it, without opportunity to meet the undisclosed evidence or suspicion on which designation may have been based, and without opportunity to establish affirmatively that the aims and acts of the organization are innocent. It is claimed that thus to maim or decapitate, on the mere say-so of the Attorney General, an organization to all outward-seeming engaged in lawful objectives is so devoid of fundamental fairness as to offend the Due Process Clause of the Fifth Amendment.

Fairness of procedure is "due process in the primary sense." *Brinkerhoff-Faris Co.* v. *Hill,* 281 U. S. 673, 681. It is ingrained in our national traditions and is designed to maintain them. In a variety of situations the Court has enforced this requirement by checking attempts of executives, legislatures, and lower courts to disregard the deep-rooted demands of fair play enshrined in the Constitution. "[T]his court has never held, nor must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in 'due process of law' as understood at the time of the adoption of the Con-

stitution. One of these principles is that no person shall be deprived of his liberty without opportunity, at some time, to be heard . . . ." *The Japanese Immigrant Case,* 189 U. S. 86, 100–101. "[B]y 'due process' is meant one which, following the forms of law, is appropriate to the case, and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by the law; it must be adapted to the end to be attained; and wherever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought." *Hagar* v. *Reclamation District,* 111 U. S. 701, 708. "Before its property can be taken under the edict of an administrative officer the appellant is entitled to a fair hearing upon the fundamental facts." *Southern R. Co.* v. *Virginia,* 290 U. S. 190, 199. "Whether acting through its judiciary or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it." *Brinkerhoff-Faris Co.* v. *Hill, supra,* 281 U. S. at 682.

The requirement of "due process" is not a fair-weather or timid assurance. It must be respected in periods of calm and in times of trouble; it protects aliens as well as citizens. But "due process," unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. Expressing as it does in its ultimate analysis respect enforced by law for that feeling of just treatment which has been evolved through centuries of Anglo-American constitutional history and civilization, "due process" cannot be imprisoned within the treacherous limits of any formula. Representing a profound attitude of fairness between man and man, and more particularly between the individual and government, "due process" is compounded of history,

reason, the past course of decisions, and stout confidence in the strength of the democratic faith which we profess. Due process is not a mechanical instrument. It is not a yardstick. It is a process. It is a delicate process of adjustment inescapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process.

Fully aware of the enormous powers thus given to the judiciary and especially to its Supreme Court, those who founded this Nation put their trust in a judiciary truly independent—in judges not subject to the fears or allurements of a limited tenure and by the very nature of their function detached from passing and partisan influences.

It may fairly be said that, barring only occasional and temporary lapses, this Court has not sought unduly to confine those who have the responsibility of governing by giving the great concept of due process doctrinaire scope. The Court has responded to the infinite variety and perplexity of the tasks of government by recognizing that what is unfair in one situation may be fair in another. Compare, for instance, *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272, with *Ng Fung Ho* v. *White*, 259 U. S. 276, and see *Communications Comm'n* v. *WJR*, 337 U. S. 265, 275. Whether the *ex parte* procedure to which the petitioners were subjected duly observed "the rudiments of fair play," *Chicago, M. & St. P. R. Co.* v. *Polt*, 232 U. S. 165, 168, cannot, therefore, be tested by mere generalities or sentiments abstractly appealing. The precise nature of the interest that has been adversely affected, the manner in which this was done, the reasons for doing it, the available alternatives to the procedure that was followed, the protection implicit in the office of the functionary whose conduct is challenged, the balance of hurt complained of and good accomplished—these are some of the considerations that must enter into the judicial judgment.

Applying them to the immediate situation, we note that publicly designating an organization as within the proscribed categories of the Loyalty Order does not directly deprive anyone of liberty or property. Weight must also be given to the fact that such designation is not made by a minor official but by the highest law officer of the Government. Again, it is fair to emphasize that the individual's interest is here to be weighed against a claim of the greatest of all public interests, that of national security. In striking the balance the relevant considerations must be fairly, which means coolly, weighed with due regard to the fact that this Court is not exercising a primary judgment but is sitting in judgment upon those who also have taken the oath to observe the Constitution and who have the responsibility for carrying on government.

But the significance we attach to general principles may turn the scale when competing claims appeal for supremacy. Achievements of our civilization as precious as they were hard won were summarized by Mr. Justice Brandeis when he wrote that "in the development of our liberty insistence upon procedural regularity has been a large factor." *Burdeau* v. *McDowell,* 256 U. S. 465, 477 (dissenting). It is noteworthy that procedural safeguards constitute the major portion of our Bill of Rights. And so, no one now doubts that in the criminal law a "person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence." *In re Oliver,* 333 U. S. 257, 273. "The hearing, moreover, must be a real one, not a sham or a pretense." *Palko* v. *Connecticut,* 302 U. S. 319, 327. Nor is there doubt that notice and hearing are prerequisite to due process in civil proceedings, *e. g., Coe* v. *Armour Fertilizer Works,* 237 U. S. 413. Only the narrowest exceptions, justified by history become part of the habits of our people or

by obvious necessity, are tolerated. *Ownbey* v. *Morgan,* 256 U. S. 94; *Endicott Johnson Corp.* v. *Encyclopedia Press,* 266 U. S. 285; see *Cooke* v. *United States,* 267 U. S. 517, 536.

It is against this background of guiding considerations that we must view the rather novel aspects of the situation at hand. It is not true that the evils against which the Loyalty Order was directed are wholly devoid of analogy in our own history. The circumstances attending the Napoleonic conflicts, which gave rise to the Sedition Act of 1798, 1 Stat. 596, readily come to mind. But it is true that the executive action now under scrutiny is of a sort not heretofore challenged in this Court. That of itself does not justify the *ex parte* summary designation procedure. It does make it necessary to consider its validity when judged by our whole experience with the Due Process Clause.

IV.

The construction placed by this Court upon legislation conferring administrative powers shows consistent respect for a requirement of fair procedure before men are denied or deprived of rights. From a great mass of cases, running the full gamut of control over property and liberty, there emerges the principle that statutes should be interpreted, if explicit language does not preclude, so as to observe due process in its basic meaning. See, *e. g., Aniston Mfg. Co.* v. *Davis,* 301 U. S. 337; *American Power Co.* v. *S. E. C.,* 329 U. S. 90, 107–108; *Wong Yang Sung* v. *McGrath,* 339 U. S. 33, 49. Fair hearings have been held essential for rate determinations [10] and, generally, to de-

[10] The reasonableness of rates has of course been held in part a question for the courts. *Ohio Valley Co.* v. *Ben Avon Borough,* 253 U. S. 287; cf. *Chicago, M. & St. P. R. Co.* v. *Minnesota,* 134 U. S. 418. But to the extent that finality is accorded to the determination of an administrative agency, the Court has exacted a high standard

prive persons of property.[11] An opportunity to be heard is constitutionally necessary to deport persons even though they make no claim of citizenship, and is accorded to aliens seeking entry in the absence of specific directions to the contrary.[12] Even in the distribution by the Government of benefits that may be withheld, the opportunity of a hearing is deemed important.[13]

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of procedural fairness. *Ohio Bell Tel. Co.* v. *Commission,* 301 U. S. 292, 304; see *I. C. C.* v. *Louisville & N. R. Co.,* 227 U. S. 88; *United States* v. *Abilene & S. R. Co.,* 265 U. S. 274; *West Ohio Gas Co.* v. *Commission (No. 1),* 294 U. S. 63; *Railroad Comm'n* v. *Pacific Gas Co.,* 302 U. S. 388; *Morgan* v. *United States,* 304 U. S. 1; cf. *United States* v. *Illinois Central R. Co.,* 291 U. S. 457.

[11] In *Southern R. Co.* v. *Virginia,* 290 U. S. 190, the Court declared unconstitutional a state officer's *ex parte* order that a railroad install an overhead crossing. Compare *Monongahela Bridge Co.* v. *United States,* 216 U. S. 177, in which a comparable order of the Secretary of War, entered after hearing, was upheld. In decisions involving local taxation for improvements, the Court has required that owners be given a hearing on valuation as well as on the question whether their property has been benefited whenever that determination has not been legislatively made. See, *e. g., Embree* v. *Kansas City Road Dist.,* 240 U. S. 242; cf. *Anniston Mfg. Co.* v. *Davis,* 301 U. S. 337. And although an individual's interest has been created by an *ex parte* decision, it may not be destroyed "without that character of notice and opportunity to be heard essential to due process of law." *United States ex rel. Turner* v. *Fisher,* 222 U. S. 204, 208; *Garfield* v. *Goldsby,* 211 U. S. 249. See also *Ex parte Robinson,* 19 Wall. 505.

[12] *The Japanese Immigrant Case,* 189 U. S. 86; see *Kwock Jan Fat* v. *White,* 253 U. S. 454; *Wong Yang Sung* v. *McGrath,* 339 U. S. 33, 49; cf. *United States ex rel. Knauff* v. *Shaughnessy,* 338 U. S. 537. In *Lloyd Sabaudo Societa* v. *Elting,* 287 U. S. 329, the Court held that a steamship company required to pay a fine to obtain port clearance for a ship which had brought a diseased alien to this country was entitled to determination of the facts by fair procedure. The Court disapproved in part *Oceanic Nav. Co.* v. *Stranahan,* 214 U. S. 320.

[13] In *Dismuke* v. *United States,* 297 U. S. 167, 172, the Court said that "in the absence of compelling language, resort to the courts to assert a right which the statute creates will be deemed to be curtailed only so far as authority to decide is given to the administrative officer. . . . If he is authorized to determine questions of fact his

The high social and moral values inherent in the procedural safeguard of a fair hearing are attested by the narrowness and rarity of the instances when we have sustained executive action even though it did not observe the customary standards of procedural fairness. It is in these instances that constitutional compulsion regarding fair procedure was directly in issue. Thus it has been held that the Constitution cannot be invoked to prevent Congress from authorizing disbursements on the *ex parte* determination of an administrative officer that prescribed conditions are met. *United States* v. *Babcock,* 250 U. S. 328; cf. *United States ex rel. Dunlap* v. *Black,* 128 U. S. 40. The importation of goods is a privilege which, if Congress clearly so directs, may likewise be conditioned on *ex parte* findings. *Buttfield* v. *Stranahan,* 192 U. S. 470; cf. *Hilton* v. *Merritt,* 110 U. S. 97. Only by a close division of the Court was it held that at a time of national emergency, when war has not been closed by formal peace, the Attorney General is not required to give a hearing before denying hospitality to an alien deemed dangerous to public security. *Ludecke* v. *Watkins,* 335 U. S. 160; *United States ex rel. Knauff* v. *Shaughnessy,* 338 U. S. 537. Again, when decisions of administrative officers in execution of legislation turn exclusively on considerations similar to those on which the legislative body could itself have acted summarily, notice and hearing may not be commanded by the Constitution. *Bi-Metallic Co.* v. *Colorado,* 239 U. S. 441.[14]

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decision must be accepted unless he exceeds his authority by making a determination which is arbitrary or capricious or unsupported by evidence, . . . or by failing to follow a procedure which satisfies elementary standards of fairness and reasonableness essential to the due conduct of the proceeding which Congress has authorized . . . ."

[14] Thus, no hearing need be granted on the question whether property is needed for a public use. *Rindge Co.* v. *Los Angeles,* 262 U. S. 700. Cf. *Martin* v. *Mott,* 12 Wheat. 19; *United States* v. *Bush & Co.,* 310 U. S. 371.

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Finally, summary administrative procedure may be sanctioned by history or obvious necessity. But these are so rare as to be isolated instances. *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272; *Springer* v. *United States*, 102 U. S. 586; *Lawton* v. *Steele*, 152 U. S. 133.

This Court is not alone in recognizing that the right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society. Regard for this principle has guided Congress and the Executive. Congress has often entrusted, as it may, protection of interests which it has created to administrative agencies rather than to the courts. But rarely has it authorized such agencies to act without those essential safeguards for fair judgment which in the course of centuries have come to be associated with due process. See *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297; *Tutun* v. *United States*, 270 U. S. 568, 576, 577; *Pennsylvania R. Co.* v. *Labor Board*, 261 U. S. 72.[15] And when Congress

[15] Cf. *Norwegian Nitrogen Co.* v. *United States*, 288 U. S. 294. In recent customs legislation Congress has required a hearing on objections to appraisement. 38 Stat. 187, as amended, 19 U. S. C. § 1501; see Freund, Administrative Powers over Persons and Property, 163. In numberless other situations Congress has required the essentials of a hearing. Among those that have come before this Court are removal orders of the Federal Reserve Board, *Board of Governors* v. *Agnew*, 329 U. S. 441; determinations under the Hatch Act, *Oklahoma* v. *Civil Service Comm'n*, 330 U. S. 127; induction orders under the draft law, *Estep* v. *United States*, 327 U. S. 114; minimum price orders of the Secretary of Agriculture, *Stark* v. *Wickard*, 321 U. S. 288; price control, *Yakus* v. *United States*, 321 U. S. 414; minimum wage determinations, *Opp Cotton Mills* v. *Administrator*, 312 U. S. 126; labor relations regulation, *Labor Board* v. *Mackay Radio Co.*, 304 U. S. 333; *Labor Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 47; *Shields* v. *Utah Idaho R. Co.*, 305 U. S. 177; *Inland Empire Council* v. *Millis*, 325 U. S. 697.

has given an administrative agency discretion to determine its own procedure, the agency has rarely chosen to dispose of the rights of individuals without a hearing, however informal.[16]

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[16] In 1941 the Attorney General's Committee on Administrative Procedure reported that it "found in its investigation of the administrative process few instances of indifference on the part of the agencies to the basic values which underlie a fair hearing." These values it defined as follows: "Before adverse action is to be taken by an agency, whether it be denying privileges to an applicant or bounties to a claimant, before a cease-and-desist order is issued or privileges or bounties are permanently withdrawn, before an individual is ordered directly to alter his method of business, or before discipline is imposed upon him, the individual immediately concerned should be apprised not only of the contemplated action with sufficient precision to permit his preparation to resist, but, before final action, he should be apprised of the evidence and contentions brought forward against him so that he may meet them. He must be offered a forum which provides him with an opportunity to bring his own contentions home to those who will adjudicate the controversy in which he is concerned. The forum itself must be one which is prepared to receive and consider all that he offers which is relevant to the controversy." Final Report, p. 62.

The monographs prepared under the direction of the Committee support the conclusion that by statutory direction or administrative interpretation agencies consistently grant at least minimum rights of hearing. For example, the Walsh-Healey Act is enforceable by the Government's recovery of liquidated damages and by its withholding further contracts for a three-year period. Administrative hearings are employed for all contested action. Monograph of the Attorney General's Committee on Administrative Procedure, S. Doc. No. 186, 76th Cong., 3d Sess., Part 1, p. 7. It is generally the practice of the Veterans' Administration to grant hearings on request of claimants. *Id.*, Part 2, p. 11. Hearings are granted on request on applications for permits from the Federal Alcohol Administration, *id.*, Part 5, p. 6, and when licenses granted under the Grain Standards Act are suspended or revoked, *id.*, Part 7, p. 10. The Federal Deposit Insurance Corporation determines admissibility of banks to membership without giving the applicant a hearing or formal opportunity to contradict the bank examiner's report. However, grounds for disapproval are reported to the applicant. *Id.*, Part 13,

The heart of the matter is that democracy implies respect for the elementary rights of men, however suspect or unworthy; a democratic government must therefore practice fairness; and fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights.[17]

An opportunity to be heard may not seem vital when an issue relates only to technical questions susceptible

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p. 15. War Department officials grant hearings on applications to construct installations in navigable waters, except when it is clear that the application should or should not be granted. S. Doc. No. 10, 77th Cong., 1st Sess., Part 2, p. 7. A 1939 amendment to the social security law requires hearings in the event a claimant is dissatisfied with the disposition of the case by the Bureau of Old-Age and Survivors Insurance. *Id.*, Part 3, p. 14. The Department of the Interior grants hearings in allocating grazing lands, *id.*, Part 7, pp. 9, 10; in disposing of applications for mineral leases, except where hearing would serve no useful purpose, *id.*, at 26; and in determining questions of fact necessary to issuing mining patents, *id.*, at 36. Hearings are frequently employed in investigations under flexible tariff procedures of the Tariff Commission, *id.*, Part 14, p. 12.

[17] The importance of opportunity to be heard is recognized as well by the English courts. The leading case is *Board of Education* v. *Rice,* [1911] A. C. 179. Lord Loreburn said in dictum, "In such cases the Board of Education will have to ascertain the law and also to ascertain the facts. I need not add that in doing either they must act in good faith and fairly listen to both sides, for that is a duty lying upon every one who decides anything. . . . They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view." *Id.*, at 182. This principle has been approved in a long line of decisions. See *Local Government Board* v. *Arlidge,* [1915] A. C. 120, 132–133; *General Medical Council* v. *Spackman,* [1943] A. C. 627; *Errington* v. *Minister of Health,* [1935] 1 K. B. 249; *Rex* v. *Westminster,* [1941] 1 K. B. 53. The Committee on Ministers' Powers reported in 1936 that while in administrative determination a Minister may "depart from the usual forms of legal procedure or from the common law rules of evidence, he ought not to depart from or offend against 'natural justice.'" Three principles of "natural justice" were

of demonstrable proof on which evidence is not likely to be overlooked and argument on the meaning and worth of conflicting and cloudy data not apt to be helpful. But in other situations an admonition of Mr. Justice Holmes becomes relevant. "One has to remember that when one's interest is keenly excited evidence gathers from all sides around the magnetic point . . . ."[18] It should be particularly heeded at times of agitation and anxiety, when fear and suspicion impregnate the air we breathe. Compare Brown, The French Revolution in English History. "The plea that evidence of guilt must be secret is abhorrent to free men, because it provides a cloak for the malevolent, the misinformed, the meddlesome, and the corrupt to play the role of informer undetected and uncorrected." *United States ex rel. Knauff* v. *Shaughnessy,* 338 U. S. 537, 551 (dissenting). Appearances in the dark are apt to look different in the light of day.

Man being what he is cannot safely be trusted with complete immunity from outward responsibility in depriving others of their rights. At least such is the conviction underlying our Bill of Rights. That a conclusion satisfies one's private conscience does not attest its reliability. The validity and moral authority of a conclusion largely depend on the mode by which it was reached. Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness. No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss

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stated to be that "a man may not be a judge in his own cause," that "No party ought to be condemned unheard," and that "a party is entitled to know the reason for the decision." Report of Committee on Ministers' Powers, Cmd. 4060, pp. 75–80.

[18] Mr. Justice Holmes made this remark in a letter to Mr. Arthur Garfield Hays in 1928. See Bent, Justice Oliver Wendell Holmes, 312.

notice of the case against him and opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done.[19]

V.

The strength and significance of these considerations—considerations which go to the very ethos of the scheme of our society—give a ready answer to the problem before us. That a hearing has been thought indispensable in so many other situations, leaving the cases of denial exceptional, does not of itself prove that it must be found essential here. But it does place upon the Attorney General the burden of showing weighty reason for departing in this instance from a rule so deeply imbedded in history and in the demands of justice. Nothing in the Loyalty Order requires him to deny organizations opportunity to present their case. The Executive Order, defining his powers, directs only that designation shall be made "after appropriate investigation and determination." This surely does not preclude an administrative procedure, however informal, which would incorporate the essentials of due process. Nothing has been presented to the Court to

[19] "In a government like ours, entirely popular, care should be taken in every part of the system, not only to do right, but to satisfy the community that right is done." 5 The Writings and Speeches of Daniel Webster, 163. The same thought is reflected in a recent opinion by the Lord Chief Justice. A witness in a criminal case had been interrogated by the court in the absence of the defendant. Quashing the conviction, Lord Goddard said: "That is a matter which cannot possibly be justified. I am not suggesting for one moment that the justices had any sinister or improper motive in acting as they did. It may be that they sent for this officer in the interests of the accused; it may be that the information which the officer gave was in the interests of the accused. That does not matter. Time and again this court has said that justice must not only be done but must manifestly be seen to be done. . . ." *Rex* v. *Justices of Bodmin*, [1947] 1 K. B. 321, 325.

indicate that it will be impractical or prejudicial to a concrete public interest to disclose to organizations the nature of the case against them and to permit them to meet it if they can. Indeed, such a contention could hardly be made inasmuch as the Loyalty Order itself requires partial disclosure and hearing in proceedings against a Government employee who is a member of a proscribed organization. Whether such procedure sufficiently protects the rights of the employee is a different story. Such as it is, it affords evidence that the wholly summary process for the organizations is inadequate.[20] And we have controlling proof that Congress did not think that the Attorney General's procedure was indispensable for the protection of the public interest. The McCarran Act, passed under circumstances certainly not more serene than when the Loyalty Order was issued, grants organizations a full administrative hearing, subject to judicial review, before they are required to register as "Communist-action" or "Communist-front." [21]

We are not here dealing with the grant of Government largess. We have not before us the measured action of Congress, with the pause that is properly engendered when the validity of legislation is assailed. The Attorney General is certainly not immune from the historic requirements of fairness merely because he acts, however conscientiously, in the name of security. Nor does he obtain immunity on the ground that designation is not an "adjudication" or a "regulation" in the conventional use of those terms. Due process is not confined in its scope to the particular forms in which rights have heretofore been

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[20] Other evidence is furnished by the State of New York. The Feinberg Law, comparable in purpose and in its scheme to the Loyalty Order, makes notice and hearing prerequisite to designation of organizations. See *Thompson* v. *Wallin,* 301 N. Y. 476, 494, 95 N. E. 2d 806, 814–815.

[21] Act of September 23, 1950, §§ 13, 14, 64 Stat. 987, 998, 1001.

found to have been curtailed for want of procedural fairness. Due process is perhaps the most majestic concept in our whole constitutional system. While it contains the garnered wisdom of the past in assuring fundamental justice, it is also a living principle not confined to past instances.

Therefore the petitioners did set forth causes of action which the District Court should have entertained.

MR. JUSTICE DOUGLAS, concurring.

While I join in the opinion of MR. JUSTICE BURTON, which would dispose of the cases on procedural grounds, the Court has decided them on the Constitution. And so I turn to that aspect of the cases.

The resolution of the constitutional question presents one of the gravest issues of this generation. There is no doubt in my mind of the need for the Chief Executive and the Congress to take strong measures against any Fifth Column worming its way into government—a Fifth Column that has access to vital information and the purpose to paralyze and confuse. The problems of security are real. So are the problems of freedom. The paramount issue of the age is to reconcile the two.

In days of great tension when feelings run high, it is a temptation to take short-cuts by borrowing from the totalitarian techniques of our opponents. But when we do, we set in motion a subversive influence of our own design that destroys us from within. The present cases, together with No. 49, *Bailey* v. *Richardson, post,* p. 918, affirmed today by an equally divided Court, are simple illustrations of that trend.

I disagree with MR. JUSTICE JACKSON that an organization—whether it be these petitioners, the American Red Cross, the Catholic Church, the Masonic Order, or the Boy Scouts—has no standing to object to being labeled "subversive" in these *ex parte* proceedings. The opinion

of MR. JUSTICE FRANKFURTER disposes of that argument. This is not an instance of name calling by public officials. This is a determination of status—a proceeding to ascertain whether the organization is or is not "subversive." This determination has consequences that are serious to the condemned organizations. Those consequences flow in part, of course, from public opinion. But they also flow from actions of regulatory agencies that are moving in the wake of the Attorney General's determination to penalize or police these organizations.[1] An organization branded as "subversive" by the Attorney General is maimed and crippled. The injury is real, immediate, and incalculable.

The requirements for fair trials under our system of government need no elaboration. A party is entitled to

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[1] The Bureau of Internal Revenue canceled the tax-exempt status of contributions to eight "subversive" organizations shortly after the Attorney General's list was released. The Bureau's announcement of the revocation indicated that the listing provided the basis for it. Treasury Dept. Press Release No. S–613, Feb. 4, 1948, 5 CCH 1948 Fed. Tax Rep. ¶ 6075.

The New York Feinberg Law, directed at eliminating members of subversive organizations from employment in the public schools, authorizes the Board of Regents to utilize the Attorney General's list in drawing up its own list of subversive organizations. Membership in a listed organization is *prima facie* evidence of disqualification. Laws of New York, 1949, c. 360, ¶ 3022 (2). The New York Superintendent of Insurance recently brought an action to dissolve the International Workers Order, Inc., petitioner in No. 71, on the grounds that it was on the Attorney General's list. *Matter of People of the State of New York*, Motion 165, Supreme Court of New York County, Dec. 18, 1950. [See 199 Misc. 941.]

The Maryland Ober Law requires candidates for appointive or elective office to certify whether they are members of "subversive" organizations. Laws of Maryland, 1949, c. 86, ¶¶ 10–15. The Commission which drafted the Act contemplated that the Attorney General's list would be employed in policing these oaths. Report of Commission on Subversive Activities to Governor Lane and the Maryland General Assembly, January, 1949, p. 43.

know the charge against him; he is also entitled to notice and opportunity to be heard. Those principles were, in my opinion, violated here.

The charge that these organizations are "subversive" could be clearly defined. But how can anyone in the context of the Executive Order say what it means? It apparently does not necessarily mean "totalitarian," "fascist" or "communist" because they are separately listed. Does it mean an organization with socialist ideas? There are some who lump Socialists and Communists together. Does it mean an organization that thinks the lot of some peasants has been improved under Soviet auspices? Does it include an organization that is against the action of the United Nations in Korea? Does it embrace a group which on some issues of international policy aligns itself with the Soviet viewpoint? Does it mean a group which has unwittingly become the tool for Soviet propaganda? Does it mean one into whose membership some Communists have infiltrated? Or does it describe only an organization which under the guise of honorable activities serves as a front for Communist activities?

No one can tell from the Executive Order what meaning is intended. No one can tell from the records of the cases which one the Attorney General applied. The charge is flexible; it will mean one thing to one officer, another to someone else. It will be given meaning according to the predilections of the prosecutor: "subversive" to some will be synonymous with "radical"; "subversive" to others will be synonymous with "communist." It can be expanded to include those who depart from the orthodox party line—to those whose words and actions (though completely loyal) do not conform to the orthodox view on foreign or domestic policy. These flexible standards, which vary with the mood or political philosophy of the prosecutor, are weapons which can be made as sharp or as blunt as the occasion requires. Since they are sub-

ject to grave abuse, they have no place in our system of law. When we employ them, we plant within our body politic the virus of the totalitarian ideology which we oppose.

It is not enough to know that the men applying the standard are honorable and devoted men. This is a government of *laws,* not of *men.* The powers being used are the powers of government over the reputations and fortunes of citizens. In situations far less severe or important than these a party is told the nature of the charge against him. Thus when a defendant is summoned before a federal court to answer to a claim for damages or to a demand for an injunction against him, there must be a "plain statement of the claim showing that the pleader is entitled to relief." [2] If that is necessary for even the most minor claim asserted against a defendant, we should require no less when it comes to determinations that may well destroy the group against whom the charge of being "subversive" is directed.[3] When the Government becomes the moving party and levels its great powers against the citizen, it should be held to the same standards of fair dealing as we prescribe for other legal contests. To let the Government adopt such lesser ones as suits the convenience of its officers is to start down the totalitarian path.

The trend in that direction is only emphasized by the failure to give notice and hearing on the charges in these cases and by the procedure adopted in *Bailey* v. *Richardson, supra.*

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[2] Rule 8 (a), Federal Rules of Civil Procedure.

[3] As MR. JUSTICE FRANKFURTER points out, due process requires no less. But apart from due process in the constitutional sense is the power of the Court to prescribe standards of conduct and procedure for inferior federal courts and agencies. See *McNabb* v. *United States,* 318 U. S. 332.

Notice and opportunity to be heard are fundamental to due process of law. We would reverse these cases out of hand if they were suits of a civil nature to establish a claim against petitioners. Notice and opportunity to be heard are indispensable to a fair trial whether the case be criminal or civil. See *Coe* v. *Armour Fertilizer Works,* 237 U. S. 413, 424; *Palko* v. *Connecticut,* 302 U. S. 319, 327; *In re Oliver,* 333 U. S. 257, 273. The gravity of the present charges is proof enough of the need for notice and hearing before the United States officially brands these organizations as "subversive." No more critical governmental ruling can be made against an organization these days. It condemns without trial. It destroys without opportunity to be heard. The condemnation may in each case be wholly justified. But government in this country cannot by edict condemn or place beyond the pale. The rudiments of justice, as we know it, call for notice and hearing—an opportunity to appear and to rebut the charge.

The system used to condemn these organizations is bad enough. The evil is only compounded when a government employee is charged with being disloyal. Association with or membership in an organization found to be "subversive" weighs heavily against the accused. He is not allowed to prove that the charge against the organization is false. That case is closed; that line of defense is taken away. The technique is one of guilt by association—one of the most odious institutions of history. The fact that the technique of guilt by association was used in the prosecutions at Nuremberg [4] does not make it

[4] The International Tribunal tried Nazi organizations to determine whether they were "criminal." Art. 9, Charter of the International Military Tribunal, Nazi Conspiracy and Aggression, Vol. 1, Office of U. S. Chief Counsel, U. S. Government Printing Office (1946) p. 6. That procedure, unlike the present one, provided that accused

congenial to our constitutional scheme. Guilt under our system of government is personal. When we make guilt vicarious we borrow from systems alien to ours and ape our enemies. Those short-cuts may at times seem to serve noble aims; but we depreciate ourselves by indulging in them. When we deny even the most degraded person the rudiments of a fair trial, we endanger the liberties of everyone. We set a pattern of conduct that is dangerously expansive and is adaptable to the needs of any majority bent on suppressing opposition or dissension.

It is not without significance that most of the provisions of the Bill of Rights are procedural. It is procedure that spells much of the difference between rule by law and rule by whim or caprice. Steadfast adherence to strict procedural safeguards is our main assurance that there will be equal justice under law. The case of Dorothy Bailey is an excellent illustration of how dangerous a departure from our constitutional standards can be. She was charged with being a Communist and with being active in a Communist "front organization." The Review Board stated that the case against her was based on reports, some of which came from "informants certified to us by the Federal Bureau of Investigation as experienced and entirely reliable."

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organizations might defend themselves against that charge. *Ibid.* But the finding of guilt as to an organization was binding on an individual who was later brought to trial for the crime of membership in a criminal organization. Article 10 provided: "In cases where a group or organization is declared criminal by the Tribunal, the competent national authority of any Signatory shall have the right to bring individuals to trial for membership therein before national, military or occupation courts. In any such case the criminal nature of the group or organization is considered proved and shall not be questioned." *Id.*

Counsel for Dorothy Bailey asked that their names be disclosed. That was refused.

Counsel for Dorothy Bailey asked if these informants had been active in a certain union. The chairman replied, "I haven't the slightest knowledge as to who they were or how active they have been in anything."

Counsel for Dorothy Bailey asked if those statements of the informants were under oath. The chairman answered, "I don't think so."

The Loyalty Board convicts on evidence which it cannot even appraise. The critical evidence may be the word of an unknown witness who is "a paragon of veracity, a knave, or the village idiot." [5] His name, his reputation, his prejudices, his animosities, his trustworthiness are unknown both to the judge and to the accused. The accused has no opportunity to show that the witness lied or was prejudiced or venal. Without knowing who her accusers are she has no way of defending. She has nothing to offer except her own word and the character testimony of her friends.

Dorothy Bailey was not, to be sure, faced with a criminal charge and hence not technically entitled under the Sixth Amendment to be confronted with the witnesses against her. But she was on trial for her reputation, her job, her professional standing. A disloyalty trial is the most crucial event in the life of a public servant. If condemned, he is branded for life as a person unworthy of trust or confidence. To make that condemnation without meticulous regard for the decencies of a fair trial is abhorrent to fundamental justice.

I do not mean to imply that but for these irregularities the system of loyalty trials is constitutional. I do not see how the constitutionality of this dragnet system of loyalty trials which has been entrusted to the administrative agencies of government can be sustained. Every gov-

[5] Barth, The Loyalty of Free Men (1951), p. 109.

ernment employee must take an oath of loyalty.[6] If he swears falsely, he commits perjury and can be tried in court. In such a trial he gets the full protection of the Bill of Rights, including trial by jury and the presumption of innocence. I am inclined to the view that when a disloyalty charge is substituted for perjury and an administrative board substituted for the court "the spirit and the letter of the Bill of Rights" are offended.[7]

The problem of security is real; and the Government need not be paralyzed in handling it. The security problem, however, relates only to those sensitive areas where secrets are or may be available, where critical policies are being formulated, or where sabotage can be committed. The department heads must have leeway in handling their personnel problems in these sensitive areas. The question is one of the fitness or qualifications of an individual for a particular position. One can be transferred from those areas even when there is no more than a suspicion as to his loyalty. We meet constitutional difficulties when the Government undertakes to punish by proclaiming the disloyalty of an employee and making him ineligible for any government post. The British have avoided those difficulties by applying the loyalty procedure only in sensitive areas and in using it to test the qualifications of an employee for a particular

[6] "The oath to be taken by any person elected or appointed to any office of honor or profit either in the civil, military, or naval service, except the President of the United States shall be as follows: 'I, A B, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.' " 23 Stat. 22, R. S. § 1757, 5 U. S. C. § 16. And see Act of Sept. 6, 1950, Pub. L. No. 759, § 1209, 64 Stat. 595, 764.

[7] See the address by Benjamin V. Cohen, 96 Cong. Rec. A785, A786.

post, not to condemn him for all public employment.[8] When we go beyond that procedure and adopt the dragnet system now in force, we trench upon the civil rights of our people. We condemn by administrative edict, rather than by jury trial.[9] Of course, no one has a con-

[8] 448 H. C. Deb. 1703 *et seq.*, 3418 *et seq.* (5th Ser. 1947–1948). The meticulous care with which this small select group is handled is reflected in the letter of the Prime Minister, dated Dec. 1, 1948, reporting on the purge of communists and fascists from the civil service. 459 H. C. Deb. 830 (5th Ser. 1948–1949).

The number of cases considered by the end of April, 1950, was 86, classified as follows:

Transferred to nonsecret departments	32
Resigned	5
Exonerated and reinstated	19
Dismissed (including one Fascist)	7
Retired for health reasons before completion of investigations	1
On special leave, either *sub judice* or confirmed Communists awaiting transfer or dismissal	22
	86

See British Information Services, Reference Division, April, 1950.

[9] The Civil Service Commission reports as of February, 1951, the following statistics relating to adjudications of loyalty under Executive Order No. 9835 of March 21, 1947:

Total cases received by Loyalty Boards	14,910
Less: cases where employee left the service during investigations	1,722
Cases received for adjudication	13,188
Less: cases where employee thereafter resigned	1,331
field investigation reports pending in loyalty boards	1,060
cases in Department of the Army	1,304
Cases adjudicated	9,493
Eligible determination	8,964
Ineligible, excluding 20 cases on review	529
Disposition of ineligibles:	
Dismissed	307
Restored after appeal	197
Remanded after appeal	19
On appeal	26

stitutional right to a government job. But every citizen has a right to a fair trial when his government seeks to deprive him of the privileges of first-class citizenship.

The evil of these cases is only emphasized by the procedure employed in Dorothy Bailey's case. Together they illustrate how deprivation of our citizens of fair trials is subversion from within.

MR. JUSTICE JACKSON, concurring.

It is unfortunate that this Court should flounder in wordy disagreement over the validity and effect of procedures which have already been pursued for several years. The extravagance of some of the views expressed and the intemperance of their statement may create a suspicion that the decision of the case does not rise above the political controversy that engendered it.

MR. JUSTICE BURTON, and those for whom he speaks, would rescue the Loyalty Order from inquiry as to its validity by spelling out an admission by the Attorney General that it has been arbitrarily misapplied. MR. JUSTICE BLACK would have us hold that listing by the Attorney General of organizations alleged to be subversive is the equivalent of a bill of attainder for treason after the fashion of those of the Stuart kings, while MR. JUSTICE REED contends, in substance, that the designation is a mere press release without legal consequences.

If the Court agreed that an accused employee could challenge the designation, its effect would be only advisory or prima facie; but as I point out later, the Court refuses so to limit the effect of the designation. In view of these and other diversified opinions, none of which has attracted sufficient adherents for a Court and none of which I can fully accept, I shall state rather than argue my view of the matter.

1. *The Loyalty Order does affect substantive legal rights.*—I agree that mere designation as subversive de-

prives the organizations themselves of no legal right or immunity. By it they are not dissolved, subjected to any legal prosecution, punished, penalized, or prohibited from carrying on any of their activities. Their claim of injury is that they cannot attract audiences, enlist members, or obtain contributions as readily as before. These, however, are sanctions applied by public disapproval, not by law. It is quite true that the popular censure is focused upon them by the Attorney General's characterization. But the right of privacy does not extend to organized groups or associations which solicit funds or memberships or to corporations dependent upon the state for their charters.[1] The right of individuals to assemble is one thing; the claim that an organization of secret undisclosed character may conduct public drives for funds or memberships is another. They may be free to solicit, propagandize, and hold meetings, but they are not free from public criticism or exposure. If the only effect of the Loyalty Order was that suffered by the organizations, I should think their right to relief very dubious.

But the real target of all this procedure is the government employee who is a member of, or sympathetic to, one or more accused organizations. He not only may be discharged, but disqualified from employment, upon no other ground than such membership or sympathetic affiliation. And he cannot attack the correctness of the Attorney General's designation in any loyalty proceeding.[2]

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[1] *United States* v. *Morton Salt Co.*, 338 U. S. 632, 652.

[2] "Boards . . . should not enter upon any evidential investigation of the nature of any of the organizations identified in the Attorney General's list, for the purpose of attacking, contradicting, or modifying the controlling conclusion reached by the Attorney General in such list. . . . [T]he Board should permit no evidence or argument before it on the point." Loyalty Review Board, Memorandum No. 2, March 9, 1948.

Ordinary dismissals from government service which violate no fixed tenure concern only the Executive branch, and courts will not review such discretionary action.[3] However, these are not discretionary discharges but discharges pursuant to an order having force of law. Administrative machinery is publicly set up to comb the whole government service[4] to discharge persons or to declare them ineligible for employment upon an incontestable finding, made without hearing, that some organization is subversive. To be deprived not only of present government employment but of future opportunity for it certainly is no small injury when government employment so dominates the field of opportunity.

The fact that one may not have a legal right to get or keep a government post does not mean that he can be adjudged ineligible illegally. *Perkins* v. *Elg*.[5]

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[3] *Eberlein* v. *United States*, 257 U. S. 82; *Keim* v. *United States*, 177 U. S. 290.

This is true, although reasons stated are alleged to be false or the officer taking the action is alleged to have acted in a biased, prejudicial and unfair manner. *Golding* v. *United States*, 78 Ct. Cl. 682, 685; cert. denied, 292 U. S. 643.

[4] "A total of 3,166 Government employees have quit or have been discharged under President Truman's loyalty program since it began March 21, 1947, the Loyalty Review Board reported today.

"Of these, 294 actually were discharged for disloyalty. The remainder, 2,872, quit while under investigation and might or might not have been found disloyal." New York Times, January 16, 1951.

[5] 307 U. S. 325, 349. That was an action to mandamus the Secretary of State to issue a passport, to which it was conceded Miss Elg had no legal right, its issuance being wholly within Executive discretion which the courts would not attempt to control. Chief Justice Hughes pointed out, however, that its denial to Miss Elg was not grounded in the Secretary's general discretion but "solely on the ground that she had lost her native born American citizenship." Finding that ground untenable, this Court directed its decree against the Secretary. The Secretary might say she would get no passport, but he could not, for unjustifiable reasons, say she was ineligible for one.

2. *To promulgate with force of law a conclusive finding of disloyalty, without hearing at some stage before such finding becomes final, is a denial of due process of law.*—On this subject, I agree with the opinion of MR. JUSTICE FRANKFURTER. That the safeguard of a hearing would not defeat the effectiveness of a Loyalty Program is apparently the judgment of Congress and of State Legislatures, for, as he points out, both congressional and state loyalty legislation recognize the right.

3. *The organizations may vindicate unconstitutional deprivation of members' rights.*—There are two stages at which administrative hearings could protect individuals' legal rights—one is before an organization is designated as subversive, the other is when the individual, because of membership, is accused of disloyalty. Either choice might be a permissible solution of a difficult problem inherent in such an extensive program. But an equally divided Court today, erroneously, I think, rejects the claim that the individual has hearing rights.[6] I am unable to comprehend the process by which those who think the Attorney General's designation is no more than a press release can foreclose attack upon it in the employees' case. Also beyond my understanding is how a Court whose collective opinion is that the designations are subject to judicial inquiry can at the same time say that a discharge based at least in part on them is not.

By the procedures of this Loyalty Order, both groups and individuals may be labeled disloyal and subversive. The Court grants judicial review and relief to the group while refusing it to the individual. So far as I recall, this is the first time this Court has held rights of individuals subordinate and inferior to those of organized groups. I think that is an inverted view of the law—it is justice turned bottom-side up.

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[6] *Bailey* v. *Richardson*, 341 U. S. 918.

I have believed that a corporation can maintain an action to protect rights under the Due Process or Equal Protection Clauses of the Fourteenth Amendment, *e. g., Wheeling Steel Corp.* v. *Glander,* 337 U. S. 562, 574. The only practical judicial policy when people pool their capital, their interests, or their activities under a name and form that will identify collective interests, often is to permit the association or corporation in a single case to vindicate the interests of all.

This procedure is appropriate here where the Government has lumped all the members' interests in the organization so that condemnation of the one will reach all. The Government proceeds on the basis that each of these associations is so identical with its members that the subversive purpose and intents of the one may be attributed to and made conclusive upon the other. Having adopted this procedure in the Executive Department, I think the Government can hardly ask the Judicial Department to deny the standing of the organizations to vindicate its members' rights.

Unless a hearing is provided in which the organization can present evidence as to its character, a presumption of disloyalty is entered against its every member-employee, and because of it, he may be branded disloyal, discharged, and rendered ineligible for government service. I would reverse the decisions for lack of due process in denying a hearing at any stage.

MR. JUSTICE REED, with whom THE CHIEF JUSTICE and MR. JUSTICE MINTON join, dissenting.

The three organizations named in the caption, together with certain other groups and individuals, filed suits in the United States District Court for the District of Columbia primarily to have declared unconstitutional Executive Order No. 9835, March 21, 1947, 12 Fed. Reg. 1935, as applied against these petitioners. Acting un-

der Part III, § 3 of Executive Order No. 9835, note 3, *infra,* the Attorney General, on November 24, 1947, transmitted the required list of organizations to the Loyalty Review Board. This list included the three above-named organizations. The Board promptly disseminated the information to all departments and agencies. It was published as Appendix A to Title 5, Administrative Personnel, CFR § 210.11 (b) (6). 13 Fed. Reg. 1471. Later, September 17, 1948, the three organizations were designated by the Attorney General as "communist." 13 Fed. Reg. 6135. The relief sought by petitioners was to have the names of the organizations deleted from the allegedly unconstitutionally created lists because of the obvious harm to their activities by reason of their designation.

The list was transmitted to the Board by the Attorney General as a part of the plan of the President, broadly set forth in Executive Order No. 9835, to furnish maximum protection "against infiltration of disloyal persons into the ranks of [government] employees, and equal protection from unfounded accusations of disloyalty" for the loyal employees. 12 Fed. Reg. 1935. Executive Order No. 9835 came after long consideration of the problems of possible damage to the Government from disloyalty among its employees. 92 Cong. Rec. 9601. See the Report of the President's Temporary Commission on Employee Loyalty (appointed 1946), p. 23:

> "The presence within the government of *any* disloyal or subversive persons, or the attempt by *any* such persons to obtain government employment, presents a problem of such importance that it must be dealt with vigorously and effectively."

A list of subversive organizations under Executive Order No. 9300, 3 CFR, 1943 Cum. Supp., 1252, was likewise disseminated to government agencies. 13 Fed. Reg. 1473.

Great Britain (see note 31, *infra*), Australia (Act of October 20, 1950), New Zealand (*Deynzer* v. *Campbell,* [1950] N. Z. L. R. 790; 37th Rep., Public Service Comm'n, New Zealand, 1949, p. 14; 38th Rep., Public Service Comm'n, New Zealand, 1950, p. 12), and the Union of South Africa (Act No. 44 of 1950) have taken legislative or administrative steps to control disloyalty among government employees. See The Report of the Royal Commission (Canada) appointed under Order in Council, P. C. 411, February 5, 1946. The method of dealing with communism and communists adopted by the Commonwealth of Australia was held beyond the powers of that government. *Australian Communist Party* v. *Commonwealth,* decision of Friday, March 9, 1951, 83 C. L. R. 1.

The procedure for designating these petitioners as communists may be summarized as follows: Executive Order No. 9835, Part III, was issued by the President as Chief Executive, "in the interest of the internal management of the Government" and under the Civil Service Act of 1883, 22 Stat. 403, as amended, and § 9A of the Hatch Act, 5 U. S. C. (Supp. II) § 118j. The former acts give general regulatory powers over the employment and discharge of government personnel; the latter is more specific.[1] These present cases do not involve the removal of any employee.

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[1] 5 U. S. C. (Supp. II) § 118j:

"(1) It shall be unlawful for any person employed in any capacity by any agency of the Federal Government, whose compensation, or any part thereof, is paid from funds authorized or appropriated by any Act of Congress, to have membership in any political party or organization which advocates the overthrow of our constitutional form of government in the United States.

"(2) Any person violating the provisions of this section shall be immediately removed from the position or office held by him, and thereafter no part of the funds appropriated by any Act of Congress for such position or office shall be used to pay the compensation of such persons."

The Order required investigation of the loyalty of applicants for government employment and similar investigation of present employees. To assure uniformity and fairness throughout the Government in the investigation of employees, a Loyalty Review Board was created to review loyalty cases from any department or agency, disseminate information pertinent to employee loyalty programs, and advise the heads thereof. Standards were provided for employment and discharge. So far as pertinent to the objections of petitioner to inclusion on the list of subversive and communist organizations, they appear in note 3 and in the note below.[2] It was apparently to avoid the necessity of continuous reexamination by all government departments and agencies of the characteristics of organizations suspected of aims inimical to the Government that provision was made in the Order for examination and designation of such organizations by

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[2] See 12 Fed. Reg. 1938, 5 CFR § 210.11 (a):

"(a) *Standard.* The standard for the refusal of employment or the removal from employment in an Executive department or agency on grounds relating to loyalty shall be that, on all the evidence, reasonable grounds exist for belief that the person involved is disloyal to the Government of the United States. The panel shall reach its decision on consideration of the complete file, arguments, brief and testimony presented to it.

"(b) *Activities and associations.* Among the activities and associations of an applicant or employee which may be considered in connection with the determination of disloyalty may be one or more of the following:

. . . . . .

"(6) Membership in, affiliation with or sympathetic association with any foreign or domestic organization, association, movement, group or combination of persons, designated by the Attorney General as totalitarian, fascist, communist, or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means."

the Attorney General. 12 Fed. Reg. 1938, Part III, § 3.[3] It was under this plan that the Attorney General made his designations.

The designations made available for the use of the Loyalty Review Board and the departmental or agency loyalty boards, the result of the investigation of the Attorney General into the character of organizations that might fall under suspicion as totalitarian, fascist, communist or subversive. The list does not furnish a basis for any court action against the organizations so designated. It of course might follow from discovery of facts by the investigation that criminal or civil proceedings would be begun to enforce an applicable criminal statute or to cancel the franchise or some license of a listed organization. In such a proceeding, however, the accused organization would have the usual protections of any defendant. The list is evidence only of the character of the listed organizations in proceedings before loyalty boards to determine whether "reasonable" grounds exist for belief "that the employee under consideration" is disloyal to the Government of the United States. See note 2, *supra*. The names were placed on the list by the Attorney General after investigation. If legally permissible, as carried out by the Attorney General, there is no question but that a single investigation as to the character of

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[3] "3. The Loyalty Review Board shall currently be furnished by the Department of Justice the name of each foreign or domestic organization, association, movement, group or combination of persons which the Attorney General, after appropriate investigation and determination, designates as totalitarian, fascist, communist or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny others their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means.

"a. The Loyalty Review Board shall disseminate such information to all departments and agencies."

an organization is preferable to one by each of the more than a hundred agencies of government that are catalogued in the United States Government Organization Manual. To require a determination as to each organization for the administrative hearing of each employee investigated for disloyalty would be impossible. The employee's association with a listed organization does not, under the Order, establish, even prima facie, reasonable grounds for belief in the employee's disloyalty.[4]

None of the complaints deny that the Attorney General made an "investigation" of the organizations to determine whether or not they were totalitarian, fascist, communist or subversive as required by Part III, § 3, or that he had material information concerning disloyal activities on their part. The Council came the nearest to such an allegation in the quoted excerpts from their complaint in note 10, but we read them as no more than allegations of unconstitutionality because "investigation" without notice and hearing is not "appropriate." Certainly there is no specific allegation of the way in which the Attorney General failed to follow the Order. We therefore assume that the designation was made after appropriate investigation and determination.[5]

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[4] 5 CFR § 210.11 (b) (6):

"Such membership, affiliation or sympathetic association is simply one piece of evidence which may or may not be helpful in arriving at a conclusion as to the action which is to be taken in a particular case. . . ."

See 5 CFR § 200.1.

[5] 13 Fed. Reg. 1471:

"After the issuance of Executive Order No. 9835 by the President, the Department of Justice compiled all available data with respect to the type of organization to be dealt with under that order. The investigative reports of the Federal Bureau of Investigation concerning such organizations were correlated. Memoranda on each such organization were prepared by attorneys of the Department. The list of organizations contained herein has been certified to the Board

No objection is or could reasonably be made in the records or briefs to an examination by the Government into the loyalty of its employees. Although the Founders of this Republic rebelled against their established government of England and won our freedom, the creation of our own constitutional government endowed that new government, the United States of America, with the right and duty to protect its existence against any force that seeks its overthrow or changes in its structure by other than constitutional means. Tolerant as we are of all political efforts by argument or persuasion to change the basis of our social, economic or political life, the line is drawn sharply and clearly at any act or incitement to act in violation of our constitutional processes. Surely the Government need not await an employee's conviction of a crime involving disloyalty before separating him from public service. Governments cannot be indifferent to manifestations of subversion. As soon as these are significant enough reasonably to cause concern as to the likelihood of action, the duty to protect the state compels the exertion of governmental power. Not to move would brand a government with a dangerous weakness of will. The determination of the time for action rests with the executive and legislative arms. An objection to consideration of an employee's sympathetic association with an admitted totalitarian, fascist, communist or subversive group, as bearing upon the propriety of his retention or employment as a government employee would have no better standing. The Order gives conclusive indication of the type of organization that is meant by the four

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by the Attorney General on the basis of recommendations of attorneys of the Department as reviewed by the Solicitor General, the Assistant Attorneys General, and the Assistant Solicitor General, and subsequent careful study of all by the Attorney General."

Cf. *United States* v. *Chemical Foundation,* 272 U. S. 1, 14; *Lewis* v. *United States,* 279 U. S. 63, 73.

word-labels.[6] Following them in Part III, § 3, 12 Fed. Reg. 1938, are the words, "or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny others their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means." Bracketed with membership in listed organizations (Exec. Order No. 9835, Part V) as activities for consideration in determining an employee's loyalty are those listed below. These are the standards that define the type of organization subject to designation.[7] Of course, the Order means that a communist or subversive organization is of the same general character as one that seeks to alter our form of government by unconstitutional means, 13 Fed. Reg. 6137, to wit by force and violence.

Procedure under the Executive Order does not require "proof" in the sense of a court proceeding that these communist organizations teach or incite to force and vio-

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[6] Cf. *Nash* v. *United States*, 229 U. S. 373, 377; *N. Y. Central Securities Corp.* v. *United States*, 287 U. S. 12, 24; *United States* v. *Petrillo*, 332 U. S. 1.

[7] 5 CFR § 210.11 (b):

"(1) Sabotage, espionage, or attempts or preparations therefor, or knowingly associating with spies or saboteurs;

"(2) Treason or sedition or advocacy thereof;

"(3) Advocacy of revolution or force or violence to alter the constitutional form of government of the United States;

"(4) Intentional, unauthorized disclosure to any person under circumstances which may indicate disloyalty to the United States, of documents or information of a confidential or non-public character obtained by the person making the disclosure as a result of his employment by the Government of the United States, or prior to his employment;

"(5) Performing or attempting to perform his duties, or otherwise acting, so as to serve the interests of another government in preference to the interests of the United States; . . . ." See also n. 2, *supra*.

lence to obtain their objectives.[8] What is required by the Order is an examination and determination by the Attorney General that these organizations are "communist." The description "communist" is adequate for the purposes of inquiry and listing. No such precision of definition is necessary as a criminal prosecution might require. Cf. *United States* v. *Chemical Foundation,* 272 U. S. 1, 14. Communism is well understood to mean a group seeking to overthrow by force and violence governments such as ours and to establish a new government based on public ownership and direction of productive property. Undoubtedly, there are reasonable grounds to conclude that accepted history teaches that revolution by force and violence to accomplish this end is a tenet of communists.[9] No more is necessary to justify an organization's designation as communist.

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[8] In *Schneiderman* v. *United States,* 320 U. S. 118, 148, 158, a review of the evidence of communist theory upon the use of force and violence presented in that record led this Court to hold that the evidence concerning communist teaching upon force and violence was not so "clear, unequivocal and convincing" as to justify deportation of that defendant. We refused specifically to pass upon the attitude of communism toward force and violence. 320 U. S. at 148, 158.

[9] The Russian Imperial Government fell quickly in February 1917, because its power had been sapped by bureaucratic rapacity and war losses as well as by communist revolutionary doctrines. Even under those circumstances, there are said to have been more than a thousand casualties in St. Petersburg. I Trotsky, History of the Russian Revolution, 141.

The doctrine and practices of communism clearly enough teach the use of force against an existing noncommunist government to justify an official of our Government taking steps to protect governmental personnel by screening individuals to determine whether they accept force and violence as a political weapon. From the last paragraphs of the Communist Manifesto to the seizure of the last satellite, force and violence appears as a communist method for gaining control. Lenin, Collected Works (1930), Vol. XVIII, pp. 279–280; Trotsky, *op. cit.,* 106, 120, 144, 151; Lenin, The State and Revo-

As a basis for petitioners' attack on the list, the Refugee Committee set forth facts in its complaint to show its charitable character. These indicate activities and expenditures in aid of the Spanish Republicans in flight from their homeland. The International Workers Order sets forth facts to show that it was a duly organized fraternal benefit society under New York law, furnishing sickness and death benefits as well as life insurance protection to its members. It states other worthy objectives in which it is engaged and asserts it is not an organization such as are referred to in the Order, Part III, § 3, *supra*. The Council, too, sets out its purpose to promote American-Soviet friendship by means of education and information. It asserts:

> "In all its activities the NATIONAL COUNCIL has sought to further the best interests of the American people by lawful, peaceful and constitutional means."

The absence of any provision in the Order or rules for notice to suspected organizations, for hearings with privilege to the organizations to confront witnesses, cross-examine, produce evidence and have representation of counsel or judicial review of the conclusion reached by the Attorney General is urged by the petitioners, as a procedure so fundamentally unfair and restrictive of personal freedoms as to violate the Federal Constitution, specifically the Due Process Clause and the First Amendment. No opportunity was allowed by the Attorney General for petitioners to offer proof of the legality of their purposes or to disprove charges of subversive opera-

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lution, August, 1917, Foreign Languages Publishing House, Moscow (1949), 28, 30, 33. Translations furnished me indicate the same attitude on the part of Stalin. Collected Works, Vol. I, pp. 131–137, 185–205, 241–246; Vol. III, pp. 367–370. And see Leites, The Operational Code of the Politburo (1950), c. xiii, "Violence."

See § 2 of the Internal Security Act of 1950, 64 Stat. 987.

tions. This is the real gravamen of each complaint, the basis upon which the determination of unconstitutionality is sought.[10]

To these complaints, the Government filed motions to dismiss because of failure to state a claim upon which relief could be granted. The motions were granted by the District Court and the Court of Appeals affirmed.

Admissions by motions to dismiss.—It is held in MR. JUSTICE BURTON'S opinion that the motion to dismiss should have been denied. It is said:

> "The inclusion of any of the complaining organizations in the designated list solely on the facts alleged in the respective complaints, which must be the basis for our decision here, is therefore an arbitrary and unauthorized act. In the two cases where the complaint specifically alleges the factual absence of any

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[10] In the *Refugee Committee* complaint unconstitutionality of the designation was predicated upon repugnancy:

"1) It is repugnant to the Constitution of the United States as a deprivation of freedom of speech, of the press, and of assembly and association in violation of the First Amendment.

"2) . . . as a deprivation of the fundamental rights of the people of the United States reserved to the people of the United States by the Ninth and Tenth Amendments.

"3) . . . as a deprivation of liberty and property without due process of law in violation of the Fifth Amendment."

In the *Council* case, it was predicated upon a lack of "any advance notice" and the Attorney General's acting "without making 'an appropriate investigation and determination,' as required" by the Order. It was said:

"The aforesaid actions of the defendants have been arbitrary, capricious, contrary to law, in excess of statutory right and authority. Such actions have violated the rights of the plaintiffs guaranteed by the First and Fifth Amendments to the Constitution and are contrary to the Ninth and Tenth Amendments."

The same general allegations of violations of the Due Process Clause and the First Amendment appear in No. 71, *International Workers Order, Inc.*

basis for the designation, and the respondents' motion admits that allegation, the designation is necessarily contrary to the record." P. 137.

I understand MR. JUSTICE BURTON'S opinion to hold that as a motion to strike for failure to state a cause of action admits all well-pleaded facts, respondents' motion admits such allegations in the complaint as that quoted in the third preceding paragraph from the Council's complaint and the assertions that petitioners are not "totalitarian, fascist, communist or subversive." Such statements, however, appear to me to be only conclusions of law as to the effect of facts stated, or empty assertions or conclusions without well-pleaded facts to sustain them.[11] Where the issue is the permissibility of designation without notice or hearing, a motion to strike does not admit an allegation of "arbitrary" action or that "all its activities [are] . . . constitutional." These complaints may not be decided upon any such posture in pleading. Petitioners' charge, that their "designation" violates due process and the First Amendment, remains the issue.

Standing to sue.—A question is raised by the United States as to petitioners' standing to maintain these actions. It seems unnecessary to analyze that problem in this dissent. If there should be a determination that petitioners' constitutional rights are violated by petitioners' designation under Part III, § 3, of the Order, it would seem they would have standing to seek redress. The "standing" turns on the existence of the federal right.[12] Does petitioners' designation abridge their rights under the First Amendment? Do petitioners have a constitutional right under the Due Process Clause of the Fifth

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[11] *Nortz* v. *United States*, 294 U. S. 317, 324; *Pierce Oil Corp.* v. *City of Hope*, 248 U. S. 498; *Straus* v. *Foxworth*, 231 U. S. 162, 168.

[12] *Bell* v. *Hood*, 327 U. S. 678, 681, 684; *Larson* v. *Domestic & Foreign Corp.*, 337 U. S. 682, 690.

Amendment to require a hearing before the Attorney General designates them as a subversive or communist organization for the purposes of Executive Order No. 9835?

First Amendment.—Petitioners assert that their inclusion on the disloyal list has abridged their freedom of speech, since listeners or readers are more difficult to obtain for their speeches and publications, and parties interested in their work are more hesitant to become associates. The Refugee Committee brief adds that "thought" is also abridged. A concurring opinion accepts these arguments to the point of concluding that the publication of the lists "with or without a hearing" violates the First Amendment.

This Court, throughout the years, has maintained the protection of the First Amendment as a major safeguard to the maintenance of a free republic. This Nation has never suffered from an enforced conformity of expression or a limitation of criticism. But neither are we compelled to endure espionage and sedition. Wide as are the freedoms of the First Amendment, this Court has never hesitated to deny the individual's right to use the privileges for the overturn of law and order. Reasonable restraints for the fair protection of the Government against incitement to sedition cannot properly be said to be "undemocratic" or contrary to the guarantees of free speech. Otherwise the guarantee of civil rights would be a mockery.[13] Even when this Court spoke out most strongly against previous restraints, it was careful to recognize that "the security of the community life may be protected against incitements to acts of violence and the overthrow by force of orderly government." *Near* v. *Minnesota,* 283 U. S. 697, 716.

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[13] *United Public Workers* v. *Mitchell,* 330 U. S. 75, 95, and cases cited; *American Communications Assn.* v. *Douds,* 339 U. S. 382, 394–399; *Feiner* v. *New York,* 340 U. S. 315, 320–321.

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Recognizing that the designation, rightly or wrongly, of petitioner organizations as communist impairs their ability to carry forward successfully whatever legitimate objects they seek to accomplish, we do not accept their argument that such interference is an abridgment of First Amendment guarantees.[14] They are in the position of every proponent of unpopular views. Heresy induces strong expressions of opposition. So long as petitioners are permitted to voice their political ideas, free from suggestions for the opportune use of force to accomplish their social and economic aims, it is hard to understand how any advocate of freedom of expression can assert that their right has been unconstitutionally abridged. As nothing in the orders or regulations concerning this list limits the teachings or support of these organizations, we do not believe that any right of theirs under the First Amendment is abridged by publication of the list.

Due Process.—This point brings us face to face with the argument that whether the Attorney General was right or wrong in listing these organizations, his designation cannot stand because a final decision of ineligibility for employment without notice and hearing rises to the importance of a constitutional defect. If standards for definition of organizations includable on the list are necessary, the order furnishes adequate tests as appears from the text preceding notes 2 and 7 above and the standards set out in those notes. Compare cases cited, note 6, *supra.*

Does due process require notice and hearing for the Department of Justice investigation under Executive Order No. 9835, Part III, § 3, note 3, *supra,* preliminary to listing? As a standard for due process one cannot do better than to accept as a measure that no one may be deprived of liberty or property without such reasonable

[14] The fairness of that designation is considered under the next point.

notice and hearing as fairness requires. This is my understanding of the meaning of the opinions upon due process cited in the concurring opinions. We are not here concerned with the rightfulness of the extent of participation in the investigations that might be claimed by petitioners.[15] They were given no chance to take part. Their claim is that the listing resulted in a deprivation of liberty or property contrary to the procedure required by the Fifth Amendment.[16]

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[15] Perhaps they would insist not only on notice that an investigation is to be had but on an opportunity to be present and to have counsel, to cross-examine, to object to the introduction of evidence, to argue and to have judicial review. Cf. *Hiatt* v. *Compagna,* 178 F. 2d 42, affirmed by an equally divided court, 340 U. S. 880. An injunction against listing could have delayed administration until today.

The statutory requirement for a hearing explains the statement in *Morgan* v. *United States,* 304 U. S. 1, 14, that "in administrative proceedings of a quasi-judicial character the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play. These demand 'a fair and open hearing,'—essential alike to the legal validity of the administrative regulation and to the maintenance of public confidence in the value and soundness of this important governmental process. Such a hearing has been described as an 'inexorable safeguard.'" This hearing was a rate determination proceeding.

See the statement in the first *Morgan* case, 298 U. S. 468, 480: "That duty is widely different from ordinary executive action. It is a duty which carries with it fundamental procedural requirements. There must be a full hearing. There must be evidence adequate to support pertinent and necessary findings of fact."

No enforceable rights to a hearing exist in an alien seeking admission to the United States. *United States ex rel. Knauff* v. *Shaughnessy,* 338 U. S. 537, 544; *Ekiu* v. *United States,* 142 U. S. 651. To the extent that *Ng Fung Ho* v. *White,* 259 U. S. 276, requires a hearing, it is on the issue of alienage, and not of admissibility.

[16] Of course, notice to petitioners that an investigation was to be had to determine whether they had seditious purposes would be useless without opportunity for an administrative hearing. That is the effect of petitioners' argument.

The contention can be answered summarily by saying that there is no deprivation of any property or liberty of any listed organization by the Attorney General's designation. It may be assumed that the listing is hurtful to their prestige, reputation and earning power. It may be such an injury as would entitle organizations to damages in a tort action against persons not protected by privilege. See *Spalding* v. *Vilas,* 161 U. S. 483; *Glass* v. *Ickes,* 73 App. D. C. 3, 117 F. 2d 273. This designation, however, does not prohibit any business of the organizations, subject them to any punishment or deprive them of liberty of speech or other freedom. The cases relied upon in the briefs and opinions of the majority as requiring notice and hearing before valid action can be taken by administrative officers are where complainant will lose some property or enforceable civil or statutory right by the action taken or proposed.[17] "[A] mere abstract declaration" by an administrator regarding the character of an organization, without the effect of for-

[17] For example, *Shields* v. *Utah Idaho R. Co.,* 305 U. S. 177, interpreted a statutory requirement for determination by the Interstate Commerce Commission of the subjection of the railroad to the Railway Labor Act to necessitate procedural due process, "the hearing of evidence and argument." We held, p. 183, that equity had cognizance of an objection to the proceeding, as "arbitrary and capricious," p. 185, because failure to post a prescribed notice is punishable as a crime. A "right" was asserted.

Reliance on *Interstate Commerce Comm'n* v. *Louisville & N. R. Co.,* 227 U. S. 88, is misplaced. The statute gave a right to a full hearing, p. 91.

United States v. *Lovett,* 328 U. S. 303, 316, protected an employee against what this Court held was legislative decree of exclusion from government employment without trial.

Columbia Broadcasting System v. *United States,* 316 U. S. 407, 418, depends upon this Court's ruling that the regulation there subjected to attack required the Federal Communications Commission to reject applications and cancel outstanding licenses "on the grounds specified in the regulations without more."

bidding or compelling conduct on the part of complainant, ought not to be subject to judicial interference. *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125, 129, 143. That is, it does not require notice and hearing.

These petitioners are not ordered to do anything and are not punished for anything. Their position may be analogized to that of persons under grand jury investigation. Such persons have no right to notice by and hearing before a grand jury; only a right to defend the charge at trial.[18] Property may be taken for government use without notice or hearing by a mere declaration of taking by the authorized official. No court has doubted the constitutionality of such summary action under the due process clause when just compensation must be paid ultimately.[19] Persons may be barred from certain positions merely because of their associations.[20]

To allow petitioners entry into the investigation would amount to interference with the Executive's discretion, contrary to the ordinary operations of Government. Long ago Mr. Chief Justice Taney in *Decatur* v. *Paulding,* 14 Pet. 497, stated the rule and the reason against judicial interference with executive discretion:

> "The head of an executive department of the government, in the administration of the various and important concerns of his office, is continually required to exercise judgment and discretion. . . .
>
> "If a suit should come before this Court, which involved the construction of any of these laws, the Court certainly would not be bound to adopt the construction given by the head of a department.

[18] *Duke* v. *United States,* 90 F. 2d 840; *United States* v. *Central Supply Assn.,* 34 F. Supp. 241.

[19] 46 Stat. 1421, 40 U. S. C. A. § 258 (a), and annotations; *Catlin* v. *United States,* 324 U. S. 229, 231.

[20] *E. g.,* Underwriters from bank employment or direction. 48 Stat. 194, as amended, 49 Stat. 709, 12 U. S. C. § 78.

> And if they supposed his decision to be wrong, they would, of course, so pronounce their judgment. But their judgment upon the construction of a law must be given in a case in which they have jurisdiction, and in which it is their duty to interpret the act of Congress, in order to ascertain the rights of the parties in the cause before them." P. 515.
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> "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; and we are quite satisfied that such a power was never intended to be given to them." P. 516.

That rule still stands. *Larson* v. *Domestic & Foreign Corp.*, 337 U. S. 682, 704.[21] This Court applied it recently in *Chicago & Southern Air Lines, Inc.* v. *Waterman S. S. Corp.*, 333 U. S. 103, as to foreign policy decisions of the President concerning overseas airline licenses.[22] In *Louisiana* v. *McAdoo*, 234 U. S. 627, the State sought to

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[21] This Court has declared the courts cannot supervise departmental action in discharge for inefficient rating, *Keim* v. *United States*, 177 U. S. 290, or enjoin leases of public lands where no contract rights are involved, *Chapman* v. *Sheridan-Wyoming Co.*, 338 U. S. 621, 625. Cf. *Work* v. *Rives*, 267 U. S. 175.

[22] It said, p. 111: "It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. Nor can courts sit *in camera* in order to be taken into executive confidences. But even if courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative."

And added, pp. 112–113:

"Until the decision of the Board has Presidential approval, it grants no privilege and denies no right. It can give nothing and can take nothing away from the applicant or a competitor. It may be a step which if erroneous will mature into a prejudicial result,

enjoin an order of the Secretary of the Treasury fixing the customs rate on sugar as "arbitrary, illegal and unjust" and irreparably injurious to the State. The Court refused the State permission to file the suit as in reality a suit against the United States, saying an officer may be compelled to act ministerially.

> "But if the matter in respect to which the action of the official is sought, is one in which the exercise of either judgment or discretion is required, the courts will refuse to substitute their judgment or discretion for that of the official entrusted by law with its execution. Interference in such a case would be to interfere with the ordinary functions of government." P. 633.

It seems clearly erroneous to suggest that "listing" determines any "guilt" or "punishment" for the organizations or has any finality in determining the loyalty of members. The President and the Attorney General pointed this out.[23] It is written into the Code of Federal Regulations,

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as an order fixing valuations in a rate proceeding may foreshow and compel a prejudicial rate order. But administrative orders are not reviewable unless and until they impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process."

[23] 5 CFR, App. A, p. 200, 13 Fed. Reg. 1471–1473:

"In connection with the designation of these organizations, the Attorney General has pointed out, as the President had done previously, that it is entirely possible that many persons belonging to such organizations may be loyal to the United States; that membership in, affiliation with, or sympathetic association with, any organization designated is simply one piece of evidence which may or may not be helpful in arriving at a conclusion as to the action which is to be taken in a particular case. 'Guilt by association' has never been one of the principles of our American jurisprudence. We must be satisfied that reasonable grounds exist for concluding that an individual is disloyal. That must be the guide."

5 CFR § 210.11 (b) (6), note 4, *supra*. The standard for discharge emphasizes the meaning. See notes 2 and 7, *supra*.

Before stating our conclusions a comment should be made as to the introduction by the concurring opinions of a discussion of the rights of a member of these organizations. It is suggested by one concurrence that as the "Government proceeds on the basis that each of these associations is so identical with its members that the subversive purpose and intents of the one may be attributed to and made conclusive upon the other," the organization must be permitted to vindicate the members' rights or due process is not satisfied. Another concurrence states "an employee may lose his job because of the Attorney General's secret and *ex parte* action." Both concurrences indicate, it seems to me, that as a member of petitioner organizations is denied due process by the effect of listing the organizations, the organization is likewise denied due process in the listing. Without accepting the logic of the concurrences, and waiving inquiry as to the standing of a corporation or unincorporated association to defend the rights of a member to employment, we think the suggestions as to lack of due process are based on an erroneous premise. Employees generally, under executive departments and agencies, whether or not members of listed organizations, without special statutory protection such as permanent employees under the competitive and classified civil service laws and regulations or preference eligibles under the Veterans' Preference Act of 1944, 58 Stat. 387, 5 U. S. C. § 851, 5 CFR, Parts 9 and 22, and Part 2, § 2.104, are subject to summary removal by the appointing officers.[24] Listing of these organiza-

[24] *Keim* v. *United States*, 177 U. S. 290; *United Public Workers* v. *Mitchell*, 330 U. S. 75, 102. Classified civil service employees by statute shall have notice of the charges in writing and the privilege

tions does not conclude the members' rights to hold government employment. It is only one piece of evidence for consideration.[25] That mere membership in listed organizations does not normally bring about findings of disloyalty is graphically shown by a report of proceedings under the loyalty program.[26] The procedure for removal of employees suspected of disloyalty follows the routine prescribed for the removal of employees on other grounds for dismissal. Employees under investigation have never had the right to confrontation, cross-examination and quasi-judicial hearing. 37 Stat. 555, as amended, 5

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of filing an answer with affidavits. The statute adds, "No examination of witnesses nor any trial or hearing shall be required except in the discretion of the officer or employee directing the removal or suspension without pay." 37 Stat. 555, as amended, 5 U. S. C. § 652. And cf. Executive Order dated July 27, 1897, amending Civil Service Rule II, in 18th Report of the U. S. Civil Service Commission, at 282.

[25] 5 CFR § 220.2 (a) (6). See note 4, *supra.*

[26] "A total of 3,166 Government employees have quit or have been discharged under President Truman's loyalty program since it began March 21, 1947, the Loyalty Review Board reported today.

"Of these, 294 actually were discharged for disloyalty. The remainder, 2,872, quit while under investigation and might or might not have been found disloyal.

"The loyalty figures cover all 2,000,000 or more Government employees, plus the additional thousands hired since the program was begun in the spring of 1947.

"The regular monthly loyalty report showed that loyalty boards of the various Federal agencies had received 13,842 reports from the Federal Bureau of Investigation and other investigating agencies since March 21, 1947. This meant investigators found something about those persons that raised a question about their loyalty.

"Of the cases ruled on by loyalty boards, 8,371 were found loyal and 522 disloyal. Of the 522, 294 were discharged, 186 won their jobs back on appeal and forty-two are still awaiting decisions." New York Times, January 16, 1951.

See also n. 9 of MR. JUSTICE DOUGLAS' concurrence.

U. S. C. § 652. Normal removal procedure functions for permanent employees about in this way. The employing agency may remove for the efficiency of the service, including grounds for disqualification of an applicant. 5 CFR, 1947 Supp., § 9.101.[27] Removal requires notice and charges.[28] Before the loyalty review boards similar procedure is followed.[29] Where initial consideration in-

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[27] Disqualification grounds are in 5 CFR § 2.104 (a):

"(a) An applicant may be denied examination and an eligible may be denied appointment for any of the following reasons:

"(1) Dismissal from employment for delinquency or misconduct.

"(2) Physical or mental unfitness for the position for which applied.

"(3) Criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct.

"(4) Intentional false statements or deception or fraud in examination or appointment.

"(5) Refusal to furnish testimony as required by § 5.3 of this chapter.

"(6) Habitual use of intoxicating beverages to excess.

"(7) On all the evidence, reasonable grounds exist for belief that the person involved is disloyal to the Government of the United States.

"(8) Any legal or other disqualification which makes the applicant unfit for the service."

Paragraph (7) is new. Cf. 12 Fed. Reg. 1938.

[28] 5 CFR § 9.102 (1):

"No employee, veteran or nonveteran, shall be separated, suspended, or demoted except for such cause as will promote the efficiency of the service and for reasons given in writing. The agency shall notify the employee in writing of the action proposed to be taken. This notice shall set forth, specifically and in detail, the charges preferred against him. The employee shall be allowed a reasonable time for filing a written answer to such charges and furnishing affidavits in support of his answer. He shall not, however, be entitled to an examination of witnesses, nor shall any trial or hearing be required except in the discretion of the agency."

See Part 22 for appeals under Veterans' Preference Act of 1944.

[29] 5 CFR, Part 220.

dicates a removal of an incumbent for disloyalty may be warranted, notice is provided for.[30] Thus, there is scrupulous care taken to see that an employee who has fallen under suspicion has notice of the charges and an opportunity to explain his actions. The employee has no opportunity to disprove the characterization placed upon the listed organization by the Attorney General for the practical reasons stated following note 2, *supra*. The employee does have every opportunity to explain his association with that organization. The Constitution requires for the employee no more than this fair opportunity to explain his questioned activities. Such procedure is quite similar to that followed in Great

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[30] 5 CFR § 220.2 (f) and (g).

"(g) . . . The notice of proposed removal action required in paragraph (f) of this section shall state to the employee:

"(1) The charges against him in factual detail, setting forth with particularity the facts and circumstances relating to the charges so far as security considerations will permit, in order to enable the employee to submit his answer, defense or explanation.

"(2) His right to answer the charges in writing, under oath or affirmation, within a specified reasonable period of time, not less than ten (10) calendar days from the date of the receipt by the employee of the notice.

"(3) His right to have an administrative hearing on the charges before a loyalty board in the agency, upon his request.

"(4) His right to appear before such board personally, to be represented by counsel or representative of his own choosing, and to present evidence in his behalf."

Id., § 220.3 (d):

"(d) *Presentation of evidence.* Both the Government and the applicant or employee may introduce such evidence as the board may deem proper in the particular case.

"The board shall take into consideration the fact that the applicant or employee may have been handicapped in his defense by the non-disclosure to him of confidential information or by the lack of opportunity to cross-examine persons constituting such sources of information."

Britain in the removal or transfer of civil servants from positions "vital to the security of the State." The Prime Minister assumed the authority to designate membership in the Communist Party or "other forms of continuing association" therewith as sufficient to bar employment in sensitive areas.[31]

Conclusion.—In our judgment organizations are not affected by these designations in such a manner as to

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[31] The Prime Minister first described this program in a statement in the House of Commons, March 15, 1948, 448 H. C. Deb. 1703 ff., and in further detail on March 25, *id.* at 3418 ff. The standards for the program are set forth at 451 H. C. Deb., Written Answers, p. 118, in the form of instructions to three "advisers on Communists and Fascists in the Civil Service," retired civil servants designated to perform a function essentially parallel to that of the Loyalty Review Board here:

"1. The Government have stated that no one who is believed to be:—

> "(i) either a member of the Communist Party or of a Fascist organisation; or
>
> "(ii) associated with either the Communist Party or a Fascist organisation in such a way as to raise legitimate doubts about his reliability;

is to be employed in connection with work the nature of which is vital to the security of the State.

"2. You have been appointed to advise Ministers, in any cases referred to you, whether in your opinion their *prima facie* ruling that a civil servant comes under (i) or (ii) above is or is not substantiated. The decision on what employment is to be regarded as involving 'connection with work the nature of which is vital to the security of the State' is one not for you but for Ministers in charge of Departments.

"3. Your functions do not extend beyond advising the Minister whether the *prima facie* case has or has not been substantiated. You are not concerned with the action which he may decide to take in relation to the matter."

The Prime Minister stated that the civil servant concerned would be informed as specifically as possible of the charges against him, but

permit a court's interference or to deny due process. That conclusion holds good also when we assume the organizations may present their members' grievances over discharge as a part of the organization's case. The administrative hearing granted an employee facing discharge is a statutory modification of the employing agent's former authority to discharge summarily. Such act of grace does not create a constitutional right. Due process is called for in determinations affecting rights.

What petitioners seek is a ruling that the Government cannot designate organizations as communist for the purpose of furthering investigations into employees' loyalty by the employing agencies without giving those organizations an opportunity to examine and meet the information on which the list is based. One can understand that position. There is a natural hesitation against any action that may damage any person or organization through an error that notice and hearing might correct. Such attitude of tolerance is reflected in § 13 of the Internal Security Act of 1950, 64 Stat. 987, 998. A statutory requirement for notice and administrative hearing, how-

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that "It is quite impossible—and everyone will realise that it is—that we should give in detail exactly the sources of information. If we do that, we destroy anything like an effective security service." *Id.*, Vol. 448, at 3423. He would be allowed to appear personally in response to charges. *Id.* at 3425.

While the program is primarily intended to effect the transfer of unreliable civil servants to jobs not vital to the security of the state (unless their technical training fits them only for security jobs), nevertheless it has apparently been extended to cover all jobs in certain agencies, such as the Air Ministry Headquarters. *Id.*, Vol. 452, at 940–941.

The Prime Minister did not answer directly questions as to the scope of the order in relation to "the telephone service and key telephone exchanges," *id.*, Vol. 448, at 1705, or "members of the Services who are engaged in dealing with secret processes." *Id.* at 1706.

ever, does not mean the existence of a constitutional requirement.[32]

The Executive has authority to gather information concerning the loyalty of its employees as congressional committees have power to investigate matters of legislative interest. A public statement of legislative conclusions on information that later may be found erroneous may damage those investigated but it is not a civil judgment or a criminal conviction. Due process does not apply. Questions of propriety of political action are not for the courts. Information that an employee associates with or belongs to organizations considered communistic may be deemed by the Executive a sound reason for making inquiries into the desirability of the employment of that employee. That is not "guilt by association." It is a warning to investigate the conduct of the employee and his opportunity for harm.

While we must be on guard against being moved to conclusions on the constitutionality of action, legislative or executive, by the circumstances of the moment, undoubtedly varying conditions call for differences in procedure. Due process requires appraisal in the light of conditions confronting the executive during the continuation of the challenged action.[33] Power lies in the executive to guard the Nation from espionage, subversion and sedition by examining into the loyalty of employees, and due process in such investigation depends upon the particular exercise of that power in particular conditions.[34] In investigations to determine the purposes of suspected organizations, the Government should be free to proceed without notice or hearing. Petitioners will have protec-

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[32] Cf. *Standard Computing Scale Co.* v. *Farrell,* 249 U. S. 571.

[33] *Hirabayashi* v. *United States,* 320 U. S. 81, 93, 100.

[34] *Home Building & Loan Assn.* v. *Blaisdell,* 290 U. S. 398, 426, 442.

tion when steps are taken to punish or enjoin their activities. Where notice and such administrative hearing as the Code of Federal Regulations prescribes precede punishment, injunction or discharge, petitioners and their members' rights to due process are protected.

The judgment of the Court of Appeals should be affirmed.

BOWMAN DAIRY CO. ET AL. *v.* UNITED STATES ET AL.

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

No. 435. Argued March 9, 1951.—Decided April 30, 1951.

Before trial on an indictment for violation of § 1 of the Sherman Act, defendants obtained under Rule 16 of the Federal Rules of Criminal Procedure an order requiring the Government to produce for inspection all documents or objects obtained from defendants and obtained by seizure or process from others. The Government complied with that order. Defendants also moved, under Rule 17 (c), for an order directing compliance with a subpoena *duces tecum* requiring the production for inspection of certain documents and objects obtained by the Government by means other than seizure or process and which (a) had been presented to the grand jury, or (b) were to be offered as evidence at the trial, or "(c) are relevant to the allegations or charges contained in said indictment, whether or not they might constitute evidence with respect to the guilt or innocence of any of the defendants." For refusal to comply with this order, respondent, a government attorney who had possession of the subpoenaed materials, was found guilty of contempt. *Held:*

1. Under Rule 17 (c), any document or other material which has been obtained by the Government by solicitation or voluntarily from third persons, and which is admissible in evidence, is subject to subpoena. Pp. 218–221.

(a) It is not required that materials thus subpoenaed be actually used in evidence, but only that a good-faith effort be made to obtain evidence; and the court may control the use of Rule 17 (c) to that end by its power to rule on motions to quash or modify. Pp. 219–220.

(b) Where such materials are required to be produced, the court should be solicitous to protect against disclosures of the identity of informants and the method, manner and circumstances of the Government's acquisition of the materials. P. 221.

2. Clause (c) of the subpoena is invalid, being not intended to produce evidentiary materials but being merely "a fishing expedition to see what may turn up." P. 221.

3. The subpoena being part good and part bad, respondent may not be held in contempt for refusal to comply with it. P. 221.
185 F. 2d 159, judgment vacated.

Upon review of an order of the District Court finding a government attorney guilty of contempt for refusal to comply with a subpoena *duces tecum*, the Court of Appeals reversed. 185 F. 2d 159. This Court granted certiorari. 340 U. S. 919. *Judgment vacated and cause remanded to the District Court*, p. 222.

L. Edward Hart, Jr. and *Walter J. Cummings, Jr.* argued the cause for petitioners. On the brief were *Mr. Hart* and *Mr. Tierney* for the Bowman Dairy Co. et al., *Herman A. Fischer* for the American Processing & Sales Co., *Kenneth F. Burgess, Edwin Clark Davis* and *Mr. Cummings* for the Borden Company et al., *Isidore Fried* for the Capitol Dairy Co. et al., and *Thomas B. Gilmore* for the Hunding Dairy Co. et al. *Louis E. Hart* was also of counsel for petitioners.

Deputy Attorney General Ford argued the cause for respondents. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Morison* and *J. Roger Wollenberg.*

Mr. Justice Minton delivered the opinion of the Court.

Petitioners were indicted for a violation of § 1 of the Sherman Act.[1] Before the case was set for trial, each petitioner filed a motion under Rule 16 of the Federal Rules of Criminal Procedure [2] for an order requiring the

[1] 26 Stat. 209, 15 U. S. C. § 1.

[2] "Rule 16. Discovery and Inspection.

"Upon motion of a defendant at any time after the filing of the indictment or information, the court may order the attorney for the government to permit the defendant to inspect and copy or photo-

United States to produce for inspection all books, papers, documents, or objects obtained from petitioners and obtained by seizure or process from others. An agreed order was entered by the court and the Government fully complied therewith. The validity of this order is not in question.

Petitioners also moved under Rule 17 (c) [3] for an order directing the Government at a time and place to be specified therein to produce for inspection certain other books, papers, documents and objects obtained by the Government by means other than seizure or process. Petitioners filed and served on the Government attorneys a

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graph designated books, papers, documents or tangible objects, obtained from or belonging to the defendant or obtained from others by seizure or by process, upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable. The order shall specify the time, place and manner of making the inspection and of taking the copies or photographs and may prescribe such terms and conditions as are just."

[3] "RULE 17. SUBPOENA.

"(a) FOR ATTENDANCE OF WITNESSES; FORM; ISSUANCE. A subpoena shall be issued by the clerk . . . and shall command each person to whom it is directed to attend and give testimony at the time and place specified therein. The clerk shall issue a subpoena, signed and sealed but otherwise in blank to a party requesting it, who shall fill in the blanks before it is served.

. . . . . .

"(c) FOR PRODUCTION OF DOCUMENTARY EVIDENCE AND OF OBJECTS. A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys."

subpoena *duces tecum,* the pertinent part of which reads as follows:

> "all documents, books, papers and objects (except memoranda prepared by Government counsel, and documents or papers solicited by or volunteered to Government counsel which consist of narrative statements of persons or memoranda of interviews), obtained by Government counsel, in any manner other than by seizure or process, (a) in the course of the investigation by Grand Jury No. 8949 which resulted in the return of the indictment herein, and (b) in the course of the Government's preparation for the trial of this cause, if such books, papers, documents and objects, (a) have been presented to the Grand Jury; or (b) are to be offered as evidence on the trial of the defendants, or any of them, under said indictment; or (c) are relevant to the allegations or charges contained in said indictment, whether or not they might constitute evidence with respect to the guilt or innocence of any of the defendants . . . ."

A hearing was held and the court entered an order directing the Government to produce for petitioners' inspection the materials designated in the subpoena.

Thereafter the Government moved to quash the subpoena and to set aside the order, contending that the access of a defendant in a criminal proceeding to materials in custody of Government attorneys is limited to rights granted by Rule 16 and that the District Court had erred in ordering production of the subpoenaed materials. This motion was denied. Respondent Hotchkiss, one of the Government attorneys to whom the subpoena was addressed, had possession of the materials called for, but refused to produce any of them. After a hearing, the District Court held him in contempt. The Court of Appeals reversed, 185 F. 2d 159. We granted certiorari

because of the importance of the scope of Rule 17 (c) in federal practice. 340 U. S. 919.

During the hearing on petitioners' motions for an order under Rule 17 (c), respondent Hotchkiss, acting for the Government, had offered to produce, and to enter into a stipulation therefor, all documents of evidentiary character, in the custody of the Government obtained other than by seizure or process, *i. e.,* documents other than the work product of the Government, solicited and volunteered narrative statements, and memoranda of interviews. However, this offer did not include documents *furnished the Government by voluntary and confidential informants.*

The subpoena was broad enough to include any documents and other materials that had been furnished the Government by voluntary informants and which did not "consist of narrative statements of persons or memoranda of interviews." The Government's chief objection to the subpoena, as stated to the court by respondent Hotchkiss, was as follows:

> "Mr. Hotchkiss: There is only one objection—basic objection which I would make to the form which is proposed: This language in this subpoena or proposed subpoena, as I construe it does not protect those confidential informants who have provided the Government with confidential material which the Government feels on the basis of very well established principles followed by the courts are normally protected from the view of litigants."

It appears from respondent's colloquy with the court that the confidential material which he would except from the subpoena consisted of "documents furnished the Government without process or seizure by voluntary informants."

It was intended by the rules to give some measure of discovery. Rule 16 was adopted for that purpose. It

gave discovery as to documents and other materials otherwise beyond the reach of the defendant which, as in the instant case, might be numerous and difficult to identify. The rule was to apply not only to documents and other materials belonging to the defendant, but also to those belonging to others which had been obtained by seizure or process. This was a departure from what had theretofore been allowed in criminal cases.[4]

Rule 16 deals with documents and other materials that are in the possession of the Government and provides how they may be made available to the defendant for his information. In the interest of orderly procedure in the handling of books, papers, documents and objects in the custody of the Government accumulated in the course of an investigation and subpoenaed for use before the grand jury and on the trial, it was provided by Rule 16 that the court could order such materials made available to the defendant for inspection and copying or photographing. In that way, the control and possession of the Government is not disturbed. Rule 16 provides the only way the defendant can reach such materials so as to inform himself.

But if such materials or any part of them are not put in evidence by the Government, the defendant may subpoena them under Rule 17 (c) and use them himself. It would be strange indeed if the defendant discovered some evidence by the use of Rule 16 which the Government was not going to introduce and yet could not require its production by Rule 17 (c). There may be documents and other materials in the possession of the Government not subject to Rule 16. No good reason appears to us why they may not be reached by subpoena under Rule 17 (c) as long as they are evidentiary. That is not to say that the materials thus subpoenaed must actually be used in evi-

[4] See Advisory Committee's Note to Rule 16, 18 U. S. C., p. 1969.

dence. It is only required that a good-faith effort be made to obtain evidence. The court may control the use of Rule 17 (c) to that end by its power to rule on motions to quash or modify.[5]

It was not intended by Rule 16 to give a limited right of discovery, and then by Rule 17 to give a right of discovery in the broadest terms. Rule 17 provided for the usual subpoena *ad testificandum* and *duces tecum,* which may be issued by the clerk, with the provision that the court may direct the materials designated in the subpoena *duces tecum* to be produced at a specified time and place for inspection by the defendant. Rule 17 (c) was not intended to provide an additional means of discovery. Its chief innovation was to expedite the trial by providing a time and place *before* trial for the inspection of the subpoenaed materials. *United States* v. *Maryland & Virginia Milk Producers Assn.,* 9 F. R. D. 509. However, the plain words of the Rule are not to be ignored. They must be given their ordinary meaning to carry out the purpose of establishing a more liberal policy for the production, inspection and use of materials at the trial.

[5] "We also find in the same rule, under (c), a provision for the production of documentary evidence or objects—the familiar subpoena duces tecum—and if the person upon whom the subpoena is served thinks it is broad or unreasonable or oppressive he may apply to the court to quash the subpoena. Furthermore, while normally under a subpoena the books and other things called for would merely be brought into court at the time of the trial, let us say immediately before they are to be offered in evidence, there is a provision in this rule that the court may, in the proper case, direct that they be brought into court in advance of the time that they are offered in evidence, so that they may then be inspected in advance, for the purpose of course of enabling the party to see whether he can use it or whether he wants to use it." Statement of Mr. G. Aaron Youngquist, Member of Advisory Committee, Federal Rules of Criminal Procedure, Proceedings of the Institute on Federal Rules of Criminal Procedure (New York University School of Law, Institute Proceedings, Vol. VI, 1946), pp. 167–168.

There was no intention to exclude from the reach of process of the defendant any material that had been used before the grand jury or could be used at the trial. In short, any document or other materials, admissible as evidence, obtained by the Government by solicitation or voluntarily from third persons is subject to subpoena. It was material of this character which the Government was unwilling to stipulate to produce or to produce in obedience to the subpoena. Such materials were subject to the subpoena. Where the court concludes that such materials ought to be produced, it should, of course, be solicitous to protect against disclosures of the identity of informants, and the method, manner and circumstances of the Government's acquisition of the materials.

Clause (c), which is the last clause in the subpoena, reads as follows:

> "are relevant to the allegations or charges contained in said indictment, whether or not they might constitute evidence with respect to the guilt or innocence of any of the defendants . . . ."

This is a catch-all provision, not intended to produce evidentiary materials but is merely a fishing expedition to see what may turn up. The clause is therefore invalid.

The subpoena calls for materials which the Government is bound to produce and for materials it is not bound to produce. The District Court said: "Give us all." The Government replied: "We will give you nothing." Both were wrong. The Government should produce the evidentiary materials called for by the subpoena. It need not produce anything under clause (c).

One should not be held in contempt under a subpoena that is part good and part bad. The burden is on the court to see that the subpoena is good in its entirety and it is not upon the person who faces punishment to cull the good from the bad.

Accordingly, the judgment of the Court of Appeals is vacated and the cause remanded to the District Court for further proceedings in conformity with this opinion.

It is so ordered.

MR. JUSTICE BLACK would affirm the District Court.

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

JORDAN, DISTRICT DIRECTOR OF IMMIGRATION & NATURALIZATION, *v.* DE GEORGE.

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

No. 348. Argued March 5, 1951.—Decided May 7, 1951.

Conspiracy to defraud the United States of taxes on distilled spirits is a "crime involving moral turpitude" within the meaning of § 19 (a) of the Immigration Act of 1917, 8 U. S. C. § 155 (a), which requires the deportation of any alien who is sentenced more than once to imprisonment for one year or more because of conviction in this country of any such crime. Pp. 223–232.

(a) Crimes in which fraud is an ingredient have always been regarded as involving moral turpitude. Pp. 227–229, 232.

(b) The phrase "crime involving moral turpitude" does not lack sufficiently definite standards to justify this deportation proceeding; and the statute is not unconstitutional for vagueness. Pp. 229–232.

183 F. 2d 768, reversed.

In a habeas corpus proceeding to challenge the validity of a deportation order, the District Court dismissed the petition. The Court of Appeals reversed. 183 F. 2d 768. This Court granted certiorari. 340 U. S. 890. *Reversed,* p. 232.

John F. Davis argued the cause for petitioner. With him on the brief were *Solicitor General Perlman, Assistant Attorney General McInerney, L. Paul Winings* and *Charles Gordon.*

Thomas F. Dolan argued the cause for respondent. With him on the brief was *Sherlock J. Hartnett.*

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

This case presents only one question: whether conspiracy to defraud the United States of taxes on distilled

spirits is a "crime involving moral turpitude" within the meaning of § 19 (a) of the Immigration Act of 1917.[1]

Respondent, a native and citizen of Italy, has lived continuously in the United States since he entered this country in 1921.[2] In 1937, respondent was indicted under 18 U. S. C. § 88 [3] for conspiring with seven other defendants to violate twelve sections of the Internal Revenue Code. The indictment specifically charged him with possessing whiskey and alcohol "with intent to sell it in fraud of law and evade the tax thereon." He was further accused of removing and concealing liquor "with intent to defraud the United States of the tax thereon." [4] After pleading guilty, respondent was sentenced to imprisonment in a federal penitentiary for a term of one year and one day.

Respondent served his sentence under this conviction, and was released from custody. Less than a year later, he returned to his former activities and in December 1939, he was indicted again with eight other defendants for violating the same federal statutes. He was charged with conspiring to "unlawfully, knowingly, and willfully

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[1] 39 Stat. 889, as amended, 8 U. S. C. § 155 (a).

[2] Less than three years after entering the United States, respondent was convicted for transporting liquor and sentenced to a term in the reformatory. In 1931, he was convicted and fined for transferring license plates.

[3] 35 Stat. 1096, now 18 U. S. C. § 371:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both."

[4] These charges were based upon 26 U. S. C. (1934 ed.) §§ 1155 (f), 1440 and 1441.

defraud the United States of tax on distilled spirits." [5] After being tried and found guilty in 1941, he was sentenced to imprisonment for two years.

While serving his sentence under this second conviction, deportation proceedings were commenced against the respondent under § 19 (a) of the Immigration Act which provides:

> ". . . any alien . . . who is hereafter sentenced more than once to such a term of imprisonment [one year or more] because of conviction in this country of any crime involving moral turpitude, committed at any time after entry . . . shall, upon the warrant of the Attorney General, be taken into custody and deported. . . ." [6]

After continued hearings and consideration of the case by the Commissioner of Immigration and Naturalization and by the Board of Immigration Appeals, respondent was ordered to be deported in January 1946, on the ground that he had twice been convicted and sentenced to terms of one year or more of crimes involving moral turpitude.[7] Deportation was deferred from time to time

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[5] The record establishes that respondent was a large-scale violator engaged in a sizable business. The second indictment alone charged him with possessing 4,675 gallons of alcohol and an undetermined quantity of distilled spirits. At the rate of $2.25 a gallon then in effect, the tax on the alcohol alone would have been over $10,000.

[6] 39 Stat. 889, as amended, 8 U. S. C. § 155 (a).

[7] Section 19 (a) further provides: ". . . The provision of this section respecting the deportation of aliens convicted of a crime involving moral turpitude shall not apply to one who has been pardoned, nor shall such deportation be made or directed if the court, or judge thereof, sentencing such alien for such crime shall, at the time of imposing judgment or passing sentence or within thirty days thereafter, due notice having first been given to representatives of the State, make a recommendation to the Attorney General that such alien shall not be deported in pursuance of this chapter . . . ." 39

at respondent's request until 1949, when the District Director of Immigration and Naturalization moved to execute the warrant of deportation.

Respondent then sought habeas corpus in the District Court, claiming that the deportation order was invalid because the crimes of which he had been convicted did not involve moral turpitude. The District Court held a hearing, and dismissed the petition. The Court of Appeals reversed the order of the District Court and ordered that the respondent be discharged. 183 F. 2d 768 (1950). The Court of Appeals stated that "crimes involving moral turpitude," as those words were used in the Immigration Act, "were intended to include only crimes of violence, or crimes which are commonly thought of as involving baseness, vileness or depravity. Such a classification does not include the crime of evading the payment of tax on liquor, nor of conspiring to evade that tax." 183 F. 2d at 772. We granted certiorari to review the decision, 340 U. S. 890 (1950), as conflicting with decisions of the courts of appeals in other circuits.

This Court has interpreted the provision of the statute before us "to authorize deportation only where an alien having committed a crime involving moral turpitude and having been convicted and sentenced, once again commits a crime of that nature and is convicted and sentenced for it." *Fong Haw Tan* v. *Phelan,* 333 U. S. 6, 9–10 (1948). Respondent has on two separate occasions been convicted of the same crime, conspiracy to defraud the United States of taxes on distilled spirits. Therefore, our inquiry in this case is narrowed to determining whether this particular offense involves moral turpitude. Whether

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Stat. 889, as amended, 8 U. S. C. § 155 (a). The record does not indicate that respondent has been pardoned, nor that the sentencing judge recommended that he not be deported, nor that respondent requested that such recommendation be made.

or not certain other offenses involve moral turpitude is irrelevant and beside the point.

The term "moral turpitude" has deep roots in the law. The presence of moral turpitude has been used as a test in a variety of situations, including legislation governing the disbarment of attorneys [8] and the revocation of medical licenses.[9] Moral turpitude also has found judicial employment as a criterion in disqualifying and impeaching witnesses,[10] in determining the measure of contribution between joint tort-feasors,[11] and in deciding whether certain language is slanderous.[12]

In deciding the case before the Court, we look to the manner in which the term "moral turpitude" has been applied by judicial decision. Without exception, federal and state courts have held that a crime in which fraud is an ingredient involves moral turpitude. In the construction of the specific section of the Statute before us, a court of appeals has stated that fraud has ordinarily been the test to determine whether crimes not of the gravest character involve moral turpitude. *United States ex rel. Berlandi* v. *Reimer,* 113 F. 2d 429 (1940).

In every deportation case where fraud has been proved, federal courts have held that the crime in issue involved moral turpitude. This has been true in a variety of situ-

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[8] *In re Kirby,* 10 S. D. 322, 73 N. W. 92, 39 L. R. A. 856 (1897). *Bartos* v. *United States District Court,* 19 F. 2d 722 (1927); see Bradway, Moral Turpitude as the Criterion of Offenses that Justify Disbarment, 24 Cal. L. Rev. 9–27.

[9] *Fort* v. *Brinkley,* 87 Ark. 400, 404, 112 S. W. 1084, 1085 (1908). "It seems clearly deducible from the above cited authorities that the words 'moral turpitude' had a positive and fixed meaning at common law . . . ."

[10] 3 Wigmore, Evidence (3d ed.), 540; cases are collected at 40 A. L. R. 1049, and 71 A. L. R. 219.

[11] *Fidelity & Cas. Co.* v. *Christenson,* 183 Minn. 182, 236 N. W. 618 (1931).

[12] *Baxter* v. *Mohr,* 37 Misc. 833, 76 N. Y. S. 982 (1902).

ations involving fraudulent conduct: obtaining goods under fraudulent pretenses, *Bermann* v. *Reimer,* 123 F. 2d 331 (1941); conspiracy to defraud by deceit and falsehood, *Mercer* v. *Lence,* 96 F. 2d 122 (1938); forgery with intent to defraud, *United States ex rel. Popoff* v. *Reimer,* 79 F. 2d 513 (1935); using the mails to defraud, *Ponzi* v. *Ward,* 7 F. Supp. 736 (1934); execution of chattel mortgage with intent to defraud, *United States ex rel. Millard* v. *Tuttle,* 46 F. 2d 342 (1930); concealing assets in bankruptcy, *United States ex rel. Medich* v. *Burmaster,* 24 F. 2d 57 (1928); issuing checks with intent to defraud, *United States ex rel. Portada v. Day,* 16 F. 2d 328 (1926). In the state courts, crimes involving fraud have universally been held to involve moral turpitude.[13]

Moreover, there have been two other decisions by courts of appeals prior to the decision now under review on the question of whether the particular offense before us in this case involves moral turpitude within the meaning of § 19 (a) of the Immigration Act. In *United States ex rel. Berlandi* v. *Reimer,* 113 F. 2d 429 (1940), and *Maita* v. *Haff,* 116 F. 2d 337 (1940), courts of appeals specifically decided that the crime of conspiracy to violate the internal revenue laws by possessing and concealing distilled spirits with intent to defraud the United States of taxes involves moral turpitude. Furthermore, in *Guarneri* v. *Kessler,* 98

[13] State decisions have held that the following crimes involve moral turpitude: passing a check with intent to defraud, *Bancroft* v. *Board of Governors of Registered Dentists of Oklahoma,* 202 Okla. 108, 210 P. 2d 666 (1949); using the mails to defraud, *Neibling* v. *Terry,* 352 Mo. 396, 177 S. W. 2d 502 (1944), *In re Comyns,* 132 Wash. 391, 232 P. 269 (1925); obtaining money and property by false and fraudulent pretenses, *In re Needham,* 364 Ill. 65, 4 N. E. 2d 19 (1936); possessing counterfeit money with intent to defraud, *Fort* v. *Brinkley,* 87 Ark. 400, 112 S. W. 1084 (1908). One state court has specifically held that the wilful evasion of federal income taxes constitutes moral turpitude. *Louisiana State Bar Assn.* v. *Steiner,* 204 La. 1073, 16 So. 2d 843 (1944).

F. 2d 580 (1938), a court of appeals held that the crime of smuggling alcohol into the United States with intent to defraud the United States involves moral turpitude.

In view of these decisions, it can be concluded that fraud has consistently been regarded as such a contaminating component in any crime that American courts have, without exception, included such crimes within the scope of moral turpitude. It is therefore clear, under an unbroken course of judicial decisions, that the crime of conspiring to defraud the United States is a "crime involving moral turpitude."

But it has been suggested that the phrase "crime involving moral turpitude" lacks sufficiently definite standards to justify this deportation proceeding and that the statute before us is therefore unconstitutional for vagueness. Under this view, no crime, however grave, could be regarded as falling within the meaning of the term "moral turpitude." The question of vagueness was not raised by the parties nor argued before this Court.

It is significant that the phrase has been part of the immigration laws for more than sixty years.[14] As dis-

[14] The term "moral turpitude" first appeared in the Act of March 3, 1891, 26 Stat. 1084, which directed the exclusion of "persons who have been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude." Similar language was reenacted in the Statutes of 1903 and 1907. § 2, Act of March 3, 1903, 32 Stat. 1213; § 2, Act of Feb. 20, 1907, 34 Stat. 898. It has been suggested that the fact that this phrase has been used in the Immigration Laws for over sixty years has no weight in upholding its constitutionality. Of course, the mere existence of a statute for over sixty years does not provide immunity from constitutional attack. We have recently held an equally ancient statute unconstitutional for vagueness. *Winters* v. *New York*, 333 U. S. 507 (1948). There, a statute, which employed vague terminology wholly lacking in common law background or interpretation, was aimed at limiting rights of free speech. Even in the *Winters* case, however, several dissenting members of this Court were of the view that the venerability of the statute was an element to be considered in deciding the question of vagueness.

cussed above, the phrase "crime involving moral turpitude" has also been used for many years as a criterion in a variety of other statutes. No case has been decided holding that the phrase is vague, nor are we able to find any trace of judicial expression which hints that the phrase is so meaningless as to be a deprivation of due process.

Furthermore, this Court has itself construed the phrase "crime involving moral turpitude." In *United States ex rel. Volpe* v. *Smith, Director of Immigration,* 289 U. S. 422 (1933), the Court interpreted the same section of the Immigration Statute now before us. There, an alien had been convicted of counterfeiting government obligations with intent to defraud, and one question of the case was whether the crime of counterfeiting involved moral turpitude. This question was raised by the parties and discussed in the briefs. The Court treated the question without hesitation, stating that the crime of counterfeiting obligations of the United States was *"plainly a crime involving moral turpitude."* 289 U. S. at 423. (Emphasis supplied.)

The essential purpose of the "void for vagueness" doctrine is to warn individuals of the criminal consequences of their conduct. *Williams* v. *United States,* 341 U. S. 97, decided April 23, 1951; *Screws* v. *United States,* 325 U. S. 91, 103–104 (1945). This Court has repeatedly stated that criminal statutes which fail to give due notice that an act has been made criminal before it is done are unconstitutional deprivations of due process of law. *Lanzetta* v. *New Jersey,* 306 U. S. 451 (1939); *United States* v. *Cohen Grocery Co.,* 255 U. S. 81 (1921). It should be emphasized that this statute does not declare certain conduct to be criminal. Its function is to apprise aliens of the consequences which follow after conviction and sentence of the requisite two crimes.

Despite the fact that this is not a criminal statute, we shall nevertheless examine the application of the vagueness doctrine to this case. We do this in view of the grave nature of deportation. The Court has stated that "deportation is a drastic measure and at times the equivalent of banishment or exile . . . . It is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty." *Fong Haw Tan* v. *Phelan, supra,* at 10. We shall, therefore, test this statute under the established criteria of the "void for vagueness" doctrine.

We have several times held that difficulty in determining whether certain marginal offenses are within the meaning of the language under attack as vague does not automatically render a statute unconstitutional for indefiniteness. *United States* v. *Wurzbach,* 280 U. S. 396, 399 (1930). Impossible standards of specificity are not required.[15] *United States* v. *Petrillo,* 332 U. S. 1 (1947). The test is whether the language conveys sufficiently definite warning as to the proscribed conduct when measured

[15] The phrase "crime involving moral turpitude" presents no greater uncertainty or difficulty than language found in many other statutes repeatedly sanctioned by the Court. The Sherman Act provides the most obvious example, "restraint of trade" as construed to mean "unreasonable or undue restraint of trade," *Nash* v. *United States,* 229 U. S. 373 (1913). Compare other statutory language which has survived attack under the vagueness doctrine in this Court: "in excess of the number of employees needed by such licensee to perform actual services," *United States* v. *Petrillo,* 332 U. S. 1 (1947); "any offensive, derisive or annoying word," *Chaplinsky* v. *New Hampshire,* 315 U. S. 568 (1942); "connected with or related to the national defense," *Gorin* v. *United States,* 312 U. S. 19 (1941); "psychopathic personality," *Minnesota* v. *Probate Court,* 309 U. S. 270 (1940); "wilfully overvalues any security," *Kay* v. *United States,* 303 U. S. 1 (1938); "fair and open competition," *Old Dearborn Co.* v. *Seagram Corp.,* 299 U. S. 183 (1936); "reasonable variations shall be permitted," *United States* v. *Shreveport Grain & Elevator Co.,* 287 U. S. 77 (1932); "unreasonable waste of natural gas," *Bandini Petro-*

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by common understanding and practices. *Connally* v. *General Construction Co.*, 269 U. S. 385 (1926).

We conclude that this test has been satisfied here. Whatever else the phrase "crime involving moral turpitude" may mean in peripheral cases, the decided cases make it plain that crimes in which fraud was an ingredient have always been regarded as involving moral turpitude. We have recently stated that doubt as to the adequacy of a standard in less obvious cases does not render that standard unconstitutional for vagueness. See *Williams* v. *United States, supra.* But there is no such doubt present in this case. Fraud is the touchstone by which this case should be judged. The phrase "crime involving moral turpitude" has without exception been construed to embrace fraudulent conduct. We therefore decide that Congress sufficiently forewarned respondent that the statutory consequence of twice conspiring to defraud the United States is deportation.

Reversed.

MR. JUSTICE JACKSON, dissenting.

Respondent, because he is an alien, and because he has been twice convicted of crimes the Court holds involve "moral turpitude," is punished with a life sentence of banishment in addition to the punishment which a citizen would suffer for the identical acts. MR. JUSTICE BLACK, MR. JUSTICE FRANKFURTER and I cannot agree, because we believe the phrase "crime involving moral turpitude," as found in the Immigration Act,[1] has no sufficiently definite meaning to be a constitutional standard for deportation.

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leum Co. v. *Superior Court*, 284 U. S. 8 (1931); "political purposes," *United States* v. *Wurzbach*, 280 U. S. 396 (1930); "range usually occupied by any cattle grower," *Omaechevarria* v. *Idaho*, 246 U. S. 343 (1918).

[1] Section 19 (a) of the Immigration Act of February 5, 1917, 39 Stat. 889, as amended, 8 U. S. C. § 155 (a).

Respondent migrated to this country from his native Italy in 1921 at the age of seventeen. Here he has lived twenty-nine years, is married to an American citizen, and his son, citizen by birth, is now a university student. In May, 1938, he pleaded guilty to a charge of conspiracy to violate the Internal Revenue Code [2] and was sentenced to imprisonment for one year and one day. On June 6, 1941, he was convicted of a second violation and sentenced to imprisonment for two years. During the decade since, he has not been arrested or charged with any law violation. While still in prison, however, deportation proceedings were instituted against him, resulting in 1946, in a warrant for arrest and deportation.

By habeas corpus proceedings, De George challenged the deportation order upon the ground that his is not a crime "involving moral turpitude." The District Court thought it did and dismissed the writ. The Court of Appeals for the Seventh Circuit thought it did not and reversed.[3] There is a conflict among the circuits.[4]

What the Government seeks, and what the Court cannot give, is a basic definition of "moral turpitude" to guide administrators and lower courts.

The uncertainties of this statute do not originate in contrariety of judicial opinion. Congress knowingly conceived it in confusion. During the hearings of the House Committee on Immigration, out of which eventually came the Act of 1917 in controversy, clear warning of its deficiencies was sounded and never denied.

> "Mr. SABATH. . . . [Y]ou know that a crime involving moral turpitude has not been defined. No

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[2] 53 Stat. 401, 26 U. S. C. § 3321.

[3] 183 F. 2d 768.

[4] *United States ex rel. Berlandi* v. *Reimer*, 113 F. 2d 429 (C. A. 2d Cir.) and *Maita* v. *Haff*, 116 F. 2d 337 (C. A. 9th Cir.) hold this crime involves moral turpitude. Cf. *Guarneri* v. *Kessler*, 98 F. 2d 580 (C. A. 5th Cir.), cert. denied, 305 U. S. 648.

> one can really say what is meant by saying a crime involving moral turpitude. Under some circumstances, larceny is considered a crime involving moral turpitude—that is, stealing. We have laws in some States under which picking out a chunk of coal on a railroad track is considered larceny or stealing. In some States it is considered a felony. Some States hold that every felony is a crime involving moral turpitude. In some places the stealing of a watermelon or a chicken is larceny. In some States the amount is not stated. Of course, if the larceny is of an article, or a thing which is less than $20 in value, it is a misdemeanor in some States, but in other States there is no distinction." [5]

Despite this notice, Congress did not see fit to state what meaning it attributes to the phrase "crime involving moral turpitude." It is not one which has settled significance from being words of art in the profession. If we go to the dictionaries, the last resort of the baffled judge, we learn little except that the expression is redundant, for turpitude alone means moral wickedness or depravity [6] and moral turpitude seems to mean little more than morally immoral.[7] The Government confesses that

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[5] Hearings before House Committee on Immigration and Naturalization on H. R. 10384, 64th Cong., 1st Sess. 8.

[6] Black's Law Dictionary defines turpitude as: "[I]nherent baseness or vileness of principle or action; shameful wickedness; depravity." An example of its use alone to signify immorality may be taken from Macaulay, whose most bitter critics would admit he was a master of the English word. "[T]he artists corrupted the spectators, and the spectators the artists, till the turpitude of the drama became such as must astonish all who are not aware that extreme relaxation is the natural effect of extreme restraint." History of England, Vol. I (1849 ed.), p. 374.

[7] Bouvier's Law Dictionary, Rawles Third Revision, defines "moral turpitude" as "An act of baseness, vileness or depravity in the private

it is "a term that is not clearly defined," and says: "The various definitions of moral turpitude provide no exact test by which we can classify the specific offenses here involved."

Except for the Court's opinion, there appears to be universal recognition that we have here an undefined and undefinable standard. The parties agree that the phrase is ambiguous and have proposed a variety of tests to reduce the abstract provision of this statute to some concrete meaning.

It is proposed by respondent, with strong support in legislative history, that Congress had in mind only crimes of violence.[8] If the Court should adopt this construction, the statute becomes sufficiently definite, and, of course, would not reach the crimes of the respondent.

The Government suggests seriousness of the crime as a test and says the statute is one by which it is "sought to reach the *confirmed criminal,* whose criminality has been revealed in *two serious penal offenses.*" (Italics supplied.) But we cannot, and the Court does not, take seri-

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and social duties which a man owes to his fellow men or to society in general, contrary to the accepted and customary rule of right and duty between man and man."

[8] "Mr. WOODS. . . . I would make provisions to get rid of an alien in this country who comes here and commits felonies and burglaries, holds you up on the streets, and commits crimes against our daughters, because we do not want that kind of alien here, and they have no right to be here. . . . The rule is that if we get a man in this country who has not become a citizen, who knocks down people in the street, who murders or who attempts to murder people, who burglarizes our houses with blackjack and revolver, who attacks our women in the city, those people should not be here . . . ." Hearings before House Committee on Immigration and Naturalization on H. R. 10384, 64th Cong., 1st Sess. 14. Mr. Woods was not an ordinary witness. As the then Police Commissioner of New York City, his testimony appears to have been most influential in this provision of the 1917 Act.

ousness as a test of turpitude. All offenses denounced by Congress, prosecuted by the Executive, and convicted by the courts, must be deemed in some degree "serious" or law enforcement would be a frivolous enterprise. However, use of qualifying words must mean that not all statutory offenses are subject to the taint of turpitude. The higher degrees of criminal gravity are commonly classified as felonies, the lower ones as misdemeanors. If the Act contemplated that repetition of any serious crime would be grounds for deportation, it would have been simple and intelligible to have mentioned felonies. But the language used indicates that there are felonies which are not included and perhaps that some misdemeanors are. We cannot see that seriousness affords any standard of guidance.

Respondent suggests here, and the Government has on other occasions taken the position, that the traditional distinction between crimes *mala prohibita* and those *mala in se* will afford a key for the inclusions and exclusions of this statute.[9] But we cannot overlook that what crimes

[9] In Volume II of Administrative Decisions under Immigration and Nationality Laws of the United States, p. 141, there is an administrative interpretation by the Department then having the administration of the Act. In an opinion on a deportation proceeding decided by the Board June 26, 1944, and approved by the Attorney General July 12, 1944, the statement was quoted with approval:

"'A crime involving moral turpitude may be either a felony or misdemeanor, existing at common law or created by statute, and is an act or omission which is *malum in se* and not merely *malum prohibitum;* which is actuated by malice or committed with knowledge and intention and not done innocently or [without advertence] or reflection; which is so far contrary to the moral law, as interpreted by the general moral sense of the community, that the offender is brought to public disgrace, is no longer generally respected, or is deprived of social recognition by good living persons; but which is not the outcome merely of natural passion, of animal spirits, of infirmity of temper, of weakness of character, of mistaken principles, *unaccompanied by a vicious motive or a corrupt mind.*' [Italics supplied.]"

belong in which category has been the subject of controversy for years.[10] This classification comes to us from common law, which in its early history freely blended religious conceptions of sin with legal conceptions of crime. This statute seems to revert to that practice.

The Government, however, offers the *mala prohibita, mala in se* doctrine here in slightly different verbiage for determining the nature of these crimes. It says: "Essentially, they must be measured against the moral standards that prevail in contemporary society to determine whether the violations are generally considered essentially immoral."

Can we accept "the moral standards that prevail in contemporary society" as a sufficiently definite standard for the purposes of the Act? This is a large country and

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[10] Crimes *mala in se,* according to Blackstone, are offenses against "[t]hose rights then which God and nature have established, and are therefore called natural rights, such as are life and liberty, . . . the worship of God, the maintenance of children, and the like." They are "crimes and misdemeanors, that are forbidden by the superior laws, and therefore styled *mala in se* (crimes in themselves), such as murder, theft, and perjury; which contract no additional turpitude from being declared unlawful by the inferior legislature." According to Blackstone, crimes *mala prohibita* "enjoin only *positive duties,* and forbid only such things as are not *mala in se* . . . without any intermixture of moral guilt." Illustrative of this type of crime are "exercising trades without serving an apprenticeship thereto, for not burying the dead in woollen, for not performing the statute-work on the public roads, and for innumerable other positive misdemeanors. Now these prohibitory laws do not make the transgression a moral offense, or sin: the only obligation in conscience is to submit to the penalty, if levied." "[A]nd his conscience will be clear, which ever side of the alternative he thinks proper to embrace." Cooley's Blackstone, Vol. I (4th ed.), pp. *54, *58. Of this, J. W. C. Turner says: "Some of the weak points in this doctrine were detected by an early editor of Blackstone, and in modern times it is generally regarded as quite discredited." The Modern Approach to Criminal Law 221. And cf. *United States* v. *Balint,* 258 U. S. 250.

acts that are regarded as criminal in some states are lawful in others. We suspect that moral standards which prevail as to possession or sale of liquor that has evaded tax may not be uniform in all parts of the country, nor in all levels of "contemporary society." How should we ascertain the moral sentiments of masses of persons on any better basis than a guess? [11]

The Court seems no more convinced than are we by the Government's attempts to reduce these nebulous abstractions to a concrete working rule, but to sustain this particular deportation it improvises another which fails to convince us. Its thesis is (1) that the statute is sixty years old, (2) that state courts have used the same concept for various purposes, and (3) that fraud imports turpitude into any offense.

1. It is something less than accurate to imply that in any sense relevant to this issue this phrase has been "part of the immigration laws for more than sixty years." [12]

But, in any event, venerability of a vague phrase may be an argument for its validity when the passing years

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[11] As Judge Learned Hand put it, in attempting to resolve a similar conflict: "Even though we could take a poll, it would not be enough merely to count heads, without any appraisal of the voters. A majority of the votes of those in prisons and brothels, for instance, ought scarcely to outweigh the votes of accredited churchgoers. Nor can we see any reason to suppose that the opinion of clergymen would be a more reliable estimate than our own." *Schmidt* v. *United States*, 177 F. 2d 450, 451 (C. A. 2d Cir.).

[12] We are construing the Act of 1917 and not the earlier Immigration Acts, those of March 3, 1891, 26 Stat. 1084; March 3, 1903, 32 Stat. 1213; February 20, 1907, 34 Stat. 898. All of these prior statutes allowed deportation for conviction for *every felony* or crime, which meant for conviction of every crime involving a sentence of not less than a year. It then added another deportable category, to wit, misdemeanors involving moral turpitude. In addition to all crimes involving a sentence of a year or more, the earlier Acts carved out a small category of petty offenses, when they were of a kind

have by administration practice or judicial construction served to make it clear as a word of legal art. To be sure, the phrase in its present context has been on the statute books since 1917. It has never before been in issue before this Court. Reliance today on *United States* v. *Smith,* 289 U. S. 422, is unwarranted. There the Court assumed without analysis or discussion a proposition not seriously relied on. There have, however, been something like fifty cases in lower courts which applied this phrase. No one can read this body of opinions and feel that its application represents a satisfying, rational process. If any consistent pattern of application or consensus of meaning could be distilled from judicial decision, neither the Government nor the Court spells it out. Irrationality is inherent in the task of translating the religious and ethical connotations of the phrase into legal decisions. The lower court cases seem to rest, as we feel this Court's decision does, upon the moral reactions of particular judges to particular offenses. What is striking about the opinions in these "moral turpitude" cases is the wearisome repetition of clichés attempting to define "moral turpitude," usually a quotation from Bouvier. But the guiding line seems to have no relation to the result reached. The chief impression from the cases is the caprice of the judgments.[13] How many aliens have

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"involving moral turpitude," *i. e.*, offenses even though carrying a small sentence having a manifestation of intrinsic badness. But that creates a very different problem from requiring us to discriminate among all offenses, felonies and misdemeanors on the basis of intrinsic badness.

[13] How unguiding the guide "moral turpitude" is, in relation to the enforcement of the Act of 1917, can be shown by three pairs of cases:

(1) In *Tillinghast* v. *Edmead,* 31 F. 2d 81, the First Circuit, over a pungent dissent, held that a conviction for petty larceny by an "ignorant colored girl" working as a domestic was an offense involving "moral turpitude." On the other hand, in *United States* v. *Uhl,*

been deported who would not have been had some other judge heard their cases, and vice versa, we may only guess. That is not government by law.

2. The use of the phrase by state courts for various civil proceedings affords no teaching for federal courts. The Federal Government has no common-law crimes and the judges are not permitted to define crimes by decision, for they rest solely in statute.[14] Nor are we persuaded that the state courts have been able to divest the phrase of its inherent ambiguities and vagueness.

3. The Court concludes that fraud is "a contaminating component in any crime" and imports "moral turpitude." The fraud involved here is nonpayment of a tax. The alien possessed and apparently trafficked in liquor without paying the Government its tax. That, of course, is a fraud on the revenues. But those who deplore

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107 F. 2d 399, the Second Circuit held that conviction for possession of a jimmy, with intent to use it in the commission of some crime, the jimmy being "adapted, designed and commonly used for the commission of the crimes of burglary and larceny" was not for an offense involving "moral turpitude."

(2) In *United States* v. *Day,* 15 F. 2d 391 (D. C. S. D. N. Y.), Judge Knox held that an assault in the second degree, though by one intoxicated, constituted a crime involving "moral turpitude." But in *United States* v. *Zimmerman,* 71 F. Supp. 534 (D. C. E. D. Pa.), Judge Maris held that jail-breaking by a bank robber awaiting trial was not an offense involving "moral turpitude."

(3) In *Rousseau* v. *Weedin,* 284 F. 565, the Ninth Circuit held that one who was convicted of being a "jointist" under a Washington statute prohibiting "the unlawful sale of intoxicating liquor" was deportable as having committed a crime involving "moral turpitude." While in *Hampton* v. *Wong Ging,* 299 F. 289, it held (with the same two judges sitting in both cases) that a conviction under the Narcotic Act was not of itself a crime of "moral turpitude," since the record did not show whether the offense for which conviction was had was "of such an aggravated character as to involve moral turpitude."

[14] *Viereck* v. *United States,* 318 U. S. 236, 241.

the traffic regard it as much an exhibition of moral turpitude for the Government to share its revenues as for respondents to withhold them. Those others who enjoy the traffic are not notable for scruples as to whether liquor has a law-abiding pedigree. So far as this offense is concerned with whiskey, it is not particularly un-American, and we see no reason to strain to make the penalty for the same act so much more severe in the case of an alien "bootlegger" than it is in the case of a native "moonshiner." I have never discovered that disregard of the Nation's liquor taxes excluded a citizen from our best society and I see no reason why it should banish an alien from our worst.

But it is said he has cheated the revenues and the total is computed in high figures. If "moral turpitude" depends on the amount involved, respondent is probably entitled to a place in its higher brackets. Whether by popular test the magnitude of the fraud would be an extenuating or an aggravating circumstance, we do not know. We would suppose the basic morality of a fraud on the revenues would be the same for petty as for great cheats. But we are not aware of any keen sentiment of revulsion against one who is a little niggardly on a customs declaration or who evades a sales tax, a local cigarette tax, or fails to keep his account square with a parking meter. But perhaps what shocks is not the offense so much as a conviction.

We should not forget that criminality is one thing—a matter of law—and that morality, ethics and religious teachings are another. Their relations have puzzled the best of men. Assassination, for example, whose criminality no one doubts, has been the subject of serious debate as to its morality.[15] This does not make crime less crim-

[15] John Stuart Mill, referring to the morality of assassination of political usurpers, passed by examination of the subject of Tyrannicide, as follows: "I shall content myself with saying that the subject

inal, but it shows on what treacherous grounds we tread when we undertake to translate ethical concepts into legal ones, case by case. We usually end up by condemning all that we personally disapprove and for no better reason than that we disapprove it. In fact, what better reason is there? Uniformity and equal protection of the law can come only from a statutory definition of fairly stable and confined bounds.

A different question might be before us had Congress indicated that the determination by the Board of Immigration Appeals that a crime involves "moral turpitude" should be given the weight usually attributed to administrative determinations. But that is not the case, nor have the courts so interpreted the statute. In the fifty-odd cases examined, no weight was attached to the decision of that question by the Board, the court in each case making its own independent analysis and conclusion. Apparently, Congress expected the courts to determine the various crimes includable in this vague phrase.[16] We think that not a judicial function.

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has been at all times one of the open questions of morals; that the act of a private citizen in striking down a criminal, who, by raising himself above the law, has placed himself beyond the reach of legal punishment or control, has been accounted by whole nations, and by some of the best and wisest of men, not a crime, but an act of exalted virtue; and that, right or wrong, it is not of the nature of assassination, but of civil war." Mill, On Liberty and Considerations on Representative Government, p. 14, n. 1.

The vice of leaving statutes that inflict penalties so vague in definition that they throw the judge in each case back upon his own notions is the unconscious tendency to

"Compound for Sins they are inclin'd to,
By damning those they have no mind to."

Butler, Hudibras, Vol. I (1772 ed.), 28.

[16] However, a statement by the Chairman of the Committee on Immigration and Naturalization may suggest another explanation: "My recollection is that the Supreme Court of the United States has

A resident alien is entitled to due process of law.[17] We have said that deportation is equivalent to banishment or exile.[18] Deportation proceedings technically are not criminal; but practically they are for they extend the criminal process of sentencing to include on the same convictions an additional punishment of deportation. If respondent were a citizen, his aggregate sentences of three years and a day would have been served long since and his punishment ended. But because of his alienage, he is about to begin a life sentence of exile from what has become home, of separation from his established means of livelihood for himself and his family of American citizens. This is a savage penalty and we believe due process of law requires standards for imposing it as definite and certain as those for conviction of crime.

Strangely enough, the Court does not even pay the tribute of a citation to its recent decision in *Musser* v. *Utah,* 333 U. S. 95, where a majority joined in vacating and remanding a decision which had sustained convictions under a Utah statute which made criminal a conspiracy "to commit acts injurious to public morals." We said of that statute: "Standing by itself, it would seem to be warrant for conviction for agreement to do almost any act which a judge and jury might find at the moment contrary to his or its notions of what was good for health, morals, trade, commerce, justice or order." 333 U. S. at 97. For my part, I am unable to rationalize why "acts injurious to public morals" is vague if "moral turpitude" is not. And on remand, the Supreme Court of

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determined what crimes are crimes involving moral turpitude under the Federal law, and if so, that would control, I should think." Hearings before House Committee on Immigration and Naturalization on H. R. 10384, 64th Cong., 1st Sess. 8.

[17] *Wong Yang Sung* v. *McGrath,* 339 U. S. 33.

[18] *Fong Haw Tan* v. *Phelan,* 333 U. S. 6, 10.

Utah said: "We are . . . unable to place a construction on these words which limits their meaning beyond their general meaning." *State* v. *Musser,* —— Utah ——, ——, 223 P. 2d 193, 194 (Oct. 20, 1950).

In *Winters* v. *New York,* 333 U. S. 507, the Court directly struck down for indefiniteness a statute sixty years on the statute books of New York and indirectly like statutes long on the books of half the States of the Union.[19] The New York statute made a person guilty of a misdemeanor who in any way distributes "any book, pamphlet, magazine, newspaper or other printed paper devoted to the publication, and principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime; . . . ." 333 U. S. at 508. That statute was certainly no more vague than the one before us now and had not caused even a fraction of the judicial conflict that "moral turpitude" has.

In *Winters* v. *New York, supra,* the Court rested heavily on *Connally* v. *General Construction Co.,* 269 U. S. 385, in which this Court found unconstitutional indefiniteness in a statute calling for "the current rate of per diem wages in the locality" where contractors were doing government work. (The sanction of the statute was a relatively small money fine, or a maximum of six months, though of course a corporate violator could only be subjected to the fine.) The test by which vagueness was to be determined according to the *Connally* case was that legislation uses terms "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application . . . ." 269 U. S. at 391. It would seem to be difficult to find a more striking instance

[19] The Court's reference to the dissent in the *Winters* case would seem to make questionable its present force as an authority.

than we have here of such a phrase since it requires even judges to guess and permits them to differ.

We do not disagree with a policy of extreme reluctance to adjudge a congressional Act unconstitutional. But we do not here question the power of Congress to define deportable conduct. We only question the power of administrative officers and courts to decree deportation until Congress has given an intelligible definition of deportable conduct.

MONTANA-DAKOTA UTILITIES CO. *v.* NORTHWESTERN PUBLIC SERVICE CO.

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

No. 77. Argued November 27, 1950.—Decided May 7, 1951.

Petitioner and respondent are public utility electric companies engaged in interstate commerce and subject to the Federal Power Act. For ten years, while under the same management through interlocking directorates and joint officers with the approval of the Federal Power Commission, petitioner's predecessor and respondent interchanged electric energy, shared expenses and made a number of intercompany contracts establishing rates and charges which were filed with and accepted by the Commission. After separation of their management, petitioner sued in a federal district court to recoup losses alleged to have resulted from its predecessor paying respondent unreasonably high charges for what respondent furnished it and receiving unreasonably low rates for what it furnished respondent. It alleged that these rates and charges were fraudulent and unlawful and were due to the interlocking directorates, which prevented protest to the Commission to have reasonable rates and charges established pursuant to the provisions of the Federal Power Act. There was no diversity of citizenship of the parties; and federal jurisdiction was asserted solely on the ground that the case arose under the Federal Power Act. *Held:*

1. Since the complaint asserted a cause of action under the Federal Power Act, the District Court had jurisdiction to determine whether it stated a cause of action maintainable in a federal court and, if so, whether it was sustained on the facts. P. 249.

2. The complaint stated no cause of action maintainable in a federal court. Pp. 249–255.

(a) Under the Federal Power Act, the right to a reasonable rate is the right to the rate which the Commission files or fixes; and, except for review of the Commission's orders, a court can assume no right to a different rate on the ground that, in the opinion of the court, such different rate is the only reasonable rate or a more reasonable rate. Pp. 250–252.

(b) In the absence of diversity of citizenship, the allegation of fraud resulting from the interlocking relationship did not state a cause of action maintainable in a federal court. Pp. 252–253.

(c) Since the Federal Power Act does not authorize the Commission to grant reparations for unreasonable rates collected in the past, the District Court could not properly refer the case to the Commission for determination of the reasonableness of the rates here involved. Pp. 253–254.

3. Since the case involves only issues which a federal court cannot decide and can only refer to a body which also would have no independent jurisdiction to decide them, the complaint must be dismissed. P. 255.

181 F. 2d 19, affirmed on a different ground.

In a suit alleged to be founded on the Federal Power Act, the District Court awarded petitioner a judgment for losses sustained on past rates and charges which the District Court found to be unreasonable and based on fraud. The Court of Appeals reversed on the ground that the District Court was without jurisdiction. 181 F. 2d 19. This Court granted certiorari. 340 U. S. 806. *Affirmed on a different ground,* p. 255.

William D. Mitchell argued the cause for petitioner. With him on the brief were *John C. Benson, H. F. Fellows* and *Rodger L. Nordbye.*

Jacob M. Lashly argued the cause for respondent. With him on the brief were *Max Royhl, Fredric H. Stafford* and *Paul B. Rava.*

By special leave of Court, *Howard E. Wahrenbrock* argued the cause for the Federal Power Commission, as *amicus curiae.* With him on the brief were *Solicitor General Perlman, Robert L. Stern, Bradford Ross* and *Reuben Goldberg.*

Mr. Justice Jackson delivered the opinion of the Court.

Petitioner and respondent are public electric utilities companies engaged in interstate commerce. Petitioner's predecessor and respondent were under the same management through interlocking directorships and joint of-

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ficers. During that relationship the two interchanged electric energy, shared expenses, and made a number of intercompany contracts establishing rates and charges, which contracts were filed with and accepted by the Federal Power Commission. These contract rates and charges are at the root of this controversy. Petitioner charges that, during the period 1935–1945, its predecessor paid respondent unreasonably high prices for what respondent furnished it, and that it received unreasonably low rates for what it provided respondent. That advantage, it is alleged, was fraudulent and unlawful and was due to the interlocking directorate, which prevented protest to the Commission to have reasonable rates and charges established pursuant to the provisions of the Federal Power Act.[1]

Petitioner sued in United States District Court and asserted jurisdiction on the ground that the case "arises under the Constitution or laws of the United States" [2] and, more particularly, under a "law regulating commerce," [3] specifically the Federal Power Act.

Petitioner was successful in the District Court, which found the contracts void for fraud and the rates and charges established therein unreasonable. The court also determined what would have been reasonable rates and charges for the period in question and gave judgment for the difference between its conception of reasonable charges and the actual charges, amounting to over three-quarters of a million dollars.[4]

The judgment was reversed by the Court of Appeals for the Eighth Circuit on the ground that the District Court was without jurisdiction.[5]

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[1] 41 Stat. 1063, 49 Stat. 838, 62 Stat. 275, 16 U. S. C. §§ 791a–825r.

[2] 28 U. S. C. § 1331.

[3] 28 U. S. C. § 1337.

[4] Not reported.

[5] 181 F. 2d 19.

As frequently happens where jurisdiction depends on subject matter, the question whether jurisdiction exists has been confused with the question whether the complaint states a cause of action. The Judicial Code, in vesting jurisdiction in the District Courts, does not create causes of action, but only confers jurisdiction to adjudicate those arising from other sources which satisfy its limiting provisions. Petitioner asserted a cause of action under the Power Act. To determine whether that claim is well founded, the District Court must take jurisdiction, whether its ultimate resolution is to be in the affirmative or the negative. If the complaint raises a federal question, the mere claim confers power to decide that it has no merit, as well as to decide that it has. In the words of Mr. Justice Holmes, ". . . if the plaintiff really makes a substantial claim under an act of Congress there is jurisdiction whether the claim ultimately be held good or bad." *The Fair* v. *Kohler Die Co.,* 228 U. S. 22, 25. See also *Hurn* v. *Oursler,* 289 U. S. 238, 240. Even a patently frivolous complaint might be sufficient to confer power to make a final decision that it is of that nature, binding as *res judicata* on the parties.

Petitioner's complaint, in substance, alleges existence of the interlocking directorship, contends that such relationship was used fraudulently to deprive it of its federally conferred right to reasonable rates and charges, and demands reparations. We think there was power in the District Court to decide whether the claims so grounded constitute a cause of action maintainable in federal court and, if so, whether it is sustained on the facts. We think a direction to dismiss for want of jurisdiction was error and that it should not stand as a precedent.

However, it is clear that the reason underlying the Court of Appeals' decision was that no federal cause of action was established. If this was correct, we should sustain

the judgment of reversal, though on other grounds than those stated.

The petitioner's problem is to avoid Scylla without being drawn into Charybdis. If its cause of action arises from fraud and deceit, it is a common-law action of which a federal court has no jurisdiction, there being no diversity in citizenship of these parties. But if it arises from being charged rates in excess of those permitted by the Power Act, it is confronted with the exclusive powers of the Commission to determine what those rates are to be. Hence, it is necessary to bring the case into court, not as a fraud action, but as one to enforce the Power Act, using the allegations of fraud to escape the limitations of the Power Commission remedies.

I.

Petitioner identifies as the source of its cause of action the Federal Power Act's requirement of reasonable electric utility rates,[6] which, it contends, creates its legal right to rates which a court may deem reasonable, even if different from those accepted by the Federal Power Commission. It is admitted, however, that a utility could not institute a suit in a federal court to recover a portion of past rates which it simply alleges were unreasonable. It would be out of court for failure to exhaust administrative remedies, for, at any time in the past, it could have applied for and secured a review and, perhaps, a reduction of the rates by the Commission.[7]

Petitioner gives its case a different cast by alleging that by fraudulent abuse of the interlocking relationship

[6] Section 205 (a) of the Act, 49 Stat. 851, 16 U. S. C. § 824d (a), states that: "All rates and charges . . . and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful."

[7] § 206 (a), 49 Stat. 852, 16 U. S. C. § 824e (a).

its predecessor was deprived of its independence and power to resort to its administrative remedy.

But the problem is whether it is open to the courts to determine what the reasonable rates during the past should have been. The petitioner, in contending that they are so empowered, and the District Court, in undertaking to exercise that power, both regard reasonableness as a justiciable legal right rather than a criterion for administrative application in determining a lawful rate. Statutory reasonableness is an abstract quality represented by an area rather than a pinpoint. It allows a substantial spread between what is unreasonable because too low and what is unreasonable because too high. To reduce the abstract concept of reasonableness to concrete expression in dollars and cents is the function of the Commission. It is not the disembodied "reasonableness" but that standard when embodied in a rate which the Commission accepts or determines that governs the rights of buyer and seller. A court may think a different level more reasonable. But the prescription of the statute is a standard for the Commission to apply and, independently of Commission action, creates no right which courts may enforce.

Petitioner cannot separate what Congress has joined together. It cannot litigate in a judicial forum its general right to a reasonable rate, ignoring the qualification that it shall be made specific only by exercise of the Commission's judgment, in which there is some considerable element of discretion. It can claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission, and not even a court can authorize commerce in the commodity on other terms.

We hold that the right to a reasonable rate is the right to the rate which the Commission files or fixes, and that,

except for review of the Commission's orders, the courts can assume no right to a different one on the ground that, in its opinion, it is the only or the more reasonable one.

II.

The petitioner here contends that its case is different by reason of its allegations of fraud. Those, the evidence that supports them, and the findings are exceedingly general, and it is not entirely clear whether, in addition to the claim that constructive fraud may be inferred from the intercorporate relationship, specific acts of deceit are found. Nor does it appear to have been thought that the difference between constructive and actual fraud mattered.

If the petitioner's grievance arises from active fraud and deceit, it gains nothing from the Federal Act. Such an action would have been maintainable if no Federal Power Act had been enacted. Before the Act, petitioner would have had no statutory right to a reasonable rate, but it did have a common-law right not to be defrauded into paying an excessive or unreasonable one. The Federal Act adds nothing to fraud as an actionable wrong, and, therefore, to find a cause of action of this character would only be to dismiss it for want of diversity.

But petitioner's case appears to have rested more heavily and perhaps entirely on constructive fraud presumed from the intercorporate relationship. The Act vests in the Commission power to authorize an interlocking directorate, which otherwise is prohibited, "upon due showing . . . that neither public nor private interests will be adversely affected thereby." [8] The relationship here concerned had received Commission approval. The effect of the approval is to exempt the relationship from the ban of the Act and remove from it any presumption of fraud that might be thought to arise from its mere

[8] § 305, 49 Stat. 856, 16 U. S. C. § 825d (b).

existence. It would be a strange contradiction between judicial and administrative policies if a relationship which the Commission has declared will not adversely affect public or private interests were regarded by courts as enough to create a presumption of fraud. Perhaps, in the absence of the Commission's approval, such relationship would be sufficient to raise the presumption under state law, but it cannot do so where the federal supervising authority has expressly approved the arrangement.

We need not decide what action the Commission is empowered to take if it believes that a fraud has been committed on itself, for it has taken no action which gives rise to or affects this controversy.

III.

The entire Court is agreed that the judgment rendered by the District Court cannot stand and all agree that it cannot adjudicate the issues that plaintiff tendered to it. We disagree only as to the consequences of the disability. The majority believe the federal court should dismiss the complaint. A minority urges that we should direct the District Court to refer issues to the Federal Power Commission.

It is true that in some cases the Court has directed lower federal courts to stay their hands pending reference to an administrative body of a subsidiary question. *Smith* v. *Hoboken R. Co.,* 328 U. S. 123; *Thompson* v. *Texas Mexican R. Co.,* 328 U. S. 134; *General American Tank Car Corp.* v. *El Dorado Terminal Co.,* 308 U. S. 422. But in all those cases the plaintiff below concededly stated a federally cognizable cause of action, to which the referred issue was subsidiary. In no instance have we directed a court to retain a case in which it could not determine a single one of its vital issues. Here the issue of reasonableness of the charges is not one clearly severable from the issues of liability, for the acts charged do not amount to

fraud unless there has been an unreasonable charge. Injury is an essential element of remediable fraud. "Deceit and injury must concur." *Adams* v. *Clark,* 239 N. Y. 403, 410, 146 N. E. 642, 644 (1925). See also *Connelly* v. *Bartlett,* 286 Mass. 311, 315, 190 N. E. 799, 801 (1934).

If the court is presented with a case it can decide but some issue is within the competence of an administrative body, in an independent proceeding, to decide, comity and avoidance of conflict as well as other considerations make it proper to refer that issue. But we know of no case where the court has ordered reference of an issue which the administrative body would not itself have jurisdiction to determine in a proceeding for that purpose. The fact that the Congress withheld from the Commission power to grant reparations [9] does not require courts to entertain proceedings they cannot themselves decide in order indirectly to obtain Commission action which Congress did not allow to be taken directly. There is no indication in the Power Act that that was Congress' intent.

It is urged that this leaves petitioner without a remedy under the Power Act. We agree. In that respect, petitioner is no worse off after losing its lawsuit than its customers are if it wins. Unless we are to assume that this company failed to include its buying costs in its selling rates, we must assume that any unreasonable amounts it paid suppliers it collected from consumers. Indeed, this is the assumption made by the Commission in its brief as *amicus curiae* here.[10] It is admitted that, if it recoups again what it has already recouped from the public, there is no machinery in or out of court by which others who have paid unreasonable charges to it can recover.[11]

[9] S. Rep. No. 621, 74th Cong., 1st Sess. 20.

[10] Brief for the Federal Power Commission as *amicus curiae,* pp. 13–14.

[11] *Id.,* pp. 14–17.

Under such circumstances, we conclude that, since the case involves only issues which a federal court cannot decide and can only refer to a body which also would have no independent jurisdiction to decide, it must decline the case forthrightly rather than resort to such improvisation.

The judgment below is affirmed upon the ground that the petitioner has not established a cause of action.

It is so ordered.

MR. JUSTICE FRANKFURTER, joined by MR. JUSTICE BLACK, MR. JUSTICE REED, and MR. JUSTICE DOUGLAS, dissenting.

The plaintiff, Montana-Dakota Utilities Company, petitioner here, is the successor in interest to several utility companies which distributed electric energy in North and South Dakota. The defendant, Northwestern Public Service Company, served the region to the south of Montana-Dakota's territory. Both corporations have been subject to the Federal Power Act since its enactment in 1935. 49 Stat. 847, 16 U. S. C. § 824 *et seq.* The controversy arises out of relations between the two enterprises prior to 1945. The facts which raise the question whether the Federal District Court had jurisdiction to entertain the suit may be briefly summarized.

After January 1, 1935, all but one of Montana-Dakota's directors were directors of Northwestern, and all of Montana-Dakota's officers were officers of the other company. These interlocking arrangements received formal authorization by the Federal Power Commission, as required by § 305 (b) of the Act. 16 U. S. C. § 825d (b). At different times between 1935 and 1945 contracts were made between the two corporations for the sale of electric energy. All such agreements have to be filed with the Commission, § 205 (c), 16 U. S. C. § 824d (c), but the legality of rates so filed is not conditioned upon the Com-

mission's approval. Unless they are challenged, either by an interested party or on the Commission's initiative, the filed rates become the legal rates. Montana-Dakota now claims, in essence, that for a decade Northwestern, by virtue of its control, deprived Montana-Dakota of the rights which that corporation enjoyed under the Federal Power Act and prevented it from contemporaneously asserting them before the Federal Power Commission. Montana-Dakota was prevented from filing what would have been the lawful rates because Northwestern, as the dominus of Montana-Dakota, filed rates for that company that were less than the reasonable rates to be exacted under the Federal Power Act—rates which would have been determined by arm's length dealing between the two companies. Having secured freedom of action and thereby the power to assert its rights, Montana-Dakota brought this suit in the United States District Court for the District of South Dakota to recoup the losses which it claims were thus imposed on it.

The defendant moved to dismiss the complaint for want of jurisdiction in that it failed to state a claim under federal law. The motion was denied, 73 F. Supp. 149, and the case went to trial. The District Court found unfair dealing in the circumstances of the interlocking relationship and resulting unreasonableness in the rates, and gave judgment for the plaintiff in the sum of $779,958.30, principal and interest.

The Court of Appeals for the Eighth Circuit reversed. It held that the Federal Power Commission "had jurisdiction and was the proper tribunal in the first instance" to determine the reasonableness of the rates and the bearing of fraud practiced on the Commission in securing permission for the interlocking arrangements and the resulting subversion of rights under the Federal Power Act. The court found that "The Commission can, no doubt, correct its own mistakes," but it did not specify

the administrative remedies it deemed available. It concluded that the District Court was without power to entertain the complaint and ordered it dismissed. 181 F. 2d 19, 23. We brought the case here since important issues in the administration of the Federal Power Act are at stake. 340 U. S. 806.

Section 317 of the Federal Power Act in its present form confers on the district courts of the United States "exclusive jurisdiction of violations of this Act or the rules, regulations, and orders thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of, this Act or any rule, regulation, or order thereunder." 49 Stat. 862, 16 U. S. C. § 825p. There can be no doubt, therefore, that if the complaint, fairly construed in light of the successful determination of the issues, seeks to enforce a duty which the Federal Power Act recognizes, the District Court properly entertained the suit under the jurisdictional provisions of the Act, reinforcing, as they do, the general jurisdictional provisions governing the district courts. See Act of March 3, 1911, § 24 First, Eighth, 36 Stat. 1091, 1092, 28 U. S. C. §§ 1331, 1337.

The Federal Power Act directs that

> "All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful." § 205 (a), 49 Stat. 851, 16 U. S. C. § 824d (a).

We face at the outset the contention that this section confers on the Federal Power Commission authority to award reparations for unreasonable rates collected in the

past. Federal railroad rate legislation gave such a power to the Interstate Commerce Commission. Act of Feb. 4, 1887, §§ 9, 16, 24 Stat. 382, 384–385, as amended, 49 U. S. C. §§ 9, 16 (1); cf. Act of Aug. 15, 1921, § 308, 42 Stat. 165, 7 U. S. C. § 209. But it was not given to the Federal Power Commission. It was withheld deliberately. See S. Rep. No. 621, 74th Cong., 1st Sess. 20. Wholesale consumers of electric energy were apparently considered, as a rule, adequately protected by the provisions of the Act authorizing the Commission to grant prospective relief and, in certain circumstances, to order refunding of sums accumulated during the pendency of rate proceedings. §§ 205 (e), 206 (a), 49 Stat. 852, 16 U. S. C. §§ 824d (e), 824e (a). Despite the unqualified statutory declaration that unreasonable rates are unlawful, we think it clear that Congress did not intend either court or Commission to have the power to award reparations on the ground that a properly filed rate or charge has in fact been unreasonably high or low. If that were all the complaint before us showed, we would agree that recovery of damages in a civil action would not be an appropriate remedy, and that the complaint should have been dismissed.

But the case before us is very different. Montana-Dakota does not assert merely that the rates fixed and filed for it by the defendant were unreasonable. Montana-Dakota claimed and introduced evidence to show that some contracts required by the Act to be filed were not filed at all; that others were filed months late; and that some were not the bona fide contracts obtained by arm's length negotiation that on their face they appeared to be, but instead were "conceived and put into operation by the defendant and its aforesaid directors and officers for the purpose of exacting large charges from [Montana-Dakota] for the purpose, among other things, of offsetting charges of [Montana-Dakota] for electrical energy gen-

erated in North Dakota and transmitted to and sold to defendant for resale in South Dakota." See cause 3, ¶ V of the complaint. Thus the complaint in substance alleges that Northwestern misled the Commission into approving schedules which would not have been approved had Northwestern complied with the obligations of full and fair disclosure imposed on it by the Federal Power Act. While the complaint does not artistically allege that domination by Northwestern prevented Montana-Dakota from complaining to the Commission that the rates and charges were unreasonable, that is its plain import and the facts were so found at the trial.

We are not here concerned with the complaint insofar as it sets forth a common-law cause of action based on misuse of powers by the directors of a controlled corporation. Such an action by itself of course cannot be brought in a federal court in the absence of diversity of citizenship between the parties. But this does not preclude the same circumstances from giving rise to a cause of action that has its roots in the Federal Power Act. As such the controversy does fall within the jurisdiction of a federal court. The essence of this cause of action is that the Federal Power Act imposed on Northwestern the duty to charge and pay reasonable rates in its transactions with Montana-Dakota; and that while under the Act rates appropriately filed are, when unchallenged, the legal rates and deemed to be reasonable, in the circumstances here alleged the schedules and contracts filed were not complete or timely or bona fide. Since it was coercively controlled, Montana-Dakota could neither file rates that were truly reasonable nor protest unreasonable rates filed on its behalf.

The Court of Appeals apparently closed the door of the District Court to this suit on the assumption that relief could be had from the Federal Power Commission for the damage flowing from violation of the Federal Power Act. Of course a court would not grant relief, at least in the

first instance, if an adequate administrative remedy were available. It is fundamental to federal regulatory legislation that "no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 50–51. This principle is particularly relevant to rate regulation. *Texas & Pac. R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426; *Mitchell Coal Co.* v. *Pennsylvania R. Co.*, 230 U. S. 247; *Armour & Co.* v. *Alton R. Co.*, 312 U. S. 195. Compare *Great Northern R. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285.

But we do not find that the Federal Power Act provides administrative remedies to meet the situation before us. We have seen that that Act does not authorize the Commission to award reparations to those subjected to unreasonable rates. The Act likewise does not afford to the Commission the authority conferred on administrative agencies under other regulatory statutes to award damages to those injured by violations of the Act. Compare Act of February 4, 1887, § 9, 24 Stat. 382, 49 U. S. C. § 9; Act of August 15, 1921, § 309 (e), 42 Stat. 166, 7 U. S. C. § 210 (e). The Power Act, it is true, does give the Commission authority to look into past rates in order to determine whether the Act has been violated. § 307 (a), 49 Stat. 856, 16 U. S. C. § 825f (a). See *Atlantic Coast Line R. Co.* v. *Florida*, 295 U. S. 301, 312. But such an inquiry cannot be made the basis for an administrative award of damages to the victims of the violations. Again, the Commission may, as the Government suggests, have power under the omnibus provisions of § 309 to vacate its approval of a rate when approval has been obtained by fraud. 49 Stat. 858, 16 U. S. C. § 825h. But this does not authorize the Commission to fix rate orders retrospectively. The Commission may establish rates only

"to be thereafter observed and in force." § 206 (a), 49 Stat. 852, 16 U. S. C. § 824e (a).

If the Commission can neither fix rates retrospectively nor award damages, it clearly can afford no adequate remedy to Montana-Dakota. Vacating its acquiescence in the interlocking directorate or in the schedules filed by Northwestern might prevent Northwestern from asserting the approval of the federal agency in an action brought against it under State law; but it would not provide a basis for recovery by the injured party or impose any certain liability on the wrongdoer. We are bound to conclude that the Court of Appeals was in error in thinking that an adequate administrative remedy existed and precluded courts from granting relief.

But we cannot agree that the inability of the Federal Power Commission to grant relief requires that courts be similarly disabled. Courts, unlike administrative agencies, are organs with historic antecedents which bring with them well-defined powers. They do not require explicit statutory authorization for familiar remedies to enforce statutory obligations. *Texas & N. O. R. Co.* v. *Brotherhood of Clerks,* 281 U. S. 548; *Virginian R. Co.* v. *System Federation,* 300 U. S. 515; *Deckert* v. *Independence Shares Corp.,* 311 U. S. 282. A duty declared by Congress does not evaporate for want of a formulated sanction. When Congress has "left the matter at large for judicial determination," our function is to decide what remedies are appropriate in the light of the statutory language and purpose and of the traditional modes by which courts compel performance of legal obligations. See *Board of Comm'rs* v. *United States,* 308 U. S. 343, 351. If civil liability is appropriate to effectuate the purposes of a statute, courts are not denied this traditional remedy because it is not specifically authorized. *Texas & Pac. R. Co.* v. *Rigsby,* 241 U. S. 33; *Steele* v. *Louisville & N. R. Co.,* 323 U. S. 192; *Tunstall* v. *Brotherhood of Locomotive*

Firemen & Enginemen, 323 U. S. 210; cf. *De Lima* v. *Bidwell,* 182 U. S. 1.

That civil liability is an appropriate remedy in the situation before us is attested alike by the words of the statute, by the force of familiar principles of liability, and by practical considerations in carrying out legislative objectives.

The Power Act is explicit that any "rate or charge that is not just and reasonable is hereby declared to be unlawful." § 205 (a), 49 Stat. 851, 16 U. S. C. § 824d (a). The aim of Congress would be needlessly aborted if this "definite statutory prohibition of conduct" did not impose civil liability in a situation not covered by administrative remedies merely because no judicial relief was explicitly authorized. Compare *Texas & N. O. R. Co.* v. *Brotherhood of Clerks, supra,* at 568. The right of civil recovery by persons compelled to pay unreasonable or discriminatory rates to common carriers is one of the oldest forms of relief in our law. *Western Union Tel. Co.* v. *Call Publishing Co.,* 181 U. S. 92. To enforce a remedy for collection of unreasonable charges in the situation before us, therefore, would recognize deeply-rooted law; to deny it would be inconsistent with long-established judicial practice. The experience of the Commission indicates that the statute itself, by virtue of the positive duties it commands, under normal circumstances is very largely its own sanction.[1] Want of explicitness in providing a familiar remedy for the rare case of disobedience should not be construed a denial of it.

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[1] Data supplied by the Commission show that rate reductions proposed by utilities invariably become effective as filed. More than half of the rate increases likewise become effective automatically as filed. Those which are suspended by the Commission are as a general rule withdrawn, modified, or approved after informal conferences between the parties and the Commission's staff.

To leave relief to the diverse and conflicting State law dealing with intercorporate relations would make for conflicting local administration of an important national problem. This Court has recently shown marked reluctance to leave to the States determination of even State law questions involved in the administration of the Federal Power Act. *First Iowa Cooperative* v. *Federal Power Commission,* 328 U. S. 152. What is involved here—the frustration, by misuse of the machinery of the Federal Power Act, of the command of Congress that rates be reasonable—has a federal character and significance. We do not think it likely that Congress intended that there should be no relief for this kind of tampering with the federal regulatory scheme other than that which might be afforded by the corporation law of the forty-eight States.

We could attribute such a purpose to Congress only if to allow civil relief in the situation before us would interfere with the administrative remedies contemplated under the Act, or impose on courts alien responsibilities or duties they are not equipped to fulfill. No such consequence is remotely involved in utilizing this age-old remedy. The statute is based on the assumption that unlawful rates will ordinarily be promptly corrected at the initiative of injured parties permitted to resort to the Commission for prospective relief. § 306, 49 Stat. 856, 16 U. S. C. § 825e. That procedure is not available when the wrong asserted is that the defendant corporation has established unlawful schedules by fraudulent domination of the utility with which it transacts business. To grant judicial relief for such a wrong will not interfere with the remedial procedure to which the Act confines corporations which are their own masters.

Nor will it transfer to the courts responsibility for deciding questions which should properly be presented to the Power Commission. In a variety of situations we have

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recently emphasized the principle that courts and agencies "are to be deemed collaborative instrumentalities of justice." *United States* v. *Morgan,* 313 U. S. 409, 422, 307 U. S. 183; *Palmer* v. *Massachusetts,* 308 U. S. 79. To that end it is established practice that courts may entertain actions brought before them, but call to their aid the appropriate administrative agency on questions within its administrative competence. See *Smith* v. *Hoboken R. Co.,* 328 U. S. 123; *Thompson* v. *Texas Mexican R. Co.,* 328 U. S. 134; cf. *United States Alkali Assn.* v. *United States,* 325 U. S. 196, 210. In the *El Dorado Oil Works* litigation we held that proper procedure required the District Court to entertain a suit on a contract but to look to the Interstate Commerce Commission for guidance as to transportation practices involved in carrying out the contract. *General American Tank Car Corp.* v. *El Dorado Terminal Co.,* 308 U. S. 422, 433; *El Dorado Oil Works* v. *United States,* 328 U. S. 12. The fact that the Federal Power Commission is not itself authorized to award damages does not disable it from advising a court on questions on which its judgment is needed. See *United States* v. *Morgan, supra; Atlantic Coast Line R. Co.* v. *Florida, supra,* at 312. We see no reason why the Commission's findings should not be sought here.

We think, therefore, that a cause of action within the jurisdiction of the district courts is stated by a complaint charging a distributor of electric energy at wholesale in interstate commerce (1) with buying or selling at unreasonable rates, (2) with failure to comply with procedural requirements of the Federal Power Act, and (3) with preventing others from resorting to the remedies afforded by that Act. In such cases the district court should stay proceedings and request determination by the Federal Power Commission of matters within the Commission's special competence. It is within the Commission's domain to rule whether filed rates should not,

in view of all relevant circumstances, be considered "reasonable" rates. It also falls to the Commission to decide what would have been the reasonable rates. The opinion of the Commission, being "only a preliminary, interim step" towards final judgment, would not be a reviewable order under § 313 (b) of the Act, but would be reviewed only as a part of the judgment entered by the district court. *Federal Power Comm'n* v. *Hope Natural Gas Co.*, 320 U. S. 591, 618, 619.

The objections raised to this procedure have apparently not been considered substantial by the Federal Power Commission, the body primarily charged with administration of the Act.[2] We do not think they should prevail. The function of the District Court is not simply to serve as a façade behind which the Commission is enabled to accomplish indirectly what it cannot do directly. Certain issues of fact—the completeness of disclosure, for instance, or the loyalties of the directors—are properly for the court. Action by the court may similarly be required in determining the appropriate disposition of the fund. See *Federal Power Comm'n* v. *Interstate Natural Gas Co.*, 336 U. S. 577, 181 F. 2d 833. Recovery by Montana-Dakota need not be a windfall to that company. Many changes in costs charged utilities are not reflected in prices they may collect. Compare *St. Louis & O'Fallon R. Co.* v. *United States*, 279 U. S. 461, 488, 505–509 (Mr. Justice Brandeis, dissenting). To the extent that Montana-Dakota has passed on its loss to its customers, they may be permitted recovery from it on well-established principles of unjust enrichment. And even if the effect of awarding relief is ultimately to benefit Montana-Dakota, it certainly has a better claim to the exacted funds than Northwestern.

[2] In its brief here the Commission urged adoption of substantially the ground set forth in this opinion.

The procedure here outlined is not unlike that which the Court employed in *United States* v. *Morgan, supra,* where a similar demand was made on the resourcefulness of law to find a remedy to meet an unusual situation. Such a remedy not only defeats unjust enrichment as between private parties. This is accomplished in the public interest of effectuating the Federal Power Act.

Because we conclude that the District Court, while correct in refusing to dismiss the complaint, should have asked the Federal Power Commission to determine matters peculiarly within its competence and report its finding to that court, we think the case should be remanded to that court for further proceedings not inconsistent with this opinion. We do not, of course, intimate any opinion as to the sufficiency of the evidence to support the conclusion that the filed rates in this case should not be deemed lawful. Nor would we restrict any appropriate use the Commission might wish to make of evidence adduced at the trial.

Syllabus.

MOSSER, SUCCESSOR TRUSTEE, ET AL. *v.* DARROW, FORMER TRUSTEE, ET AL.

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

No. 461. Argued April 10–11, 1951.—Decided May 7, 1951.

1. Respondent was appointed by a federal district court as reorganization trustee for two common-law trusts whose principal assets were securities of subsidiary companies. He employed to assist him in the trusteeship two persons whose services he thought were indispensable, and he expressly agreed that they could continue to trade in securities of the debtors' subsidiaries. Although respondent did not personally benefit, these employees traded extensively in securities of the debtors' subsidiaries and made substantial profits. *Held:* Respondent was properly surcharged as trustee in an amount representing the profits which these employees derived from their trading in securities of the debtors' subsidiaries. Pp. 268–275.

   (a) That which the trustee had no right to do he had no right to authorize, and the transactions were as forbidden for benefit of others as they would have been on behalf of the trustee himself. Pp. 271–272.

   (b) The liability here is not created by a failure to detect defalcations, in which case negligence might be required to surcharge a trustee, but is a case of a willful and deliberate setting up of an interest in employees adverse to that of the trust. P. 272.

   (c) The most effective sanction for good administration by a bankruptcy trustee is personal liability for the consequences of forbidden acts; and a trustee may effectively protect himself against personal liability by accounting at prompt intervals and by seeking instructions from the court as to matters which involve difficult questions of judgment. Pp. 273–275.

2. From a judgment reversing an order of the District Court surcharging a former reorganization trustee, a petition for certiorari was filed in this Court by one who had already resigned as successor trustee, and who was joined in the petition by an indenture trustee. *Held:* The indenture trustee's standing is expressly authorized by 52 Stat. 894, 11 U. S. C. § 606; and the substitution of a subsequently appointed successor trustee is authorized. Pp. 270–271.

(a) Successor trustees, unlike successors of public officers, are regarded as transferees or assignees of all the interests of their predecessors, and removal of a trustee does not cause abatement. P. 271.

184 F. 2d 1, reversed.

An order of the District Court surcharging a reorganization trustee was reversed by the Court of Appeals. 184 F. 2d 1. This Court granted certiorari. 340 U. S. 928. *Reversed and remanded,* p. 275.

Stanley A. Kaplan argued the cause for petitioners. With him on the brief were *Carl W. Mulfinger, J. Edgar Kelly* and *Jacob B. Courshon.*

Roger S. Foster argued the cause for the Securities & Exchange Commission, urging reversal. With him on the brief were *Solicitor General Perlman, John F. Davis* and *David Ferber.*

Urban A. Lavery and *Irving Herriott* argued the cause and filed a brief for Darrow, respondent.

Mr. Justice Jackson delivered the opinion of the Court.

The principal question here concerns personal liability of a reorganization trustee who, although making no personal profit, permitted key employees to profit from trading in securities of the debtors' subsidiaries. Upon a long record, controlling facts have been found with little disagreement.

In 1935, the United States District Court appointed respondent Darrow as reorganization trustee for two common-law trusts. These had functioned as holding companies and their principal assets were the securities of twenty-seven underlying companies, each of which owned improved real estate and had its own debt and capital structure. Both the subsidiary companies and

the two trusts had been promoted by Jacob Kulp and Myrtle Johnson, who thoroughly knew the inside of the business and were acquainted with many of the investors. The tangled financial history leading to the reorganization is not important to our issue.

Darrow employed Kulp and Miss Johnson to assist in his trusteeship. That they were competent and useful is undenied. Kulp managed the physical properties while Miss Johnson supervised the office, had complete charge of all records of income, expenditures and properties of both debtors and all underlying companies. Darrow decided upon a policy of buying in bonds of the subsidiaries for retirement, where they were available at a discount, and during his trusteeship reduced the outstanding bonds of subsidiaries by this method by about two and one-half million dollars. Darrow depended upon Miss Johnson's judgment and advice in allocating funds for sinking fund operations, in his purchase of securities and in fixing prices to be offered.

Kulp and Miss Johnson were employed by Darrow with the express agreement that they could continue to trade in securities of the debtors' subsidiaries personally and through Colonial Securities Corporation, which they owned. Without such consent they stated they would not have remained. Darrow and Colonial for a considerable period shared office facilities and personnel, with Miss Johnson in charge both of the trustee's office, which was interested in the purchase of bonds, and her own Colonial, interested in the same thing.

Miss Johnson and Kulp, during their employment by the trustee, traded extensively in bonds of the subsidiary companies. On many occasions they acquired bonds for themselves and on the same day, or within a few days, transferred them to Darrow at a profit. Darrow paid for some securities in advance of their delivery to him and for some even before Miss Johnson had made her

own purchase of them. Johnson and Kulp sometimes bought for themselves bonds offered by bondholders who had come to the trustee's office to dispose of them to the trustee. They made substantial profits through these transactions.

In his eight years of trusteeship, Darrow filed but one account for one of the debtor-corporations and none for the other. The Securities and Exchange Commission intervened and demanded investigation of his conduct of the trust and thereafter he resigned and filed his accounts, which were met with objections by his successor trustee. These issues were referred to a special master, who heard a long contest over the foregoing and many other items unimportant here. The master recommended a surcharge on account of the foregoing conduct. The master's report was reviewed by the District Court, which concluded that the evidence supported the findings and recommendations and surcharged the trustee in the amount of $43,447.46, reserving some questions for later consideration. Darrow appealed and the Court of Appeals reversed the decision of the District Court, for reasons that we will later consider. 184 F. 2d 1. We conclude that the District Court was correct and the decision of the Court of Appeals cannot stand.

At the outset we are met with a jurisdictional objection. Respondent contends that we are powerless to grant a motion to substitute parties because the petition for the writ of certiorari is jurisdictionally defective in that it is filed in the name of Stacy Mosser, a resigned trustee. It is further contended that John W. Guild, the other named petitioner, is without standing to seek review because he is only an indenture trustee. Both contentions are erroneous.

An indenture trustee's standing is expressly authorized by 52 Stat. 894, 11 U. S. C. § 606, which provides, "the debtor, *the indenture trustees,* and any creditor or stock-

holder of the debtor shall have the right to be heard on all matters arising in a proceeding under this chapter." (Italics added.) And respondent, in opposing the motion to substitute, erroneously relies on cases involving government officers. *Davis* v. *Preston,* 280 U. S. 406; *Snyder* v. *Buck,* 340 U. S. 15. Successor trustees, unlike successors of public officers, are regarded as transferees or assignees of all the interests of their predecessor, and removal of a trustee does not cause abatement. 52 Stat. 840, 860, 11 U. S. C. § 74. We hold, in accord with *Bowden* v. *Johnson,* 107 U. S. 251, 264, that substitution is fully authorized and proper in these circumstances and accordingly turn to the merits.

This was a strict trusteeship, not one of those quasi-trusteeships in which self-interest and representative interests are combined. A reorganization trustee is the representative of the court and it is not contended and would not be arguable that if he had engaged for his own advantage in the same transactions that he authorized on the part of his subordinates he should not be surcharged. Equity tolerates in bankruptcy trustees no interest adverse to the trust. This is not because such interests are always corrupt but because they are always corrupting. By its exclusion of the trustee from any personal interest, it seeks to avoid such delicate inquiries as we have here into the conduct of its own appointees by exacting from them forbearance of all opportunities to advance self-interest that might bring the disinterestedness of their administration into question.

These strict prohibitions would serve little purpose if the trustee were free to authorize others to do what he is forbidden. While there is no charge of it here, it is obvious that this would open up opportunities for devious dealings in the name of others that the trustee could not conduct in his own. The motives of man are too complex for equity to separate in the case of its trustees the motive

of acquiring efficient help from motives of favoring help, for any reason at all or from anticipation of counter-favors later to come. We think that which the trustee had no right to do he had no right to authorize, and that the transactions were as forbidden for benefit of others as they would have been on behalf of the trustee himself.

It is argued here, and appears to have been the view of the Court of Appeals, that principles of negligence applied and that a trustee could not be surcharged under many decisions unless guilty of "supine negligence." We see no room for the operation of the principles of negligence in a case in which conduct has been knowingly authorized. This is not the case of a trustee betrayed by those he had grounds to believe were trustworthy, for these employees did exactly what it was agreed by the trustee that they should do. The question whether he was negligent in not making detailed inquiries into their operations is unimportant, because he had given a blanket authority for the operations. The liability here is not created by a failure to detect defalcations, in which case negligence might be required to surcharge the trustee, but is a case of a willful and deliberate setting up of an interest in employees adverse to that of the trust.

It is contended, however, that the trust has incurred no loss. Indeed, it is argued, and much evidence was taken to the effect, that the buying program of Darrow as a whole was to the advantage of the trust. Of course, these dealings in a rising market did not directly extract any amounts from the till of the trustee. But it is obvious that a buying program to retire at discount bonds of subsidiaries advances most rapidly and achieves its greatest results when the purchase prices are lowest. Darrow concededly relied on Miss Johnson in fixing offering prices. Those offering prices were sufficiently above what bondholders were willing to accept, so that a margin was left for Miss Johnson to profit. It may not have

been intentionally rigged for the purpose, but there can be no doubt of the result. If people were willing to trudge to the trustee's office to dispose of their holdings for less than his offer, there is no reason why the advantage of that low price should not have been taken by the trustee. Instead, in his own office, Miss Johnson intervened between the seller and the buyer and made a profit for herself by doing so.

In one of the larger transactions, a block of securities was offered at judicial sale. Darrow did not bid but Miss Johnson did. About one-half of the purchase price she obtained through a resale to Darrow. He paid her, in advance of delivery, $12,447 for securities that cost her approximately $8,000, and his check was used by Miss Johnson to make the payment due under her bid. If Darrow's employees were able to purchase in the open market these securities at less than Darrow on their advice thereafter offered and paid, it is difficult to say that there was no injury to the estate of the trust through these transactions. But equity has sought to limit difficult and delicate fact-finding tasks concerning its own trustee by precluding such transactions for the reason that their effect is often difficult to trace, and the prohibition is not merely against injuring the estate—it is against profiting out of the position of trust. That this has occurred, so far as the employees are concerned, is undenied.

It is argued, and the Court of Appeals appears to have been impressed by the argument, that this surcharge creates a very heavy liability upon a man who enjoyed no personal profit and must be condoned " 'so as not to strike terror into mankind acting for the benefit of others and not for their own.' " 184 F. 2d 1, 8. Trustees are often obliged to make difficult business judgments, and the best that disinterested judgment can accomplish with foresight may be open to serious criti-

cism by obstreperous creditors aided by hindsight. Courts are quite likely to protect trustees against heavy liabilities for disinterested mistakes in business judgment. But a trusteeship is serious business and is not to be undertaken lightly or so discharged. The most effective sanction for good administration is personal liability for the consequences of forbidden acts, and there are ways by which a trustee may effectively protect himself against personal liability.

The practice is well established by which trustees seek instructions from the court, given upon notice to creditors and interested parties, as to matters which involve difficult questions of judgment. In this particular matter, it is claimed that the special knowledge of Miss Johnson and Kulp was indispensable to the trustee. This, it is said, is the reason the trustee yielded to their insistence upon the right to speculate in the securities underlying the trust. If their services were so indispensable that an arrangement so highly irregular was of advantage to the trust, this might have been fully disclosed to the court and the creditors cited to show cause why it should not have been openly authorized. Instead of this, the trustee, although he did discuss with Judge Holly the employment of Kulp and Miss Johnson, did not disclose the critical fact that he was employing them on terms which permitted their trading in the underlying securities. Indeed, it appears that he did not even disclose this feature of the transaction to his own counsel. It is hardly probable that a candid disclosure to creditors, to the court, and to interested parties would have resulted in instructions to have pursued this course; but, had it been authorized, at least the assenting creditors might have found themselves estopped to question the transaction.

A further remedy of a trustee for limiting, if not avoiding, personal liability is to account at prompt intervals, which puts upon objectors the burden of raising their

objections. And had the trustee accounted, as good practice would have required, he undoubtedly would have discovered long ago that this arrangement was objectionable. It hardly lies in the mouth of a trustee to allow his liabilities to accumulate over such a period of time and then ask the court to relieve him of them because they have become too burdensome.

In fairness to the trustee, it is to be noted that there is no hint or proof that he has been corrupt or that he has any interest, present or future, in the profits he has permitted these employees to make. For all that appears, he was simply misled into thinking these persons indispensable, but he entered into an arrangement which courts cannot sanction unless they are to open the door to practices which would demoralize trusteeships and discredit bankruptcy administration.

The judgment of the Court of Appeals is reversed and the cause remanded to the District Court for proceedings consistent with this opinion.

Reversed and remanded.

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

MR. JUSTICE BLACK, dissenting.

The Special Master, District Court, Court of Appeals and this Court all seem to agree that the respondent trustee, Darrow, has been guilty of no act of bad faith. As a result of his administration, large profits accrued to the estate. Nevertheless, the Court now holds that respondent must be surcharged $43,000 solely because two of the trust's employees profited to that extent from trading in trust securities with his knowledge. This rule of trustee liability did not exist before today, as is shown by the fact that no statute or case is cited in support of the Court's decision.

Despite its novelty, there is much to be said in favor of such a rule for cases arising in the future. It seems to me, however, that there is no reason why the rule should be retroactively applied to this respondent when to do so is grossly unfair. Admittedly, the most that can be said against respondent is that he made an honest mistake which before today would not have subjected him to the heavy financial penalty. Under these circumstances, if the new rule is to be announced by the Court, I think it should be given prospective application only. See *Great Northern R. Co.* v. *Sunburst Oil Co.*, 287 U. S. 358 and cases cited, 85 A. L. R. 262.

I would affirm the judgment of the Court of Appeals.

Syllabus.

ELDER ET AL. *v.* BRANNAN, SECRETARY OF AGRICULTURE.

NO. 474. CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.*

Argued April 11, 1951.—Decided May 7, 1951.

1. Petitioners are veterans entitled to the benefits of the Veterans' Preference Act of 1944. They were appointed as attorneys in a Government Department in 1943, when a civil service regulation limited such appointments to the duration of the war plus six months, and persons so appointed were not to acquire a classified (competitive) civil service status. In 1947, through a reduction in force, petitioners and other attorneys in the Department were separated from the service, although nonveteran attorneys with classified status were retained. They sought relief in an action in the District Court, alleging that their separation from the service was unlawful. *Held:* Petitioners' separation from the service was in accord with the Civil Service Commission's retention-preference regulations; the regulations were consistent with § 12 of the Act and were valid; and petitioners' separation from the federal service was therefore valid. Pp. 281–285.

(a) Petitioners did not acquire a classified civil service status and were not entitled under civil service regulations to retention preference over all nonveterans. P. 281.

(b) The proviso of § 12 of the Act does not give to veterans with an efficiency rating of "good" or better an absolute preference over all other employees, with or without classified status or its equivalent. Pp. 283–285.

(c) The Commission's retention regulations, adopted pursuant to § 12 of the Act, can hardly be deemed invalid for making a distinction on the basis of tenure when they reflect a long-standing definition of "competing" groups, when they were issued by the agency which proposed the statutory language finally adopted, and when Congress indicated no intent whatsoever to supply a new standard. P. 285.

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*Together with No. 473, *Brannan, Secretary of Agriculture,* v. *Elder et al.*, also on certiorari to the same court.

(d) The contention that, apart from § 12, veterans were given an absolute preference by § 4 of the Act of 1912, 37 Stat. 413, and that the preference so granted was carried over by the saving clause in § 18 of the 1944 Act, cannot be sustained as to these temporary war-service employees. Pp. 285–286.

(e) Section 2 of the 1944 Act does not, in and of itself, extend absolute preference to veterans with limited tenure. No specific preference rights are granted by that section. P. 286.

2. Petitioners' complaint also alleged that the Department had rehired some of the other attorneys, that some of those rehired had a lower classification on the retention register than that of petitioners, and that petitioners were thus wrongfully denied preference in rehiring. They did not allege that they had requested that their names be placed on the appropriate reemployment list, nor that the appointing officer failed to follow the procedures specified by §§ 7, 8, 15 and pertinent regulations. *Held:* The complaint was insufficient to state a cause of action under the Act. Pp. 286–289.

(a) Section 2 of the 1944 Act grants petitioners no "reinstatement and reemployment" preference rights. Pp. 286–287.

(b) Reinstatement or reemployment preferences are not to be measured by retention-preference regulations under § 12 of the Act. P. 287.

(c) Petitioners' rights to preference in reemployment were governed by § 15 of the Act. They were entitled to those rights only if they requested that their names be placed on the appropriate reemployment list; and, even if they did so, their preference rights were violated only if the appointing officer failed to follow the procedures specified by §§ 7, 8, 15 and pertinent regulations. P. 289.

87 U. S. App. D. C. 117, 184 F. 2d 219, affirmed in part and reversed in part.

In actions brought against the Secretary of Agriculture by two veterans, who sought to be restored to their former positions in the Department, the District Court granted the motion of the Secretary for summary judgment. The Court of Appeals reversed and remanded the cause. 87 U. S. App. D. C. 117, 184 F. 2d 219. This Court granted cross-petitions for certiorari. 340 U. S. 928. *Affirmed in part, reversed in part, and remanded to the District Court,* p. 289.

Morton Liftin argued the cause for the Secretary of Agriculture. With him on the briefs were *Solicitor General Perlman, Assistant Attorney General Baldridge* and *Samuel D. Slade. Acting Assistant Attorney General Clapp* was also on the brief in No. 473.

Robert D. Elder and *Greene Chandler Furman, pro se,* argued the cause and filed a brief. *C. L. Dawson* was also on the brief.

MR. JUSTICE CLARK delivered the opinion of the Court.

These actions involve questions concerning the precise scope of rights to employment in the federal service granted by the Veterans' Preference Act of 1944. 58 Stat. 387, 5 U. S. C. (1946 ed.) §§ 851 *et seq.* The ultimate issues are two: (1) whether under § 12 of the Act veterans with temporary war-service appointments are entitled to retention preference over nonveterans with the equivalent of classified civil service status when reduction-in-force discharges are made; and (2) whether the reemployment rights of veterans lawfully discharged are governed by § 12 retention priorities or by other provisions of the Act.

We treat these cases together, as did the courts below, and shall refer to Elder and Furman as petitioners. Petitioners are honorably discharged veterans and as such are concededly entitled to whatever benefits the Act affords. They were appointed associate attorneys in the Office of the Solicitor of the Department of Agriculture in July and August 1943. At the time of their appointments, a civil service regulation was in effect under which all appointments as attorneys were to be limited to the duration of the war plus six months, and persons so appointed were not to acquire a classified (competitive) civil service status. On May 29, 1947, petitioners and eighteen other attorneys in the Department were notified

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that, because of a reduction in force compelled by lack of funds, they would be separated from service on June 30 following. Nonveteran attorneys with the equivalent of classified status were to be retained. The selection was made on the basis of civil service retention-preference regulations—under § 12—which plainly required that nonveterans with classified status or its equivalent be given a higher retention priority than veterans without.

Plaintiffs appealed to the Commission, which subsequently found that their separation was in accord with the statute and regulations. Meanwhile, however, they instituted these actions in the District Court for the District of Columbia, alleging first that they had acquired a classified status, and hence were entitled under the regulations to a retention priority over nonveterans; second, that in any event, the statute gave veterans an absolute retention priority regardless of status, and that Commission regulations to the contrary were invalid.

While these actions were pending, the Department came into additional funds, and several attorneys not reached for separation resigned voluntarily or transferred. The Department then rehired nine of the attorneys previously separated, the first of whom took office on October 27, 1947. Some of the attorneys rehired were nonveterans with a lower reduction-in-force retention priority than that possessed by petitioners at the time all were separated. On this ground, the latter amended their complaints before the District Court to allege in addition that they had been deprived of a preferential right to "reemployment" or "reinstatement." The Secretary moved for a summary judgment, and the District Court granted the motion. On appeal, the Court of Appeals affirmed the judgment that petitioners' separation from the service was lawful. But it found that the allegations concerning violation of reemployment or reinstatement rights were well founded. The court

therefore reversed and remanded with directions that the Secretary be given leave to deny the facts alleged. 87 U. S. App. D. C. 117, 184 F. 2d 219. From this judgment, the parties filed cross-petitions for review. Petitioners sought review of the judgment that their separation was lawfully carried out. The Secretary sought review of the judgment that petitioners' allegations as to deprivation of reemployment or reinstatement rights stated a cause of action under the statute. We granted certiorari because of the obvious impact of these issues on federal employment policies. 340 U. S. 928 (1951).

For reasons outlined below, we agree that petitioners' separation from service was in full accord with the statute. We disagree with the holding that the allegations of the complaint are sufficient to state an unlawful deprivation of a preferential right to reemployment.

I.

As the Court of Appeals pointed out, there is no merit in petitioners' contention that they had acquired a classified civil service status and were thus entitled under the regulations to retention preference over all nonveterans.[1]

[1] Executive Order 9063, issued February 16, 1942, and in effect at all times relevant, authorized the Civil Service Commission to formulate special procedures for the recruitment of personnel during the war, and further provided that

"[p]ersons appointed solely by reason of any special procedures adopted under authority of this order . . . shall not thereby acquire a classified (competitive) civil-service status, but, in the discretion of the Civil Service Commission, may be retained for the duration of the war and for six months thereafter." 3 CFR (Cum. Supp. 1943) 1091.

On March 16, 1942, the Board of Legal Examiners, functioning under the Commission, amended its regulations to provide that all appointment to attorney positions be effected under this Executive Order, and be limited to the duration of the war plus six months. 7 Fed. Reg. 2201. See also Executive Order 9230, 7 Fed. Reg. 6665, 3 CFR (Cum. Supp. 1943) 1201, 1202. This regulation was continued in

The validity of petitioners' discharge, therefore, turns on the validity of the Commission's retention-preference regulations. 5 CFR (Supp. 1947) § 20.3. These regulations were adopted pursuant to § 12 of the Veterans' Preference Act, 5 U. S. C. § 861, which reads in part as follows:

> "In any reduction in personnel in any civilian service of any Federal agency, *competing* employees shall be released in accordance with Civil Service Commission regulations which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings: *Provided,* . . . That preference employees whose efficiency ratings are 'good' or better shall be retained in preference to all other *competing* employees and that preference employees whose efficiency ratings are below 'good' shall be retained in preference to *competing* nonpreference employees who have equal or lower efficiency ratings . . . ." (Emphasis added.)

The regulations first define "competing" employees on the basis of tenure of employment. The highest priority is given Group A, which includes (1) employees having classified civil service status, and (2) those holding positions excepted from examination requirements and whose appointments are without time limitation. Group B, second in retention priority, includes employees without classified status or whose appointments are limited to the duration of the war plus six months. Group C is composed of employees appointed for one year or less. The regulations then classify employees within each group on

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effect by § 17.1 (g) of the Board's regulations, 5 CFR (Cum. Supp. 1943) § 17.1 (g), and § 17.1 (g) remained in effect when, by Executive Order 9358 of July 1, 1943, 8 Fed. Reg. 9175, the functions of the Board were vested in the Commission itself. No plausible reason has been or could be advanced for holding this regulation invalid.

the basis of veterans' preference and efficiency ratings. Subgroups A–1, B–1 and C–1 include employees with both veterans' preference and efficiency ratings of "good" or better. Subgroups A–2, B–2 and C–2 include those with "good" or better efficiency ratings but without veterans' preference. Under these regulations, petitioners, as war-service employees, were classified B–1, and were separated while some nonveteran attorneys with an A–2 classification (permanent employees) were retained. The Secretary had no other choice, since the regulations group employees by tenure and limit the reach of veterans' preference to competing employees of the same group.

Petitioners contend that this feature violates the statute, that the proviso of § 12 plainly gives veterans with an efficiency rating of "good" or better an absolute preference over all other employees, with or without classified status or its equivalent. But the proviso, like the body of § 12, contains the term "competing" employees, which necessarily implies that a veteran's preference operates only within a defined group. And since the statute does not supply a definition, we must determine from the legislative history of the Act, and from prior legislation and regulations, whether the Commission's definition may reasonably be said to "carry into full effect the provisions, intent, and purpose [of the statute]." 5 U. S. C. § 868.

This Court made a similar examination in *Hilton* v. *Sullivan,* 334 U. S. 323 (1948). The decision in that case upheld the retention-preference regulations insofar as they granted veterans with classified status an absolute priority over nonveterans of the same status regardless of *length of service.* The Court stated that in the light of all pertinent history "no other interpretation of [§ 12] . . . can fairly be reached." *Id.* at 336. Since "length of service" and "tenure of employment" appear as parallel terms in the body of § 12, it can be argued that if the proviso eliminates length of service as a barrier to veter-

ans' preference, it also eliminates tenure. But this ignores a crucial difference in the historical treatment of these two factors. Executive orders and Civil Service regulations prior to 1944 had consistently disregarded length of service in giving veterans preference over non-veterans with the same tenure—a fact stressed in the *Hilton* case. *Id.* at 336–337. On the other hand, the regulations had just as consistently distinguished "competing" groups on the basis of tenure, and had confined the scope of veterans' preference to employees of the same group. As early as 1932, the Commission provided that reduction in force was to be carried out in inverse order of tenure, permanent employees to be separated last.[2] The rule was still in force at the time the Veterans' Preference Act of 1944 was passed. 5 CFR (Supp. 1943) § 12.304.

Moreover, the legislative history of the Act is barren of any indication that this long-established separation of "competing" employees on the basis of tenure was to be broken down and subordinated to veterans' preference. In general, the Act was designed to "give legislative sanction to existing veterans' preference" and to "give some additional strength" to that preference.[3] Additional rights granted were specifically brought to the Congress' attention. One addition which was stressed, for example, was the third proviso of § 12, which grants preference to veteran employees of an agency when that agency is replaced or any of its functions transferred to another

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[2] Minute of the Civil Service Commission, August 11, 1932. See Civil Service Commission, Acts, Rules and Regulations (as amended to September 15, 1934), p. 54.

[3] Statement of Representative Starnes, author of the bill, Hearings before Senate Committee on Civil Service on S. 1762 and H. R. 4115, 78th Cong., 2d Sess. 8–9; statement of Representative Ramspeck, Chairman of the Civil Service Committee, 90 Cong. Rec. 3505 (1944).

administrative body.[4] But, in the only interpretive discussion of the proviso here involved, Commissioner Flemming stated that it "simply continues what has been in practice throughout the entire Federal service since 1923."[5] More important, two bills earlier proposed by veterans' organizations would have specifically granted the right which plaintiffs claim in this case—absolute preference in retention regardless of tenure.[6] These bills were rejected in favor of § 12 as enacted, the language of which was proposed by the Commission itself.[7] In sum, the Commission's retention regulations can hardly be called invalid for making a distinction on the basis of tenure when they reflect a long-standing definition of "competing" groups, when they were issued by the agency which proposed the statutory language finally adopted, and when Congress indicated no intent whatsoever to supply a new standard.

Two further points remain. Petitioners contend that, apart from § 12, veterans were given an absolute preference by § 4 of the Act of 1912, 37 Stat. 413, and that the preference so granted was carried over by the saving clause in § 18 of the 1944 Act. 5 U. S. C. § 867. The flaw in this argument, as the court below pointed out, is that § 4 by its terms was confined to the classified civil service. Its features were subsequently applied, under Executive Orders, within the unclassified service, but as indicated above, temporary appointment veterans never had retention preference over permanent tenure nonvet-

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[4] Hearings, *supra*, note 3 at 9–10. For a specification of this and other additions to veterans' rights, see also, 90 Cong. Rec. 3503; S. Rep. No. 907, 78th Cong., 2d Sess. 2–4; H. R. Rep. No. 1289, 78th Cong., 2d Sess. 3–4.

[5] Hearings, *supra*, note 3 at 27.

[6] H. R. 5101, 76th Cong., 1st Sess.; H. R. 5147, 76th Cong., 1st Sess.

[7] H. R. Rep. No. 1289, *supra*, note 4 at 6.

erans. Alternatively, petitioners contend that § 2 of the 1944 Act in and of itself extends absolute preference to veterans with limited tenure. 5 U. S. C. § 851. But it seems apparent that § 2 gives no specific preference rights at all. The section contains only a general statement of policy, a listing of preferred groups, and a specification of federal positions covered. It provides that "preference shall be given" in certification for appointment, appointment, reinstatement, reemployment and retention; it does not delineate what that preference shall be. The details are spelled out in subsequent sections of the Act, retention preference being governed by § 12. Cf. *Hilton* v. *Sullivan, supra.* Section 2 was described throughout the legislative history as merely "defining the groups to whom preference was to be granted." [8]

Since retention rights are governed by § 12, and since the regulations are consistent with the statute, petitioners were properly separated from their positions in the federal service.

II.

The complaint that plaintiffs were wrongfully denied preference in rehiring rests solely on the allegation that the Department reemployed attorneys with a lower classification on the retention register. The Court of Appeals concluded that this allegation, not denied by the Secretary, was sufficient to state a cause of action under the statute. It held that § 2 of the statute granted "reinstatement and re-employment" preference rights, and that these rights were measured by the retention-preference regulations under § 12. 87 U. S. App. D. C. 117, 120, 184 F. 2d 219, 222 (C. A. D. C. Cir. 1950). Neither of these holdings withstands analysis. Section 2, as has been indicated, grants no specific rights except insofar as it may be thought

[8] H. R. Rep. No. 1289, *supra,* note 4 at 3; S. Rep. No. 907, *supra,* note 4 at 2; 90 Cong. Rec. 3503.

to preserve, in conjunction with § 18, any rights previously arising from statute, executive order or regulation and not granted by the other sections of the 1944 Act.

Nor are we able to accept the ruling that reinstatement or reemployment preferences are to be measured by retention-preference regulations under § 12. Reemployment preferences are specially dealt with elsewhere in the Act. Section 15 provides that all preference eligibles who have been separated without fault on their part may—at their request—have their names placed on all appropriate registers or employment lists for positions for which they are qualified. 5 U. S. C. § 864. It further provides that their eligibility for reappointment is then governed by §§ 7 and 8 of the Act, dealing with appointments in general. 5 U. S. C. §§ 856, 857. The names of preference eligibles are placed on the appropriate registers or lists in accordance with their respective numerical ratings, which are augmented by 10 points in the case of disabled veterans, their wives, or unmarried widows of deceased veterans; 5 points in the case of other preference eligibles. 5 U. S. C. § 852. The appointing officer may pass over a veteran in favor of a nonveteran, but if he does so he must file in writing his reasons therefor, and the Commission must examine those reasons to determine their sufficiency. Section 15 further provides that no appointment shall be made from an examination register, except of 10-point preference eligibles, when there are three or more names of preference eligibles on any appropriate reemployment list for the position to be filled.

There is no persuasive reason why the provisions of § 15 are not applicable in this case. Petitioners make a twofold argument to the contrary: (1) that their right was to preference in "reinstatement" rather than in "reemployment," and that "reinstatement" preference is granted and governed by § 2; (2) that § 15 applies only to the competitive civil service, from which attorneys

were excepted by regulations taking effect May 1, 1947. 12 Fed. Reg. 2839, 5 CFR (Supp. 1947) § 6.4. Even if valid, the first contention is of no help to petitioners. "Reinstatement"—to the extent it had any peculiar meaning in civil service parlance prior to the time that 1944 Act was passed—meant reemployment of a person *upon formal request of the appointing officer.* 1 Fed. Reg. 602, 5 CFR §§ 9.1, 9.101 (1939).[9] The preference accorded veterans was that they might be reinstated without time limit, whereas a request for reinstatement of nonveterans had to come within specified periods after their separation. The term was not confined to reappointment to a position formerly held. An involuntarily separated employee could be reinstated in any part of the service, and the Commission was authorized to provide for similar reinstatement of any classified status employee. The apparent analogue of this type of reemployment is contained in § 13 of the 1944 Act, which provides that any preference eligible "who has resigned or who has been dismissed or furloughed" may be appointed to any position for which he is eligible "at the request of any appointing officer." 5 U. S. C. § 862. Petitioners would interpret § 2 as creating an entirely new and absolute right of preference in "reinstatement," not dependent upon the request of the appointing officer. Such an interpretation would not only stretch § 2 beyond its apparent and intended scope, but would in effect strike § 15 off the books, since no veteran would ever

[9] The provisions of Part 9 were superseded in part by the wartime service regulations adopted in 1943, § 18.8 of which provided that former employees with at least one year's service "may be reappointed by war service appointment to any position for which he meets the standards," and further provided that veterans who would have status for reinstatement under Part 9 could be reemployed without regard to length of prior service. 5 CFR (Supp. 1943) § 18.8.

have cause to use the limited preference in reemployment there granted.

The second claim, that § 15 covers reemployment only in positions within the competitive civil service, is clearly erroneous. The section provides that the name of a preference eligible be placed on appropriate registers and lists "for every position for which his qualifications have been established, as maintained by the Civil Service Commission, or as shall be maintained by any agency or project of the Federal Government . . . ."

Petitioners were lawfully separated from their positions in the Department of Agriculture. Their rights to preference in reemployment were governed by § 15 of the Act. They were entitled to those rights only if they requested that their names be placed on the appropriate reemployment list. Their complaints contain no allegation that they made such a request. And even if they did so, their preference rights were violated only if the appointing officer failed to follow the procedures specified by §§ 7, 8, 15 and pertinent regulations. Again, there are no such allegations in the complaints. The complaints as they stand are fatally defective in these respects, and unless petitioners on remand are able to supply the missing links in allegations and proof, the Secretary is entitled to a summary judgment.

The judgment of the Court of Appeals is affirmed in part and reversed in part, and the cases are remanded to the District Court for further proceedings in conformity with this opinion.

So ordered.

MR. JUSTICE BLACK dissents.

UNITED STATES ET AL. *v.* CHAMPLIN REFINING CO.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA.

No. 433. Argued March 8–9, 1951.—Decided May 7, 1951.

Appellee owns and operates a pipe line from its refinery in Oklahoma to its terminals in other States. It uses the pipe line solely to carry its own refined petroleum products. No other pipe line or refiner has connections with appellee's line, and no other refiner has ever shipped products through it. At each of its terminals, appellee has storage facilities from which it makes deliveries to jobber purchasers, who supply their own transportation therefrom. At two of its terminals it has ethyl plants where it processes 20% of its products. Appellee presently handles 1.98% of the total products consumed in its marketing area. There are ample common-carrier pipe-line facilities available to these markets; and no refinery or other pipe-line company has requested a connection with appellee. In an earlier proceeding, *Champlin Refining Co.* v. *United States*, 329 U. S. 29, this Court found that appellee was a "common carrier" within the meaning of § 1 of the Interstate Commerce Act, and sustained a Commission order under § 19a requiring appellee to file valuation data, maps, charts, etc. pertaining to its operations. *Held:*

1. A subsequent order of the Commission is sustained, insofar as it requires appellee, under § 20 of the Act, to file annual, periodic and special reports, and to institute and maintain a uniform system of accounts applicable to pipe lines. Pp. 294–297.

2. Insofar as the order requires appellee, under § 6 of the Act, to publish and file schedules showing rates and charges for interstate transportation of refined petroleum products—which might force appellee to devote its pipe line, at least partially, to public use—it goes beyond what Congress contemplated when it passed the Act; and it cannot be sustained. Pp. 297–301.

95 F. Supp. 170, affirmed in part and reversed in part.

The Interstate Commerce Commission issued an order requiring appellee to take certain steps under §§ 6 and 20 of the Interstate Commerce Act. 274 I. C. C. 409. A three-judge district court denied enforcement. 95 F.

Supp. 170. On direct appeal to this Court, *affirmed in part and reversed in part,* p. 301.

Charles H. Weston argued the cause for appellants. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Morison, John F. Davis, Daniel W. Knowlton* and *H. L. Underwood.*

Dan Moody argued the cause for appellee. With him on the brief were *Harry O. Glasser, Nathan Scarritt, E. S. Champlin* and *Samuel H. Horne.*

MR. JUSTICE CLARK delivered the opinion of the Court.

Section 1 of the Interstate Commerce Act provides that "common carriers" engaged in the "transportation" of oil or other commodities shall be subject to the regulatory requirements specified in other sections of the statute.[1] In an earlier proceeding, this Court found that Champlin, as owner of a pipe line, was a "common carrier" within the meaning of § 1; and on the record there presented the Court upheld an I. C. C. order under § 19a (a)–(e) of the Act requiring the company to submit valuation data, maps, charts and other documents pertaining to its operations.[2] *Champlin Refining Co.* v. *United States,* 329 U. S.

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[1] 49 U. S. C. § 1:

"(1) *Carriers subject to regulation.*

"The provisions of this chapter shall apply to common carriers engaged in—

. . . . . .

"(b) The transportation of oil or other commodity, except water and except natural or artificial gas, by pipe line . . . .

. . . . . .

"(3) . . . (a) The term 'common carrier' as used in this chapter shall include all pipe-line companies; . . . ."

[2] 49 U. S. C. § 19a:

"(a) *Physical valuation of property of carriers; classification and inventory.*

"The Commission shall . . . investigate, ascertain, and report the

29 (1946). The present proceeding involves a subsequent I. C. C. order directing Champlin (1) to file annual, periodic and special reports, and to institute and maintain a uniform system of accounts applicable to pipe lines, both under § 20 of the Act; [3] and (2) to publish and file schedules showing the rates and charges for interstate transportation of refined petroleum products, pursuant to § 6.[4]

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value of all the property owned or used by every common carrier subject to the provisions of this chapter . . . .

. . . . . .

"(e) . . . Every common carrier subject to the provisions of this chapter shall furnish to the commission or its agents from time to time and as the commission may require maps, profiles, contracts, reports of engineers, and any other documents . . . ."

[3] 49 U. S. C. § 20:

"(1) *Reports from carriers and lessors.*

"The Commission is authorized to require annual, periodical, or special reports from carriers . . . .

. . . . . .

"(3) *Uniform system of accounts.*

"The Commission may, in its discretion, for the purpose of enabling it the better to carry out the purposes of this chapter, prescribe a uniform system of accounts applicable to any class of carriers subject thereto . . . .

"(4) *Depreciation charges.*

"The Commission shall . . . prescribe for carriers the classes of property for which depreciation charges may properly be included under operating expenses, and the rate or rates of depreciation which shall be charged . . . .

. . . . . .

"(8) . . . the term 'carrier' means a common carrier subject to this chapter . . . ."

[4] 49 U. S. C. § 6:

"(1) *Schedule of rates, fares, and charges; filing and posting.*

"Every common carrier subject to the provisions of this chapter shall file with the commission . . . and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation . . . ."

Section 1 (5) of the Act provides that all charges "shall be just and reasonable." 49 U. S. C. § 1 (5).

A specially constituted three-judge District Court, with one member dissenting, refused to enforce the order on the ground that Champlin, at least for the purposes of §§ 6 and 20, is not within the class of carriers intended to be regulated by the Act. It held further that to impose the requirements of § 6 on Champlin would be to take its property without due process in violation of the Fifth Amendment. 95 F. Supp. 170. The Government and the Commission appealed, 28 U. S. C. §§ 1253, 2101 (e), 2325.

The facts here are substantially the same as in the earlier case. Champlin owns and operates a pipe line running from its refinery at Enid, Oklahoma, to terminals at Hutchinson, Kansas; Superior, Nebraska; and Rock Rapids, Iowa—a distance of 516 miles. It uses the pipe line solely to carry its own refined petroleum products, such as gasoline and kerosene. No other refiner has connections with the line, and none has ever shipped products through it. The line does not connect with any other pipe line. Champlin has storage facilities at each of its three terminals. Jobbers purchasing Champlin products supply their own transportation from the storage tanks to their bulk depots.

Since the first case, there has been a change in Champlin's method of quoting prices. At the time of the earlier proceeding, the price was computed as f. o. b. the Enid refinery, plus a differential equal to the through rail rate from Enid to the purchaser's destination minus the charges for local transportation between the nearest pipeline terminal and the destination. However, Champlin made frequent and substantial departures from this formula in order to meet competitive prices at various locations. In May 1948, the company began quoting prices as f. o. b. the respective terminals, a policy which is still in effect. But as before, adjustments are made so that

delivered prices to jobbers will be competitive with those offered by other refiners.

On the basis of these and other facts, the Government contends (1) that there are no significant factual differences between this and the prior case, and therefore Champlin is barred by collateral estoppel from relitigating the holding of this Court that it is a "common carrier" engaged in "transportation" within the meaning of § 1 of the Act; (2) that since the definition of "common carrier" in § 1 applies to §§ 6 and 20 as well as to § 19a, the Court's prior holding *per se* establishes the validity of the present order; (3) that even if estoppel does not apply, the facts are adequate under the statute to support the Commission's order; (4) that the alleged constitutional question is frivolous.

Champlin claims (1) that factual changes remove this case from the realm of collateral estoppel; (2) that the Court specifically reserved the statutory issue presented by this case, namely whether the I. C. C. may convert a private carrier into a common carrier for hire; and (3) that the lower court was correct in holding that the Act violates the Fifth Amendment if construed to authorize the I. C. C.'s order.

We agree with the Government that there have been no significant factual changes in Champlin's operations since the prior case. The practice of quoting prices f. o. b. Enid made it superficially more obvious that transportation charges were being collected, a point which the Court brought out. 329 U. S. at 34. And the record indicates that the change to an f. o. b. terminal formula resulted in minor alterations in the pattern of relative delivered prices at various locations. But Champlin is still transporting, and unless it has launched on a calculated plan of bankruptcy, its prices on the average are necessarily intended to cover transportation costs as well as other costs. Champlin further points out that it has con-

structed ethyl plants at two of its pipe-line terminals and is there processing some 20 percent of its products. It claims that this change makes the pipe line a part of "manufacturing" facilities and thus brings the company within the *Uncle Sam* rule, which excepted a class of gathering lines from the coverage of the Act. *Pipe Line Cases,* 234 U. S. 548, 562 (1914). But a Champlin officer testified in this case that the company has "always done some blending and treating" of its products at the terminals; and 80 percent of the products are still transported in their final form. Hence, there is no justification for reconsidering this Court's refusal to "expand the actual holding" of the *Uncle Sam* case to include Champlin, and its ruling that Champlin was a "common carrier" as defined by § 1 of the Act.

However, we disagree with the Government's contention that the prior holding disposes of all the statutory issues in this case. To be sure, the literal terms of the statute lend some weight to the Government's argument. Section 1 (1) provides that "the provisions of this part" shall apply to "common carriers" as defined, the word "part" referring to §§ 1–27 inclusive. Section 19a, under which the earlier order was issued, applies to "every common carrier subject to the provisions of this part." Section 20 applies to "carriers," which is defined in subparagraph (8) as "common carrier[s] subject to this chapter"; and § 6 applies to "every common carrier subject to the provisions of this chapter." Hence, the Commission's jurisdiction to issue orders under any of these sections is determined by a decision that a company is a "common carrier" under § 1. The Government in effect argues, however, that a decision as to jurisdiction also settles the merits, that facts adequate to support a specific valuation order under § 19a are also adequate to support an order under §§ 6 and 20. But this is the very conclusion which this Court necessarily rejected in *Champlin I.* In

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that case, it was Champlin which argued that an interpretation encompassing it within § 1 would convert a private pipe line into a public utility and require it to become a common carrier in fact. But the Court stated that "our conclusion rests on no such basis and affords no such implication. . . . The contention . . . is too premature and hypothetical to warrant consideration . . . ." 329 U. S. at 35. In holding merely that Champlin could be required to submit information as a "common carrier" under the Act, the Court plainly indicated that the application of more rigorous sanctions would be reserved for treatment as an independent statutory issue on a proper record.

The reasons for this approach were suggested in *Valvoline Oil Co.* v. *United States,* 308 U. S. 141, 146 (1939). Collection of information has a significance independent from the imposition of regulations, whether or not such regulations ever come forth. Valuation and cost data from companies not subject to rate making may add to the statistical reliability of standards imposed on those companies which are. "Publicity alone may give effective remedy to abuses, if any there be." *Id.* at 146. Disclosure may alter the future course of a company otherwise disposed to indulge in activities which the statute condemns. Disclosure provides the basis for prompt action should a future change in circumstances make full-scale regulation appropriate. Finally, reports may bring to light new abuses and thus provide the groundwork for future statutory amendments. We assume that the Congress which passed the Interstate Commerce Act was well aware of these benefits. We conclude, as before, that the Congress did not mean to eschew them by omitting a general provision empowering the Commission to collect pertinent data from all interstate pipe lines.

The prior holding, therefore, supports that part of the Commission's order involving § 20 of the Act. The re-

quirement of annual and special reports cannot be differentiated from a request for maps, charts and valuation data. The requirement that Champlin maintain a uniform system of accounts is somewhat more burdensome, but we think its independent value as a measuring rod for companies fully regulated under the Act is clearly sufficient to justify the Commission's requesting so much as is pertinent.

At the same time, we find it hard to conclude, despite the generality of the statutory terms used, that Congress intended to apply the sanctions of § 6—imposing the duty of serving the public at regulated rates—on all private pipe lines merely because they cross state lines. The statute cannot be divorced from the circumstances existing at the time it was passed, and from the evil which Congress sought to correct and prevent. The circumstances and the evil are well-known. Pipe lines were few in number and heavily concentrated under the control of one company, Standard Oil. That company, through the ownership of subsidiaries and affiliates, had "made itself master of the only practicable oil transportation between the oil fields east of California and the Atlantic Ocean and carried much the greater part of the oil between those points. . . . Availing itself of its monopoly of the means of transportation [it] refused through its subordinates to carry any oil unless the same was sold to it or to them . . . on terms more or less dictated by itself." *Pipe Line Cases, supra,* at 559. Small independent producers—who lacked the resources to construct their own lines, or whose output was so small that a pipe line built to carry that output alone would be economically unfeasible—were in a desperate competitive position. There is little doubt, from the legislative history, that the Act was passed to eliminate the competitive advantage which existing or future integrated companies might possess from exclusive ownership of a pipe line.

This evil could not have been reached by bringing within the coverage of the Act only those pipe lines who were common carriers for hire in the common-law sense. Attempts so to limit the Act's scope were made during the course of congressional debates. Senator Lodge, sponsor of the principal amendment, rendered the obvious answer that such an alteration would "absolutely destroy [the proposal] . . . so far as its effectiveness is concerned." 40 Cong. Rec. 7000 (1906). Hence the bill as finally enacted was clearly intended "to bring within its scope pipe lines that although not technically common carriers yet were carrying all oil offered, if only the offerers would sell at their price." *Pipe Line Cases, supra,* at 560. And see *Valvoline Oil Co.* v. *United States, supra.* We may also assume for purposes of argument—no such facts ever having been before this Court—that the generality of the term "all pipe lines" was meant to impose full regulation on integrated producer pipe lines who exploit a competitive advantage simply by refusing to deal with independent producers having no comparably cheap method of reaching consuming markets. But it would be strange to suppose that Congress, in adopting a term broad enough to cover all competitive imbalances which might arise, intended that the Commission should make common carriers for hire out of private pipe lines whose services were unused, unsought after, and unneeded by independent producers, and whose presence fosters competition in markets heavily blanketed by large "majors." Such a step would at best be pointless; it might well subvert the chief purpose of the Act.

Yet on the record before us, this is precisely what the Commission is attempting to do. Unlike the crude-oil gathering lines of Valvoline, which carried the products of over 3,800 independent owners and operators, Cham-

plin's refined-products line carries only its own.[5] The Government concedes that the order under § 6 carries a necessary implication that Champlin may now be forced to devote its pipe line, at least partially, to public use. Nevertheless, the Commission has not only failed to disclose circumstances which the Act was passed to correct, but has either assumed or made findings to the contrary. In addition to findings previously referred to, the Commission stated as follows:

> "Only about 1.98 percent of the total gasoline consumed in [Champlin's marketing] area is moved through the pipe line and sold from respondent's terminal storage facilities. . . . The total capacity of the common-carrier lines into the Nebraska market is about 13 times that of the Champlin line and about 10 times that of the latter into the Iowa market. The common-carrier pipe-line capacity available to refineries in Oklahoma and Kansas aggregates 172,800 barrels a day [in contrast to Champlin's capacity of 9,800 barrels], and respondent's pipe line is the small-

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[5] Champlin is sole owner of the stock of the Cimarron Valley Pipe Line Company, an intrastate crude-oil gathering system which supplies oil from both its own and others' wells to the Champlin refinery. However, the Commission both in this case and in *Champlin I* gave no consideration, either in the hearings or the orders, to Champlin's gathering facilities.

In any event, it would seem that Champlin's exclusive ownership of the *refined-products* line would be of no concern to independent *crude-oil* producers unless the following assumptions were true: (a) that independent refiners were shut out of gasoline markets which they would otherwise enter; (b) that this reduced their output below the capacity of their refineries; (c) that this decreased their demand for crude oil, thus reducing their competition with Champlin in the purchase of crude, and thus depressing the price which crude-oil producers could get. As to the first, and crucial, assumption, the Commission found precisely to the contrary. See text, *infra*.

> est of any common-carrier or private pipe line operating in this territory. Apparently, *common-carrier pipe-line transportation is available to any small refiner in this area desiring such transportation.*
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> . . . . . .
>
> "So far as appears, no other pipe-line company has threatened to force . . . a connection [with Champlin's], and because of the *ample common-carrier pipe-line facilities available, as revealed by respondent, no refinery would be likely to interest itself in such a connection.*" 274 I. C. C. 412–413, 415 (1949). (Emphasis supplied.)

The court below, in its Findings of Fact, concluded that "Champlin does not have a monopoly or any power to establish a monopoly either in the transportation of petroleum products into the trade territory or in the sale of petroleum products therein." It further found that "Champlin . . . is a small company in comparison with companies with which it competes in the area reached by its pipe line. . . . Champlin's acts create competition." See also Chairman Splawn, dissenting from the Commission report. 274 I. C. C. 416.[6] The Government seeks to rebuild its case by pointing to small refiners who are closer to Champlin's pipe line than to any other, and by stressing the expense of building long connecting lines. But there is no evidence that any of these refiners wish to market

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[6] ". . . [T]he evidence is clear that there has been, and is, no holding out by Champlin of a common-carrier service either directly or indirectly. None of the products moved through the line has ever been purchased from any other interest. Moreover, the evidence shows that the products transported through Champlin's pipe line constitutes an inconsequential part of the total volume of products that moves by pipe line to the consuming territory served by Champlin from its storage facilities.

"Requiring Champlin to comply with our valuation orders and the requirements of section 20 of the act . . . is one thing, but to require

outside their immediate area. And in any event, it is not the function of this Court to rescue the Commission by making findings *de novo* which the Commission itself was unable or unwilling to make. We hold that on this record the Commission's order, insofar as it concerns § 6, goes beyond what Congress contemplated when it passed the Act.

The judgment below will be modified by striking out those portions setting aside the Commission's order in Cause No. 29912, *Champlin Refining Company Accounts and Reports,* and as modified, it is affirmed.

So ordered.

MR. JUSTICE FRANKFURTER, while joining the Court's opinion, would overrule the earlier *Champlin* decision, 329 U. S. 29, on the ground set forth in the dissent in that case.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE REED and MR. JUSTICE BURTON concur, concurring in part and dissenting in part.

The term "common carrier" has but one meaning in the Act—the meaning given it by § 1. That definition was held in *Champlin Refining Co.* v. *United States,* 329

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it to file tariffs and thereby obligate itself to transport oil products of others in common-carrier service, to the exclusion of its own, is something entirely different.

. . . . . .

"The purpose of the amendment in 1906 was to protect small independent producers from monopoly power. This report construes that amendment so as to convert into a common carrier the pipe line wholly owned and completely utilized by a relatively small independent company, though the company is wholly dependent upon such facility . . . in the conduct of its refining business. *This ultra literal construction regardless of differing conditions and circumstances* might well have the effect of destroying small independent companies instead of affording them the protection intended by the amendment." (Emphasis supplied.)

U. S. 29, sufficiently broad to include appellee. Section 19a was involved there and § 6 is involved here. That may make a constitutional difference; but there can be none so far as the statute is concerned. Since § 6, like § 19a, can reach appellee only through § 1, if § 1 is broad enough for the one section it is broad enough for the other. As the Court in its several decisions has not been consistent in its interpretation of the scope of the Act as applied to private pipe lines, I feel free to follow the precedent of the *Pipe Line Cases,* 234 U. S. 548, 561–562, and the view expressed in the dissent in *Champlin Refining Co.* v. *United States,* 329 U. S. 29, that pipe lines carrying only the commodities of their owners from the owners' refineries to the owners' storage tanks for marketing have not been made by Congress subject to the Act. Consequently, I agree that § 1 is not broad enough to bring appellee under the regulatory power of the Interstate Commerce Commission. Therefore, neither § 6 nor § 20 applies.

MR. JUSTICE BLACK, dissenting.

From whatever angle this case is approached, it seems to me that the holding of the Court is wrong. The decision rides roughshod over clear statutory language making the Hepburn Act[1] applicable to interstate oil-carrying pipe lines, and makes impossible enforcement of the Act as Congress intended. The decision undercuts and I think overrules several prior cases without mentioning

[1] 34 Stat. 584. The Hepburn Act was passed in 1906 as an amendment to the Interstate Commerce Act of 1887, 24 Stat. 379, and may now be found in 49 U. S. C. §§ 1–27. All quotations in the text follow the original language of the Hepburn Act, this Court twice having held that subsequent minor modifications changed neither the purpose nor the meaning of the Act. *Valvoline Oil Co.* v. *United States,* 308 U. S. 141, 145–146; *Champlin Rfg. Co.* v. *United States,* 329 U. S. 29, 32, note 4.

this fact. And this appellant, Champlin, is even given a second trial and victorious relitigation of the same issues we had previously determined against it. Finally, the opinion suggests to me that the Court accepts what I deem to be a frivolous constitutional challenge to the Act, namely that Congress is without power to force oil-carrying interstate pipe lines to serve as common carriers for hire.

I.

The Court's holding that Champlin must comply with § 20 of the Hepburn Act, but need not comply with § 6, cannot be reconciled with clear language in those sections or with our previous decisions construing the same language. Section 20 authorizes the Interstate Commerce Commission to require that "all common carriers subject to the provisions of this Act" [2] file, among other things, certain annual reports; § 6 commands that "every common carrier subject to the provisions of this Act" [3] shall file schedules of rates with the Commission. I do not understand why it should be necessary to labor the obvious—this language requires Champlin (if it is a "common carrier subject to the . . . Act") to comply with § 6 if it is required to comply with § 20, or to comply with § 20 if it is required to comply with § 6. The Court holds that Champlin is a "common carrier subject to" the Act, and accordingly sustains the Commission's order to file reports under § 20. Paradoxically, however, it then proceeds to hold that the same Champlin, though "subject to" the Act, need not comply with § 6. How the Court

[2] 34 Stat. 593, now 49 U. S. C. § 20, which provides that the I. C. C. may require reports "from carriers" and ". . . the term 'carrier' means a common carrier subject to this chapter . . . ."

[3] 34 Stat. 586, now 49 U. S. C. § 6: "Every common carrier subject to the provisions of this chapter shall file . . . ."

gives the identical language in the two sections such different meanings is left a mystery.[4]

The Court may be saying that § 6 is something *sui generis,* that no pipe-line company need comply with that section unless it is something more than a "common carrier subject to the . . . Act."[5] While the meaning of this "something more" is not made clear, the Court, in overturning the Commission order does suggest in passing that it might possibly sustain an order requiring Champlin to comply with § 6 upon Commission findings that the company exploited "a competitive advantage simply by refusing to deal with independent producers having no comparably cheap method of reaching consuming markets" or that Champlin enjoyed a "monopoly" position in its area. Certainly nothing in the Hepburn Act should encourage such judicial creativeness for § 6 applies to "every common carrier subject to the . . . Act" in language which does not logically admit of limiting the section's coverage to carriers that have refused "to deal with independent producers" or achieved "monopoly" status. That § 6 would or could be thus restricted was not hinted at in the *Pipe Line Cases,* 234 U. S. 548 (where this section was involved), nor in *Valvoline Oil Co.* v. *United States,* 308 U. S. 141,[6] nor in our decision in the first *Champlin* case, *Champlin Rfg. Co.* v. *United States,*

[4] The mystery is not lessened by the Court's use of the concept of the "Commission's jurisdiction" in connection with tariffs. For the duty of a common carrier to file tariffs is not dependent on any "jurisdiction" or any order of the I. C. C. Section 6 unequivocally commands that common carriers subject to the Act "shall file." See note 3, *supra.*

[5] I am unable to find any support for this interesting theory in the language or history of any part of the Act, or from any other source. But see Splawn, Commissioner, dissenting, 274 I. C. C. 416; compare the opinion of Commissioners Aitchison, Splawn and Alldredge in the first *Champlin* case, 49 Val. Rep. (I. C. C.) 463.

[6] See Part III, *infra.*

329 U. S. 29.[7] It should be noted that the dissenting justices in *Champlin I* thought that an additional "something" was necessary before the Hepburn Act was applicable; they believed that *none* of the Act's provisions should apply to pipe-line companies unless they were "common carriers in substance." But neither those justices nor anyone else, so far as I know, have ever before suggested that the Court can pick and choose sections into which additional requirements can be imported. This possibility remained for today's majority to discover, 46 years after passage of the Hepburn Act.[8]

II.

Far more important than the judicial exemption of Champlin from filing papers under § 6, however, is the Court's holding that pipe-line companies engaged in inter-

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[7] The holding of the last two cited cases was that Valvoline and Champlin had to comply with 49 U. S. C. § 19a (a) and (e). Section 19a, like § 6 and § 20, applies to "every common carrier subject to the provisions of this chapter . . . ."

[8] I do not think that the Court in *Champlin I* reserved "as an independent *statutory* issue on a proper record" (emphasis added) the question whether Champlin could be converted into a public carrier for hire; rather the question left open was whether the Fifth Amendment barred converting Champlin into a public carrier.

Of course, the Government argued in *Champlin I*, as it did in *Valvoline*, that the Act's provisions should be treated as "separable" in passing on the *constitutional* question raised. But the Government has never intimated that the sections of the Act as a matter of *statutory* construction were "separable." Even an assumption that the sections were separable, however, would not justify the Court in exempting Champlin from § 6 unless it could find support for such an exemption in some statutory language. The Court has pointed to no such exclusionary language; I can find none. Moreover, as an Appendix to this opinion, *infra*, p. 315, shows, Senator Lodge intended to make "the pipe lines and the oil companies subject to all the provisions of the bill" unless expressly excluded in a particular provision.

state transportation of their own petroleum products need not act as public carriers for hire unless they have already voluntarily become "something more" than interstate oil-carrying pipe lines. The proper answer to this basic question in the case turns on § 1 of the Hepburn Act: "[T]his Act shall apply to any corporation or any person or persons engaged in the transportation of oil or other commodity . . . by means of pipe lines . . . who shall be considered and held to be common carriers within the meaning and purpose of this Act . . . ." [9]

That Champlin is a common carrier within the literal language of this provision is shown by the unchallenged findings of fact made by the I. C. C.: Champlin, a fully integrated company, produces, refines, transports and markets petroleum products. Through a wholly owned subsidiary it also buys, gathers and transports to its refinery oil produced from the wells of others.[10] Its trunk pipe line extends 516 miles across five states from its refinery at Enid, Oklahoma, to its terminal at Rock Rapids, Iowa. Although application of the Act does not depend on a pipe-line company's size, Champlin is by no means a small company; rather, it occupies an important position in the area it serves.[11] But for the Court's hold-

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[9] 34 Stat. 584, now 49 U. S. C. § 1: "(1) . . . The provisions of this chapter shall apply to common carriers engaged in— . . . (b) [t]he transportation of oil or other commodity . . . by pipe line . . . . (3) . . . (a) The term 'common carrier' as used in this chapter shall include all pipe-line companies; . . . ." See note 1, *supra*.

[10] Mr. A. G. E. Leverton, Comptroller of the Champlin Refining Company, testified: "We have never produced more than approximately 45 percent of the crude oil required by our refinery and hence have always been compelled to purchase on the open market, more than half of our crude oil requirements. . . ."

[11] The total cost of Champlin's pipe line and appurtenant facilities as of December 31, 1940, was $3,189,028.66. Champlin, according to the I. C. C., owns: (1) Approximately 149 oil wells on 53 leases

ing, I should have thought that § 1 of the Act on the admitted facts obviously required Champlin to serve as a common carrier for the products of others.

That the Hepburn Act did convert Champlin into a public carrier for hire is made even clearer by the legislative history. The pipe-line provision was sponsored in 1906 by Senator Henry Cabot Lodge of Massachusetts who offered to amend a pending railroad bill in a manner which would convert interstate oil-carrying pipe lines into common carriers subject to regulation by the I. C. C.[12] The Lodge Amendment reflected dissatisfaction with monopoly conditions in the petroleum industry. Such conditions, it was thought, had been brought about in the main through control of oil-carrying pipe lines by large integrated companies (especially the Standard Oil Company) which were using their control to exclude independent producers and refiners from this cheap transportation facility.[13] But the ensuing debate left no room for

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in Oklahoma, 45 wells on 13 leases in Kansas, and 52 wells on 10 leases in Texas; (2) approximately 75,000 acres of undeveloped leases; (3) the Enid refinery which processes approximately 4½ million barrels of crude oil annually; (4) all the stock of the Cimarron Valley Pipe Line Company which owns and operates 450 miles of gathering lines in Oklahoma; (5) 723 tank cars; (6) approximately 316 filling stations and 248 gasoline and oil bulk plants; (7) the products pipe line involved in this case; (8) trucks and other equipment used to promote the producing, purchasing and refining of crude oil and the marketing of the products thereof. 49 Val. Rep. (I. C. C.) 463–464; 274 I. C. C. 410.

[12] The "pipe line provision" was added to § 1 of the Hepburn Act and is the language quoted from § 1 in the text accompanying note 9, *supra*. That provision is now found in 49 U. S. C. § 1. See note 9, *supra*.

[13] Immediately before Senator Lodge introduced his amendment, President Theodore Roosevelt transmitted to the Congress a report on the transportation of petroleum. 40 Cong. Rec. 6358. The report pointed out the advantage possessed by Standard Oil as a result of its control of pipe lines. H. R. Doc. No. 100, 59th Cong., 1st

doubt that the purpose of the Amendment, as its language clearly showed, was to deprive any oil company, not merely Standard,[14] of power to utilize pipe-line control to crush competition. To this end, as is shown by an Appendix following this opinion, the Amendment was designed to make public or common carriers for hire out of *every* private pipe-line company transporting petroleum products in interstate commerce. Senators who were opposed charged that the passage of the Amendment would do exactly this against the will of "private" carriers. Lodge and other proponents freely admitted it, explaining that anything less would be ineffective. All *congressional* efforts to narrow the Amendment to cover only companies already acting like common carriers were defeated.

Sess. 29, 36–37, 60–62, 398–400. For the background of monopolistic practices in the petroleum industry at that time, see generally Beard, Regulation of Pipe Lines as Common Carriers (1941), 10–27; 2 Sharfman, The Interstate Commerce Commission (1931), 59, 96; Whitesel, Recent Federal Regulation of the Petroleum Pipe Line as a Common Carrier, 32 Cornell L. Q. 337, 341. For history of Standard Oil practices, see *Standard Oil Co.* v. *United States*, 221 U. S. 1; *United States* v. *Standard Oil Co.*, 173 F. 177; Tarbell, The History of The Standard Oil Company (1925).

Control of pipe-line transportation is still important today. See, *e. g.*, the statement of Alfred M. Landon: "Very little crude oil is moved in any other way than by pipe line. There is only a small amount moved by intrastate shipments. The independent producer therefore finds himself at the mercy of his competitor in the business of producing oil when that competitor controls practically one hundred per cent of the transportation facilities, because it becomes simply a question of bookkeeping as to the end of the business in which this big monopoly shows its profit. It can pay less for the oil and make its profit from the transportation. The independent refiner is choked also by this same means—the control of the transportation facilities." Hearings before House Committee on Interstate and Foreign Commerce on H. R. 16695, 71st Cong., 3d Sess. 59.

[14] As to the danger involved in interpreting this Act as aimed at a single corporation, see *McFarland* v. *American Sugar Co.*, 241 U. S. 79.

Therefore it is strange to say, as the Court does, that applying the pipe-line provisions so as to make Champlin a common carrier for hire would "subvert the chief purpose of the Act." Stranger still is the Court's unexplained apprehension that requiring all interstate pipe-line companies to serve as public carriers for hire would somehow "foster" monopoly.

III.

The Court, without mentioning it, necessarily overrules one or more of our previous decisions construing the Hepburn Act. In the *Pipe Line Cases, supra,* it was held that the Hepburn Act converted into common carriers for hire all private pipe-line companies "engaged in the transportation of oil or other commodity" across state lines, a decision which meant that all such companies are by law required to offer their services to the public.[15]

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[15] Justice Holmes wrote for the Court: "The provisions of the act are to apply to any person engaged in the transportation of oil by means of pipe lines. The words 'who shall be considered and held to be common carriers within the meaning and purpose of this act' obviously are not intended to cut down the generality of the previous declaration to the meaning that only those shall be held common carriers within the act who were common carriers in a technical sense, but an injunction that those in control of pipe lines and engaged in the transportation of oil shall be dealt with as such." 234 U. S. at 559–560.

Both the Interstate Commerce Commission and the Commerce Court had construed the statute as requiring all interstate, oil-carrying pipe lines to serve as common carriers for hire. 24 I. C. C. 1 (1912); 204 F. 798 (1913). It is true that the Commerce Court held the Hepburn Act unconstitutional as a taking of property without due process of law, one judge dissenting. But on appeal, *Pipe Line Cases,* 234 U. S. 548, this Court reversed, holding the Act constitutional: As to those pipe lines in existence before passage of the Act, one ground assigned by the Court was that they were already common carriers in substance. As to pipe lines built subsequent to the passage of the Act, see Part V, *infra.*

In the first *Champlin* case, *supra,* we determined that this appellant was so "engaged." [16] Consequently, today's decision allowing Champlin to refrain from filing tariffs under § 6 necessarily overrules either the *Pipe Line Cases* or *Champlin I,* or both. If they are to be overruled, the Court should say so. I would not overrule either.

Nor do I understand how today's holding can be reconciled with *Valvoline Oil Co.* v. *United States, supra,* where we held that Valvoline was a "common carrier subject to" the Act. The pattern of operations of Valvoline and Champlin are identical with two minor exceptions: (1) Valvoline's interstate pipe lines transported crude oil while Champlin's trunk line transports gasoline. This difference is immaterial; even assuming that "gasoline" is not "oil" within the meaning of § 1, that section makes the Act apply not merely to any pipe-line company carrying "oil" but to pipe-line companies carrying any "other commodity." (2) Valvoline chose to operate its gathering lines and purchase oil from independent producers in its own corporate name while Champlin chooses to operate its gathering lines and purchase oil in the name of a wholly owned subsidiary. The Court, however, had no difficulty in the *Pipe Line Cases* in treating as a single unit the Standard Oil Company and its wholly owned or even partly owned subsidiaries.[17]

It should be noted, moreover, that Valvoline unsuccessfully made the same contention that the Court now

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[16] 329 U. S. at 34. In the *Pipe Line Cases, supra,* the Uncle Sam Oil Company, which operated its business on the border between Oklahoma and Kansas, was held not to be so "engaged" because it was "simply drawing oil from its own wells across a state line to its own refinery for its own use, and that [was] all . . . ." 234 U. S. at 562. There is no *Uncle Sam* problem in this case since a majority of the Court today reaffirms the former holding that Champlin is "engaged in transportation."

[17] But cf. *United States* v. *Elgin, J. & E. R. Co.,* 298 U. S. 492; *United States* v. *South Buffalo R. Co.,* 333 U. S. 771.

accepts in order to relieve Champlin from its statutory duties. Thus, Valvoline attempted to avoid becoming a common carrier for hire by claiming that the Act applied only to companies enjoying a monopoly position in an area, a position not held by Valvoline because public pipe lines for hire adequately served the fields where Valvoline bought its oil.[18] The I. C. C. refused to accept Valvoline's proposed interpretation of the Act, and we necessarily did the same in affirming the Commission's order.

The Court nevertheless seeks to distinguish the *Valvoline* case on the ground that Valvoline "carried the products of over 3,800 independent owners and operators." The quoted language correctly states a fact only if it is understood to mean that Valvoline made purchases from 3,800 independents and then carried the purchased oil in its pipe line. This fact, however, certainly does not distinguish the two cases. Like Valvoline, Champlin carries the "oil of others" all the way from the well to the market area: over half of the oil and gasoline carried by Champlin is originally purchased as crude oil from independent producers in the field before transportation begins.[19] As noted above, Champlin does make these purchases through a wholly owned subsidiary, rather than in its own corporate name, but this fact is unimportant.[20]

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[18] As to the factual similarity between Champlin's and Valvoline's domination (or lack of domination) in the fields served, compare 274 I. C. C. 413 ("[a]pparently, common-carrier pipe-line transportation is available to any small refiner in [Champlin's] area desiring such transportation") with 47 Val. Rep. (I. C. C.) 534, 535 ("[a]t least one common-carrier pipe-line company serves each of the fields reached by the Valvoline").

[19] See note 10, *supra*. Whether Champlin buys from more or less than 3,800 independent producers does not appear in the record. But the exact number cannot have legal significance here. See *Valvoline Oil Co.* v. *United States*, 308 U. S. 141, 147.

[20] Even if Champlin produced all the oil it transported, the Act would require its regulation because of the effect of exclusive pipe-

Since there is no substantial difference between the operations of Champlin and Valvoline, and between the legal arguments made in the two cases, I conclude that, verbalisms aside, the effect of today's decision is to undermine the *Valvoline* holding. In this situation I think *Valvoline* should be expressly overruled. Why, in fairness, should Valvoline and others similarly situated be required to serve as common carriers for hire while Champlin is left free to conduct its pipe lines as it chooses?

IV.

In the first *Champlin* case we upheld findings of fact made by the I. C. C., 49 Val. Rep. (I. C. C.) 463, 470, that appellant was "engaged in transportation" and was "a common carrier subject to the provisions of" the Act. Since these questions were "distinctly put in issue and directly determined," Champlin may not dispute them in this second proceeding between the same parties unless there is a departure from the principles most recently announced in *United States* v. *Munsingwear*, 340 U. S. 36,

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line ownership on Champlin's price policy at the other end of the pipe line. For one major purpose of the Act was to insure competition in the petroleum industry by regulating pipe-line transportation so that the independent refiner, the jobber and the consumer would not be charged exorbitant prices by the integrated companies. See 40 Cong. Rec. 6365, 6366; Note, Public Control of Petroleum Pipe Lines, 51 Yale L. J. 1338, 1347–1348. It is noteworthy that the price of Champlin's gasoline was ⅛¢ per gallon higher at Superior, Kansas (a point not served by any other common carrier pipe line), than it was at Rock Rapids, Iowa (a point served by a common carrier line, hence in a competitive market); Rock Rapids is 260 miles further from the Enid refinery than is Superior. The effect of such control was pointed out long ago by this Court in *Standard Oil Co.* v. *United States*, 221 U. S. 1, 77, as follows: "As substantial power over the crude product was the inevitable result of the absolute control which existed over the refined product, the monopolization of the one carried with it the power to control the other . . . ."

38. Yet three concurring justices today appear to take the position that Champlin is not "engaged in transportation," and is therefore not a common carrier subject to the Act, a position which this Court emphatically rejected in *Champlin I*. I also believe that the majority's position is unjustified under the *Munsingwear* principle when the effect (as distinguished from the language) of their decision is considered.

V.

Why should the Court interpret the Hepburn Act in a way which nullifies its purpose? I am forced by process of elimination to consider whether the decision reflects either a hostility to the policy of the Act or an unarticulated belief that it is unconstitutional, if enforced as written. Neither this Court nor any other should strangle an Act because of judicial disagreement with congressional policy. If destruction of the Act results from a feeling that the Constitution forbids Congress to convert private companies into public servants, I think that this view should be announced here, as it was by a majority of the court below. Pipe-line companies, administrators of the law, the bench, the bar, and the Congress are entitled to no less. Of course, the same constitutional contention was expressly rejected in 1914 in the *Pipe Line Cases, supra:* As to companies which, like Champlin, built their lines after passage of the Act, Justice Holmes, speaking for the Court, dismissed the challenge brusquely with less than a sentence, stating merely that "there can be no doubt that it [the pipe line provision] is valid." 234 U. S. at 561. Again, in 1922, the Court, relying on the *Pipe Line Cases, supra,* rejected a somewhat similar constitutional argument as "futile to the point almost of being frivolous." *Pierce Oil Corp.* v. *Phoenix Rfg. Co.,* 259 U. S. 125, 128. Surely a contention deemed "almost frivolous" twenty-nine years ago should not now be reinvigorated by implication.

VI.

No one can be sure that under the Act as now rewritten by the Court the Commission can or should succeed in forcing any oil company—even those now complying with the Act—to carry gasoline or oil for others as a common carrier. Even without the newly engrafted, Court-created hurdles, the pipe-line provisions, for one reason or another, have never been enforced as effectively as might be desired.[21] Perhaps, therefore, no great harm will result from the Court's polite but sure frustration of the Hepburn Act's purpose. Some people in and familiar with the oil industry, however, believe that this Act should be strengthened, not weakened.[22] Be that as it may, I deem it my duty to vote to enforce the Act as Congress has passed it.

I would reverse.

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[21] "The major oil companies have their greatest control in the transportation of crude oil. . . . The control of transportation today by the majors appears in many respects to be just as complete and effective as was the case of the Standard Oil Trust." Report of the Temporary National Economic Committee, 76th Cong., 3d Sess., Monograph 39 (1941), p. 28. This report contains an excellent discussion of transportation problems in the petroleum industry. *Id.* at 19–28. And see Kemnitzer, Rebirth of Monopoly (1938), 78–95; Whitesel, Recent Federal Regulation of the Petroleum Pipe Line as a Common Carrier, 32 Cornell L. Q. 337, 355–369.

[22] See, *e. g.*, the statement of Alfred M. Landon: "The crushing strength of the old Standard Oil Co. lay in the fact that, of its thirty-odd companies, some were producers only, some were transporters only, some were refiners only, and some were marketers only.

"But the master minds that controlled the old Standard Oil Co. coordinated these thirty and odd companies into one vast company—a great single, integrated, coordinated 'unit' that, as a corporate entity, did all of these things (producing, transporting, refining, and marketing)—and all of them within the corporate inclusiveness of 'one' company.

"Therein rested the terrific, the overpowering strength of the old

APPENDIX TO OPINION OF MR. JUSTICE BLACK.

On May 4, 1906, President Theodore Roosevelt transmitted to the Congress a report describing and condemning various monopolistic practices in the petroleum industry. 40 Cong. Rec. 6358. Senator Lodge of Massachusetts on the same day introduced an amendment to § 1 of the Hepburn Act making pipe-line companies engaged in the interstate transportation of oil and other commodities common carriers:

> "[That the provisions of this act shall apply to] Any corporation or any person or persons engaged in the transportation of oil or other commodity, except natural gas or water for municipal purposes, by means of pipe lines, or partly by pipe lines and partly by railroad, or partly by pipe lines and partly by water, who shall be considered and held to be common carriers within the meaning and purpose of this act . . . ." *Id.* at 6361.

Standard Oil Co.

"To-day, from a corporate standpoint, we have the 'equivalent,' many times over, of the old Standard Oil Co. . . .

. . . . . .

"It is inevitable that the only escape from monopolistic domination in the oil industry—and it is being rapidly accomplished through mergers and integration—is to clearly, definitely, and effectively segregate, first, the entire pipe line transportation system of the oil industry from the rest of the industry. The first effect of this segregation would be the substitution of competition in the transportation of crude oil for the present practice which, in each individual case, is, to all practical purposes, a monopoly." Hearings before House Committee on Interstate and Foreign Commerce on H. R. 16695, 71st Cong., 3d Sess. 60, 61. For views against the proposed strengthening of the Hepburn Act, see House Report on Pipe Lines, 72d Cong., 2d Sess. (1933), especially Special Counsel Splawn's conclusions, p. lxxviii. See also Kemnitzer, Rebirth of Monopoly (1938), 87–90; F. R. Black, Oil Pipe Line Divorcement by Litigation and Legislation, 25 Cornell L. Q. 510.

Senator Foraker of Ohio immediately objected to the broad scope of the Lodge proposal: "I do not want to make any opposition to the Senator's amendment, but it occurs to me that the amendment ought to be further amended, so as to provide that it shall apply only to pipe lines operated for the public. I do not understand how you would compel a man who has a private pipe line of his own to become a common carrier. . . . I think such a limitation ought to be put in the Senator's amendment by an amendment to the amendment that it shall apply to all pipe lines that are carrying for the public, and not to private pipe lines that an individual or a single corporation may have laid down and put into operation for its own benefit." *Id.* at 6361.

Senator Nelson in reply stated that Foraker's suggestion would "practically nullify the provision, because every one of these pipe lines can say 'we refuse to do business for the public.' Practically the [Lodge] amendment would be of no use at all." *Id.* at 6365. And Senator Lodge added: "[T]he amendment suggested by [Senator Foraker] to the effect that no pipe line, unless it carries for the public, shall come under this rule, will, as [Senator Nelson] says, absolutely destroy the value of my amendment." *Id.* at 6365.

During the course of the debate an attempt was made to make the Lodge amendment applicable only to carriers "for the public" or to "transportation for hire" or "for compensation," but it was unsuccessful. *Id.* at 7000. Senator Lodge again stated that such an amendment would "absolutely destroy" his proposal "so far as its effectiveness is concerned." *Id.* at 7000.

There can be no doubt but that the proponents knew and stated their purpose. Senator Lodge declared: "[T]he purpose of this amendment is to bring the transportation of oil and other commodities within the inter-

state-commerce law. Oil is one of the greatest articles of interstate commerce carried in this country, and it is now absolutely outside and beyond any Government regulation whatsoever." *Id.* at 6365. Later he added: "All pipe lines owned by any company within the United States . . . are made common carriers." *Id.* at 7001. Senator Clay, speaking about the pipe-line provision, observed: "This bill makes every corporation engaged in the transmission of oil a common carrier. Every private corporation transmitting its own oil . . . is made a common carrier by the [Lodge] amendment . . . ." *Id.* at 7009. And Senator Culberson said: "Nothing is left to the courts for construction, but the statute itself declares that any corporation, or any person or persons engaged in transporting oil by pipe lines—of course, as interstate commerce—are common carriers, and are declared to be such in this act of Congress, subject to the authority of this act . . . ." *Id.* at 7005. Senator Bailey, in the final debate on the measure, described the Lodge proposal as the " 'pipe-line amendment,' by which we mean the amendment that makes the pipe lines common carriers." *Id.* at 9647.

The "commodities clause" of the Hepburn Act was designed to prevent railroads from owning businesses whose shipments they carried. When that clause was first considered in the Senate, it applied to "common carriers subject to" the Act. Some senators realized that the "commodities clause"—read together with the Lodge Amendment making every pipe-line company subject to the Act—would force a divorcement of pipe lines from refineries. To avoid this, they again suggested that the Lodge proposal be amended so as to apply only to pipe lines operating for the public. Senator Lodge said: "What I want to suggest to the Senator is that this [original Lodge] amendment makes the pipe lines and

the oil companies subject to all the provisions of the bill. If the Senator thinks there is an injustice, the place to remedy it is on page 5, at that amendment [the commodities clause], and not at this one [the Lodge amendment]." *Id.* at 7009. Accordingly, the "commodities clause" finally passed by Congress referred specifically to railroads. 34 Stat. 585.

UNITED STATES *v.* WHEELOCK BROS., INC.

NO. 169. CERTIORARI TO THE COURT OF CLAIMS.*

Argued January 3, 1951.—Decided May 7, 1951.

A private motor carrier sued in the Court of Claims to recover just compensation for an alleged temporary taking of its property and business by the United States under Executive Order No. 9462. While the case was pending, the Motor Carrier Claims Commission Act was enacted; and the motor carrier timely filed its claim with the Commission before the Court of Claims entered judgment. *Held:* This deprived the Court of Claims of jurisdiction to enter judgment in the case. Pp. 319–320.

115 Ct. Cl. 733, 88 F. Supp. 278, vacated and remanded.

Oscar H. Davis argued the cause for the United States. With him on the brief were *Solicitor General Perlman, Acting Assistant Attorney General Clapp, Paul A. Sweeney* and *Melvin Richter.*

Max Siskind argued the cause for Wheelock Bros., Inc. With him on the brief were *Franklin N. Parks* and *Leo B. Parker.*

Brent O. Stordahl and *Nils A. Boe* filed a brief for Robert G. May, as *amicus curiae,* in support of Wheelock Bros., Inc.

PER CURIAM.

Wheelock Bros., Inc., a private motor carrier, sued in the Court of Claims to recover just compensation for an alleged temporary taking of its properties and business by the United States pursuant to Executive Order No. 9462. 9 Fed. Reg. 10071 (1944). The Court of Claims entered judgment awarding Wheelock Bros., Inc., just compensation in an amount less than that claimed. 115

*Together with No. 177, *Wheelock Bros., Inc.* v. *United States,* also on certiorari to the same court.

Ct. Cl. 733, 88 F. Supp. 278 (1950). We granted certiorari on the petitions of both parties. 340 U. S. 808 (1950).

While the action was pending in the Court of Claims, Congress passed the Motor Carrier Claims Commission Act,* providing that that Commission "shall hear and determine, according to law, existing claims against the United States arising out of the taking by the United States of possession or control of any of the motor-carrier transportation systems described in Executive Order Numbered 9462 . . . ." Section 2. Within the time provided in the Act and before entry of judgment in the Court of Claims, Wheelock Bros., Inc., filed its claim with the Commission.

At the threshold, we are met with the question whether the Court of Claims had jurisdiction to enter judgment in this case. Congress, in § 6 of the Motor Carrier Claims Commission Act, expressly provided:

> "The jurisdiction of the Commission over claims presented to it as provided in section 2 of this Act shall be exclusive; but nothing in this Act shall prevent any person who does not elect to present his claim to the Commission from pursuing any other remedy available to him."

Wheelock Bros., Inc., by filing its claim with the Commission, did elect to present it to that tribunal. The Commission's jurisdiction over the claim being "exclusive," the Court of Claims was without jurisdiction to enter judgment in this case. For this reason, the judgment below is vacated and the case is remanded to the Court of Claims with instructions to dismiss the claim in that court.

It is so ordered.

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*62 Stat. 1222 (1948), as amended, 62 Stat. 1289, 1290 (1948), 63 Stat. 80 (1949).

EWING, FEDERAL SECURITY ADMINISTRATOR, *v.* GARDNER, EXECUTOR.

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

No. 621. Decided May 7, 1951.

Under 28 U. S. C. § 2412 (a), costs may not be assessed against the Federal Security Administrator in a suit brought against him in his official capacity, when there is no express statutory authority for the allowance of such costs.

185 F. 2d 781, reversed in part.

In a suit against the Federal Security Administrator in his official capacity, the District Court awarded a judgment and assessed costs against the Administrator. 88 F. Supp. 315. The Court of Appeals affirmed. 185 F. 2d 781. Certiorari granted and judgment *reversed,* insofar as it relates to the taxation of costs against petitioner.

Solicitor General Perlman for petitioner.

Theodore F. Gardner for respondent.

PER CURIAM.

The petition for writ of certiorari is granted. The sole question presented by the petition is the validity of the affirmance by the Court of Appeals of the judgment rendered against the petitioner for costs by the District Court. There being no express statutory authority for the allowance of costs to the respondent, such an award of costs is precluded by 28 U. S. C. § 2412 (a). The judgment of the Court of Appeals, insofar as it relates to the taxation of costs against the petitioner, is therefore reversed.

NATIONAL LABOR RELATIONS BOARD *v.* HIGHLAND PARK MANUFACTURING CO.

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

No. 425. Argued April 23, 1951.—Decided May 14, 1951.

1. The Congress of Industrial Organizations (C. I. O.) is a "national or international labor organization" within the meaning of § 9 (h) of the National Labor Relations Act, as amended by the Labor Management Relations Act; and the National Labor Relations Board could not proceed against an employer at the instance of a union affiliated with C. I. O. when the officers of C. I. O. had not filed the non-Communist affidavits required by that section, although the affiliated union's own officers had filed such affidavits. Pp. 323–325.
2. When a court of appeals is petitioned to decree enforcement of an order of the National Labor Relations Board requiring an employer to bargain with a union and the facts regarding compliance with § 9 (h) are not in dispute, the employer is entitled to a judicial review of the legal question whether there has been compliance with § 9 (h). Pp. 325–326.

184 F. 2d 98, affirmed.

The Court of Appeals denied enforcement of an order of the National Labor Relations Board requiring an employer to bargain with a union affiliated with the Congress of Industrial Organizations because the officers of the latter had not filed the non-Communist affidavits required by § 9 (h) of the National Labor Relations Act, as amended by the Labor Management Relations Act, 61 Stat. 146, 29 U. S. C. (Supp. III) § 159 (h), 184 F. 2d 98. This Court granted certiorari. 340 U. S. 927. *Affirmed,* p. 326.

Mozart G. Ratner argued the cause for petitioner. With him on the brief were *Solicitor General Perlman, James L. Morrisson, David P. Findling* and *Alvin Gallen.*

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

Briefs of *amici curiae* urging reversal were filed by *J. Albert Woll, Herbert S. Thatcher* and *James A. Glenn* for the American Federation of Labor; *Arthur J. Goldberg* and *Thomas E. Harris* for the Congress of Industrial Organizations; and *Isadore Katz* and *David Jaffe* for the Textile Workers Union of America.

MR. JUSTICE JACKSON delivered the opinion of the Court.

The National Labor Relations Board entertained a complaint by the Textile Workers Union of America against respondent, Highland Park Manufacturing Company, and ordered respondent to bargain with that Union. At all times relevant to the proceedings, the Textile Workers Union was affiliated with the Congress of Industrial Organizations and, while the Textile Workers Union officers had filed the non-Communist affidavits pursuant to statute, the officers of the C. I. O. at that time had not. The statute provides that "No investigation shall be made by the Board . . ., no petition under subsection (e) (1) of this section shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 160 of this title, unless there is on file with the Board an affidavit executed . . . by each officer of such labor organization and the officers of any *national or international labor organization* of which it is an affiliate or constituent unit that he is not a member of the Communist Party [etc.]." § 9 (h) of the National Labor Relations Act, as amended by the Labor Management Relations Act, 61 Stat. 146, 29 U. S. C. (Supp. III) § 159 (h). (Italics added.) The order was challenged upon the grounds, among others, that the failure of the C. I. O. officers to file non-Com-

munist affidavits disabled its affiliate, the Textile Workers Union, and the Board could not entertain their complaint and enter the order.

The general counsel of the Board had ruled that the Board could not entertain a complaint under these circumstances; but the Board, with one member dissenting, overruled him, for reasons stated in *Matter of Northern Virginia Broadcasters,* 75 N. L. R. B. 11. The Court of Appeals for the District of Columbia Circuit reached the same conclusion as the Board in *West Texas Utilities Co.* v. *Labor Board,* 87 U. S. App. D. C. 179, 184 F. 2d 233. The Court of Appeals for the Fourth Circuit in this case, 184 F. 2d 98, and the Court of Appeals for the Fifth Circuit, in *Labor Board* v. *Postex Cotton Mills,* 181 F. 2d 919, arrived at a contrary result, holding that the Board could not entertain the complaint. The conflicting results are each so well-considered and so thoroughly documented in opinions already appearing in the books that little could be added to either. We agree with the conclusions of the Fourth and Fifth Circuits.

The definition of "labor union" in the statute concededly includes the C. I. O. It is further conceded that the phrase "labor organization national or international *in scope*" as found in § 10 (c) refers to the A. F. of L. and C. I. O. (Italics added.) But it is claimed that when the adjectives "national" or "international" are alone added, they exclude the C. I. O., because it is regarded in labor circles as a federation rather than a national or international union. We think, however, that the use of geographic terms to reach nation-wide or more than nation-wide unions does not exclude those of some particular technical structure. The C. I. O., being admittedly a labor union and one of nation-wide jurisdiction, operation and influence, is certainly in the speech of people a national union, whatever its internal composition. If Congress intended geographic adjectives to have

a structural connotation or to have other than their ordinarily accepted meaning, it would and should have given them a special meaning by definition.

The language in its ordinarily accepted sense is consistent with the context and purpose of the Act, which we have defined at length in *American Communications Assn.* v. *Douds,* 339 U. S. 382. As the Courts of Appeals for both the Fourth and Fifth Circuits have said, the congressional purpose was to "wholly eradicate and bar from leadership in the American labor movement, at each and every level, adherents to the Communist party and believers in the unconstitutional overthrow of our Government." 181 F. 2d 919, 920; 184 F. 2d 98, 101. It would require much clearer language of exemption to justify holding that the very top levels of influence and actual power in the labor movement in this country were untouched while only the lower levels were affected.

The further contention is advanced by the Board that the administrative determination that a petitioning labor organization has complied with the Act is not subject to judicial review at the instance of an employer in an unfair labor practice proceeding. If there were dispute as to whether the C. I. O. had filed the required affidavits or whether documents filed met the statutory requirements and the Board had resolved that question in favor of the labor organizations, a different question would be presented. But here there is no question of fact. While the C. I. O. officers have since filed the affidavits, they were not on file at any time relevant to this proceeding.

It would be strange indeed if the courts were compelled to enforce without inquiry an order which could only result from proceedings that, under the admitted facts, the Board was forbidden to conduct. The Board is a statutory agency, and, when it is forbidden to investigate or entertain complaints in certain circumstances, its final order could hardly be valid. We think the contention is

without merit and that an issue of law of this kind, which goes to the heart of the validity of the proceedings on which the order is based, is open to inquiry by the courts when they are asked to lend their enforcement powers to an administrative tribunal.

Judgment affirmed.

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

MR. JUSTICE FRANKFURTER, dissenting.

Congress, of course, could have exacted affidavits of nonmembership in Communist organizations from the officers of all local unions, of all nationals and internationals of which locals are constituents, and of all the federated organizations—*i. e.*, the C. I. O. and the A. F. of L.—of which national and international organizations are members. To carry out such a purpose it could have been explicit. It could also have used some colloquially all-embracing term such as the phrase "national or international in scope" which it in fact did employ in § 10 (c) of the Act. Congress did not choose to express its will in either of these unequivocal forms. Instead it used the phrase "national or international labor organization."

The fact that the phrase "national or international labor organization" consists of ordinary English words, which to the ordinary ear may carry a meaning different from that which they carry in the domain of industrial relations, does not destroy our duty to determine whether they do have a technical meaning when used in regard to matters of industrial relations. See the decision, per Holmes, J., in *Boston Sand Co.* v. *United States,* 278 U. S. 41, 48. The Taft-Hartley Act is not an abstract document to be construed with only the aid of a standard dictionary. Its sponsors were familiar with labor organization and labor problems and it was doubtless drawn by specialists in

labor relations. If they used terms having a special meaning within the field, such words of art, in the absence of contrary indications, must be given that meaning.

The best source for us in determining whether a term used in the field of industrial relations has a technical connotation is the body to which Congress has committed the administration of the statute. Certainly, if there is no reasonable ground for rejecting the determination of the National Labor Relations Board, its view should not be rejected. We are advised by the Board that "national and international organization" is a term of art referring to the autonomous national and international organizations of workers which in federation constitute the C. I. O. and the A. F. of L. "We are familiar with no use of the term 'national or international labor organization' which includes parent federations such as the AFL or the CIO within its meaning. On the contrary, every definition or description of the structure of these two federations clearly indicates that the AFL and the CIO are different from 'national' or 'international' labor organizations." *Northern Virginia Broadcasters, Inc.*, 75 N. L. R. B. 11, 13. Nothing called to our attention has put in question this authoritative finding by the National Labor Relations Board. We ought not, therefore, to reject it.

MR. JUSTICE DOUGLAS, dissenting.

I see no answer to the analysis of MR. JUSTICE FRANKFURTER if objectivity is our standard and if the expertise of administrative agencies is to continue as our guide. In situations no more difficult than this we have taken the administrative construction of statutory words. Until today the test has been not whether the construction would be our own if we sat as the Board, but whether it has a reasonable basis in custom, practice, or legislative

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history. See *Gray* v. *Powell*, 314 U. S. 402; *Labor Board* v. *Hearst Publications*, 322 U. S. 111.

Of course the C. I. O. is at times a "national or international labor organization" within the meaning of the Act. The Board so held in *American Optical Co.*, 81 N. L. R. B. 453. In that case the petitioning labor organization was an "organizing committee" of the C. I. O. over which the C. I. O. had control comparable to the power a "national or international" union exercises over its constituent unions. The same would be true of local unions directly chartered by the C. I. O. If one of those unions had filed the complaint against respondent, then the C. I. O. would have to file the affidavits, since it would be in the relation of a "national or international labor organization" to that dispute. A labor organization which has that relation to a dispute has the power and control at which the affidavit provision is aimed. If we took, as we customarily do, the administrative construction of the words Congress used, we would hold that the C. I. O. must file the affidavits only when in the dispute before the Board it stands, as it sometimes does, in the position of "national or international labor organization"—to use the parlance of the trade. But that is a different case from the one before us.

Syllabus.

PANHANDLE EASTERN PIPE LINE CO. *v.* MICHIGAN PUBLIC SERVICE COMMISSION ET AL.

APPEAL FROM THE SUPREME COURT OF MICHIGAN.

No. 486. Argued April 23, 1951.—Decided May 14, 1951.

Appellant is engaged in the transportation of natural gas by pipe line from other states into Michigan, and is subject to regulation by the Federal Power Commission under the Natural Gas Act. Appellee gas company is a Michigan public utility which distributes natural gas, obtained entirely from appellant, to domestic, commercial and industrial consumers in the Detroit area; and a substantial portion of its revenues is derived from sales to large industrial consumers. Appellant seeks to make direct sales of natural gas to large industrial consumers in Michigan, and in its operations would use streets and alleys in the Detroit area. *Held:* An order of the Michigan Public Service Commission requiring appellant to obtain from that Commission a certificate of public convenience and necessity before selling natural gas direct to industrial consumers in a municipality already served by a public utility is not in conflict with the Natural Gas Act or the Commerce Clause of the Federal Constitution. Pp. 330–337.

(a) The sale to industrial consumers as proposed by appellant is clearly interstate commerce, but the sale and distribution of gas to local consumers by one engaged in interstate commerce is "essentially local" in aspect and is subject to state regulation. P. 333.

(b) The Natural Gas Act applies only to such sales of gas in interstate commerce as are for resale, and does not apply to sales made direct to consumers, the latter being left to state regulation. P. 334.

(c) There are in this case no conflicting claims between state and federal regulation. P. 336.

(d) To require appellant to secure a certificate of public convenience and necessity before it may enter a municipality already served by a public utility is regulation, not absolute prohibition. *Hood & Sons* v. *Du Mond,* 336 U. S. 525, distinguished. Pp. 336–337.

328 Mich. 650, 44 N. W. 2d 324, affirmed.

A cease-and-desist order issued against appellant by the Michigan Public Service Commission was affirmed by the State Supreme Court. 328 Mich. 650, 44 N. W. 2d 324. On appeal to this Court, *affirmed,* p. 337.

Robert P. Patterson argued the cause for appellant. With him on the brief was *Clayton F. Jennings.*

Edmund E. Shepherd, Solicitor General of Michigan, argued the cause for the Michigan Public Service Commission, appellee. With him on the brief were *Frank G. Millard,* Attorney General, *Daniel J. O'Hara* and *Charles M. A. Martin,* Assistant Attorneys General. *Stephen J. Roth,* then Attorney General, was also of counsel.

Donald R. Richberg argued the cause for the Michigan Consolidated Gas Co., appellee. With him on the brief were *Clifton G. Dyer* and *James W. Williams.*

Solicitor General Perlman, Robert L. Stern, Bradford Ross and *Bernard A. Foster, Jr.* filed a memorandum for the Federal Power Commission, as *amicus curiae.*

Mr. Justice Minton delivered the opinion of the Court.

This is an appeal from the affirmance of an order of the Michigan Public Service Commission requiring appellant to obtain a certificate of public convenience and necessity before selling natural gas direct to industrial consumers in a municipality already served by a public utility.

Appellant is engaged in the transportation of natural gas by pipe line from fields in Texas, Oklahoma and Kansas into areas which include the State of Michigan. Appellant is a "natural-gas company" within the coverage of the Natural Gas Act, 52 Stat. 821, 15 U. S. C. §§ 717 *et seq.,* and subject thereunder to regulation by the Federal Power Commission. Appellee Michigan Consoli-

dated Gas Company is a public utility of Michigan which under appropriate authorization distributes gas to domestic, commercial and industrial consumers in and around Detroit. Consolidated obtains its entire supply of natural gas for distribution in the Detroit district from appellant.

In 1945 appellant publicly announced a program of securing large industrial customers for the direct sale of natural gas in Michigan. In Detroit it offered to pay the City for the right to lay and operate its pipe line along the streets and alleys directly to large industrial customers. In October of that year appellant succeeded in securing a large direct-sale contract with the Ford Motor Company for gas at its Dearborn plant, located in the Detroit district. Ford was already purchasing substantial quantities of gas for industrial use at the Dearborn plant from Consolidated.

Believing its interests and those of its customers were prejudiced by appellant's program, particularly the Ford contract, Consolidated filed a complaint with the Michigan Public Service Commission. Appellant appeared to contest the jurisdiction of the Commission over such sales. After hearing, the Commission ordered appellant to—

> "cease and desist from making direct sales and deliveries of natural gas to industries within the State of Michigan, located within municipalities already being served by a public utility, until such time as it shall have first obtained a certificate of public convenience and necessity from this Commission to perform such services." [1]

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[1] The Commission acted under authority of Mich. Comp. Laws, 1948, § 460.502, which provides:

"Sec. 2. No public utility shall hereafter begin the construction or operation of any public utility plant or system thereof nor shall it render any service for the purpose of transacting or carrying on a

Appellant obtained an injunction against the order of the Commission in the Circuit Court of Ingham County, Michigan. The Circuit Court held that the order was a prohibition of interstate commerce and therefore invalid. The Supreme Court of Michigan, three judges dissenting, reversed the Circuit Court and affirmed the Commission's order. 328 Mich. 650, 44 N. W. 2d 324. That court rejected the argument that the order of the Commission was an absolute denial of the right of appellant to sell natural gas in Michigan direct to consumers. Since appellant was free to make application to the Michigan Commission for a certificate of public convenience and necessity as to such sales, the order was construed as denying the right of appellant to sell direct without first obtaining such certificate. The court held this require-

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local business either directly, or indirectly, by serving any other utility or agency so engaged in such local business, in any municipality in this state where any other utility or agency is then engaged in such local business and rendering the same sort of service, or where such municipality is receiving service of the same sort, until such public utility shall first obtain from the commission a certificate that public convenience and necessity requires or will require such construction, operation, service, or extension."

Other relevant sections of the Michigan statute provide:

"Sec. 3. Before any such certificate of convenience and necessity shall issue, the applicant therefor shall file a petition with the commission stating the name of the municipality or municipalities which it desires to serve and the kind of service which it proposes to render, and that the applicant has secured the necessary consent or franchise from such municipality or municipalities authorizing it to transact a local business." § 460.503.

"Sec. 5. In determining the question of public convenience and necessity the commission shall take into consideration the service being rendered by the utility then serving such territory, the investment in such utility, the benefit, if any, to the public in the matter of rates and such other matters as shall be proper and equitable in determining whether or not public convenience and necessity requires the applying utility to serve the territory. . . ." § 460.505.

ment to be within the State's regulatory authority despite the interstate character of the sales. This appeal challenges the correctness of that decision.

The sale to industrial consumers as proposed by appellant is clearly interstate commerce. *Panhandle Pipe Line Co.* v. *Public Service Comm'n of Indiana,* 332 U. S. 507, 513; *Pennsylvania Gas Co.* v. *Commission,* 252 U. S. 23, 28. But the sale and distribution of gas to local consumers made by one engaged in interstate commerce is "essentially local" in aspect and is subject to state regulation without infringement of the Commerce Clause of the Federal Constitution. In the absence of federal regulation, state regulation is required in the public interest. *Pennsylvania Gas Co.* v. *Commission, supra,* at 31. See also opinion of Cardozo, J., in *Pennsylvania Gas Co.* v. *Commission,* 225 N. Y. 397, 122 N. E. 260. These principles apply to direct sales for industrial consumption as well as to sales for domestic and commercial uses. *Panhandle-Indiana, supra,* at 514, 519–520.

The facts in the instant case show that the proposed sales are primarily of local interest. They emphasize the need for local regulation and the wisdom of the principles just discussed. To accommodate its operations, appellant proposes to use the streets and alleys of Detroit and environs. A local utility already operating in the same area, Consolidated, receives its entire supply of natural gas from appellant. A substantial portion of Consolidated's revenues is derived from sales to large industrial consumers. Appellant ignored requests of Consolidated for additional gas to meet the increased wants of its industrial customers. Instead of attempting to meet increased needs through Consolidated, appellant launched a program to secure for itself large industrial accounts from customers, some of whom were already being served by Consolidated. In connection with the Ford Motor Company, it is note-

worthy that the tap line by which appellant proposed to serve Ford directly would be substantially parallel to and only a short distance from the existing tap line by which Consolidated now serves Ford.

Thus, not only would there be two utilities using local facilities to accommodate their distribution systems, but they would be seeking to serve the same industrial consumers. Appellant asserts a right to compete for the cream of the volume business without regard to the local public convenience or necessity. Were appellant successful in this venture, it would no doubt be reflected adversely in Consolidated's over-all costs of service and its rates to customers whose only source of supply is Consolidated. This clearly presents a situation of "essentially local" concern and of vital interest to the State of Michigan.

Of course, when Congress acts in this field it is supreme. It has acted. Section 1 (b) of the Natural Gas Act, *supra,* provides as follows:

> "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."

By this Act Congress occupied only a part of the field. As to sales, only the sale of gas in interstate commerce for resale was covered. Direct sales for consumptive use were designedly left to state regulation. *Panhandle-Indiana,* 332 U. S. at 516–518. Speaking further of the divi-

sion of regulatory authority over interstate commerce in natural gas, this Court said in the same case:

> "It would be an exceedingly incongruous result if a statute so motivated, designed and shaped to bring about more effective regulation, and particularly more effective state regulation, were construed in the teeth of those objects, and the import of its wording as well, to cut down regulatory power and to do so in a manner making the states less capable of regulation than before the statute's adoption. Yet this, in effect, is what appellant asks us to do. For the essence of its position, apart from standing directly on the commerce clause, is that Congress by enacting the Natural Gas Act has 'occupied the field,' *i. e.*, the entire field open to federal regulation, and thus has relieved its direct industrial sales of any subordination to state control.
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> "The exact opposite is the fact. Congress, it is true, occupied a field. But it was meticulous to take in only territory which this Court had held the states could not reach. That area did not include direct consumer sales, whether for industrial or other uses. Those sales had been regulated by the states and the regulation had been repeatedly sustained. In no instance reaching this Court had it been stricken down.
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> . . . . . .
>
> "The Natural Gas Act created an articulate legislative program based on a clear recognition of the respective responsibilities of the federal and state regulatory agencies. It does not contemplate ineffective regulation at either level. We have emphasized repeatedly that Congress meant to create a comprehensive and effective regulatory scheme, complementary in its operation to those of the states and in no manner usurping their authority. . . .

> And, as was pointed out in *Power Comm'n* v. *Hope Gas Co.*, [320 U. S. 591] at 610, 'the primary aim of this legislation was to protect consumers against exploitation at the hands of natural gas companies.' The scheme was one of cooperative action between federal and state agencies. It could accomplish neither that protective aim nor the comprehensive and effective dual regulation Congress had in mind, if those companies could divert at will all or the cream of their business to unregulated industrial uses." 332 U. S. at 519, 520–521.

The statutory scheme of "dual regulation" might have some overlaps or conflicts but no such exigencies appear here. There are no opposing directives and hence no necessity for us to resolve any conflicting claims as between state and federal regulation.

Appellant concedes, as it must, that direct sales by it to industrial consumers are subject to state *rate* regulation under the *Panhandle-Indiana* decision. It contends, however, that that decision does not comprehend its problem, reasoning that the jurisdiction here asserted by the Michigan Commission is the power to prohibit interstate commerce in natural gas.

Although the end result might be prohibition of particular direct sales, to require appellant to secure a certificate of public convenience and necessity before it may enter a municipality already served by a public utility is regulation, not absolute prohibition. There is no intimation that appellant cannot deliver and sell available gas to Consolidated for resale to customers who have additional gas requirements. It is no discrimination against interstate commerce for Michigan to require appellant to route its sales of gas through the existing certificated utility where the public convenience and necessity would not be served by direct sales. That there is neither discrimination nor prohibition here saves this regulation from the

rule of such cases as *Hood & Sons* v. *Du Mond,* 336 U. S. 525, relied on by appellant, where a state was said to have discriminated against interstate commerce by *prohibiting* it because it would subject local business to competition. And the statute under which the Michigan Commission acted does not distinguish between an interstate or intrastate agency desiring to operate in a locality already served by a utility.[2] See *Cities Service Co.* v. *Peerless Co.,* 340 U. S. 179, 188.

It does not follow that because appellant is engaged in interstate commerce it is free from state regulation or free to manage essentially local aspects of its business as it pleases. The course of this Court's decisions recognizes no such license. See *Cities Service* case, *supra; Panhandle-Indiana* case, *supra; Pennsylvania Gas Co.* v. *Commission,* 252 U. S. 23. Such a course would not accomplish the effective dual regulation Congress intended, and would permit appellant to prejudice substantial local interests. This is not compelled by the Natural Gas Act or the Commerce Clause of the Constitution.

Judgment affirmed.

MR. JUSTICE FRANKFURTER, whom MR. JUSTICE DOUGLAS joins, dissenting.

Panhandle seeks to sell natural gas from its fields in Texas, Oklahoma and Kansas directly to the Ford Motor Company at its Dearborn plant in Michigan. Concededly this is the clearest kind of interstate commerce. We have not here in controversy Panhandle's desire to lay pipes in the public highways of Michigan and the power of Michigan to make exactions for such privileges so long as it does not offend the doctrine of unconstitutional conditions. Michigan here is asserting a wholly different claim. The State claims the right to say whether an out-

[2] See note 1, *supra.*

of-State seller may be permitted to compete with Michigan distributors in the sale of natural gas to Michigan industrial consumers. Michigan says that it may determine that the local market is saturated and that, since the entry of an out-of-State distributor may disadvantage or disrupt the local market, it may deny him leave to make such sales.

The right here asserted by Michigan to prohibit Panhandle from furnishing gas directly to consumers has, since 1938, by virtue of the Natural Gas Act, been lodged in the Federal Power Commission. We are advised by the Commission that it has exercised in multitudinous instances authority over transportation for direct sale to consumers. "It is, of course, true," adds the Commission, "that a state certificate authorizing an interstate sale to an industrial consumer would be meaningless if the Federal Commission can deny a certificate for the necessary transportation facility, and *vice versa*." If this means anything it means that the control which Michigan here claims is within the effective authority of the Federal Power Commission. The Federal Power Commission may deny a certificate for transportation of gas by Panhandle to the Ford Motor Company for the same reasons that Michigan would rely upon in withholding a certificate of convenience and necessity to Panhandle to sell its gas to Ford. Questions of conservation, of market stability, of cut-throat competition and the like would be relevant factors in one case as well as in the other. The Commission is clear that the power of Michigan is subordinate to its authority, so that Michigan could not frustrate the Commission's authority in granting or denying to Panhandle the right to enter Michigan for direct sale to consumers.

The inference to be drawn from the Commission's position is that, since Panhandle needs the Commission's cer-

tificate for the physical transportation of the gas to Ford, it cannot in any event make such sale to Ford prior to the issuance of the certificate. Howsoever this be, the Court has placed the case in a different focus. It is suggested that until there is an actual clash between an order of the Commission and the order now assailed there is a vacuum which Michigan may enter. No doubt Congress could give the States authority over such a field of interstate commerce and deny it to the Commission or give it to the States until supplanted by Commission action. It has done neither. The problem therefore remains what it was under the law of the Commerce Clause before the enactment of the Natural Gas Act.

The problem does not disappear by invoking a solving phrase, "regulation, not absolute prohibition." The Commerce Clause sought to put an end to the economic autarchy of the States. It is not for Michigan to determine what competition she will or will not allow from without, subject, of course, to her right to protect those State interests which are implied by the now threadbare phrase that interstate commerce must also pay its way, or to protect local interests that only incidentally or insignificantly touch interstate or foreign commerce. *E. g., Union Brokerage Co.* v. *Jensen,* 322 U. S. 202.

If there were no Constitution with a Commerce Clause, each State could shut out the products of other States or admit them on conditions. Under the Constitution such commerce belongs not to the States but to Congress. It is not for the States, in pursuit of local State policies, to decide what products from without may cross State boundaries or admit them on condition that they satisfy local economic policy. If as a matter of national policy States are to have such power, Congress must give it to them, as it did in the case of liquor, prison-made goods, and insurance. See Act of Aug. 8, 1890, 26 Stat.

313, 27 U. S. C. § 121; Act of July 24, 1935, 49 Stat. 494; Act of Aug. 10, 1939, 53 Stat. 1391, 26 U. S. C. § 1606 (a); Act of Mar. 9, 1945, 59 Stat. 34, 15 U. S. C. § 1012 (b).

Against the inherent right of a State to keep out except by its leave the products or services from other States, the decisions in *Buck* v. *Kuykendall,* 267 U. S. 307, and *Bush Co.* v. *Maloy,* 267 U. S. 317, seem to me decisive.

What Mr. Justice Brandeis, speaking for the entire Court, excepting only Mr. Justice McReynolds, said in the *Buck* case defines the situation here. There, as here, the Court was confronted with a State statute requiring a certificate of convenience and necessity. The regulation related to passenger and freight busses. There was no outright prohibition, but of course such a system of certification is based on the duty of denying access to the market if the community is already adequately served. Such a scheme "determines whether the prohibition shall be applied by resort, through state officials, to a test which is peculiarly within the province of federal action—the existence of adequate facilities for conducting interstate commerce. . . . Thus, the provision of the Washington statute is a regulation, not of the use of its own highways, but of interstate commerce. Its effect upon such commerce is not merely to burden but to obstruct it. Such state action is forbidden by the Commerce Clause." 267 U. S. at 316.

It is easy to mock or minimize the significance of "free trade among the states," *Baldwin* v. *G. A. F. Seelig, Inc.,* 294 U. S. 511, 526, which is the significance given to the Commerce Clause by a century and a half of adjudication in this Court. With all doubts as to what lessons history teaches, few seem clearer than the beneficial consequences which have flowed from this conception of the Commerce Clause. It is true of this principle, as of others, that the principle is not to be reduced to the appeal of the particular instance in which it is invoked.

ALABAMA PUBLIC SERVICE COMMISSION ET AL. *v.* SOUTHERN RAILWAY CO.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA.

No. 395. Argued February 27–28, 1951.—Decided May 21, 1951.

Appellee applied to the Alabama Public Service Commission for a permit to discontinue certain local intrastate trains, on the ground that they were operating at a loss. After a hearing, the Commission found that there was public need for the service and entered an order denying the permit. Without applying to a state court for the adequate judicial review to which it was entitled as a matter of right under state law, appellee sued in a federal court to enjoin enforcement of the Commission's order. It alleged that its enforcement would result in irreparable injury, either through operating losses resulting from compliance or through severe penalties for violations. *Held:* Assuming that the federal court had jurisdiction, such jurisdiction should not be exercised in this case as a matter of sound equitable discretion. Pp. 342–351.

(a) The problems raised by the discontinuance of these trains cannot be resolved alone by reference to appellee's loss in their operation but depend more upon the predominantly local factor of public need for the service rendered. P. 347.

(b) Since adequate state-court review of an administrative order based on predominantly local factors is available to appellee, intervention of a federal court is not necessary for the protection of federal rights. P. 349.

(c) In these circumstances, under the usual rule of comity governing the exercise of equitable jurisdiction by federal courts in matters affecting the domestic policies of the states, appellee should be left to pursue through the state courts whatever rights it may have. P. 350.

91 F. Supp. 980, reversed.

In a suit by a railroad, a three-judge federal district court enjoined enforcement of an order of the Alabama Public Service Commission. 91 F. Supp. 980. On appeal to this Court under 28 U. S. C. § 1253, *reversed,* p. 351.

By special leave of Court, *Merton Roland Nachman, Jr.*, Assistant Attorney General of Alabama, *pro hac vice*, and *Richard T. Rives* argued the cause for appellants. With them on the brief was *Si Garrett*, Attorney General. *A. A. Carmichael*, then Attorney General, and *Wallace L. Johnson*, then Assistant Attorney General, were also on a brief with *Mr. Rives*.

Charles Clark argued the cause for appellee. With him on the brief were *Marion Rushton, Earl E. Eisenhart, Jr., Sidney S. Alderman* and *Jos. F. Johnston*.

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

The Southern Railway Company, appellee, brought this action in the Federal District Court to enjoin the members of the Alabama Public Service Commission and the Attorney General of Alabama, appellants, from enforcing laws of Alabama prohibiting discontinuance of certain railroad passenger service. Appellee's Alabama intrastate service is governed by a statute prohibiting abandonment of "any portion of its service to the public . . . unless and until there shall first have been filed an application for a permit to abandon service and obtained from the commission a permit allowing such abandonment." Ala. Code, 1940, tit. 48, § 106.[1] Severe penalties are prescribed for wilful violation of regulatory statutes or orders of the Commission by utilities or their employees. *Id.* §§ 399, 400, 405.

Appellee operates a railroad system throughout the South. This case, however, involves only that Alabama

[1] Upon the filing of an application for permission to discontinue, the statute provides for notification of municipal officials, publication of notice in the area affected by the change in service, and a hearing by the Commission. Ala. Code, 1940, tit. 48, § 107. "The commission, as it deems to the best interest of the public, may grant in part or in whole, or may refuse such applications, ..." *Id.* § 108.

intrastate passenger service furnished by trains Nos. 7 and 8 operated daily between Tuscumbia, Alabama, and Chattanooga, Tennessee, a distance of approximately 145 miles mainly within Alabama. On September 13, 1948, appellee applied to the Alabama Public Service Commission for permission to discontinue trains Nos. 7 and 8, alleging that public use of the service had so declined that revenues fell far short of meeting direct operating expenses. After hearing evidence at Huntsville, Alabama, one of the communities served by the trains, the Commission entered an order on April 3, 1950, denying permission to discontinue on the grounds that there exists a public need for the service and that appellee had not attempted to reduce losses through adoption of more economical operating methods.

Instead of pursuing its right of appeal to the state courts,[2] appellee filed a complaint in the United States District Court alleging diversity of citizenship and that requiring continued operation of trains Nos. 7 and 8 at an out-of-pocket loss amounted to a confiscation of its property in violation of the Due Process Clause of the Fourteenth Amendment. Injunctive relief was prayed to protect appellee from irreparable loss, flowing on the one hand from operating losses in complying with Alabama law or, on the other, from severe penalties for discontinuance of service in the face of that law. A three-judge court[3] heard evidence, made its own findings of fact and entered judgment holding the Commission order void and permanently enjoining appellants from taking any steps to enforce either the Commission order or the penalty

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[2] Ala. Code, 1940, tit. 48, §§ 79 *et seq.*

[3] Under 28 U. S. C. (Supp. III) § 2281, only a district court of three judges may issue an injunction restraining enforcement of "any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State stat-

provisions of the Alabama Code in relation to the discontinuance of trains Nos. 7 and 8.[4] 91 F. Supp. 980 (1950). The case is properly here on appeal, 28 U. S. C. (Supp. III) § 1253.

Federal jurisdiction in this case is grounded upon diversity of citizenship as well as the allegation of a federal question. Exercise of that jurisdiction does not involve construction of a state statute so ill-defined that a federal court should hold the case pending a definitive construction of that statute in the state courts, *e. g., Railroad Commission of Texas* v. *Pullman Co.*, 312 U. S. 496 (1941); *Shipman* v. *DuPre,* 339 U. S. 321 (1950). We also put to one side those cases in which the constitutionality of a state statute itself is drawn into question, *e. g., Toomer* v. *Witsell,* 334 U. S. 385 (1948). For in this case appellee attacks a state administrative order issued under a valid regulatory statute designed to assure the provision of adequate intrastate service by utilities operating within Alabama.[5]

Appellee takes the position, adopted by the court below, that whenever a plaintiff can show irreparable loss caused

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utes . . . ." The word "statute" comprehends all state legislative enactments, including those expressed through administrative orders. *American Federation of Labor* v. *Watson,* 327 U. S. 582, 591–593 (1946); *Oklahoma Natural Gas Co.* v. *Russell,* 261 U. S. 290, 292 (1923).

[4] Appellants contend for the first time in this Court that a suit to restrain state officials from enforcing unconstitutional state laws is, in effect, a suit against the state prohibited by the Eleventh Amendment. The contention is not tenable in view of the many cases prior to and following *Ex parte Young,* 209 U. S. 123 (1908), in which this Court has granted such relief over the same objection.

[5] The Alabama statute requiring application for a permit from the Alabama Public Service Commission before discontinuing transportation service was upheld by this Court in *St. Louis-San Francisco R. Co.* v. *Alabama Public Service Commission,* 279 U. S. 560 (1929). The statute was recently construed and applied by the Alabama Supreme Court in *Alabama Public Service Commission* v. *Atlantic Coast Line R. Co.,* 253 Ala. 559, 45 So. 2d 449 (1950).

by an allegedly invalid state administrative order ripe for judicial review in the state courts the presence of diversity of citizenship or a federal question opens the federal courts to litigation as to the validity of that order, at least so long as no action involving the same subject matter is actually pending in the state courts. But, it by no means follows from the fact of district court jurisdiction that such jurisdiction must be exercised in this case.[6] As framed by the Court in *Burford* v. *Sun Oil Co.*, 319 U. S. 315, 318 (1943), the question before us is:

> "Assuming that the federal district court had jurisdiction, should it, as a matter of sound equitable discretion, have declined to exercise that jurisdiction here?"

In assessing the propriety of equitable relief, a review of the regulatory problem involved in this case is appropriate.

Appellee conducts an interstate business over the same tracks and by means of the same trains involved in this case, and such interstate activities are regulated by the Federal Interstate Commerce Commission, 49 U. S. C. §§ 1 *et seq.* But, it has long been held that this interblending of the interstate and intrastate operations does not deprive the states of their primary authority over intrastate transportation in the absence of congressional action supplementing that authority. *Minnesota Rate Cases*, 230 U. S. 352 (1913). And Congress has since provided:

> "That nothing in [the Interstate Commerce Act] shall impair or affect the right of a State, in the exercise of its police power, to require just and rea-

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[6] *Gulf Oil Corp.* v. *Gilbert*, 330 U. S. 501, 504–505 (1947); *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U. S. 293, 297 (1943); *Atlas Life Ins. Co.* v. *W. I. Southern, Inc.*, 306 U. S. 563, 570 (1939); *Canada Malting Co., Ltd.* v. *Paterson Steamships, Ltd.*, 285 U. S. 413, 422–423 (1932).

> sonable freight and passenger service for intrastate business, except insofar as such requirement is inconsistent with any lawful order of the [Interstate Commerce Commission]." 49 U. S. C. § 1 (17) (a).[7]

This Court has held that regulation of intrastate railroad service is "primarily the concern of the state." *North Carolina* v. *United States,* 325 U. S. 507, 511 (1945) (rates); *Palmer* v. *Massachusetts,* 308 U. S. 79 (1939) (discontinuance of local service).

State and federal regulatory agencies have expressed concern over the chronic deficit arising out of passenger train operations as a threat to the financial security of the American railroads and have recommended drastic action to minimize the deficit, including the discontinuance of unpatronized and unprofitable service.[8] However, our concern in this case is limited to the propriety of a federal court injunction enjoining enforcement of a state regulatory order.[9]

The court below justified the exercise of its jurisdiction with a finding that continued operation of trains Nos.

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[7] Appellee seeks to discontinue only two of several passenger trains serving the same communities. This is a proposed partial discontinuance and not an abandonment over which the Interstate Commerce Commission is given exclusive authority under 49 U. S. C. §§ 1 (18–20). *Colorado* v. *United States,* 271 U. S. 153 (1926). The I. C. C. has held that it has no authority under 49 U. S. C. §§ 1 (18–20) to authorize a partial discontinuance as such of intrastate passenger service. *Kansas City Southern R. Co.,* 94 I. C. C. 691 (1925); *New York Central R. Co.,* 254 I. C. C. 745, 765 (1944).

[8] See 64th Annual Report, Interstate Commerce Commission (1950) 5–6; 63d Annual Report, Interstate Commerce Commission (1949) 4–5; *Increased Freight Rates, 1948,* 276 I. C. C. 9, 32–40 (1949); Proceedings, 61st Annual Convention, National Association of Railroad and Utilities Commissioners (1949) 378–382, 410–414.

[9] As the jurisdiction of the Interstate Commerce Commission under 49 U. S. C. § 13 (4) has not been invoked for decision as to whether the continuance of this intrastate service constitutes an undue discrimination against interstate commerce, we cannot, in this proceeding,

7 and 8 would result in confiscation of appellee's property in violation of the Due Process Clause of the Fourteenth Amendment. In pursuing the threshold inquiry whether a federal court should exercise jurisdiction in this case, we find it unnecessary to consider issues relating to the merits of appellee's case, issues which appellants did not see fit to raise in this Court either in their Statement of Jurisdiction or in their briefs. We do note that in passing upon similar contentions in the past, this Court has recognized that review of an order requiring performance of a particular utility service, even at a pecuniary loss, is subject to considerations quite different from those involved when the return on the entire intrastate operations of a utility is drawn into question. *Atlantic Coast Line R. Co.* v. *North Carolina Corporation Commission,* 206 U. S. 1, 24–27 (1907). The problems raised by the discontinuance of trains Nos. 7 and 8 cannot be resolved alone by reference to appellee's loss in their operation but depend more upon the predominantly local factor of public need for the service rendered. *Chesapeake & Ohio R. Co.* v. *Public Service Commission of West Virginia,* 242 U. S. 603, 608 (1917).

The Alabama Commission, after a hearing held in the area served, found a public need for the service. The court below, hearing evidence *de novo,* found that no public necessity exists in view of the increased use and availability of motor transportation. We do not attempt to resolve these inconsistent findings of fact. We take note, however, of the fact that a federal court has been asked to intervene in resolving the essentially local problem of balancing the loss to the railroad from continued operation of trains Nos. 7 and 8 with the public need

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consider any impact the order of the Alabama Public Service Commission might have on interstate commerce. *Western & Atlantic R. Co.* v. *Georgia Pub. Serv. Comm'n,* 267 U. S. 493 (1925), and cases cited therein.

for that service in Tuscumbia, Decatur, Huntsville, Scottsboro, and the other Alabama communities directly affected.

Not only has Alabama established its Public Service Commission to pass upon a proposed discontinuance of intrastate transportation service, but it has also provided for appeal from any final order of the Commission to the circuit court of Montgomery County as a matter of right. Ala. Code, 1940, tit. 48, § 79. That court, after a hearing on the record certified by the Commission, is empowered to set aside any Commission order found to be contrary to the substantial weight of the evidence or erroneous as a matter of law, *id.* § 82, and its decision may be appealed to the Alabama Supreme Court. *Id.* § 90. Statutory appeal from an order of the Commission is an integral part of the regulatory process under the Alabama Code. Appeals, concentrated in one circuit court, are "supervisory in character." *Avery Freight Lines, Inc.* v. *White,* 245 Ala. 618, 622–623, 18 So. 2d 394, 398 (1944). The Supreme Court of Alabama has held that it will review an order of the Commission as if appealed directly to it, *Alabama Public Service Commission* v. *Nunis,* 252 Ala. 30, 34, 39 So. 2d 409, 412 (1949), and that judicial review calls for an independent judgment as to both law and facts when a denial of due process is asserted. *Alabama Public Service Commission* v. *Southern Bell Tel. & Tel. Co.,* 253 Ala. 1, 11–12, 42 So. 2d 655, 662 (1949).

The fact that review in the Alabama courts is limited to the record taken before the Commission presents no constitutional infirmity. *Washington ex rel. Oregon R. & N. Co.* v. *Fairchild,* 224 U. S. 510 (1912). And, whatever the scope of review of Commission findings when an alleged denial of constitutional rights is in issue, it is now settled that a utility has no right to relitigate factual questions on the ground that constitutional rights are involved. *New York* v. *United States,* 331 U. S. 284,

334–336 (1947); *Railroad Commission of Texas* v. *Rowan & Nichols Oil Co.*, 311 U. S. 570, 576 (1941). Appellee complains of irreparable injury resulting from the Commission order pending judicial review, but has not invoked the protective powers of the Alabama courts to direct the stay or supersedeas of a Commission order pending appeal. Ala. Code, 1940, tit. 48, §§ 81, 84.[10] Appellee has not shown that the Alabama procedure for review of Commission orders is in any way inadequate to preserve for ultimate review in this Court any federal questions arising out of such orders.

As adequate state court review of an administrative order based upon predominantly local factors is available to appellee,[11] intervention of a federal court is not necessary for the protection of federal rights. Equitable relief may be granted only when the District Court, in its sound discretion exercised with the "scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts," [12] is convinced

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[10] Compare *Pacific Tel. & Tel. Co.* v. *Kuykendall*, 265 U. S. 196 (1924), where supersedeas was not available to adequately protect federal rights, and *Oklahoma Natural Gas Co.* v. *Russell*, 261 U. S. 290 (1923), where supersedeas was sought but denied by the state court.

[11] Compare such cases as *Bacon* v. *Rutland R. Co.*, 232 U. S. 134 (1914), where State judicial review procedures plus review in this Court were thought to be inadequate. This inadequacy derived from the rationale that the federal right of a utility to be protected from confiscation of its property depended upon "pure matters of fact" to the extent that a *de novo* hearing of such facts in a federal court was essential to the protection of constitutional rights. *Prentis* v. *Atlantic Coast Line R. Co.*, 211 U. S. 210, 228 (1908). See Lilienthal, The Federal Courts and State Regulation of Public Utilities, 43 Harv. L. Rev. 379, 424 (1930). The decisions in *Railroad Commission of Texas* v. *Rowan & Nichols Oil Co.*, 311 U. S. 570, 576 (1941), and *New York* v. *United States, supra,* holding that due process does not require relitigation of factual matters determined by an administrative body, eliminated the premise upon which equitable relief in *Bacon* rested.

[12] *Matthews* v. *Rodgers*, 284 U. S. 521, 525 (1932). See *Pennsylvania* v. *Williams*, 294 U. S. 176, 185 (1935).

that the asserted federal right cannot be preserved except by granting the "extraordinary relief of an injunction in the federal courts."[13] Considering that "[f]ew public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies,"[14] the usual rule of comity must govern the exercise of equitable jurisdiction by the District Court in this case. Whatever rights appellee may have are to be pursued through the state courts. *Burford* v. *Sun Oil Co.*, 319 U. S. 315 (1943); *Railroad Commission of Texas* v. *Rowan & Nichols Oil Co.*, 311 U. S. 570, 577 (1941); *Railroad Commission of Texas* v. *Rowan & Nichols Oil Co.*, 310 U. S. 573, as amended, 311 U. S. 614, 615 (1940).

The Johnson Act, 48 Stat. 775 (1934), now 28 U. S. C. (Supp. III) § 1342, does not affect the result in this case. That Act deprived federal district courts of jurisdiction to enjoin enforcement of certain state administrative orders affecting public utility rates where "A plain, speedy and efficient remedy may be had in the courts of such State." As the order of the Alabama Service Commission involved in this case is not one affecting appellee's rates, the Johnson Act is not applicable. We have assumed throughout this opinion that the court below had jurisdiction, *supra*, p. 345, but hold that jurisdiction should not be exercised in this case as a matter of sound equitable discretion. As this Court held in *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U. S. 293, 297–298 (1943):

> "This withholding of extraordinary relief by courts having authority to give it is not a denial of the jurisdiction which Congress has conferred on the

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[13] *Railroad Commission of Texas* v. *Rowan & Nichols Oil Co.*, 310 U. S. 573, as amended, 311 U. S. 614, 615 (1940).

[14] *Railroad Commission of Texas* v. *Pullman Co.*, 312 U. S. 496, 500 (1941).

> federal courts . . . . On the contrary, it is but a recognition . . . that a federal court of equity . . . should stay its hand in the public interest when it reasonably appears that private interests will not suffer. . . .
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> "It is in the public interest that federal courts of equity should exercise their discretionary power to grant or withhold relief so as to avoid needless obstruction of the domestic policy of the states." [15]

For the foregoing reasons, the judgment of the District Court is

Reversed.

MR. JUSTICE FRANKFURTER, whom MR. JUSTICE JACKSON joins, concurring in the result.

The Southern Railway asked leave of the Alabama Public Service Commission to take off two of its passenger trains. The Commission, deeming the service of these runs necessary for the communities served, denied leave. The Railway thereafter applied to the United States District Court for an injunction against the order of the Commission. The bill asking for this injunction was based on a claim under the Due Process Clause of the Fourteenth Amendment. The allegations of the bill and the proof under it failed to establish a substantial claim under the United States Constitution. Under familiar, well-established principles the District Court

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[15] In *Meredith* v. *Winter Haven*, 320 U. S. 228, 237 (1943), the Court sustained the exercise of jurisdiction by a federal court in a case involving matters of state law, but only where decision "does not require the federal court to determine or shape state policy governing administrative agencies" and "entails no interference with such agencies or with the state courts." The absence of a legal remedy in the federal courts does not of itself justify the granting of equitable relief in such cases. *Atlas Life Ins. Co.* v. *W. I. Southern, Inc.*, 306 U. S. 563, 569–570 (1939).

should have dismissed the bill. The Court likewise directs the District Court to dismiss the bill. But it chooses to do so by a line of argument in plain disregard of congressional legislation. Against that I am compelled to protest.

Alabama has the conventional feature of railroad regulatory legislation requiring leave of the State Public Service Commission for the discontinuance of trains. Ala. Code, 1940, tit. 48, § 106. The Southern Railway Company asked permission to discontinue the two trains on the ground that, as segregated items of its total business in Alabama, these trains were operating at a substantial loss. The Commission refused permission after a full hearing, and no question of procedural due process is before us.

Southern brought its suit to restrain enforcement of the Commission order in the United States District Court for the Middle District of Alabama. The case was heard by a three-judge court, as required by 28 U. S. C. § 2281, and a permanent injunction was granted. A direct appeal to this Court lies from such a decision. 28 U. S. C. § 1253.

In holding that the order of the State Commission violated the Due Process Clause of the Fourteenth Amendment, the District Court relied chiefly upon the fact that the operation of the two trains involved a substantial loss. It has long been settled, however, that a requirement that a particular service be rendered at a loss does not make such a service confiscatory and thereby an unconstitutional taking of property. *St. Louis & S. F. R. Co.* v. *Gill,* 156 U. S. 649, 665–666; *Atlantic Coast Line R. Co.* v. *North Carolina Comm'n,* 206 U. S. 1; *Missouri Pacific R. Co.* v. *Kansas,* 216 U. S. 262, 278; *Chesapeake & O. R. Co.* v. *Public Serv. Comm'n,* 242 U. S. 603; *Puget Sound Traction Co.* v. *Reynolds,* 244 U. S. 574; *Fort Smith Light & Traction Co.* v. *Bourland,* 267

U. S. 330; see *Northern Pacific R. Co.* v. *North Dakota,* 236 U. S. 585, 600.

Unlike a department store or a grocery, a railroad cannot of its own free will discontinue a particular service to the public because an item of its business has become unprofitable. "One of the duties of a railroad company doing business as a common carrier is that of providing reasonably adequate facilities for serving the public. This duty arises out of the acceptance and enjoyment of the powers and privileges granted by the State and endures so long as they are retained. It represents a part of what the company undertakes to do in return for them, and its performance cannot be avoided merely because it will be attended by some pecuniary loss." *Chesapeake & O. R. Co.* v. *Public Serv. Comm'n, supra,* at 607.

It is true that we have, on rare occasion, found an order requiring service so arbitrary as to constitute confiscation. Thus, in *Northern Pacific R. Co.* v. *North Dakota, supra,* the State was attempting to force railroads to subsidize production of a particular commodity. In *Mississippi Comm'n* v. *Mobile & O. R. Co.,* 244 U. S. 388, the Court concluded: "Looking to the extent and productiveness of the business of the company as a whole, the small traveling population to be served, the character and large expense of the service required by this order, and to the serious financial conditions confronting the carrier, with the public loss and inconvenience which its financial failure would entail, we fully agree with the District Court in concluding that the order of the commission at the time and under the circumstances when it was issued was arbitrary and unreasonable . . . ." *Id.* at 396.

In the case before us, the trains involved, Nos. 7 and 8, are local passenger trains operated between Sheffield-Tuscumbia, Alabama, and Chattanooga. Southern operates four other trains between these points. Nos. 45 and 46 do not stop at all stations and operate on a schedule

inconvenient to the public here concerned. The State Commission found that the schedules of Nos. 35 and 36 "are not comparable to" those of Trains 7 and 8 and do not afford the same convenience.

It appears that the operation of Trains 7 and 8 resulted in a loss of $8,527.24 per month during the twelve-month period ending February 28, 1949. During the five-month period ending July 31, 1949, the loss amounted to $10,738.51 per month. But the railroad made no claim that it is operating at a loss, or failing to receive a fair return, either on its total investment or upon its investment within the State of Alabama. The record contains only the sketchiest findings concerning the operation of the railroad in its entirety. But it does appear that, although Southern has operated its passenger business at a loss aside from the war years, it has earned a substantial net operating income upon both its entire business and its service within the State of Alabama.[1] This litigation seems to have been concerned almost exclusively with the operations of Trains 7 and 8. No showing whatever was made that by the loss incurred in running these trains Southern was deprived of that protection for its investment in Alabama which alone can be made the basis of a claim under the Due Process Clause of the Fourteenth

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[1] The record contains no allegations or findings on the value of the railroad's property and no particulars concerning its accounting system. Finding 23 indicates that the railroad has had the following yearly "net operating income" from its entire business:

1931–1941 (average)	$16,232,045
1942–1945 (average)	35,561,045
1946–1948 (average)	23,278,299

Finding 24 indicates that the railroad has had the following yearly "net operating income" from its service within Alabama:

1936–1941 (average)	$1,508,282
1942–1945 (average)	4,220,203
1946–1948 (average)	2,598,459

Amendment. The lack of merit in the plaintiff's case is so clear that it calls for dismissal of the complaint.

Instead, as we have stated, this Court rests its decision on a ground that requires it to overturn a long course of decisions and, in effect, to repeal an act of Congress defining the jurisdiction of the district courts. It is undisputed that the plaintiff is asserting a claim under the Federal Constitution. The Court admits that the District Court has jurisdiction of the suit. 28 U. S. C. §§ 1331, 1332. It is said, however, that the District Court must decline to exercise this jurisdiction because judicial review of the order could have been had in the State courts.

In 1875, Congress for the first time (barring the abortive Act of 1801) opened the federal courts to claims based on a right under the Constitution or laws of the United States. Act of March 3, 1875, 18 Stat. 470.[2] Theretofore such claims had to be pursued in the State courts and brought to this Court for review of the federal question under § 25 of the Judiciary Act of 1789, 1 Stat. 73, 85. In *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362, 391, we rejected the argument that suit could not be brought in the federal court to restrain the enforcement of a State agency order. The Court has consistently held to the view that it cannot overrule the determination of Congress as to whether federal courts should be allowed jurisdiction, concurrent with the State courts, even where the plaintiff seeks to restrain action of a State agency. *Smyth* v. *Ames*, 169 U. S. 466, 516; *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19, 40; *Bacon* v. *Rutland R. Co.*, 232 U. S. 134, 137; *Detroit & Mackinac R. Co.* v. *Michigan Comm'n*, 235 U. S. 402; *Oklahoma Natural Gas Co.* v.

[2] Jurisdiction over cases where there is diversity of citizenship was conferred by § 11 of the Judiciary Act of 1789. 1 Stat. 73, 78. In *Meredith* v. *Winter Haven*, 320 U. S. 228, we held that in an equity case the District Court could not decline to exercise its jurisdiction merely because matters of State law were involved.

Russell, 261 U. S. 290, 293; *Prendergast* v. *New York Telephone Co.,* 262 U. S. 43, 47; *Pacific Telephone & Telegraph Co.* v. *Kuykendall,* 265 U. S. 196, 201; *Railroad & Warehouse Comm'n of Minnesota* v. *Duluth St. R. Co.,* 273 U. S. 625, 628; see *Prentis* v. *Atlantic Coast Line R. Co.,* 211 U. S. 210, 228.

These cases can be overruled. They cannot be explained away. The theory of the cases now discarded was clearly stated in *Willcox* v. *Consolidated Gas Co., supra,* decided the same Term as the *Prentis* case: "That the case may be one of local interest only is entirely immaterial, so long as the parties are citizens of different States or a question is involved which by law brings the case within the jurisdiction of a Federal court. The right of a party plaintiff to choose a Federal court where there is a choice cannot be properly denied." 212 U. S. at 40. What the Court today holds is that if a plaintiff can be sent to a State court to challenge an agency order there is no federal court available to him.[3] Since the body of decisions

[3] We are told by the Court: "Compare such cases as *Bacon* v. *Rutland R. Co.,* 232 U. S. 134 (1914), where State judicial review procedures plus review in this Court were thought to be inadequate." There is not the shadow of a hint in the *Bacon* case to warrant such an explanation of it. No such thing was "thought" before today's decision. The *Bacon* case is merely an instance of what until today was the settled doctrine that a railroad company had the choice of going either into the State court or into the federal court to press a federal constitutional claim.

It is suggested that the "inadequacy" of State judicial review, by which the *Bacon* case is now sought to be explained, "derived from the rationale that the federal right of a utility to be protected from confiscation of its property depended upon 'pure matters of fact' to the extent that a *de novo* hearing of such facts in a federal court was essential to the protection of constitutional rights. *Prentis* v. *Atlantic Coast Line R. Co.,* 211 U. S. 210, 228 (1908)."

I regret the necessity for saying again that there is no warrant whatever for this statement. It cannot be found at the place cited in the *Prentis* opinion. That merely repeats the doctrine of the

which hold the contrary is thus to be discarded, they ought not to be left as derelicts on the waters of the law.

In Congress, a prolonged debate has ensued over the wisdom of the broad grants of power made to the federal courts of original jurisdiction—power which may be invoked against State regulation of economic enterprise. Bill after bill has been proposed to prevent the lower federal courts from interfering with such State action. Finally, in 1910, by a provision in the Mann-Elkins Act, Congress provided that an action for an interlocutory injunction to restrain the action of a State officer acting under a statute alleged to violate the Federal Constitution be heard by a court of three judges, with a right of direct appeal to the Supreme Court. Act of June 18, 1910, § 17, 36 Stat. 539, 557. In 1913, this procedure was extended to applications for an interlocutory injunction to restrain enforcement of the order of a State board or commission. Act of March 4, 1913, 37 Stat. 1013. By the same statute, a State was empowered to keep litigation concerning the validity of State agency regulation in its own courts if it was willing to stay the administrative order.[4] In 1925, the provision for a three-judge court and

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numerous cases after the Act of 1875 that a plaintiff has a choice of State or federal court where a constitutional claim is made:

"All their constitutional rights, we repeat, depend upon what the facts are found to be. They are not to be forbidden to try those facts before a court of their own choosing if otherwise competent. 'A State cannot tie up a citizen of another State, having property within its territory invaded by unauthorized acts of its own officers, to suits for redress in its own courts.' *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362, 391; *Smyth* v. *Ames*, 169 U. S. 466, 517. See *McNeill* v. *Southern Railway Co.*, 202 U. S. 543; *Ex parte Young*, 209 U. S. 123, 165." 211 U. S. at 228.

[4] "It is further provided that if before the final hearing of such application a suit shall have been brought in a court of the State having jurisdiction thereof under the laws of such State, to enforce such statute or order, accompanied by a stay in such State court

direct appeal was extended to a permanent injunction. Act of Feb. 13, 1925, 43 Stat. 936, 938.

Congress, fully aware of the problem, was still not satisfied with the jurisdiction it had left to the federal district courts. Accordingly, in 1934, it passed the Johnson Act which withdrew their jurisdiction over suits to enjoin the enforcement of State rate orders, providing that a remedy was available in the State courts. Act of May 14, 1934, 48 Stat. 775. This restriction on a district court is not here applicable, for the order in controversy is not a rate order. In 1937, Congress further limited federal jurisdiction by providing that a district court could not enjoin enforcement of a State tax statute where a remedy was available in the State courts. Act of Aug. 21, 1937, 50 Stat. 738.

Plainly we are concerned with a jurisdictional issue which has been continuously before Congress and with which it has dealt by explicit and detailed legislation. Congress first made a broad grant of jurisdiction to the federal courts as to all constitutional and other federal claims. Experience gave rise to dissatisfaction with this grant and Congress began to hedge and limit the power. It required that the case be heard by three judges, that a speedy appeal be available, and that the State courts could have exclusive jurisdiction if they would stay the administrative order. It withdrew jurisdiction to enjoin enforcement of State statutes and orders in the two fields where the greatest dissatisfaction with federal jurisdiction existed—rate orders and taxation—so long as a State rem-

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of proceedings under such statute or order pending the determination of such suit by such State court, all proceedings in any court of the United States to restrain the execution of such statute or order shall be stayed pending the final determination of such suit in the courts of the State." 37 Stat. 1014. See 28 U. S. C. § 2284 (5).

Alabama did not avail itself of this means for taking the litigation from the federal court.

edy was available. But Congress did not take away the power of the district court to decide a case like the one before us. Instead, it recognized by the wording of § 17 of the Mann-Elkins Act and later legislation that it had given a right to resort to the federal courts and that such power was an obligatory jurisdiction, not to be denied because as a matter of policy it might be more desirable to raise such constitutional claims in a State court.

The Court rejects the guidance of these amendatory acts, all placing specific limitations upon the exercise of district court jurisdiction in cases affecting local regulation. Instead, the Court now limits the jurisdiction of the federal courts as though Congress had amended § 1331 of Title 28 to read:

> "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States, *provided that the district courts shall not exercise this jurisdiction where a suit involves a challenge to an order of a state regulatory commission.*" (New matter in italics.)

It does not change the significance of the Court's decision to coat it with the sugar of equity maxims. As we have seen, there is no warrant in the decisions of this Court for saying that the plaintiff has an "adequate remedy at law" merely because he may bring suit in the State courts. An "adequate remedy at law," as a bar to equitable relief in the federal courts, refers to a remedy on the law side of federal courts. *Petroleum Exploration, Inc.* v. *Commission,* 304 U. S. 209, 217; *Di Giovanni* v. *Camden Ins. Assn.,* 296 U. S. 64, 69; *Henrietta Mills* v. *Rutherford County,* 281 U. S. 121, 126; *Risty* v. *Chicago, R. I. & Pac. R. Co.,* 270 U. S. 378, 388. An equity court

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may decline to give relief by injunction if the plaintiff would be adequately compensated by money damages, his "remedy at law." *Armour & Co.* v. *Dallas,* 255 U. S. 280, *Harrisonville* v. *Dickey Clay Co.,* 289 U. S. 334. But it is not suggested that this suit should have been transferred to the law side of the federal court.

An equity court may also decline to issue an injunction if the interest of the plaintiff is relatively unimportant when compared to some overwhelming public interest. See Mr. Justice Brandeis, dissenting, in *Truax* v. *Corrigan,* 257 U. S. 312, 354, 374. See also *Virginian R. Co.* v. *System Federation,* 300 U. S. 515, 552. An equity court, in the exercise of its broad powers, may also decline to give relief if there are special circumstances which make it desirable for the court to stay its hand or decline to interfere. Thus, traditionally, an equity court will be reluctant to interfere with the administration of criminal justice. *Beal* v. *Missouri Pacific R. Corp.,* 312 U. S. 45. It should avoid decision of a constitutional question when construction of a State statute in the State courts may make such a decision unnecessary. *Railroad Comm'n* v. *Pullman Co.,* 312 U. S. 496. It may decline to consider a case which involves a specialized aspect of a complicated system of local law outside the normal competence of a federal court. *Burford* v. *Sun Oil Co.,* 319 U. S. 315, 332 *et seq.* In that case, the majority found that the technicalities of oil regulation and the importance of competent, uniform review made it proper for the District Court to decline to exercise its equity jurisdiction. Again, an equity court, like a court of law for that matter, ought not to hear a case before the plaintiff has exhausted all available nonjudicial legal remedies. *Prentis* v. *Atlantic Coast Line R. Co., supra.*

Here the plaintiff has exhausted its nonjudicial remedies. *Avery Freight Lines, Inc.* v. *Persons,* 250 Ala. 40, 32 S. 2d 886 (1947). Concededly there is no State statute

to construe. There is no consideration which should make a court of equity, as a matter of discretion, decline to entertain a bill for an injunction. Nor does the situation in this suit involve a specialized field of State law in which out-of-State federal judges are not at home. On the contrary, the claim that is made here is within the easy grasp of federal judges, and certainly within the competence of three judges bred in Alabama law, with wide experience in its administration. The only reason for declining to entertain the suit is that it may well be more desirable as a matter of State-Federal relations for the order of a State agency to be reviewed originally in the State lower court and not to be challenged in the first instance in a federal court. It is not for me to quarrel with the wisdom of such a policy. But Congress, in the constitutional exercise of its power to define the jurisdiction of the inferior federal courts, has decided otherwise.

Equity by its very nature denies relief if, on balance of considerations of convenience relevant to equity, it would be inequitable to grant the extraordinary remedy of an injunction. Federal courts of equity have always acted on this equitable doctrine. But it was never a doctrine of equity that a federal court should exercise its judicial discretion to dismiss a suit merely because a State court could entertain it.

This is so because discretion based solely on the availability of a remedy in the State courts would for all practical purposes repeal the Act of 1875. This Act gave to the federal courts a jurisdiction not theretofore possessed so that a State could not tie up a litigant making such a claim by requiring that he bring suit for redress in its own courts. That jurisdiction was precisely the jurisdiction to hear constitutional challenge to local action on the basis of the vast limitations placed upon State action by the Civil War amendments. And precisely because of objections to the choice of courts given plain-

tiffs by the Act of 1875, Congress, by piecemeal restrictive legislation, did require that some federal claims against local regulatory action be litigated originally in State courts and from there brought here for review.

By one fell swoop the Court now finds that Congress indulged in needless legislation in the Acts of 1910, 1913, 1925, 1934 and 1937. By these measures, Congress, so the Court now decides, gave not only needless but inadequate relief, since it now appears that the federal courts have inherent power to sterilize the Act of 1875 against all proceedings challenging local regulation. For if this decision means anything beyond disposing of this particular litigation it means that hereafter no federal court should entertain a suit against any action of a State agency. For every State must afford judicial review in its courts of a claim under the Due Process Clause if such claim would give a federal court jurisdiction. In the absence of such judicial review in the State courts, State action under the doctrine of *Ohio Valley Co.* v. *Ben Avon Borough,* 253 U. S. 287, would be nugatory because unconstitutional.

I regret my inability to make clear to the majority of this Court that its opinion is in flagrant contradiction with the unbroken course of decisions in this Court for seventy-five years.

ALABAMA PUBLIC SERVICE COMMISSION ET AL. *v.* SOUTHERN RAILWAY CO.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA.

No. 146. Argued February 27–28, 1951.—Decided May 21, 1951.

Decided upon the authority of *Alabama Public Service Comm'n* v. *Southern R. Co., ante,* p. 341.
88 F. Supp. 441, reversed.

In a suit by a railroad, a three-judge federal district court enjoined enforcement of an order of the Alabama Public Service Commission. 88 F. Supp. 441. On appeal to this Court under 28 U. S. C. § 1253, *reversed,* p. 366.

By special leave of Court, *Merton Roland Nachman, Jr.,* Assistant Attorney General of Alabama, *pro hac vice,* and *Richard T. Rives* argued the cause for appellants. With them on the brief was *Si Garrett,* Attorney General. *A. A. Carmichael,* then Attorney General, and *Wallace L. Johnson,* then Assistant Attorney General, were also on a brief with *Mr. Rives.*

Charles Clark argued the cause for appellee. With him on the brief were *Marion Rushton, Earl E. Eisenhart, Jr., Sidney S. Alderman* and *Jos. F. Johnston.*

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

This case was argued with No. 395, decided this day, *ante,* p. 341, and brings the same parties before the Court.

This proceeding arises out of appellee's efforts to discontinue operation of passenger trains Nos. 11 and 16 operated daily between Birmingham, Alabama, and Columbus, Mississippi, a distance of approximately 120 miles

mainly within Alabama. Alleging that the trains are little used and produce revenues far below their direct operating expenses, appellee applied to the Alabama Public Service Commission on September 13, 1948, for the permission to discontinue required by Alabama law.

Over a year later, and before any action on the application had been taken by the Alabama Commission, the Interstate Commerce Commission ordered a reduction in the interstate and intrastate operation of coal-burning passenger locomotives to prevent undue depletion of coal reserves during a national coal strike. In response to the I. C. C. order, appellee discontinued service on a number of its trains, including trains Nos. 11 and 16. When the I. C. C. order was rescinded, other trains were restored to operation but appellee refused to restore the financially costly operation of trains Nos. 11 and 16, at least until the Alabama Commission granted a hearing upon its application for permanent discontinuance. An impasse developed and the Alabama Commission entered an order in which it refused to hear evidence proffered by appellee, threatened to delay any hearing on the application until appellee restored the trains, found appellee in contempt of the Commission and called appellee's attention to a provision of the Alabama Code providing penalties for the violation of an order of the Commission. On December 6, 1949, the day after entry of this order, appellee filed its complaint in the District Court alleging that requiring continued operation of trains 11 and 16 would confiscate its property in violation of the Due Process Clause of the Fourteenth Amendment. It prayed for an injunction restraining appellants from enforcing those laws of Alabama, including penalty provisions, which prevented appellee from discontinuing those trains. A temporary restraining order was issued.

In the court below and in this Court, appellants have argued that a federal court should not interfere with a

state's imposition of penalties to punish defiant disregard of its regulatory laws. *Beal* v. *Missouri Pacific R. Corp.,* 312 U. S. 45, 51 (1941); *Wadley Southern R. Co.* v. *Georgia,* 235 U. S. 651, 662 (1915). Compare *Western & Atlantic R. Co.* v. *Georgia Public Service Commission,* 267 U. S. 493, 496 (1925). Appellee, on the other hand, emphasizes the Commission's delay in passing upon its application to discontinue the financially burdensome service as being so long-continued and unreasonable as to permit the intervention of a federal court before a decision by the Commission. *Smith* v. *Illinois Bell Telephone Co.,* 270 U. S. 587 (1926).

Though these arguments were relevant when the temporary restraining order was issued, we are called upon to review only the final decree, cf. *Shaffer* v. *Carter,* 252 U. S. 37, 44 (1920), and do not find it necessary to pass upon such contentions in view of the additional developments occurring prior to the entry of the final judgment below. The Commission did hold a hearing on December 8, 1949, in Fayette, Alabama, one of the communities affected by the discontinuance of service, and, on January 9, 1950, entered an order denying permission to discontinue operation of trains Nos. 11 and 16 on the grounds that a public need exists for the service and that appellee had not made a sufficient effort to reduce losses through adoption of more economical operating methods. The pleadings in the court below were amended in light of the Commission's order of January 9, 1950, and the final judgment entered by the three-judge District Court was based upon a finding that enforcement of that order would be contrary to the Fourteenth Amendment. 88 F. Supp. 441 (1950).

Appellee challenges the validity of an order of the Alabama Public Service Commission, but did not invoke the adequate state remedy provided for review of such orders.

Therefore, as this case comes to us, it is governed by our decision in No. 395, decided this day, *ante*, p. 341. Accordingly, the judgment of the District Court is

Reversed.

MR. JUSTICE FRANKFURTER and MR. JUSTICE JACKSON concur in the result for the reasons set forth in their opinion in No. 395, *Alabama Public Service Comm'n* v. *Southern R. Co.*, *ante*, p. 351.

Syllabus.

TENNEY ET AL. *v.* BRANDHOVE.

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

No. 338. Argued March 1, 1951.—Decided May 21, 1951.

Respondent sued petitioners in the Federal District Court for damages under 8 U. S. C. §§ 43 and 47 (3), alleging that, in connection with an investigation by a committee of the California Legislature, he had been deprived of rights guaranteed by the Federal Constitution. Petitioners are the committee and the members thereof, all of whom are members of the legislature. *Held:* From the allegations of the complaint, it appears that petitioners were acting in a field where legislators traditionally have power to act; and 8 U. S. C. §§ 43 and 47 (3) do not create civil liability for such conduct. Pp. 369–379.

(a) The privilege of legislators to be free from arrest or civil process for what they do or say in legislative proceedings has been carefully preserved in the formation of our State and National Governments. Pp. 372–375.

(b) By 8 U. S. C. §§ 43 and 47 (3), Congress did not intend to limit this privilege by subjecting legislators to civil liability for acts done within the sphere of legislative activity. P. 376.

(c) The privilege is not destroyed by a claim that the motives of the legislators were improper. P. 377.

(d) In order to find that a legislative committee's investigation has exceeded the bounds of legislative power, it must be obvious that there was a usurpation of functions exclusively vested in the Judiciary or the Executive. P. 378.

(e) Legislative privilege deserves greater respect in a case in which the defendants are members of the legislature than where an official acting on behalf of the legislature is sued or where the legislature seeks the affirmative aid of the courts to assert a privilege. P. 379.

183 F. 2d 121, reversed.

In an action brought by respondent against petitioners under 8 U. S. C. §§ 43 and 47 (3), the District Court dismissed the complaint. The Court of Appeals reversed. 183 F. 2d 121. This Court granted certiorari. 340 U. S. 903. *Reversed,* p. 379.

Harold C. Faulkner argued the cause for petitioners. With him on the brief were *Edmund G. Brown,* Attorney General of California, *Bert W. Levit,* Chief Deputy Attorney General, *Ralph N. Kleps* and *A. C. Morrison.*

Martin J. Jarvis and *Richard O. Graw* argued the cause for respondent. With them on the brief was *George Olshausen.*

Briefs in support of petitioners were filed as *amici curiae* as follows: A joint brief for the States of Florida, by *Richard W. Ervin,* Attorney General; Georgia, by *Eugene Cook,* Attorney General; Idaho, by *Robert E. Smylie,* Attorney General; Iowa, by *Robert L. Larson,* Attorney General; Kansas, by *Harold R. Fatzer,* Attorney General; Kentucky, by *A. E. Funk,* Attorney General; Maine, by *Alexander A. LaFleur,* Attorney General; Maryland, by *Hall Hammond,* Attorney General; Michigan, by *Frank G. Millard,* Attorney General, *Edmund E. Shepherd,* Solicitor General, and *Daniel J. O'Hara,* Assistant Attorney General; Nevada, by *W. T. Mathews,* Attorney General; New York, by *Nathaniel L. Goldstein,* Attorney General; North Carolina, by *Harry McMullan,* Attorney General; North Dakota, by *Elmo T. Christianson,* Attorney General; Ohio, by *C. William O'Neill,* Attorney General; Oregon, by *George Neuner,* Attorney General; Rhode Island, by *William E. Powers,* Attorney General; South Carolina, by *T. C. Callison,* Attorney General; Tennessee, by *Roy H. Beeler,* Attorney General; Texas, by *Price Daniel,* Attorney General, and *E. Jacobson,* Assistant Attorney General; Virginia, by *J. Lindsay Almond, Jr.,* Attorney General; Washington, by *Smith Troy,* Attorney General; Wisconsin, by *Vernon W. Thomson,* Attorney General; and Wyoming, by *Harry S. Harnsberger,* Attorney General; and a brief for the State of Wisconsin, by *Vernon W. Thomson,* Attorney General, and *Harold H. Persons* and *Roy G. Tulane,* Assistant Attorneys General.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

William Brandhove brought this action in the United States District Court for the Northern District of California, alleging that he had been deprived of rights guaranteed by the Federal Constitution. The defendants are Jack B. Tenney and other members of a committee of the California Legislature, the Senate Fact-Finding Committee on Un-American Activities, colloquially known as the Tenney Committee. Also named as defendants are the Committee and Elmer E. Robinson, Mayor of San Francisco.

The action is based on §§ 43 and 47 (3) of Title 8 of the United States Code. These sections derive from one of the statutes, passed in 1871, aimed at enforcing the Fourteenth Amendment. Act of April 20, 1871, c. 22, §§ 1, 2, 17 Stat. 13. Section 43 provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." R. S. § 1979, 8 U. S. C. § 43.

Section 47 (3) provides a civil remedy against "two or more persons" who may conspire to deprive another of constitutional rights, as therein defined.[1]

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[1] R. S. § 1980 (par. Third), 8 U. S. C. § 47 (3):

"If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving

Reduced to its legal essentials, the complaint shows these facts. The Tenney Committee was constituted by a resolution of the California Senate on June 20, 1947. On January 28, 1949, Brandhove circulated a petition among members of the State Legislature. He alleges that it was circulated in order to persuade the Legislature not to appropriate further funds for the Committee. The petition charged that the Committee had used Brandhove as a tool in order "to smear Congressman Franck R. Havenner as a 'Red' when he was a candidate for Mayor of San Francisco in 1947; and that the Republican machine in San Francisco and the campaign management of Elmer E. Robinson, Franck Havenner's opponent, conspired with the Tenney Committee to this end." In view of the conflict between this petition and evidence previously given by Brandhove, the Committee asked local prosecuting officials to institute criminal proceedings against him. The Committee also summoned Brandhove to appear before them at a hearing held on January 29. Testimony was there taken from the Mayor of San Francisco, allegedly a member of the conspiracy. The plaintiff appeared with counsel, but refused to give testimony.

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or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice-President, or as a member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

For this, he was prosecuted for contempt in the State courts. Upon the jury's failure to return a verdict this prosecution was dropped. After Brandhove refused to testify, the Chairman quoted testimony given by Brandhove at prior hearings. The Chairman also read into the record a statement concerning an alleged criminal record of Brandhove, a newspaper article denying the truth of his charges, and a denial by the Committee's counsel—who was absent—that Brandhove's charges were true.

Brandhove alleges that the January 29 hearing "was not held for a legislative purpose," but was designed "to intimidate and silence plaintiff and deter and prevent him from effectively exercising his constitutional rights of free speech and to petition the Legislature for redress of grievances, and also to deprive him of the equal protection of the laws, due process of law, and of the enjoyment of equal privileges and immunities as a citizen of the United States under the law, and so did intimidate, silence, deter, and prevent and deprive plaintiff." Damages of $10,000 were asked "for legal counsel, traveling, hotel accommodations, and other matters pertaining and necessary to his defense" in the contempt proceeding arising out of the Committee hearings. The plaintiff also asked for punitive damages.

The action was dismissed without opinion by the District Judge. The Court of Appeals for the Ninth Circuit held, however, that the complaint stated a cause of action against the Committee and its members. 183 F. 2d 121.[2] We brought the case here because important issues are raised concerning the rights of individuals and the power of State legislatures. 340 U. S. 903.

[2] The Court of Appeals affirmed the dismissal as to Robinson on the ground that he was not acting under color of law and that the complaint did not show him to be a member of a conspiracy. We have denied a petition to review this decision. 341 U. S. 936.

We are again faced with the Reconstruction legislation which caused the Court such concern in *Screws* v. *United States,* 325 U. S. 91, and in the *Williams* cases decided this term, *ante,* pp. 70, 97. But this time we do not have to wrestle with far-reaching questions of constitutionality or even of construction. We think it is clear that the legislation on which this action is founded does not impose liability on the facts before us, once they are related to the presuppositions of our political history.

The privilege of legislators to be free from arrest or civil process for what they do or say in legislative proceedings has taproots in the Parliamentary struggles of the Sixteenth and Seventeenth Centuries. As Parliament achieved increasing independence from the Crown, its statement of the privilege grew stronger. In 1523, Sir Thomas More could make only a tentative claim. Roper, Life of Sir Thomas More, in More's Utopia (Adams ed.) 10. In 1668, after a long and bitter struggle, Parliament finally laid the ghost of Charles I, who had prosecuted Sir John Elliot and others for "seditious" speeches in Parliament. Proceedings against Sir John Elliot, 3 How. St. Tr., 294, 332. In 1689, the Bill of Rights declared in unequivocal language: "That the Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament." 1 Wm. & Mary, Sess. 2, c. II. See *Stockdale* v. *Hansard,* 9 Ad. & El. 1, 113–114 (1839).

Freedom of speech and action in the legislature was taken as a matter of course by those who severed the Colonies from the Crown and founded our Nation. It was deemed so essential for representatives of the people that it was written into the Articles of Confederation and later into the Constitution. Article V of the Articles of Confederation is quite close to the English Bill of Rights: "Freedom of speech and debate in Congress shall not be impeached or questioned in any court or place out of Congress . . . ." Article I, § 6, of the Constitution pro-

vides: ". . . for any Speech or Debate in either House, [the Senators and Representatives] shall not be questioned in any other Place."

The reason for the privilege is clear. It was well summarized by James Wilson, an influential member of the Committee of Detail which was responsible for the provision in the Federal Constitution. "In order to enable and encourage a representative of the public to discharge his public trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offence." II Works of James Wilson (Andrews ed. 1896) 38. See the statement of the reason for the privilege in the Report from the Select Committee on the Official Secrets Acts (House of Commons, 1939) xiv.

The provision in the United States Constitution was a reflection of political principles already firmly established in the States. Three State Constitutions adopted before the Federal Constitution specifically protected the privilege. The Maryland Declaration of Rights, Nov. 3, 1776, provided: "That freedom of speech, and debates or proceedings, in the legislature, ought not to be impeached in any other court or judicature." Art. VIII. The Massachusetts Constitution of 1780 provided: "The freedom of deliberation, speech and debate, in either house of the legislature, is so essential to the rights of the people, that it cannot be the foundation of any accusation or prosecution, action, or complaint, in any other court or place whatsoever." Part The First, Art. XXI. Chief Justice Parsons gave the following gloss to this provision in *Coffin* v. *Coffin,* 4 Mass. 1, 27 (1808):

> "These privileges are thus secured, not with the intention of protecting the members against prosecutions for their own benefit, but to support the

> rights of the people, by enabling their representatives to execute the functions of their office without fear of prosecutions, civil or criminal. I therefore think that the article ought not to be construed strictly, but liberally, that the full design of it may be answered. I will not confine it to delivering an opinion, uttering a speech, or haranguing in debate; but will extend it to the giving of a vote, to the making of a written report, and to every other act resulting from the nature, and in the execution, of the office; and I would define the article as securing to every member exemption from prosecution, for every thing said or done by him, as a representative, in the exercise of the functions of that office, without inquiring whether the exercise was regular according to the rules of the house, or irregular and against their rules."

The New Hampshire Constitution of 1784 provided: "The freedom of deliberation, speech, and debate, in either house of the legislature, is so essential to the rights of the people, that it cannot be the foundation of any action, complaint, or prosecution, in any other court or place whatsoever." Part I, Art. XXX.[3]

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[3] In two State Constitutions of 1776, the privilege was protected by general provisions preserving English law. See S. C. Const., 1776, Art. VII; N. J. Const., 1776, Art. XXII. Compare N. C. Const., 1776, § XLV.

Three other of the original States made specific provision to protect legislative freedom immediately after the Federal Constitution was adopted. See Pa. Const., 1790, Art. I, § 17; Ga. Const., 1789, Art. I, § 14; Del. Const., 1792, Art. II, § 11. Connecticut and Rhode Island so provided in the first constitutions enacted to replace their uncodified organic law. Conn. Const., 1818, Art. Third, § 10; R. I. Const., 1842, Art. IV, § 5.

In New York, the Bill of Rights passed by the legislature on January 26, 1787, provided: "That the freedom of speech and debates, and proceedings in the senate and assembly, shall not be

It is significant that legislative freedom was so carefully protected by constitutional framers at a time when even Jefferson expressed fear of legislative excess.[4] For the loyalist executive and judiciary had been deposed, and the legislature was supreme in most States during and after the Revolution. "The legislative department is every where extending the sphere of its activity, and drawing all power into its impetuous vortex." Madison, The Federalist, No. XLVIII.

As other States joined the Union or revised their Constitutions, they took great care to preserve the principle that the legislature must be free to speak and act without fear of criminal and civil liability. Forty-one of the forty-eight States now have specific provisions in their Constitutions protecting the privilege.[5]

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impeached or questioned in any court or place out of the senate or assembly." In Virginia, as well as in the other colonies, the assemblies had built up a strong tradition of legislative privilege long before the Revolution. See Clarke, Parliamentary Privilege in the American Colonies (1943), *passim*, especially 70 and 93 *et seq.*

[4] See Jefferson, Notes on the State of Virginia (3d Am. ed. 1801), 174–175. The Notes were written in 1781. See also, a letter from Jefferson to Madison, March 15, 1789, to be published in a forthcoming volume of The Papers of Thomas Jefferson (Boyd ed.): "The tyranny of the legislatures is the most formidable dread at present, and will be for long years." As to the political currents at the time the United States Constitution and the State Constitutions were formulated, see Corwin, The Progress of Constitutional Theory between the Declaration of Independence and the Meeting of the Philadelphia Convention, 30 Am. Hist. Rev. 511 (1925).

[5] Ala. Const., Art. IV, § 56; Ariz. Const., Art. IV, 2, § 7; Ark. Const., Art. V, § 15; Colo. Const., Art. V, § 16; Conn. Const., Art. Third, § 10; Del. Const., Art. II, § 13; Ga. Const., Art. III, § VII, par. III; Idaho Const., Art. III, § 7; Ill. Const., Art. IV, § 14; Ind. Const., Art. 4, § 8; Kan. Const., Art. 2, § 22; Ky. Const., § 43; La. Const., Art. III, § 13; Me. Const., Art. IV, Pt. Third, § 8; Md. D. R. 10, Const., Art. III, § 18; Mass. Const., Pt. First, Art. 21; Mich. Const., Art. V, § 8; Minn. Const., Art. IV, § 8; Mo. Const., Art. III, § 19; Mont. Const., Art. V, § 15; Neb. Const., Art. III, § 26; N. H. Const.,

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Did Congress by the general language of its 1871 statute mean to overturn the tradition of legislative freedom achieved in England by Civil War and carefully preserved in the formation of State and National Governments here? Did it mean to subject legislators to civil liability for acts done within the sphere of legislative activity? Let us assume, merely for the moment, that Congress has constitutional power to limit the freedom of State legislators acting within their traditional sphere. That would be a big assumption. But we would have to make an even rasher assumption to find that Congress thought it had exercised the power. These are difficulties we cannot hurdle. The limits of §§ 1 and 2 of the 1871 statute—now §§ 43 and 47 (3) of Title 8—were not spelled out in debate. We cannot believe that Congress—itself a staunch advocate of legislative freedom—would impinge on a tradition so well grounded in history and reason by covert inclusion in the general language before us.

We come then to the question whether from the pleadings it appears that the defendants were acting in the sphere of legitimate legislative activity. Legislatures may not of course acquire power by an unwarranted extension of privilege. The House of Commons' claim of power to

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Pt. First, Art. 30th; N. J. Const., Art. IV, § *IV*, par. 8; N. M. Const., Art. IV, § 13; N. Y. Const., Art. III, § 11; N. D. Const., Art. II, § 42; Ohio Const., Art. II, § 12; Okla. Const., Art. V, § 22; Ore. Const., Art. IV, § 9; Pa. Const., Art. II, § 15; R. I. Const., Art. IV, § 5; S. D. Const., Art. III, § 11; Tenn. Const., Art. II, § 13; Tex. Const., Art. III, § 21; Utah Const., Art. VI, § 8; Vt. Const., c. I, Art. 14th; Va. Const., Art. IV, § 48; Wash. Const., Art. II, § 17; W. Va. Const., Art. VI, § 17; Wis. Const., Art. IV, § 16; Wyo. Const., Art. 3, § 16.

Compare Iowa Const., Art. III, § 10; N. C. Const., Art. II, § 17 (right of legislator to protest action of legislature). See also, Cal. Const., Art. IV, § 11; Iowa Const., Art. III, § 11; Miss. Const., Art. 4, § 48; Nev. Const., Art. IV, § 11; S. C. Const., Art. III, § 14 (freedom from arrest). Only the Florida Constitution has no provision concerning legislative privilege.

establish the limits of its privilege has been little more than a pretense since *Ashby* v. *White,* 2 Ld. Raym. 938, 3 *id.* 320. This Court has not hesitated to sustain the rights of private individuals when it found Congress was acting outside its legislative role. *Kilbourn* v. *Thompson,* 103 U. S. 168; *Marshall* v. *Gordon,* 243 U. S. 521; compare *McGrain* v. *Daugherty,* 273 U. S. 135, 176.

The claim of an unworthy purpose does not destroy the privilege. Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. One must not expect uncommon courage even in legislators. The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives. The holding of this Court in *Fletcher* v. *Peck,* 6 Cranch 87, 130, that it was not consonant with our scheme of government for a court to inquire into the motives of legislators, has remained unquestioned. See cases cited in *Arizona* v. *California,* 283 U. S. 423, 455.

Investigations, whether by standing or special committees, are an established part of representative government.[6] Legislative committees have been charged with

[6] See Wilson, Congressional Government (1885), 303: "It is the proper duty of a representative body to look diligently into every affair of government and to talk much about what it sees. It is meant to be the eyes and the voice, and to embody the wisdom and will of its constituents. Unless Congress have and use every means of acquainting itself with the acts and the disposition of the administrative agents of the government, the country must be helpless to learn how it is being served; and unless Congress both scrutinize these things and sift them by every form of discussion, the country must remain in embarrassing, crippling ignorance of the very affairs which it is most important that it should understand and direct. The informing function of Congress should be preferred even to its legislative function."

losing sight of their duty of disinterestedness. In times of political passion, dishonest or vindictive motives are readily attributed to legislative conduct and as readily believed.[7] Courts are not the place for such controversies. Self-discipline and the voters must be the ultimate reliance for discouraging or correcting such abuses. The courts should not go beyond the narrow confines of determining that a committee's inquiry may fairly be deemed within its province. To find that a committee's investigation has exceeded the bounds of legislative power it must be obvious that there was a usurpation of functions exclusively vested in the Judiciary or the Executive. The present case does not present such a situation. Brandhove indicated that evidence previously given by him to the committee was false, and he raised serious charges concerning the work of a committee investigating a problem within legislative concern. The Committee was entitled to assert a right to call the plaintiff before it and examine him.

It should be noted that this is a case in which the defendants are members of a legislature. Legislative privilege in such a case deserves greater respect than where an official acting on behalf of the legislature is sued or the legislature seeks the affirmative aid of the courts to assert a privilege. In *Kilbourn* v. *Thompson, supra,* this Court allowed a judgment against the Sergeant-at-Arms, but found that one could not be entered against the defendant members of the House.

We have only considered the scope of the privilege as applied to the facts of the present case. As Mr. Justice Miller said in the *Kilbourn* case: "It is not necessary to decide here that there may not be things done, in the one House or the other, of an extraordinary character, for

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[7] See Dilliard, Congressional Investigations: The Role of the Press, 18 U. of Chi. L. Rev. 585.

which the members who take part in the act may be held legally responsible." 103 U. S. at 204. We conclude only that here the individual defendants and the legislative committee were acting in a field where legislators traditionally have power to act, and that the statute of 1871 does not create civil liability for such conduct.

The judgment of the Court of Appeals is reversed and that of the District Court affirmed.

Reversed.

MR. JUSTICE BLACK, concurring.

The Court holds that the Civil Rights statutes[1] were not intended to make legislators personally liable for damages to a witness injured by a committee exercising legislative power. This result is reached by reference to the long-standing and wise tradition that legislators are immune from legal responsibility for their intra-legislative statements and activities. The Court's opinion also points out that *Kilbourn* v. *Thompson,* 103 U. S. 168, held legislative immunity to have some limits. And today's decision indicates that there is a point at which a legislator's conduct so far exceeds the bounds of legislative power that he may be held personally liable in a suit brought under the Civil Rights Act. I substantially agree with the Court's reasoning and its conclusion. But since this is a difficult case for me, I think it important to emphasize what we do *not* decide.

It is not held that the validity of legislative action is coextensive with the personal immunity of the legislators. That is to say, the holding that the chairman and the other members of his Committee cannot be sued in this case is not a holding that their alleged persecution of Brandhove is legal conduct. Indeed, as I understand the decision, there is still much room for challenge to the

[1] 8 U. S. C. §§ 43, 47 (3).

Committee action. Thus, for example, in any proceeding instituted by the Tenney Committee to fine or imprison Brandhove on perjury, contempt or other charges, he would certainly be able to defend himself on the ground that the resolution creating the Committee or the Committee's actions under it were unconstitutional and void.

In this connection it is not out of place to observe that the resolution creating the Committee is so broadly drawn that grave doubts are raised as to whether the Committee could constitutionally exercise all the powers purportedly bestowed on it.[2] In part, the resolution directs the Committee

> "to ascertain . . . all facts relating to the activities of persons and groups known or suspected to be dominated or controlled by a foreign power, and who owe allegiance thereto because of religious, racial, political, ideological, philosophical, or other ties, including but not limited to the influence upon all such persons and groups of education, economic circumstances, social positions, fraternal and casual associations, living standards, race, religion, political, ancestry and the activities of paid provocation . . . ." Cal. Senate Resolution 75, June 20, 1947.

Of course the Court does not in any way sanction a legislative inquisition of the type apparently authorized by this resolution.

Unfortunately, it is true that legislative assemblies, born to defend the liberty of the people, have at times violated their sacred trusts and become the instruments of oppression. Many specific instances could be cited but perhaps the most recent spectacular illustration is the use of a committee of the Argentine Congress as the

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[2] See Judge Edgerton dissenting in *Barsky* v. *United States*, 83 U. S. App. D. C. 127, 138, 167 F. 2d 241, 252; Judge Charles E. Clark dissenting in *United States* v. *Josephson*, 165 F. 2d 82, 93.

instrument to strangle the independent newspaper *La Prensa* because of the views it espoused.[3] In light of this Argentine experience, it does not seem inappropriate to point out that the right of every person in this country to have his say, however unorthodox or unpopular he or his opinions may be, is guaranteed by the same constitutional amendment that protects the free press. Those who cherish freedom of the press here would do well to remember that this freedom cannot long survive the legislative snuffing out of freedom to believe and freedom to speak.

MR. JUSTICE DOUGLAS, dissenting.

I agree with the opinion of the Court as a statement of general principles governing the liability of legislative committees and members of the legislatures. But I do

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[3] N. Y. Times, Mar. 16, 1951, p. 1, col. 2; N. Y. Times, Mar. 17, 1951, p. 1, col. 2. The situation was graphically described in an editorial appearing in *La Nacion* of Buenos Aires on March 18, 1951: "But no one could have imagined until this moment that Congress, properly invested with implicit powers of investigation, could decree interventions of this nature intended to carry out acts which, under no circumstance, come within the province of the Legislature. In the present case this alteration of functions is of unusual importance because it affects an inviolable constitutional principle. If Congress cannot dictate 'laws restrictive of the freedom of the press' [Art. 23, Argentine Constitution], which would be the only possible step within its specific function, how could it take possession of newspapers, hinder their activity and decide their fate, all these being acts whereby the exercise of that same freedom is rendered impracticable? If such a state of things is permitted and becomes generalized, then it means that the repetition of these acts whenever it is deemed suitable in view of conflicting opinions, would cause the constitutional guarantee to be utterly disregarded. . . . Last year the activities of an investigating congressional commission [The Committee on Anti-Argentine Activities], appointed for another concrete purpose, served to bring about the closure of up to 49 newspapers in one day. . . ." See generally, Editor & Publisher, Mar. 24, 1951, p. 5.

not agree that all abuses of legislative committees are solely for the legislative body to police.

We are dealing here with a right protected by the Constitution—the right of free speech. The charge seems strained and difficult to sustain; but it is that a legislative committee brought the weight of its authority down on respondent for exercising his right of free speech. Reprisal for speaking is as much an abridgment as a prior restraint. If a committee departs so far from its domain to deprive a citizen of a right protected by the Constitution, I can think of no reason why it should be immune. Yet that is the extent of the liability sought to be imposed on petitioners under 8 U. S. C. § 43.[1]

It is speech and debate in the legislative department which our constitutional scheme makes privileged. Included, of course, are the actions of legislative committees that are authorized to conduct hearings or make investigations so as to lay the foundation for legislative action. But we are apparently holding today that the actions of those committees have no limits in the eyes of the law. May they depart with impunity from their legislative functions, sit as kangaroo courts, and try men for their loyalty and their political beliefs? May they substitute trial before committees for trial before juries? May they sit as a board of censors over industry, prepare their blacklists of citizens, and issue pronouncements as devastating as any bill of attainder?

No other public official has complete immunity for his actions. Even a policeman who exacts a confession by

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[1] "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

force and violence can be held criminally liable under the Civil Rights Act, as we ruled only the other day in *Williams* v. *United States,* 341 U. S. 97. Yet now we hold that no matter the extremes to which a legislative committee may go it is not answerable to an injured party under the civil rights legislation. That result is the necessary consequence of our ruling since the test of the statute, so far as material here, is whether a constitutional right has been impaired, not whether the domain of the committee was traditional. It is one thing to give great leeway to the legislative right of speech, debate, and investigation. But when a committee perverts its power, brings down on an individual the whole weight of government for an illegal or corrupt purpose, the reason for the immunity ends. It was indeed the purpose of this civil rights legislation to secure federal rights against invasion by officers and agents of the states. I see no reason why any officer of government should be higher than the Constitution from which all rights and privileges of an office obtain.

SCHWEGMANN BROTHERS ET AL. *v.* CALVERT DISTILLERS CORP.

NO. 442. CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.*

Argued April 9–10, 1951.—Decided May 21, 1951.

The Miller-Tydings Act exempts from the operation of the Sherman Act "contracts or agreements prescribing minimum prices for the resale" of specified commodities when "contracts or agreements of that description are lawful as applied to intrastate transactions" under local law. Respondents, distributors of gin and whiskey in interstate commerce, have contracts or agreements with Louisiana retailers fixing minimum retail prices for respondents' products. Louisiana law authorizes enforcement of price fixing not only against parties to a "contract" but also against nonsigners. Petitioner, a retailer in New Orleans, refused to sign a price-fixing contract with respondents and sold respondents' products at cut-rate prices. *Held:* Respondents were not entitled by reason of the Miller-Tydings Act to enjoin petitioner from selling their products at less than the minimum prices fixed by their schedules. Pp. 385–395.

(a) Price fixing is unlawful *per se* under the Sherman Act. P. 386.

(b) The Miller-Tydings Act exempts "contracts or agreements prescribing minimum prices for the resale" of the articles purchased, not "contracts or agreements" respecting the practices of noncontracting competitors of the contracting retailers. Pp. 387–390.

(c) The history of the Miller-Tydings Act supports the construction here given it. Pp. 390–395.

184 F. 2d 11, reversed.

The District Court enjoined petitioner from alleged unlawful price cutting. The Court of Appeals affirmed. 184 F. 2d 11. This Court granted certiorari. 340 U. S. 928. *Reversed,* p. 395.

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*Together with No. 443, *Schwegmann Brothers et al.* v. *Seagram Distillers Corp.,* also on certiorari to the same court.

John Minor Wisdom and *Saul Stone* argued the cause and filed a brief for petitioners.

Monte M. Lemann argued the cause for respondents. With him on the brief were *Thomas Kiernan, Edgar E. Barton, J. Blanc Monroe* and *Walter J. Suthon, Jr.*

Solicitor General Perlman, Assistant Attorney General Morison, Robert L. Stern, Charles H. Weston and *J. Roger Wollenberg* filed a brief for the United States, as *amicus curiae,* urging reversal.

Briefs of *amici curiae* supporting respondents were filed by *Robert E. Woodside,* Attorney General, and *Harry F. Stambaugh* for the State of Pennsylvania; *Samuel I. Rosenman, Godfrey Goldmark* and *Herman S. Waller* for the National Assn. of Retail Druggists et al.; *Herbert A. Bergson* for Coty Incorporated et al.; and by *Murray F. Cleveland* for the Louisiana State Pharmaceutical Association.

Mr. Justice Douglas delivered the opinion of the Court.

Respondents, Maryland and Delaware corporations, are distributors of gin and whiskey. They sell their products to wholesalers in Louisiana, who in turn sell to retailers. Respondents have a price-fixing scheme whereby they try to maintain uniform retail prices for their products. They endeavor to make retailers sign price-fixing contracts under which the buyers promise to sell at not less than the prices stated in respondents' schedules. They have indeed succeeded in getting over one hundred Louisiana retailers to sign these agreements. Petitioner, a retailer in New Orleans, refused to agree to the price-fixing scheme and sold respondents' products at a cut-rate price. Respondents thereupon brought this suit in the District Court by reason of diversity of citizen-

ship to enjoin petitioner from selling the products at less than the minimum prices fixed by their schedules.

It is clear from our decisions under the Sherman Act (26 Stat. 209) that this interstate marketing arrangement would be illegal, that it would be enjoined, that it would draw civil and criminal penalties, and that no court would enforce it. Fixing minimum prices, like other types of price fixing, is illegal *per se*. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150; *Kiefer-Stewart Co.* v. *Seagram & Sons*, 340 U. S. 211. Resale price maintenance was indeed struck down in *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U. S. 373. The fact that a state authorizes the price fixing does not, of course, give immunity to the scheme, absent approval by Congress.

Respondents, however, seek to find legality for this marketing arrangement in the Miller-Tydings Act enacted in 1937 as an amendment to § 1 of the Sherman Act. 50 Stat. 693, 15 U. S. C. § 1. That amendment provides in material part that "nothing herein contained shall render illegal, *contracts or agreements* prescribing minimum prices for the resale" of specified commodities when "*contracts or agreements of that description* are lawful as applied to intrastate transactions" under local law.[1] (Italics added.)

Louisiana has such a law. La. Gen. Stat., §§ 9809.1 *et seq.* It permits a "contract" for the sale or resale of a commodity to provide that the buyer will not resell "except at the price stipulated by the vendor." The

[1] Resale price maintenance is allowed only as respects commodities which bear, or the label or container of which bear, the trade mark, brand, or name of the producer or distributor and which are in free and open competition with commodities of the same general class produced or distributed by others. Excluded are agreements between manufacturers, between producers, between wholesalers, between brokers, between factors, between retailers or between persons, firms or corporations in competition with each other.

Louisiana statute goes further. It not only allows a distributor and retailer to make a "contract" fixing the resale price; but once there is a price-fixing "contract," known to a seller, with any retailer in the state, it also condemns as unfair competition a sale at less than the price stipulated even though the seller is not a party to the "contract." [2] In other words, the Louisiana statute enforces price fixing not only against parties to a "contract" but also against nonsigners. So far as Louisiana law is concerned, price fixing can be enforced against all retailers once any single retailer agrees with a distributor on the resale price. And the argument is that the Miller-Tydings Act permits the same range of price fixing.

The argument is phrased as follows: the present action is outlawed by the Sherman Act—the Miller-Tydings Act apart—only if it is a contract, combination, or conspiracy in restraint of trade. But if a contract or agreement is the vice, then by the terms of the Miller-Tydings Act that contract or agreement is immunized, provided it is immunized by state law. The same is true if the vice is a conspiracy, since a conspiracy presupposes an agreement. That was in essence the view of the Court of Appeals, which affirmed by a divided vote a judgment of a district court enjoining petitioner from price cutting. 184 F. 2d 11.

The argument at first blush has appeal. But we think it offends the statutory scheme.

We note to begin with that there are critical differences between Louisiana's law and the Miller-Tydings Act.

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[2] The nonsigner clause in the Louisiana Act reads as follows: "Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provision of section 1 [§ 9809.1] of this act, *whether the person so advertising, offering for sale or selling is or is not a party to such contract,* is unfair competition and is actionable at the suit of any person damaged thereby."

The latter exempts only "contracts or agreements prescribing minimum prices for the resale." On the other hand, the Louisiana law sanctions the fixing of maximum as well as minimum prices, for it exempts any provision that the buyer will not resell "except at the price stipulated by the vendor." We start then with a federal act which does not, as respondents suggest, turn over to the states the handling of the whole problem of resale price maintenance on this type of commodity. What is granted is a limited immunity—a limitation that is further emphasized by the inclusion in the state law and the exclusion from the federal law of the nonsigner provision. The omission of the nonsigner provision from the federal law is fatal to respondents' position unless we are to perform a distinct legislative function by reading into the Act a provision that was meticulously omitted from it.

A refusal to read the nonsigner provision into the Miller-Tydings Act makes sense if we are to take the words of the statute in their normal and customary meaning. The Act sanctions only "contracts or agreements." If a distributor and one or more retailers want to agree, combine, or conspire to fix a minimum price, they can do so if state law permits. Their contract, combination, or conspiracy—hitherto illegal—is made lawful. They can fix minimum prices pursuant to their contract or agreement with impunity. When they seek, however, to impose price fixing on persons who have not contracted or agreed to the scheme, the situation is vastly different. That is not price fixing by contract or agreement; that is price fixing by compulsion. That is not following the path of consensual agreement; that is resort to coercion.

Much argument is made to import into the contracts which respondents make with retailers a provision that the parties may force nonsigners into line. It is said that state law attaches that condition to every such con-

tract and that therefore the Miller-Tydings Act exempts it from the Sherman Act. Such a condition, if implied, creates an agreement respecting not sales made under the contract but other sales. Yet all that are exempted by the Miller-Tydings Act are "contracts or agreements prescribing minimum prices for the resale" of the articles purchased, not "contracts or agreements" respecting the practices of noncontracting competitors of the contracting retailers.

It should be noted in this connection that the Miller-Tydings Act expressly continues the prohibitions of the Sherman Act against "horizontal" price fixing by those in competition with each other at the same functional level.[3] Therefore, when a state compels retailers to follow a parallel price policy, it demands private conduct which the Sherman Act forbids. See *Parker* v. *Brown,* 317 U. S. 341, 350. Elimination of price competition at the retail level may, of course, lawfully result if a distributor successfully negotiates individual "vertical" agreements with all his retailers. But when retailers are *forced* to abandon price competition, they are driven into a compact in violation of the spirit of the proviso which forbids "horizontal" price fixing. A real sanction can be given the prohibitions of the proviso only if the price maintenance power granted a distributor is limited to *voluntary* engagements. Otherwise, the exception swallows the proviso and destroys its practical effectiveness.

The contrary conclusion would have a vast and devastating effect on Sherman Act policies. If it were adopted, once a distributor executed a contract with a

[3] "*Provided further,* That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, . . . or between retailers, or between persons, firms, or corporations in competition with each other." 15 U. S. C. § 1.

single retailer setting the minimum resale price for a commodity in the state, all other retailers could be forced into line. Had Congress desired to eliminate the consensual element from the arrangement and to permit blanketing a state with resale price fixing if only one retailer wanted it, we feel that different measures would have been adopted—either a nonsigner provision would have been included or resale price fixing would have been authorized without more. Certainly the words used connote a voluntary scheme. Contracts or agreements convey the idea of a cooperative arrangement, not a program whereby recalcitrants are dragged in by the heels and compelled to submit to price fixing.

The history of the Act supports this construction. The efforts to override the rule of *Dr. Miles Medical Co.* v. *Park & Sons Co., supra,* were long and persistent. Many bills had been introduced on this subject before Senator Tydings introduced his. Thus in 1929, in the Seventy-First Congress, the Capper-Kelly fair trade bill was offered.[4] It had no nonsigner provision. It merely permitted resale price maintenance as respects specified classes of commodities by declaring that no such "contract relating to the sale or resale" shall be unlawful. As stated in the House Report, that bill merely legalized an agreement "that the vendee will not resell the commodity specified in the contract except at a stipulated price." [5] That bill became the model for the California act passed in 1931—the first state act permitting resale price maintenance.[6] The California act contained no nonsigner clause. Neither did the Capper-Kelly bill that

[4] S. 240, 71st Cong., 1st Sess.; H. R. 11, 71st Cong., 1st Sess. See H. R. Rep. No. 536, 71st Cong., 2d Sess.

[5] H. R. Rep. No. 536, 71st Cong., 2d Sess. 2.

[6] Cal. Stat., 1931, c. 278. The California Act was sometimes known as "the Junior Capper-Kelly." See Grether, Price Control Under Fair Trade Legislation (1939), p. 54.

was introduced in the Seventy-Second Congress.[7] So far as material here it was identical with its predecessor.

The Capper-Kelly bill did not pass. And by the time the next bill was introduced—three years later—the California act had been changed by the addition of the nonsigner provision.[8] That was in 1933. Yet when in 1936 Senator Tydings introduced his first bill in the Seventy-Fourth Congress[9] he followed substantially the Capper-Kelly bills and wrote no nonsigner provision into it. His bill merely legalized "contracts or agreements prescribing minimum prices or other conditions for the resale" of a commodity. By this date several additional states had resale price maintenance laws with nonsigner provisions.[10] Even though the state laws were the models for the federal bills, the nonsigner provision was never added. That was true of the bill introduced in the Seventy-Fifth Congress as well as the subsequent one. They all followed in this respect the pattern of the Capper-Kelly bill as it appeared before the first nonsigner provision was written into state law. The "contract" concept utilized by Capper-Kelly before there was a nonsigner provision in state law was thus continued even after the nonsigner provision appeared. The inference, therefore, is strong that there was continuity between the first Tydings bill and the preceding Capper-Kelly bills. The Tydings bills built on the same foundation; they were no more concerned with nonsigner provisions than were their predecessors. In view of this history we can only conclude that, if the

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[7] S. 97, 72d Cong., 1st Sess.; H. R. 11, 72d Cong., 1st Sess.

[8] Cal. Stat., 1933, c. 260: The California law is now found in Business & Professions Code, Pt. 2, c. 3, § 16904.

[9] S. 3822, 74th Cong., 2d Sess., 80 Cong. Rec. 1007.

[10] See Ill. Laws 1935, p. 1436; Iowa Laws 1935, c. 106; Md. Laws 1935, c. 212, § 2; N. J. Laws 1935, c. 58, § 2; N. Y. Laws 1935, c. 976, § 2; Ore. Laws 1935, c. 295, § 2; Pa. Laws 1935, No. 115, § 2; Wash. Laws 1935, c. 177, § 4; Wis. Laws 1935, c. 52.

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draftsman intended that the nonsigning retailer was to be coerced, it was strange indeed that he omitted the one clear provision that would have accomplished that result.

An argument is made from the reports and debates to the effect that "contracts or agreements" nevertheless includes the nonsigner provisions of state law. The Senate Report on the first Tydings bill, after stating that the California law authorized a distributor "to make a contract that the purchaser will not resell" except at the stipulated price, said that the proposed federal law "does no more than to remove Federal obstacles to the enforcement of contracts which the States themselves have declared lawful." [11] The Senate Report on the second Tydings bill, which was introduced in the Seventy-fifth Congress, did little more than reprint the earlier report.[12] The House Report, heavily relied on here, gave a more extended analysis.[13]

The House Report referred to the state fair trade acts as authorizing the maintenance of resale prices by contract and as providing that "third parties with notice are bound by the terms of such a contract regardless of whether they are parties to it"; and the Report also stated that the objective of the Act was to permit the public policy of the states having such acts to operate with respect to interstate contracts for the sale of goods.[14] This Report is the strongest statement for respondents' position which is found in the legislative history. The bill which that Report endorsed, however, did not pass. The bill which became the law was attached by the Senate Committee on the District of Columbia as a rider to the District of Columbia revenue bill. In that form it was debated and passed.

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[11] S. Rep. No. 2053, 74th Cong., 2d Sess. 2.

[12] S. Rep. No. 257, 75th Cong., 1st Sess.

[13] H. R. Rep. No. 382, 75th Cong., 1st Sess.

[14] *Id.*, p. 2.

It is true that the House Report quoted above [15] was referred to when the Senate amendment to the revenue measure was before the House.[16] And one Congressman in the debate said that the nonsigner provision of state laws was validated by the federal law.

But we do not take these remarks at face value. In the first place, the House Report, while referring to the nonsigner provision when describing a typical state fair trade act, is so drafted that the voluntary contract is the core of the argument for the bill. Hence, the General Statement in the Report states that the sole objective of the Act was "to permit the public policy of States having 'fair trade acts' to operate with respect to interstate *contracts* for the resale of goods"; and the fair trade acts are referred to as legalizing "the maintenance, *by contract,* of resale prices of branded or trade-marked goods." [17] (Italics added.)

In the second place, the remarks relied on were not only about a bill on which no vote was taken; they were about a bill which sanctioned "contracts or agreements" prescribing not only "minimum prices" but "other conditions" as well. The words "other conditions" were dropped from the amendment that was made to the revenue bill. Why they were deleted does not appear. It is said that they have no relevance to the present problem, since we are dealing here with "minimum prices" not with "other conditions." But that answer does not quite hold. The question is the amount of state law embraced in the words "contracts or agreements." It might well be argued that one of the "conditions" attaching to a contract fixing a minimum price would be the liability of a nonsigner.

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[15] *Id.*

[16] See, *e. g.*, the statement of Rep. Dirksen, a House conferee, in 81 Cong. Rec. 8138.

[17] H. R. Rep. No. 382, 75th Cong., 1st Sess. 2.

We do no more than stir the doubt, for the doubt alone is enough to make us skeptical of the full implications of the old report as applied to a new and different bill.

We look for more definite clues; and we find the following statement made on the floor by Senator Tydings: "What does the amendment do? It permits a man who manufactures an article to state the minimum resale price of the article in a contract with the man who buys it for ultimate resale to the public . . . ." [18] Not once did Senator Tydings refer to the nonsigner provisions of state law. Not once did he suggest that the amendment would affect anyone but the retailer who signs the contract. We search the words of the sponsors for a clear indication that coercive as well as voluntary schemes or arrangements are permissible. We find none.[19] What we do find is the expression of fear in the minority report of the Senate Committee that the nonsigner provisions of the state laws would be made effective if the law passed.[20] These fears were presented in the Senate debate by Senator King in opposition to the amendment.[21] But the Senate Report emphasizes the "permissive" nature of the state laws,[22] not once pointing to their coercive features.

The fears and doubts of the opposition are no authoritative guide to the construction of legislation. It is the sponsors that we look to when the meaning of the statu-

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[18] 81 Cong. Rec. 7495.

[19] H. R. Rep. No. 1413, 75th Cong., 1st Sess. 10 (the Conference Report of the House) merely stated: "This amendment provides for an amendment to the antitrust laws under which contracts and agreements stipulating minimum resale prices of certain commodities, and which are similar to contracts and agreements which are lawful as applied to intrastate commerce, are not to be regarded as being illegal under the antitrust laws."

[20] S. Rep. No. 879, 75th Cong., 1st Sess.

[21] 81 Cong. Rec. 7491. And see S. Rep. No. 879, Part 2, 75th Cong., 1st Sess.

[22] S. Rep. No. 879, 75th Cong., 1st Sess. 6.

tory words is in doubt. And when we read what the sponsors wrote and said about the amendment, we cannot find that the distributors were to have the right to use not only a *contract* to fix retail prices but a *club* as well. The words they used—"contracts or agreements"—suggest just the contrary.

It should be remembered that it was the state laws that the federal law was designed to accommodate. Federal regulation was to give way to state regulation. When state regulation provided for resale price maintenance by both those who contracted and those who did not, and the federal regulation was relaxed only as respects "contracts or agreements," the inference is strong that Congress left the noncontracting group to be governed by preexisting law. In other words, since Congress was writing a law to meet the specifications of state law, it would seem that if the nonsigner provision as well as the "contract" provision of state law were to be written into federal law, the pattern of the legislation would have been different.

We could conclude that Congress carved out the vast exception from the Sherman Act now claimed only if we were willing to assume that it took a devious route and yet failed to make its purpose plain.

Reversed.

MR. JUSTICE JACKSON, whom MR. JUSTICE MINTON joins, concurring.

I agree with the Court's judgment and with its opinion insofar as it rests upon the language of the Miller-Tydings Act. But it does not appear that there is either necessity or propriety in going back of it into legislative history.

Resort to legislative history is only justified where the face of the Act is inescapably ambiguous, and then I think we should not go beyond Committee reports, which presumably are well considered and carefully prepared.

I cannot deny that I have sometimes offended against that rule. But to select casual statements from floor debates, not always distinguished for candor or accuracy, as a basis for making up our minds what law Congress intended to enact is to substitute ourselves for the Congress in one of its important functions. The Rules of the House and Senate, with the sanction of the Constitution, require three readings of an Act in each House before final enactment. That is intended, I take it, to make sure that each House knows what it is passing and passes what it wants, and that what is enacted was formally reduced to writing. It is the business of Congress to sum up its own debates in its legislation. Moreover, it is only the words of the bill that have presidential approval, where that approval is given. It is not to be supposed that, in signing a bill, the President endorses the whole Congressional Record. For us to undertake to reconstruct an enactment from legislative history is merely to involve the Court in political controversies which are quite proper in the enactment of a bill but should have no place in its interpretation.

Moreover, there are practical reasons why we should accept whenever possible the meaning which an enactment reveals on its face. Laws are intended for all of our people to live by; and the people go to law offices to learn what their rights under those laws are. Here is a controversy which affects every little merchant in many States. Aside from a few offices in the larger cities, the materials of legislative history are not available to the lawyer who can afford neither the cost of acquisition, the cost of housing, or the cost of repeatedly examining the whole congressional history. Moreover, if he could, he would not know any way of anticipating what would impress enough members of the Court to be controlling. To accept legislative debates to modify statutory provi-

sions is to make the law inaccessible to a large part of the country.

By and large, I think our function was well stated by Mr. Justice Holmes: "We do not inquire what the legislature meant; we ask only what the statute means." Holmes, Collected Legal Papers, 207. See also *Soon Hing* v. *Crowley,* 113 U. S. 703, 710–711. And I can think of no better example of legislative history that is unedifying and unilluminating than that of the Act before us.

MR. JUSTICE FRANKFURTER, whom MR. JUSTICE BLACK and MR. JUSTICE BURTON join, dissenting.

In 1890, Congress passed the Sherman Law, which declared illegal "[e]very 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." Act of July 2, 1890, § 1, 26 Stat. 209, 15 U. S. C. § 1. In 1937, Congress passed the Miller-Tydings Amendment. This excepted from the Sherman Law "contracts or agreements" prescribing minimum prices for the resale of trade-marked commodities where such contracts or agreements were valid under State statute or policy. Act of Aug. 17, 1937, Title VIII, 50 Stat. 673, 693, 15 U. S. C. § 1. It would appear that, insofar as the Sherman Law made maintenance of minimum resale prices illegal, the Miller-Tydings Amendment made it legal to the extent that State law legalized it. "Contracts or agreements" immunized by the Miller-Tydings Amendment surely cannot have a narrower scope than "contract, combination . . . or conspiracy" in the Sherman Law. The Miller-Tydings Amendment is an amendment to § 1 of the Sherman Law. The category of contract cannot be given different content in the very same section of the same act, and every combination or conspiracy implies an agreement.

The setting of the Miller-Tydings Amendment and its legislative history remove any lingering doubts. The depression following 1929 gave impetus to the movement for legislation which would allow the fixing of minimum resale prices. In 1931, California passed a statute allowing a manufacturer to establish resale prices binding only upon retailers who voluntarily entered into a contract with him. This proved completely ineffective, and in 1933 California amended her statute to provide that such a contract established a minimum price binding upon any person who had notice of the contract. Grether, Experience in California with Fair Trade Legislation Restricting Price Cutting, 24 Calif. L. Rev. 640, 644 (1936). This amendment was the so-called "non-signer" clause which, in effect, allowed a manufacturer or wholesaler to fix a minimum resale price for his product. Every "fair trade" law thereafter passed by any State contained this "non-signer" clause. By the close of 1936, 14 States had passed such laws. In 1937, 28 more States passed them. Today, 45 out of 48 States have "fair trade" laws. See Report of the Federal Trade Commission on Resale Price Maintenance XXVII (Dec. 13, 1945).

A substantial obstacle remained in the path of the "fair trade" movement. In 1911, we had decided *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U. S. 373. There, in a suit brought against a "non-signer," we held that an agreement to maintain resale prices was a "contract . . . in restraint of trade" which was contrary to the Sherman Law. To remove this block, the Miller-Tydings Amendment was enacted. It is said, however, that thereby Congress meant only to remove the bar of the Sherman Law from agreements between the manufacturer and retailer, that Congress did not mean to make valid the "non-signer" clause which formed an integral part of each of the 42 State statutes in effect when the Amendment was passed.

The Miller-Tydings Amendment was passed as a rider to a Revenue Bill for the District of Columbia. The Senate Committee which attached the rider referred the Senate to S. Rep. No. 2053, 74th Cong., 2d Sess.[1] The House Conference Report (H. R. Rep. No. 1413, 75th Cong., 1st Sess.), contains only five lines concerning the rider. But the rider was not a new measure. It came as no surprise to the House, which already had before it practically the same language in the Miller Bill, reported favorably by the Committee on the Judiciary. H. R. Rep. No. 382, 75th Cong., 1st Sess. Both the House and Senate, therefore, had before them reports dealing with the substance of the Miller-Tydings Amendment. These reports speak for themselves, and I attach them as appendices to this opinion, *post,* p. 402. Every State act referred to in these reports contained a "non-signer" provision. I cannot see how, in view of these reports, we can conclude that Congress meant the "non-signer" provisions to be invalid under the Sherman Law—unless, that is, we are to depart from the respect we have accorded authoritative legislative history in scores of cases during the last decade. See cases collected in *Commissioner* v. *Estate of Church,* 335 U. S. 632, 687, Appendix A. In many of these cases the purpose of Congress was far less clearly revealed than here.[2] It has never been questioned

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[1] The Senate Report on the District of Columbia Revenue Bill, S. Rep. No. 879, 75th Cong., 1st Sess., quoted S. Rep. No. 2053, 74th Cong., 2d Sess. See S. Rep. No. 257, 75th Cong., 1st Sess., which also quotes the text of the earlier report.

[2] The intricate verbal arguments used to support the Court's decision do not affect the clarity of the statute and its legislative history. (1) It is said that the proviso to the Miller-Tydings Amendment makes it inapplicable to "non-signer" clauses in State acts. But the proviso only made explicit that the Amendment applied only to vertical agreements and did not make legal horizontal agree-

in this Court that committee reports, as well as statements by those in charge of a bill or of a report, are authoritative elucidations of the scope of a measure.

It is suggested that we go to the words of the sponsors of the Miller-Tydings Amendment. We have done so. Their words confirm the plain meaning of the words of the statute and of the congressional reports. Senator Tydings made the following statement: "What we have attempted to do is what 42 States have already written on their statute books. It is simply to back up those acts, that is all; to have a code of fair trade practices written not by a national board such as the N. R. A. but by each State, so that the people may go to the State

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ments, for example, those between retailers or between manufacturers. See statements of Senator Tydings, 81 Cong. Rec. 7487, 7496. The wording of the proviso, in fact, follows closely a statement of what the Senate Committee thought was implicit in the State acts. See S. Rep. No. 2053, 74th Cong., 2d Sess. 2. (2) The fact that the 1931 California statute used wording similar to the Miller-Tydings Amendment and was later amended to refer to nonsigners is beside the mark. The words of the 1933 amendment to the California statute make clear that it was not, like the Miller-Tydings Amendment, designed to remove the bar of an antitrust act. It was enacted to give an affirmative right to recover from nonsigners, something the Miller-Tydings Amendment does not purport to do. In such a statute specific language referring to nonsigners would of course have to be used. (3) It is said that H. R. Rep. No. 382, 75th Cong., 1st Sess., refers to a bill containing the phrase "other conditions." The words "other conditions," when used in conjunction with a phrase referring to minimum prices, could scarcely mean anything except "conditions other than minimum prices." We are here concerned with minimum prices. (4) "Permissive" was used in the Senate Report not to refer to retailers but to manufacturers. "[The State acts] merely authorize a manufacturer or producer to enter into contracts for the maintenance of his price, but they do not compel him to do so. In other words, they are merely permissive." S. Rep. No. 2053, 74th Cong., 2d Sess. 2.

legislature and correct immediately any abuses that may develop." 81 Cong. Rec. 7496.

Representative Dirksen made a statement to the House as a member of its Conference Committee. He referred to the case of *Old Dearborn Co.* v. *Seagram Corp.*, 299 U. S. 183, in which this Court had held that the "non-signer" provision of the Illinois "fair trade" statute did not violate the Due Process Clause. Mr. Dirksen continued: "A question then arose as to whether or not the maintenance of such resale prices under a State fair trade act might not be in violation of the Sherman Anti-Trust Law of 1890 insofar as these transactions sprang from a contract in interstate commerce. This question was presented to the House Judiciary Committee and there determined by the reporting of the Miller bill. It was essentially nothing more than an enabling act which placed the stamp of approval upon price maintenance transactions under State acts, notwithstanding the Sherman Act of 1890." 81 Cong. Rec. 8138.

Every one of the 42 State acts which the Miller-Tydings Amendment was to "back up"—the acts on which the Miller-Tydings Amendment was to place a "stamp of approval"—contained a "non-signer" provision. As demonstrated by experience in California, the State acts would have been futile without the "non-signer" clause. The Court now holds that the Miller-Tydings Amendment does not cover these "non-signer" provisions. Not only is the view of the Court contrary to the words of the statute and to the legislative history. It is also in conflict with the interpretation given the Miller-Tydings Amendment by the Federal Trade Commission,[3] by the Depart-

[3] See letter addressed to the President by the Chairman of the Federal Trade Commission, S. Doc. No. 58, 75th Cong., 1st Sess., pp. 2–3. See also Report of the Federal Trade Commission on Resale Price Maintenance LXII (Dec. 13, 1945).

ment of Justice,[4] and by practically all persons adversely affected by the "fair trade" laws.[5] The "fair trade" laws may well be unsound as a matter of economics. Perhaps Congress should not pass an important measure dealing with an extraneous subject as a rider to a revenue bill, with the coercive influence it exerts in avoiding a veto; perhaps it should restrict legislation to a single relevant subject, as required by the constitutions of three-fourths of the States. These are matters beyond the Court's concern. Where both the words of a statute and its legislative history clearly indicate the purpose of Congress, it should be respected. We should not substitute our own notion of what Congress should have done.

APPENDIX TO OPINION OF MR. JUSTICE FRANKFURTER.

HOUSE REPORT No. 382, 75TH CONG., 1ST SESS.

The Committee on the Judiciary, to whom was referred the bill (H. R. 1611) to amend the act entitled "An act to protect trade and commerce against unlawful restraints and monopolies," approved July 2, 1890, after consideration, report the same favorably to the House with an amendment with the recommendation that as amended the bill do pass.

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[4] The Department of Justice appears to have instituted no prosecutions because of enforcement of "fair trade" acts against nonsigners. The Assistant Attorney General who played an important part in enforcement of the antitrust laws called for repeal of the Miller-Tydings Amendment because it made legal the nonsigner provisions of the State "fair trade" acts. Statement of Mr. Thurman Arnold, T. N. E. C. Hearings, pp. 18162–18165.

[5] The contention that the "non-signer" provisions are not within the Miller-Tydings Amendment appears to have been made in only two reported cases since the Amendment was passed in 1937. *Calamia* v. *Goldsmith Bros., Inc.*, 299 N. Y. 636 and 795, 87 N. E. 2d 50 and 687; *Pepsodent Co.* v. *Krauss Co.*, 56 F. Supp. 922. In both, the argument was rejected.

The committee amendment is as follows: Strike out all after the enacting clause and insert in lieu thereof the following:

> That section 1 of the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July 2, 1890 (U. S. Code, title 15, sec. 1), be amended to read as follows:
>
> "SECTION 1. Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. Nothing herein contained shall render illegal, contracts or agreements prescribing minimum prices or other conditions for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when such contracts or agreements are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 5, as amended and supplemented, of the Act entitled 'An Act to create a Federal Trade Commission, to

define its powers and duties, and for other purposes,' approved September 26, 1914 (U. S. Code, title 15, sec. 45)."

GENERAL STATEMENT

The sole objective of this proposed legislation is to permit the public policy of States having "fair trade acts" to operate with respect to interstate contracts for the resale of goods within those States. The fair-trade acts referred to legalize the maintenance, by contract, of resale prices of branded or trade-marked goods which are in free competition with other goods of the same general class.

To accomplish this end, the reported bill amends section 1 of the Sherman Antitrust Act which declares every contract in restraint of trade illegal. The amendment adds a sentence to the section, in the nature of a limitation, to the effect, in substance, that nothing therein contained shall render illegal contracts prescribing minimum prices or other conditions for resale of branded or trade-marked goods when such contracts are lawful as to intrastate transactions under the State law of the State in which the resale is to be made; and that the making of such contracts shall not be an unfair method of competition under section 5 of the Federal Trade Commission Act.

In view of the decision of the Supreme Court in *Dr. Miles Medical Co.* v. *Park & Sons Co.* (220 U. S. 373), and other cases, it is doubtful, at least, that such contracts are now valid in interstate commerce.

STATE FAIR TRADE ACTS

State fair trade acts typically provide, first, that contracts may lawfully be made which provide for maintenance by contract of resale prices of branded or trade-marked competitive goods. Second, that third parties

with notice are bound by the terms of such a contract regardless of whether they are parties to it.

The pertinent provisions of the Illinois act, recently held constitutional by the Supreme Court in the case of *Old Dearborn Distributing Co.* v. *Seagram-Distillers Corporation* (decided Dec. 7, 1936) read as follows:

> SECTION 1. No contract relating to the sale or resale of a commodity which bears, or the label or content of which bears, the trade mark, brand, or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the State of Illinois by reason of any of the following provisions which may be contained in such contract:
>
> (1) That the buyer will not resell such commodity except at the price stipulated by the vendor.
>
> (2) That the producer or vendee of a commodity require upon the sale of such commodity to another that such purchaser agree that he will not, in turn, resell except at the price stipulated by such producer or vendee.
>
> Such provisions in any contract shall be deemed to contain or imply conditions that such commodity may be resold without reference to such agreement in the following cases:
>
> (1) In closing out the owner's stock for the purpose of discontinuing delivery of any such commodity: *Provided, however,* That such stock is first offered to the manufacturer of such stock at the original invoice price, at least ten (10) days before such stock shall be offered for sale to the public.
>
> (2) When the goods are damaged or deteriorated in quality, and notice is given to the public thereof.
>
> (3) By any officer acting under the orders of any court.

> SEC. 2. Wilfully and knowingly advertising, offering for sale, or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of section 1 of this Act, whether the person so advertising, offering for sale, or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby.

The following States, the committee is advised, have adopted fair trade acts: California, Washington, Oregon, Montana, Wyoming, Arizona, New Mexico, Utah, North Dakota, South Dakota, Kansas, Louisiana, Arkansas, Iowa, Wisconsin, Illinois, Kentucky, Tennessee, Indiana, Ohio, Georgia, Virginia, West Virginia, Pennsylvania, Maryland, New York, New Jersey, and Rhode Island.

The committee is advised that in addition one house of each of the following States have passed a fair trade bill: South Carolina, North Carolina, Idaho, Colorado, and Oklahoma.

The committee is further advised that bills are pending in the Legislatures of Nevada, Michigan, Minnesota, Texas, Mississippi, Delaware, Missouri, Connecticut, Massachusetts, New Hampshire, and Maine; and that only one State, Vermont, has definitely rejected legislation of this character.

ECONOMIC ASPECTS

The anticipated economic effects of the legislation here proposed were presented both by proponents and opponents of the bill in the hearings held by the subcommittee of the Committee on the Judiciary in charge of the bill. On the one hand it is urged that predatory price cutting is a weapon of monopolistic large distributors to crush small businessmen. On the other hand, it is contended that price-maintenance legislation tends unduly to enhance

the price of goods to the consumer. To this argument it is answered that the free play of competition between products of different manufacturers of the same general class will prevent such a result.

However, in the opinion of the committee, those arguments are more properly addressed to the State legislatures considering the enactment of fair trade acts. It is the legislature's responsibility to fix the public policy of the State. This legislation merely seeks to help effectuate a public policy so fixed in a State. It has no application to any State which does not see fit to enact a fair trade act.

In this connection the committee invites attention to the following paragraph of the opinion of the Supreme Court, heretofore referred to, upholding the constitutionality of the Illinois act, the Court speaking through Mr. Justice Sutherland:

> There is a great body of fact and opinion tending to show that price cutting by retail dealers is not only injurious to the goodwill and business of the producer and distributor of identified goods, but injurious to the general public as well. The evidence to that effect is voluminous; but it would serve no useful purpose to review the evidence or to enlarge further upon the subject. True, there is evidence, opinion, and argument to the contrary; but it does not concern us to determine where the weight lies. We need say no more than that the question may be regarded as fairly open to differences of opinion. The legislation here in question proceeds upon the former and not the latter view; and the legislative determination in that respect, in the circumstances here disclosed, is conclusive so far as this court is concerned. Where the question of what the facts establish is a fairly debatable one we accept and

carry into effect the opinion of the legislature. *Radice* v. *New York* (264 U. S. 292, 294); *Zahn* v. *Board of Public Works* (274 U. S. 325, 328, and cases cited).

EFFECTUATION OF STATE PUBLIC POLICY

Your committee respectfully submit that sound public policy on the part of the Federal Government lies in the direction of lending assistance to the States to effectuate their own public policy with regard to their internal affairs. It is submitted that this is especially true where such assistance, as in this instance, consists of removing a handicap resulting from the surrender of the power over interstate commerce by the States to the Federal Government.

. . . . .

SENATE REPORT No. 2053, 74TH CONG., 2D SESS.

The Committee on the Judiciary, having had under consideration the bill (S. 3822) to amend the act entitled "An act to protect trade and commerce against unlawful restraints and monopolies," approved July 2, 1890, report the same back with the recommendation that the bill do pass.

In 1933 a law was enacted by the State of California authorizing a manufacturer or producer of a commodity which bears his trade mark, brand, or name, and which is sold in free and open competition with commodities of the same general class produced by others, to make a contract that the purchaser will not resell such commodity except at the price stipulated by the manufacturer or producer.

The purpose of the California act, as expressed in its title, was to protect trade-mark owners, distributors, and the general public against injurious and uneconomic prac-

tices in the distribution of articles of standard quality under a trade mark, brand, or name, and the particular practice against which it was directed was the so-called "loss-leader selling."

Since the passage of the California act similar legislation has been enacted in 12 other States, namely, New York, Illinois, Pennsylvania, New Jersey, Oregon, Washington, Wisconsin, Iowa, Maryland, Ohio, Virginia, and Rhode Island (the last three since the introduction of the proposed bill).

In still other States contracts stipulating minimum resale prices are valid at common law.

In the States where such contracts are lawful it has been found that loss-leader selling of identified merchandise sold under competitive conditions operates as a fraud on the consumer destroys the producer's goodwill in his trade mark, and is used by the large merchant to eliminate his small independent competitor.

In recommending the passage of S. 3822 the committee, while fully recognizing the evils of loss-leader selling, is not required to determine the effectiveness of the device adopted by the States to eliminate the same.

It is sufficient that this type of selling unquestionably has had a disastrous effect upon the small independent retailer, thereby tending to create monopoly, and that a large number of States have found that its evil effects can be mitigated, if not eliminated, by legalizing contracts stipulating minimum resale prices.

The Congress is not called upon to pass upon the effectiveness of the remedy, but it should not put obstacles in the way of efforts of the individual States to make the remedy effective.

Though there is no specific adjudication on the subject, it is believed that contracts stipulating minimum resale prices, even when they are made or are to be performed

in a State where such contracts are lawful, may violate the Sherman Act whenever the goods sold under the contract move in interstate commerce.

Consequently, many manufacturers not domiciled in the state of the vendee are unwilling to run the risk of violating the Federal law, and the effectiveness of the State fair-trade laws is thereby seriously impaired.

S. 3822 removes the doubt as to the applicability of the Sherman Act by expressly legalizing such contracts where legal under the laws of the State where made or where they are to be performed.

Moreover, the proposed bill declares such contracts shall not be an unfair method of competition under the Federal Trade Commission law.

The language of the bill, in describing the class of commodities to which it is applicable, follows closely the language of the State acts, and the scope of the bill is therefore carefully limited to commodities "in free and open competition with commodities of the same general class produced by others."

The State acts are in no sense general price-fixing acts. They merely authorize a manufacturer or producer to enter into contracts for the maintenance of his price, but they do not compel him to do so. In other words, they are merely permissive.

They do not authorize horizontal contracts, that is to say, contracts or agreements between manufacturers, between producers, or between wholesalers, or between retailers as to the sale or resale price of any commodity.

They apply only to commodities which are in free and open competition with commodities of the same general class produced by others, and they therefore do not in any sense restrain trade or competition. In fact, they legalize a device which is intended to increase competition and prevent monopoly.

But most important, from the standpoint of the Congress, the proposed bill merely permits the individual States to function, without Federal restraint, within their proper sphere, and does not commit the Congress to a national policy on the subject matter of the State laws.

In other words, the bill does no more than to remove Federal obstacles to the enforcement of contracts which the States themselves have declared lawful.

RADIO CORPORATION OF AMERICA ET AL. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

No. 565. Argued March 26–27, 1951.—Decided May 28, 1951.

After extensive hearings on, and demonstrations of, three different methods of color television transmission, the Federal Communications Commission issued an order which, in effect, permits use of the method of Columbia Broadcasting System (CBS) and excludes use of others. This order was based upon findings that the CBS method was the best presently available and had reached a state of development which justified its acceptance to the exclusion of others, though color telecasts by the CBS method could not be received either in color or in black and white on the millions of existing black and white receivers without costly adaptations. Subsequently, the Commission declined to reopen the proceedings at the request of Radio Corporation of America (RCA), which claimed to have made great advances toward a method of color television transmission which could be received in black and white on existing black and white receivers without any adaptation. The District Court dismissed a suit by RCA to enjoin and set aside the Commission's order. *Held:*

1. The District Court did not fail to review the record as a whole in determining that the Commission's order was supported by substantial evidence. Pp. 414–416.

2. The District Court did not misapprehend or misapply the proper judicial standard in holding that the Commission's order was not arbitrary or against the public interest as a matter of law. Pp. 416–420.

(a) Viewing the record as a whole, the Commission did not err as a matter of law in concluding that the CBS color method had reached a state of development which justified its acceptance to the exclusion of others. Pp. 416–419.

(b) The Commission's determination, after hearing evidence on all sides, that the CBS method will provide the public with color television of good quality and that television viewers should be given an opportunity to receive it if they so desire, was not capricious. Pp. 419–420.

(c) Courts should not overrule an administrative decision merely because they disagree with its wisdom. P. 420.

3. Whether the Commission should have reopened its proceedings to permit RCA to offer proof of new discoveries for its method was a question within the discretion of the Commission; and that discretion was not abused. Pp. 420–421.

95 F. Supp. 660, affirmed.

A three-judge district court sustained an order of the Federal Communications Commission prescribing standards for color television transmission. 95 F. Supp. 660. On direct appeal to this Court under 28 U. S. C. §§ 1253 and 2101 (b), *affirmed*, p. 421.

John T. Cahill argued the cause for the Radio Corporation of America et al., appellants. With him on the brief were *Weymouth Kirkland, Howard Ellis, Joseph V. Heffernan, John W. Nields, Ray B. Houston* and *Robert G. Zeller.*

Simon H. Rifkind argued the cause and filed a brief for the Emerson Radio & Phonograph Corporation, appellant. Also of counsel was *Thomas D. Nash.*

Alfred Kamin argued the cause and filed a brief for Local 1031, International Brotherhood of Electrical Workers, A. F. of L., appellant.

A. L. Schapiro and *B. C. Schiff* submitted on brief for the Pilot Radio Corporation, appellant.

John J. Kelly, Jr. for the Radio Craftsmen, Inc.; *Frank S. Righeimer, Jr.* for Wells-Gardner & Co.; and *Gerald Ratner* for the Television Installation Service Association, appellants.

Solicitor General Perlman argued the cause for the United States and the Federal Communications Commission, appellees. *Samuel I. Rosenman* argued the cause for the Columbia Broadcasting System, Inc., appellee. With them on a joint brief were *Stanley M. Silverberg,*

Benedict P. Cottone, Max Goldman and *Richard A. Solomon* for the United States and the Federal Communications Commission, and *Ralph F. Colin* and *Richard S. Salant* for the Columbia Broadcasting System, Inc.

MR. JUSTICE BLACK delivered the opinion of the Court.

Radio Corporation of America (RCA) and two of its subsidiaries brought this action in a three-judge District Court to enjoin and set aside an order of the Federal Communications Commission prescribing standards for transmission of color television.[1] The effect of the challenged order was to reject a color system proposed by RCA and to accept one proposed by the Columbia Broadcasting System (CBS).[2] The basis of RCA's complaint was that the order had been entered arbitrarily and capriciously, without the support of substantial evidence, against the public interest, and contrary to law. After hearing and oral argument, the District Court entered summary judgment sustaining the Commission, one judge dissenting.[3] RCA and the other plaintiffs took this direct appeal under 28 U. S. C. § 1253 and § 2101 (b).

At the outset we are faced with RCA's contention that the District Court failed to review the record as a whole in determining whether the Commission's order was supported by substantial evidence; it is urged that for this reason we should summarily reverse and remand the case for further consideration by that court. If RCA's premise were correct, the course which it suggests might be wholly

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[1] The subsidiaries are the National Broadcasting Co. and RCA Victor Distributing Corp. Later, other parties were permitted over the Commission's objection to intervene in support of RCA's position. The Columbia Broadcasting System (CBS) intervened as a party defendant.

[2] The order also rejected a system proposed by Color Television, Inc., which is not a party to this litigation.

[3] 95 F. Supp. 660 (N. D. Ill.).

appropriate. For as pointed out recently, in considering the question of sufficiency of evidence to support an administrative order this Court must and does rely largely on a first reviewing court's conclusion. *Universal Camera Corp.* v. *Labor Board,* 340 U. S. 474. The present case, however, need not be returned for further scrutiny below because we are convinced that the review already afforded did not fall short of that which is required. The District Court heard oral argument for three days and deliberated for about five weeks before handing down its decision. Both the majority and dissenting opinions show a familiarity with RCA's basic contention (and the minor ones as well) that could have come only from careful study of the record as a whole. To be sure, there was a casual statement in the majority opinion susceptible of the interpretation that the court in reaching the decision made an examination of the record less complete than it should have been.[4] Fairly construed, however, the remark, while perhaps unfortunate, is entirely consistent with that conscientious review which we are satisfied was given this

[4] "After listening to many hours of oral argument by able counsel representing the respective parties, we formed some rather definite impressions relative to the merits of the order, as well as the proceedings before the Commission upon which it rests. And our reading and study of the numerous and voluminous briefs with which we have been favored have not altered or removed those impressions. *Also, in studying the case, we have been unable to free our minds of the question as to why we should devote the time and energy which the importance of the case merits, realizing as we must that the controversy can only be finally terminated by a decision of the Supreme Court.* This is so because any decision we make is appealable to that court as a matter of right and we were informed during oral argument, in no uncertain terms, that which otherwise might be expected, that is, that the aggrieved party or parties will immediately appeal. In other words, this is little more than a practice session where the parties prepare and test their ammunition for the big battle ahead." (Emphasis added.) 95 F. Supp. at 664.

record by the District Court. We therefore pass to the question of validity of the Commission's order.

All parties agree, as they must, that given a justifiable fact situation, the Commission has power under 47 U. S. C. § 303 (c), (e), (f), (g) [5] to do precisely what it did in this case, namely, to promulgate standards for transmission of color television that result in rejecting all but one of the several proposed systems. Moreover, it cannot be contended seriously that the Commission in taking such a course was without evidential support for its refusal to adopt the RCA system at this time.[6] The real argu-

[5] 47 U. S. C. § 303: ". . . [T]he Commission . . . as public convenience, interest, or necessity requires, shall—

. . . . . .

"(c) Assign bands of frequencies to the various classes of stations, and assign frequencies for each individual station and determine the power which each station shall use and the time during which it may operate;

. . . . . .

"(e) Regulate the kind of apparatus to be used with respect to its external effects and the purity and sharpness of the emissions from each station and from the apparatus therein;

"(f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this chapter . . . .

"(g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest."

[6] The Commission unanimously believed that CBS had the best system presently available, although two Commissioners dissented on other grounds. The relative merits and demerits of the RCA and CBS systems were summarized as follows:

"[T]he RCA system [is] deficient in the following respects:

"(a) The color fidelity of the RCA picture is not satisfactory.

"(b) The texture of the color picture is not satisfactory.

"(c) The receiving equipment utilized by the RCA system is exceedingly complex.

"(d) The equipment utilized at the station is exceedingly complex.

"(e) The RCA color system is much more susceptible to certain

ment, advanced at great length and in many different forms, boils down to this: Viewing the record as a whole, the Commission as a matter of law erred in concluding that the CBS color system had reached a state of development which justified its acceptance to the exclusion of RCA's and that of others. Consequently, before the Commission, the District Court and here, RCA's main attempt has been to persuade that no system has yet been proven worthy of acceptance for public use, that commercial color broadcasting must be postponed awaiting inventions that will achieve more nearly perfect results.

We sustain the Commission's power to reject this position and hold valid the challenged order, buttressed as it is by the District Court's approval. To explain our

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kinds of interference than the present monochrome system or the CBS system.

"(f) There is not adequate assurance in the record that RCA color pictures can be transmitted over the 2.7 megacycle coaxial cable facilities.

"(g) The RCA system has not met the requirements of successful field testing.

. . . . . .

"[T]he CBS system produces a color picture that is most satisfactory from the point of view of texture, color fidelity and contrast. . . . [R]eceivers and station equipment are simple to operate and . . . receivers when produced on a mass marketing basis should be within the economic reach of the great mass of purchasing public. . . . [E]ven with present equipment the CBS system can produce color pictures of sufficient brightness without objectionable flicker to be adequate for home use and . . . the evidence concerning long persistence phosphors shows that there is a specific method available for still further increasing brightness with no objectionable flicker. Finally, . . . while the CBS system has less geometric resolution than the present monochrome system the addition of color to the picture more than outweighs the loss in geometric resolution so far as apparent definition is concerned." Second Report of the Commission, October 10, 1950, 1 Pike & Fischer Radio Reg. (P. & F.), ¶ 91:26, pp. 91:441–442.

conclusion it is unnecessary to repeat the detailed statement of facts made in the majority and minority opinions of the Commission and District Court.[7] Nor, for present purposes, is it necessary to attempt a translation of the technical terms invented to carry meanings in the rapidly growing television industry. It will suffice to give the following brief summary of the background of the Commission's findings and what was found:

Standards for black and white television transmission were first promulgated by the Commission in 1941. RCA's complaint alleges, and all apparently agree, that "The quality of the present [black and white] service, the improvements and reductions in price to the public that have been made, the incredible expansion of the industry as a whole, are all due to the fact that manufacturers could build upon a *single set of long-range high-quality standards.*"[8] From 1941 until now the Commission has been engaged in consideration of plans and proposals looking toward promulgation of a single set of color standards.[9] CBS apparently made quicker progress

[7] The facts found by the Commission appear in two reports on Color Television Issues. First Report of the Commission, September 1, 1950, 1 P. & F. ¶ 91:24, p. 91:261; Second Report of the Commission, October 10, 1950, 1 P. & F. ¶ 91:26, p. 91:441. The District Court described the proceedings before the Commission as follows: "The hearing, participated in by all members of the Commission, commenced September 26, 1949 and ended May 26, 1950. In all, fifty-three different witnesses were heard and 265 exhibits received. The transcript of the hearing covers 9717 pages. During the period from November 22, 1949 to February 6, 1950, extensive field tests were made of the three systems [RCA, CBS, Color Television, Inc.] proposed. Progress reports concerning these tests were filed with the Commission by the three proponents during December 1949 and January 1950. Comparative demonstrations of the three proposed systems were made on different dates until May 17, 1950." 95 F. Supp. at 665.

[8] Emphasis added.

[9] See the particularly interesting historical summary of these efforts in Commissioner Jones' dissent to the First Report of the Commis-

in developing an acceptable system than did others.[10] It was soon attacked, however, on the ground that it was utilizing old knowledge highly useful in the realm of the physical sciences and mechanical practices but incongruous in the new fields of electronics occupied by television. This is still the core of the objection to the CBS system, together with the objection that existing receiving sets are not constructed in such a way that they can, without considerable adjustments, receive CBS color broadcasts either in color or black and white. The fact that adjustments are required before a CBS color broadcast can be received in black and white on existing sets makes this system "incompatible" with the millions of television receivers now in the hands of the public.

There is no doubt that a "compatible" color television system would be desirable. Recognition of this fact seems to be the controlling reason why the Commission did not long ago approve the "incompatible" CBS system. In the past, it has postponed adoption of standards with the hope that a satisfactory "compatible" color television system would be developed. But this time, in light of previous experience, the Commission thought that further delay in making color available was too high a price to pay for possible "compatibility" in the future, despite RCA's claim that it was on the verge of discovering an acceptable "compatible" system.

The Commission's special familiarity with the problems involved in adopting standards for color television is amply attested by the record. It has determined after hearing evidence on all sides that the CBS system will provide the public with color of good quality and that television viewers should be given an opportunity to re-

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sion, September 1, 1950, 1 P. & F. ¶ 91:24, pp. 91:346–447. His view was that color television standards should have been promulgated long before they were.

[10] See note 6, *supra*.

ceive it if they so desire.[11] This determination certainly cannot be held capricious. It is true that the choice between adopting standards now or at a later date was not free from difficulties. Moreover, the wisdom of the decision made can be contested as is shown in the dissenting opinions of two Commissioners. But courts should not overrule an administrative decision merely because they disagree with its wisdom.[12] We cannot say the District Court misapprehended or misapplied the proper judicial standard in holding that the Commission's order was not arbitrary or against the public interest as a matter of law.[13]

Whether the Commission should have reopened its proceedings to permit RCA to offer proof of new discoveries for its system was a question within the discretion of the Commission which we find was not abused.[14] We

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[11] See note 6, *supra.*

[12] *National Broadcasting Co.* v. *United States,* 319 U. S. 190, 224.

[13] *Universal Camera Corp.* v. *Labor Board,* 340 U. S. 474, 490–491.

[14] See *United States* v. *Pierce Auto Lines,* 327 U. S. 515, 534–535. With respect to reopening the record, the Commission said in part: ". . . [A] new television system is not entitled to a hearing or a reopening of a hearing simply on the basis of a paper presentation. In the radio field many theoretical systems exist and can be described on paper but it is a long step from this process to successful operation. There can be no assurance that a system is going to work until the apparatus has been built and has been tested. None of the new systems or improvements in systems meet these tests so as to warrant reopening of the hearing. . . .

"The Commission does not imply that there is no further room for experimentation. . . . Many of the results of such experimentation can undoubtedly be added without affecting existing receivers. As to others some obsolescence of existing receivers may be involved if the changes are adopted. In the interest of stability this latter type of change will not be adopted unless the improvement is substantial in nature, when compared to the amount of dislocation involved. But when such an improvement does come along, the Commission cannot refuse to consider it merely because the owners of existing

have considered other minor contentions made by RCA but are satisfied with the way the District Court disposed of them.

The District Court's judgment sustaining the order of the Commission is

Affirmed.

MR. JUSTICE FRANKFURTER, *dubitante.*

Since I am not alone in entertaining doubts about this case they had better be stated. The ultimate issue is the function of this Court in reviewing an order of the Federal Communications Commission, adopted October 10, 1950, whereby it promulgated standards for the transmission of color television. The significance of these standards lies in the sanction of a system of "incompatible" color television, that is, a system requiring a change in existing receivers for the reception of black and white as well as colored pictures. The system sanctioned by the Commission's order will require the addition of an appropriate gadget to the millions of outstanding receiving sets at a variously estimated, but in any event substantial, cost. From the point of view of the public interest, it is highly desirable to have a color television system that is compatible. The Commission's order sanctioning an incompatible system is based not on the scientific unattainability of a compatible system, nor even on a

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receivers might be compelled to spend additional money to continue receiving programs.

". . . [A]ny improvement that results from the experimentation might face the problem of being incompatible with the present monochrome system or the color system we are adopting today. In that event, the new color system or other improvement will have to sustain the burden of showing that the improvement which results is substantial enough to be worth while when compared to the amount of dislocation involved to receivers then in the hands of the public." Second Report of the Commission, October 10, 1950, 1 P. & F. ¶ 91:26, pp. 91:445–446.

forecast that its feasibility is remote. It rests on the determination that inasmuch as compatibility has not yet been achieved, while a workable incompatible system has proven itself, such a system, however intrinsically unsatisfactory, ought no longer to be withheld from the public.

After hearings on the Commission's proposals were closed, the Radio Corporation of America, persistent promoter of a compatible system, suggested to the Commission further consideration of the progress made after the Commission had taken the matter under advisement in May, 1950. To be sure, this proffer of relevant information concerning progress toward the desired goal was made by an interested party. But within the Commission itself the need for further light was urged in view of the rapid development that had been made since the Commission's hearings got under way. The heart of the controversy was thus put by Commissioner Hennock: "It is of vital importance to the future of television that we make every effort to gain the time necessary for further experimentation leading to the perfection of a compatible color television system." The Commission did not rule out reasonable hope for the early attainment of compatibility. Indeed, it gave ground for believing that success of experimentation to that end is imminent. But it shut off further inquiry into developments it recognized had grown apace because in its "sound discretion" it concluded that "a delay in reaching a determination with respect to the adoption of standards for color television service . . . would not be conducive to the orderly and expeditious dispatch of the Commission's business and would not best serve the ends of justice . . . ."

The real question, as I have indicated, is whether this determination of the Commission, considering its nature and its consequences, is beyond judicial scrutiny.

I am no friend of judicial intrusion into the administrative process. I do not believe in a construction of the

Communications Act that would cramp the broad powers of the Communications Commission. See *National Broadcasting Co.* v. *United States,* 319 U. S. 190. I have no doubt that if Congress chose to withdraw all court review from the Commission's orders it would be constitutionally free to do so. See *Stark* v. *Wickard,* 321 U. S. 288, 312. And I deem it essential to the vitality of the administrative process that, even when subject to judicial review, the Commission be allowed to exercise its powers unhampered by the restrictive procedures appropriate for litigation in the courts. See *Federal Communications Comm'n* v. *National Broadcasting Co.,* 319 U. S. 239, 248. But so long as the Congress has deemed it right to subject the orders of the Commission to review by this Court, the duty of analyzing the essential issues of an order cannot be escaped by too easy reliance on the conclusions of a district court or on the indisputable formula that an exercise of discretion by the Commission is not to be displaced by a contrary exercise of judicial discretion.

What may be an obvious matter of judgment for the Commission in one situation may so profoundly affect the public interest in another as not to be a mere exercise of conventional discretion. Determinations by the Commission are not abstract determinations. We are not here called upon to pass on the abstract question whether the Commission may refuse to reconsider a problem before it although enlightening new evidence is promised. We are faced with a particular order of great significance. It is not the effect of this order upon commercial rivalries that gives it moment. The Communications Act was not designed as a code for the adjustment of conflicting private interests. It is the fact that the order originates color television, with far-reaching implications to the public interest.

The assumption underlying our system of regulation is that the national interest will be furthered by the fullest

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possible use of competition. At some point, of course, the Commission must fix standards limiting competition. But once those standards are fixed, the incentive for improvement is relaxed. It is obvious that the money spent by the public to adapt and convert the millions of sets now in use may well make the Commission reluctant to sanction new and better standards for color pictures if those standards would outmode receiving sets adapted to the system already in use. And even if the Commission is willing to adopt a second, inconsistent set of color television standards sometime in the future, the result will be economic waste on a vast scale.

And all to what end? And for what overriding gain? Of course the Commission does not have to wait for the millennium. Of course it does not have to withhold color pictures from the American public indefinitely because improvements in color transmission will steadily be perfected. That is not what is involved here. What the Commission here decided is that it could not wait, or the American public could not wait, a little while longer, with every prospect of a development which, when it does come, concededly will promote the public interest more than the incompatible system now authorized. Surely what constitutes the public interest on an issue like this is not one of those expert matters as to which courts should properly bow to the Commission's expertness. In any event, nothing was submitted to us on argument, nor do I find anything in the Commission's brief of 150 pages, which gives any hint as to the public interest that brooks no delay in getting color television even though the method by which it will get it is intrinsically undesirable, inevitably limits the possibilities of an improved system or, in any event, leads to potential great economic waste. The only basis for this haste is that the desired better method has not yet proved itself and in view of past failures there is no great assurance of early success. And

so, since a system of color television, though with obvious disadvantages, is available, the requisite public interest which must control the Commission's authorization is established. I do not agree.

One of the more important sources of the retardation or regression of civilization is man's tendency to use new inventions indiscriminately or too hurriedly without adequate reflection of long-range consequences. No doubt the radio enlarges man's horizon. But by making him a captive listener it may make for spiritual impoverishment. Indiscriminate use of the radio denies him the opportunities for reflection and for satisfying those needs of withdrawal of which silent prayer is only one manifestation. It is an uncritical assumption that every form of reporting or communication is equally adaptable to every situation. Thus, there may be a mode of what is called reporting which may defeat the pursuit of justice.

Doubtless, television may find a place among the devices of education; but much long-headed thought and patient experimentation are demanded lest uncritical use may lead to hasty jettisoning of hard-won gains of civilization. The rational process of trial and error implies a wary use of novelty and a critical adoption of change. When a college head can seriously suggest, not by way of irony, that soon there will be no need of people being able to read—that illiteracy will be the saving of wasteful labor—one gets an idea of the possibilities of the new barbarism parading as scientific progress.

Man forgets at terrible cost that the environment in which an event is placed may powerfully determine its effect. Disclosure conveyed by the limitations and power of the camera does not convey the same things to the mind as disclosure made by the limitations and power of pen or voice. The range of presentation, the opportunities for distortion, the impact on reason, the effect on the looker-on as against the reader-hearer, vary; and the

differences may be vital. Judgment may be confused instead of enlightened. Feeling may be agitated, not guided; reason deflected, not enlisted. Reason—the deliberative process—has its own requirements, met by one method and frustrated by another.*

What evil would be encouraged, what good retarded by delay? By haste, would morality be enhanced, insight deepened, and judgment enlightened? Is it even economically advantageous to give governmental sanction to color television at the first practicable moment, or will it not in fact serve as an added drain on raw materials for which the national security has more exigent needs?

Finally, we are told that the Commission's determination as to the likely prospect of early attainment of compatibility is a matter within its competence and not subject to court review. But prophecy of technological feasibility is hardly in the domain of expertness so long as scientific and technological barriers do not make the prospect fanciful. In any event, this Court is not without experience in understanding the nature of such complicated issues. We have had occasion before to consider complex scientific matters. *Telephone Cases,* 126 U. S. 1; *McCormick* v. *Graham's Adm'r,* 129 U. S. 1 (harvester); *Corona Co.* v. *Dovan Corp.,* 276 U. S. 358 (improvement

*"Broadcasting as an influence on men's minds has great possibilities, either of good or evil. The good is that if broadcasting can find a serious audience it is an unrivalled means of bringing vital issues to wider understanding. The evil is that broadcasting is capable of increasing perhaps the most serious of all dangers which threaten democracy and free institutions today—the danger of passivity—of acceptance by masses of orders given to them and of things said to them. Broadcasting has in itself a tendency to encourage passivity, for listening as such, if one does no more, is a passive occupation. Television may be found to have this danger of passivity in even stronger form." Report of the Broadcasting Committee, 1949 (Cmd. 8116, 1951) 75.

in vulcanization of rubber); *DeForest Radio Co.* v. *General Electric Co.,* 283 U. S. 664 (high-vacuum discharge tube); *Radio Corporation* v. *Radio Engineering Laboratories,* 293 U. S. 1 (audion oscillator); *Marconi Wireless Co.* v. *United States,* 320 U. S. 1 (wireless telegraphy improvement); and *Universal Oil Products Co.* v. *Globe Oil & Rfg. Co.,* 322 U. S. 471 (oil cracking process).

Experience has made it axiomatic to eschew dogmatism in predicting the impossibility of important developments in the realms of science and technology. Especially when the incentive is great, invention can rapidly upset prevailing opinions of feasibility. One may even generalize that once the deadlock in a particular field of inquiry is broken progress becomes rapid. Thus, the plastics industry developed apace after a bottleneck had been broken in the chemistry of rubbers. Once the efficacy of sulfanilamide was clearly established, competent investigators were at work experimenting with thousands of compounds, and new and better antibiotics became available in a continuous stream. A good example of the rapid change of opinion that often occurs in judgment of feasibility is furnished by the cyclotron. Only a few years ago distinguished nuclear physicists proclaimed the limits on the energy to which particles could be accelerated by the use of a cyclotron. It was suggested that 12,000,000-volt protons were the maximum obtainable. Within a year the limitations previously accepted were challenged. At the present time there are, I believe, in operation in the United States at least four cyclotrons which accelerate protons to energies of about 400,000,000 volts. One need not have the insight of a great scientific investigator, nor the rashness of the untutored, to be confident that the prognostications now made in regard to the feasibility of a "compatible" color television system will be falsified in the very near future.

STANDARD OIL CO. *v.* NEW JERSEY.

APPEAL FROM THE SUPREME COURT OF NEW JERSEY.

No. 384. Argued March 5, 1951.—Decided May 28, 1951.

Under the New Jersey Escheat Act, proceedings were instituted in a state court to escheat to the State certain personal property, including unclaimed shares of appellant corporation's stock and unclaimed dividends. Personal service was made on appellant, and notice identifying the property and the last-known owners was given by publication. Appellant is a New Jersey corporation but has no office or place of business in the State except a statutory registered office. It has no tangible property in the State except its stock and transfer books. The stock was issued and the dividends held in other states; and the last-known addresses of the owners were chiefly in other states and foreign countries. Over appellant's objection to the validity of the proceedings under the Federal Constitution, it was decreed that the unclaimed stock and dividends had escheated to the State. *Held:* The judgment is sustained. Pp. 429–443.

1. The notice required by the statute, as construed by the Supreme Court of New Jersey, and which was given, was adequate to bind interested persons. Pp. 432–435.

2. The statute does not impair the obligation of contracts in violation of Art. I, § 10, ¶ 1, of the Federal Constitution. Pp. 435–436.

3. Regardless of theories as to their situs, stock certificates and undelivered dividends may be abandoned property subject to the disposition of the domiciliary state of the corporation when the whereabouts of the owners are unknown for such lengths of time, and under such circumstances, as permit a declaration of abandonment. Pp. 437–442.

(a) The fact that appellant is a New Jersey corporation, amenable to process through its designated agent at its registered office in New Jersey, gave New Jersey power to seize the *res* here involved—*i. e.*, the "debts or demands due to the escheated estate." Pp. 438–439.

(b) No matter where appellant's assets may be, since it is its obligation to pay to the escheated estate that is taken, personal service on appellant effects a seizure of that obligation. P. 439.

(c) Since choses in action have no tangible existence, control over them can only arise from control over the persons whose relationships are the source of the rights and obligations. Pp. 439–440.

(d) Since the New Jersey court had jurisdiction of appellant by personal service and of the owners of the stock and dividends through notice or service by publication, New Jersey had power to act on their rights respecting these choses in action within constitutional limits. Pp. 440–441.

4. Under the Full Faith and Credit Clause of the Federal Constitution, the debts and demands against appellant represented by the stock and dividends cannot be taken from appellant by another state when they have already been taken from appellant by a valid judgment of New Jersey. Pp. 442–443.

5 N. J. 281, 74 A. 2d 565, affirmed.

A New Jersey court decreed escheat to the State of certain unclaimed stock of appellant and of unclaimed dividends. 2 N. J. Super. 442, 64 A. 2d 386; 5 N. J. Super. 460, 68 A. 2d 499. The Supreme Court of New Jersey affirmed. 5 N. J. 281, 74 A. 2d 565. On appeal to this Court, *affirmed,* p. 443.

Josiah Stryker argued the cause and filed a brief for appellant.

Emerson Richards, Deputy Attorney General of New Jersey, argued the cause for appellee. With him on the brief was *Theodore D. Parsons,* Attorney General.

MR. JUSTICE REED delivered the opinion of the Court.

The Standard Oil Company, a New Jersey corporation, appeals from a judgment of the Supreme Court of New Jersey insofar as it declares escheated to the State of New Jersey unpaid dividends declared upon the stock of Standard Oil, and twelve shares of the common stock of the Company.

The New Jersey Escheat Act reads in part:

> "If any person, who, at the time of his death, has been or shall have been, the owner of any personal property within this State, and shall have died, or shall die, intestate, without heirs or known kindred, capable of inheriting the same, and without leaving a surviving spouse, such personal property, of whatsoever nature the same may be, shall escheat to the State."
>
> "Whenever the owner, beneficial owner, or person entitled to any personal property within this State, has been or shall be and remain unknown for the period of fourteen successive years, or whenever the whereabouts of such owner, beneficial owner or person, has been or shall be and remain unknown for the period of fourteen successive years, or whenever any personal property wherever situate has been or shall be and remain unclaimed for the period of fourteen successive years, then, in any such event, such personal property shall escheat to the State." N. J. Rev. Stat. (Cum. Supp. 1945–1947) 2:53–16, 2:53–17.

In accordance with the procedure prescribed by the Act, a petition in the name of the State of New Jersey for a decree escheating certain personal property,[1] including the property in issue here, was filed in the Chancery Division of the Superior Court of New Jersey. The petition alleged that appellant had in its custody or possession property which was subject to escheat under the Act

[1] The Escheat Act defines the term "personal property" to include "moneys, negotiable instruments, choses in action, interest, debts or demands due to the escheated estate, stocks, bonds, deposits, machinery, farm crops, live stock, fixtures, and every other kind of tangible or intangible property and the accretions thereon." N. J. Rev. Stat. (Cum. Supp. 1945–1947) 2:53–15.

for each of the alternative reasons listed in the above provisions: the owners of the property had died intestate without leaving anyone capable of taking the property; the owners had been unknown for fourteen successive years; the whereabouts of the owners had been unknown for fourteen successive years; the property had been unclaimed for fourteen successive years.

The appellant answered the petition and, after notice and hearing, the Chancery Division of the Superior Court entered a final judgment ordering escheat of the personal property. 2 N. J. Super. 442, 64 A. 2d 386; 5 N. J. Super. 460, 68 A. 2d 499. This judgment was modified and affirmed as modified by the Supreme Court of New Jersey. 5 N. J. 281, 74 A. 2d 565.

Standard Oil, appealing from the decision of the Supreme Court of New Jersey, claims that the New Jersey Escheat Act and the judgment thereunder deprived the Company of its property without due process of law in violation of the Fourteenth Amendment. This unconstitutional deprivation is alleged to arise from the fact that the judgment of escheat does not protect Standard Oil from later liability to the stockholders whose claims to stock and dividends are escheated, because: (1) both the notice to the claimants of the property prescribed by the statute and the notice actually published were so inadequate that claimants were afforded no reasonable opportunity to learn of the escheat proceeding and of its effect on their claims, or to appear and protect their rights; (2) the obligation of the contracts of the persons whose property was escheated was impaired by the statute and judgment thereunder in violation of Art. I, § 10, ¶ 1 of the Constitution of the United States; (3) the New Jersey courts were without jurisdiction to enter the judgment since neither the shares of stock nor the divi-

dends had a situs in New Jersey for the purpose of escheat, nor were either lawfully seized in the escheat proceedings.[2]

Notice.—Appellant contends that the judgment of escheat deprives the various claimants against Standard Oil of their property without adequate notice, and since the claimants may therefore sue appellant later and recover on these claims, this statute and judgment deprive appellant of its property without due process of law.[3]

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[2] In addition to the shares of common stock and the dividends, the personal property in possession of appellant, which the Chancery Division of the Superior Court held to be escheated, included unpaid wages of former employees, money withheld from wages of former employees for purchase of Liberty Bonds, moneys representing the amounts of unpresented commercial checks issued by appellant, and moneys representing unpresented coupons on a debenture issue. But the Supreme Court of New Jersey held that the Escheat Act did not apply to debts or demands due the escheated estate that had been "extinguished, either by satisfaction or by the bar of the statute of limitations." *State* v. *Standard Oil Co.*, 5 N. J. 281, 293, 74 A. 2d 565, 570. Moneys representing unpaid wages and unpresented checks and coupons were affected by this ruling. The New Jersey rule is that the statute of limitation bars the right as well as the remedy. *Id.* at 292 *et seq.*, 74 A. 2d at 570 *et seq.* Cf. *Chase Securities Corp.* v. *Donaldson*, 325 U. S. 304, 311, considering *Campbell* v. *Holt*, 115 U. S. 620. The New Jersey Supreme Court also held that minor claims that were not listed in the notice of the Chancery Division's proceedings were not escheated. 5 N. J. 281, 310, 74 A. 2d 565, 579. Consequently, appellant complains only of the escheat of twelve shares of common stock of an aggregate par value of $300, and of unpaid dividends.

Of course, New Jersey's construction of the escheat statutes is binding on this Court except where matters of federal law are involved. *Hebert* v. *Louisiana*, 272 U. S. 312, 317; *United States* v. *Burnison*, 339 U. S. 87, 89.

[3] The escheat statute makes the decree a full release of liability in any jurisdiction in which it is effective but New Jersey makes no guarantee to protect appellant against such claims. N. J. Rev. Stat. (Cum. Supp. 1945–1947) 2:53–23.1.

The statute, N. J. Rev. Stat. (Cum. Supp. 1945–1947) 2:53–21, provides:

> "A notice containing a summary of the order designating the time and place of hearing, as approved by the court shall be published in a manner directed by the court and shall also be published once a week for three successive weeks in a newspaper of general circulation designated by the court; . . . ."

The Supreme Court of New Jersey authoritatively construed this to require "that the notice shall identify the property of which escheat is sought and the last known owner." 5 N. J. at 307, 74 A. 2d at 577.[4] The published notice in this case corresponded with this construction. It described the property in accordance with the state court's understanding of the requirements of N. J. Rev. Stat. 2:53–21, and clearly indicated that the petition was one for escheat.

This case differs from *Wuchter* v. *Pizzutti,* 276 U. S. 13, relied on by appellant, since it is not here attempted to validate a defective statutory provision for notice by recourse to the sufficiency of the notice which, although not required by statute, was in fact given. Here it is the statute itself, as interpreted by the state court, which requires what we think is adequate notice.

In *Security Savings Bank* v. *California,* 263 U. S. 282, a case involving statutory escheat of the bank deposits presumed abandoned, where nothing to the contrary is known by bank officials, because unused and unclaimed

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[4] The New Jersey Supreme Court did not specifically require that the address of the last known owner be included in the notice, but the notice which it approved did, in fact, contain the last known addresses, and also described the value and character of the property which was to be escheated. The notice was published once a week for three successive weeks, in accordance with the statutory requirement. N. J. Rev. Stat. (Cum. Supp. 1945–1947) 2:53–21.

for twenty years, it was similarly contended the bank was denied due process because depositors would not be bound by the judgment of escheat. P. 286. This Court said: "[T]he essentials of jurisdiction over the deposits are that there be seizure of the *res* at the commencement of the suit; and reasonable notice and opportunity to be heard." P. 287. The procedural provision made the depositors affected parties and required publication in Sacramento County, only, of the summons with no requirement of the depositors' addresses. Delivery of a copy of the summons on the bank was commanded. It was held, p. 287, that the personal service on the bank effected seizure of the deposit and the publication of the summons was effective as similar publication would be in litigation involving unknown persons with possible claims to property. Cf. *Anderson National Bank* v. *Luckett,* 321 U. S. 233, 243.

In *Mullane* v. *Central Hanover Trust Co.,* 339 U. S. 306, in a proceeding to settle trusts with numerous parties as possible beneficiaries whose names and interests were unknown to the trustee, we commented on the subject of notice:

> "This Court has not hesitated to approve of resort to publication as a customary substitute in another class of cases where it is not reasonably possible or practicable to give more adequate warning." P. 317.

We held that:

> "Accordingly we overrule appellant's constitutional objections to published notice insofar as they are urged on behalf of any beneficiaries whose interests or addresses are unknown to the trustee." P. 318.

The sound reasons stated in the foregoing cases for deeming the notices there given adequate to bind interested persons in the respective proceedings, lead us to the conclusion that the notice by publication in this case was

adequate. If the state has the responsibility of looking after abandoned property subject to its sovereign power, these publications are adequate to affect the owner's rights.

Impairment of Contract.—Appellant attacks the validity of the New Jersey escheat statute on the ground that it impairs the contract rights of the owners of the dividends and stock certificates in violation of Art. I, § 10, ¶ 1, of the Constitution: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ." This New Jersey law was enacted to authorize the state to take possession of "personal property" whenever the owner entitled to that "personal property within [New Jersey] . . . shall be and remain unknown" or his "whereabouts" remain unknown or the property remains "unclaimed" for fourteen successive years. N. J. Rev. Stat. (Cum. Supp. 1945–1947) 2:53–15 and 17. We need not consider whether a state possesses inherent power for such legislation as to personalty as the successor to a prerogative of royal sovereignty.[5]

As a broad principle of jurisprudence rather than as a result of the evolution of legal rules, it is clear that a

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[5] The right of the King at common law to take possession, in certain circumstances, of abandoned chattels is clear. VII Holdsworth, History of English Law (2d ed.), 495. *E. g.*, treasure trove, *Attorney-General* v. *Trustees of the British Museum*, [1903] 2 Ch. 598. This doctrine of *bona vacantia* came to include choses in action, X Holdsworth, *supra*, 350, such as certificates of stock in corporations, VII Holdsworth, *supra*, 515 *et seq.*; Ames, Disseisin of Chattels, 3 Select Essays in Anglo-American Legal History 541, 558. Thus the King possessed as *bona vacantia* the right to dividends on a claim of a dissolved corporation in a bankruptcy proceeding against the corporation's debtor. This was held in 1898 on the theory that the corporation was "extinct without successor or representative." *In re Higginson & Dean*, [1899] 1 Q. B. 325, 330. See Grant on Corporations (1854 ed.) 303–304. Wright, J., said, [1899] 1 Q. B. 329: "The Courts will not allow a person who has obtained title or possession as a

state, subject to constitutional limitations, may use its legislative power to dispose of property within its reach, belonging to unknown persons.[6] Such property thus escapes seizure by would-be possessors and is used for the general good rather than for the chance enrichment of particular individuals or organizations. Normally the obligor or holder and the obligee or owner of abandoned property would, as here, have no contractual arrangement between themselves for its disposition in case of the owner's failure to make claim. As the disposition of abandoned property is a function of the state, no implied contract arises between obligor and obligee to determine the disposition of such property. Consequently, there is no impairment of contract by New Jersey's statute, enacted subsequent to the creation of the obligations here under examination, but only the exercise of a regulatory power over abandoned property.[7]

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mere trustee of chattels to set up unconscientiously any beneficial title by occupancy, possession, or otherwise." Thus the Crown took the place of the extinct creditor. Cf. Enever, Bona Vacantia Under the Law of England (1927), 55.

See particularly, *In re Melrose Ave.*, 234 N. Y. 48, 53, 136 N. E. 235, 237.

Cunnack v. *Edwards*, [1896] 2 Ch. 679, dealt with a society treated as a legal unit. The members had associated themselves to provide annuities for their widows. After the death of all the associates and their widows, £1250 surplus remained. As it was not a charity but rather a business arrangement under which all obligees had received payment in full, the court held that neither the *cy-pres* doctrine nor the doctrine of the resulting trust applied, and as Lord Halsbury put it: "The only other alternative remaining is that which I adopt, namely, that these funds are bona vacantia, and belong to the Crown in that character."

[6] *Cunnius* v. *Reading School District*, 198 U. S. 458, 469. Compare *Mormon Church* v. *United States*, 136 U. S. 1, 47. See 3 Scott, Law of Trusts (1939), § 411.4.

[7] *Security Savings Bank* v. *California*, 263 U. S. 282, 285; *Connecticut Ins. Co.* v. *Moore*, 333 U. S. 541, 545–548; *Provident Savings Institution* v. *Malone*, 221 U. S. 660, 663, 665–666.

Situs of Property.—Appellant argues that the escheat to New Jersey of the stock and the dividends denies it due process because such property has no situs in New Jersey for the purpose of escheat.[8] Appellant also contends that it has neither custody nor possession of these debts or demands due from it to its stockholders and therefore they cannot be seized. Since the property cannot be seized or escheated, the corporation would remain liable to its stockholders, and to require the payment to the state denies due process.

Appellant has no tangible property in New Jersey except its stock and transfer books, kept at its registered office, located in the office of an individual, at Flemington, New Jersey. Appellant points out that in the *Security Savings Bank* case, 263 U. S. at 285, and the *Anderson National Bank* case, 321 U. S. at 241, the contracts of deposit were made in the respective states by banks doing business therein. A like situation does not exist here, as the stock was issued and the dividends were held in other states. Further it is said that the bank deposit cases did not deal with escheat statutes, but rather, like the *Moore* case, with conservation statutes.

It was not solely the fact that the contracts for bank deposits were made in California and Kentucky that gave those states power over the abandoned deposits. Had the contract been one of bailment between two individual citizens of those states who had subsequently removed to another state, the courts of the state of the

[8] Each classified list of debts or demands due to the escheated estates by the appellant company includes as the last known addresses of the holders of said claims chiefly points outside New Jersey. The methods of payment of the different claims have varied. For example, dividends have been paid from bank accounts maintained in New York banks by appellant either in its own name or that of its transfer agent. As we think these business practices are not significant in determining appellant's liability for these escheats, they will not be further discussed.

contract would not have controlled, though its laws might have. The controlling fact was that the banks and the depositors could be served with process, either personally or by publication, to determine rights in this chose in action.[9]

Appellant is a corporation of New Jersey, amenable to process through its designated agent at its registered office. N. J. Rev. Stat. (Cum. Supp. 1945–1947) 14:4–1, 14:4–2. Cf. *State* v. *Garford Trucking, Inc.*, 4 N. J. 346, 72 A. 2d 851. This gave New Jersey power to seize the *res* here involved, to wit, the "debts or demands due to the escheated estate." And the fact that this is immediate escheat is not significant. Escheat is permitted against persons whose addresses or existence is unknown.[10] The taking-over in the bank deposit cases foreshadowed escheat. See the *Malone* case, 221 U. S. at 664, the

[9] This is like the creditor's ability to garnishee the debtor of his debtor, wherever the garnisheed debtor may be. *Harris* v. *Balk*, 198 U. S. 215; *Louisville & Nashville R. Co.* v. *Deer*, 200 U. S. 176; *Baltimore & Ohio R. Co.* v. *Hostetter*, 240 U. S. 620. Cf. Carpenter, 31 Harv. L. Rev. 905, but see Beale, 27 Harv. L. Rev. 107. Whatever may be Professor Beale's view of garnishment, he agrees with the theory of control relied upon herein.

"The true doctrine would seem to be that a debt has in fact no situs anywhere; not merely because it is intangible but because as a mere forced relation between the parties it has no real existence anywhere. Like other such relations it may, of course, be controlled by the law, and by the courts as instruments of the law; but the control must be obtained by making use of the relation. In order to control the relation the court must have the power to control both parties to it. Any court which has both debtor and creditor may compel a release from the creditor and an assignment of the action of the creditor. In other words if a debt is to be legally assigned or discharged it requires the action of both parties and especially the creditor, and the court which has to apply such a process must do so through its control over both parties." 27 Harv. L. Rev. at 115–116.

[10] *Christianson* v. *King County*, 239 U. S. 356, 368; *Hamilton* v. *Brown*, 161 U. S. 256, 268.

Security Savings Bank case, 263 U. S. at 283 and 290, the *Anderson National Bank* case, 321 U. S. at 241.

No matter where the appellant's assets may be, since it is its obligation to pay to the escheated estate that is taken, personal service on appellant effects a seizure of that obligation in just the same way that service on a bank is seizure of the deposit as shown in the *Notice* subdivision of this opinion, *supra,* p. 432. That power to seize the debt by jurisdiction over the debtor provides not only the basis for notice to the absent owner but also for taking over the debt from the debtor. *Security Savings Bank* v. *California, supra,* at 287. It is true that fiction plays a part in the jurisprudential concept of control over intangibles. There is no fiction, however, in the fact that choses in action, stock certificates and dividends held by the corporation, are property. Whether such property has its situs with the obligor or the obligee or for some purposes with both has given rise to diverse views in this Court.[11]

We see no reason to doubt that, where the debtor and creditor are within the jurisdiction of a court, that court has constitutional power to deal with the debt. Since choses in action have no spatial or tangible existence, control over them can "only arise from control or power over the persons whose relationships are the source of the rights and obligations." *Estin* v. *Estin,* 334 U. S. 541, 548.[12] Situs of an intangible is fictional but control over

[11] *Blackstone* v. *Miller,* 188 U. S. 189, overruled by *Farmers Loan & Trust Co.* v. *Minnesota,* 280 U. S. 204, 209. The latter case led to a like decision in *First National Bank* v. *Maine,* 284 U. S. 312, which was in turn overruled by *State Tax Comm'n* v. *Aldrich,* 316 U. S. 174, 181. See *Treichler* v. *Wisconsin,* 338 U. S. 251, 256.

[12] *Curry* v. *McCanless,* 307 U. S. 357, 365–366: "Such rights are but relationships between persons, natural or corporate, which the law recognizes by attaching to them certain sanctions enforceable in courts. The power of government over them and the protection which it gives them cannot be exerted through control of a physical

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parties whose judicially coerced action can make effective rights created by the chose in action enables the court with such control to dispose of the rights of the parties to the intangible.[13] Since such power exists through the state's jurisdiction of the parties whose dealings have created the chose in action, we need not rely on the concept that the asset represented by the certificate or dividend is where the obligor is found.[14] The rights of the owners of the stock and dividends come within the reach of the court by the notice, *i. e.,* service by publication; the rights of the appellant by personal service. That power enables the escheating state to compel the issue of the certificates or payment of the dividends. Compare *Great Northern R.*

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thing. They can be made effective only through control over and protection afforded to those persons whose relationships are the origin of the rights."

See a like ruling in *Direction der Disconto-Gesellschaft* v. *United States Steel Corp.*, 300 F. 741, 746, and 267 U. S. 22, 28.

[13] When taxation of intangibles was ruled by *Farmers Loan & Trust Co.* v. *Minnesota,* 280 U. S. 204, to the effect that states could not tax intangibles belonging to nonresidents though owed by residents, Washington held that a Washington bank deposit, belonging to the estate of a known nonresident decedent without heirs, could not escheat to Washington. "[T]he situs of this property was at the domicile of its owner, and therefore it was not property within this state at the time of his death and not subject to escheat under our statute." *In re Lyons' Estate,* 175 Wash. 115, 123, 26 P. 2d 615, 618. A contrary view was taken in *In re Rapoport's Estate,* 317 Mich. 291, 26 N. W. 2d 777. There it was held that the Michigan bank deposit of a nonresident decedent without heirs passed to Michigan on the theory that the Michigan escheat statute overruled the Michigan doctrine of the domiciliary situs of intangibles.

[14] 2 Beale, Conflict of Laws, § 309.1: "The picture of *bona vacantia* is that of movables without an owner being taken by the officers of the state. In reality, the money which [is] represented by the bank deposit was where the bank was when it was proved to be without an owner." An obligor on a chose in action, a bank especially, does not always have tangible assets to represent the liability.

Co. v. *Sutherland,* 273 U. S. 182, 193.[15] This gives New Jersey jurisdiction to act. That action, of course, must be in accord with the boundaries on legislation set by the Constitution.

Unclaimed property at the disposal of the state may include deposits in banks doing business in the particular state, though incorporated by the Federal Government, 12 U. S. C. § 21 *et seq. Anderson National Bank* v. *Luckett,* 321 U. S. 233. Such a deposit "is a part of the mass of property within the state whose transfer and devolution is subject to [the same] state control," p. 248, as would be "tangible property." *Security Savings Bank* v. *California, supra,* p. 285. Moneys owed by foreign insurance companies, doing business in a state, on life policies issued on the lives of residents of that state and remaining unclaimed for an adequate period, are subject to the state's disposition. *Connecticut Ins. Co.* v. *Moore,* 333 U. S. 541.

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[15] The fact that New Jersey has adopted the Uniform Stock Transfer Act with its provisions for the transfer of shares and the replacement of lost certificates is, we think, without a bearing on the problem of power to escheat. N. J. Rev. Stat. (Cum. Supp. 1945–1947) 14:8–27 and 14:8–43. While those sections provide for transfer of stock certificates only by delivery and the issue of new certificates only after notice by publication or otherwise and upon security, they were apparently treated by New Jersey as inapplicable to the problem of escheat. See *State* v. *Standard Oil Co.,* 5 N. J. 281, 307, 74 A. 2d 565, 577. New Jersey may consider that escheat is a proceeding of the same general character as matters of internal corporate management reserved in its decision in *Elgart* v. *Mintz,* 123 N. J. Eq. 404, 414–415, 197 A. 747, 753, an attachment case. The purpose of the Uniform Stock Transfer Act was to provide a system for transfer of stock that states might follow to simplify transactions that touched other states. See for example the complications over attachments in *Mills* v. *Jacobs,* 333 Pa. 231, 4 A. 2d 152. As the Uniform Stock Transfer Act was not specifically directed at shares with unknown owners, New Jersey may treat such shares in its corporations differently from lost shares.

We think that stock certificates and undelivered dividends thereon may also be abandoned property subject to the disposition of the domiciliary state of the corporation when the whereabouts of the owners are unknown for such lengths of time, and under such circumstances, as permit the declaration of abandonment.[16] That rule is applicable here.

Full Faith and Credit.—Finally, we shall deal with appellant's objection that this statutory escheat takes its property without due process because it does not protect it from claims by the owners. The argument is that the protection afforded by the New Jersey escheat statute is inadequate in that N. J. Rev. Stat. (Cum. Supp. 1945–1947) 2:53–23.1[17] is no protection beyond the state against owners of the escheated shares or against escheat or conservation actions by other states against Standard Oil of New Jersey for the same debts or demands due from Standard to its stockholders.[18] The judgment, as modified, calls for the reissue of the abandoned certificates to New Jersey and for the payment to that state of the unpaid dividends.

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[16] Cf. VII Holdsworth, History of English Law (2d ed.), 515.

[17] 2:53–23.1: "Operation and effect in decree—

"Any decree entered pursuant to the act to which this act is a supplement, shall automatically operate as a full, absolute and unconditional release and discharge of the person having such property in possession or custody from any and all claim, demand, or liability to any person whatever other than the State Treasurer with respect to such property, and such decree may be pleaded as an absolute bar to any action brought against such person with respect to such property by any person other than the State Treasurer."

[18] We lay aside without consideration the possibility that the escheated certificates had legally been transferred to other parties by the owners prior to publication in this action. ". . . I think that the risk . . . is not serious enough to justify a refusal to adjust the differences actually presented." *Direction der Disconto-Gesellschaft* v. *United States Steel Corp.*, 300 F. 741, 743; 267 U. S. 22, 29.

We have indicated above that we consider the notice to the stockholders adequate to support a valid judgment against their rights as well as those of the Company. The *res* is the debt and the same rule applies as with tangible property.[19] The debts or demands represented by the stock and dividends having been taken from the appellant company by a valid judgment of New Jersey, the same debts or demands against appellant cannot be taken by another state. The Full Faith and Credit Clause bars any such double escheat. Cf. *Baltimore & Ohio R. Co.* v. *Hostetter,* 240 U. S. 620, 624, and cases cited, particularly *Harris* v. *Balk,* 198 U. S. 215, 226.

Dissents suggest that states may enact only custodial statutes until this Court settles any controversy that may arise between states over rights to abandoned choses in action. The details of the method of bringing other states and foreign countries before this Court for selection of the appropriate sovereignty to receive the abandoned property are not elaborated upon. The claim of no other state to this property is before us and, of course, determination of any right of a claimant state against New Jersey for the property escheated by New Jersey must await presentation here.

The judgment of the Supreme Court of New Jersey is

Affirmed.

MR. JUSTICE FRANKFURTER, whom MR. JUSTICE JACKSON joins, dissenting.

I do not understand that the Court affirms the judgment of escheat on the ground that New Jersey may condition the granting of a corporate charter on payment

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[19] *Pennoyer* v. *Neff,* 95 U. S. 714; *Hamilton* v. *Brown,* 161 U. S. 256; *Pennington* v. *Fourth National Bank,* 243 U. S. 269. See n. 9, *supra.*

to the State of dividends unclaimed after 14 years. Indeed, the Court specifically bars the possibility of double escheat, which would logically result from such a holding. As I understand it, the decision must rest upon New Jersey's power over interests which in a territorial sense are assumed to be within its control. The foundation of this power is usually conveyed by the concept of situs. As to this ground of decision I must dissent. In *Connecticut Life Ins. Co.* v. *Moore,* 333 U. S. 541, this Court sustained a New York statute allowing escheat of the unclaimed proceeds of insurance policies on the basis of the insured's residence in the State at the time of the delivery of the policy. On that basis, the State where the last known owner was domiciled certainly has a better claim to abandoned stock than a State in which it happens that the corporation is subject to process.

If perchance one is to infer from the opinion that the unclaimed dividends deposited with the Guaranty Trust Company of New York are also escheatable by New York and that New York, had she anticipated New Jersey, could have exhausted all the potentialities of escheat in the unclaimed dividends, there is an added reason for dissent. The Constitution ought not to be placed in an unseemly light by suggesting that the constitutional rights of the several States depend on, and are terminated by, a race of diligence. The Bankruptcy Act expresses appropriate condemnation of such unseemly conduct and accidental solution of competing interests. It is one thing for a State to take custody of abandoned property as trustee, leaving open for subsequent determination what State has a controlling interest justifying escheat. But if a State wishes to assert its right to escheat property which by its very nature is not exclusively within its control, other interested States should be parties to the litigation. The right to resort to this Court for adjust-

ment of conflicting interests among several States has been placed in the Constitution to avoid crude remedies of self-help in the settlement of interstate controversies. See *Texas* v. *Florida,* 306 U. S. 398.

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

There are several states with possible claims to the escheat of intangibles. The state of incorporation of the obligor; the state where the last known owner was domiciled (see *Connecticut Ins. Co.* v. *Moore,* 333 U. S. 541); the state where later on the true residence of the owner was proved to be; the state of his last known domicile; the state where the obligor has its main place of business; in case of insurance or trust property, the state of residence (or domicile) of the beneficiary. There may be still other states with claims of an equal or greater dignity to these. In this case we have heard from only one—the state of incorporation.

I think any of several states, including the state of incorporation, might constitutionally enact a custodial statute under which it undertook to hold the escheated intangibles pending determination by this Court of the claims of competing states. New Jersey has not done that. New Jersey undertakes to appropriate to her exclusive use (after a short statute of limitations has run) this vast amount of wealth. Hence, I dissent.

ZITTMAN *v.* McGRATH, ATTORNEY GENERAL, SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN.

NO. 298. CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.*

Argued February 28, 1951.—Decided May 28, 1951.

After "transfers" of assets of German nationals had been forbidden by Executive Orders Nos. 8785 and 8389, issued by the President pursuant to § 5 (b) of the Trading with the Enemy Act, petitioners, American holders of claims against German banks, levied attachments on the debtors' accounts in a New York bank and prosecuted the claims to judgments in New York state courts. Subsequently, the Alien Property Custodian issued Vesting Orders vesting in himself the right, title and interest of the debtors in the accounts. Due to the outstanding attachment levies, the New York bank refused to release the accounts; and the Custodian sued in a federal district court for a declaratory judgment that petitioners "obtained no lien or other interest in" the attached accounts and that the Custodian was entitled to possession of the funds in the accounts. *Held:* The Custodian was not entitled to the relief sought. Pp. 447–449, 464.

1. Under New York law, petitioners have judgments, secured by attachments on balances owned by German aliens, good as against the debtors, but subject to federal licensing before they can be satisfied by transfer of title or possession. Pp. 449–452.

2. The attachment levies in this case are not nullities as against the right, title and interest of the German banks. Pp. 452–459.

(a) Attachments such as these have been treated as valid by consistent administrative practice, and are not to be deemed invalid by retroactive application of General Ruling No. 12 specifically designating an attachment levy as a "transfer" prohibited by Executive Order No. 8389. Pp. 452–459.

3. The attachment proceedings pursued in this case are not inconsistent with the federal program for control of alien property,

*Together with No. 314, *McCarthy* v. *McGrath, Attorney General, Successor to the Alien Property Custodian,* also on certiorari to the same court.

since they do not purport to control the Custodian in the exercise of the federal licensing power or in his power to vest the *res* for purposes of administration. *Propper* v. *Clark*, 337 U. S. 472, distinguished. Pp. 459–463.

4. As against the German debtors, the attachments and the judgments they secure are valid under New York law; and they cannot be cancelled or annulled under a Vesting Order by which the Alien Property Custodian takes over only the right, title and interest of those debtors in the accounts. Pp. 463–464.

182 F. 2d 349, reversed.

In declaratory judgment actions against petitioners by the Alien Property Custodian, the District Court granted the relief sought. 82 F. Supp. 740. The Court of Appeals affirmed. 182 F. 2d 349. This Court granted certiorari. 340 U. S. 882. *Reversed*, p. 464.

Joseph M. Cohen argued the cause and filed a brief for petitioner in No. 298.

Henry I. Fillman argued the cause for petitioner in No. 314. With him on the brief was *Otto C. Sommerich.*

Ralph S. Spritzer argued the cause for respondent. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Baynton, James L. Morrisson* and *George B. Searls.*

MR. JUSTICE JACKSON delivered the opinion of the Court.

On December 11, 1941, petitioner Zittman, holder of claims against the Deutsche Reichsbank and the Deutsche Golddiskontbank, caused attachment warrants to be issued by the appropriate New York court and levied on accounts maintained by the debtors in New York City with the Chase National Bank. On January 21, 1942, petitioner McCarthy, holder of a claim against the Reichsbank, also attached its accounts with the Chase

Bank. Both attachments were followed by state court actions which were pursued to default judgments. The judgments remain unsatisfied because the attached funds were and are "frozen" by federal government foreign funds controls. The New York courts have repeatedly extended the ninety-day limitation provided for the sheriff to reduce the accounts to his possession or commence an action to do so,[1] so that the attachments, like the judgments, are outstanding.

The accounts were frozen June 14, 1941, by Executive Order No. 8785,[2] which extended to assets of German nationals freezing controls initiated by Executive Order No. 8389,[3] issued April 10, 1940, by the President, pursuant to the powers vested in him by § 5 (b) of the Trading With the Enemy Act.[4] The general effect of the basic order was to forbid "transactions" in the assets of blocked nationals, including all "transfers" of such funds.[5] In October, 1946, more than four and a half years after the levy of these attachments, the Alien Property Custodian issued Vesting Orders, which vested "that certain debt or other obligation owing to" the German bank "and any and all rights to demand, enforce and collect the same." The Chase Bank notified the Custodian that, due to the outstanding attachment levies,

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[1] As provided for in N. Y. Civ. Prac. Act § 922.

[2] 3 CFR, 1943 Cum. Supp., 948, 6 Fed. Reg. 2897.

[3] 3 CFR, 1943 Cum. Supp., 645, 5 Fed. Reg. 1400.

[4] 40 Stat. 411, 415, as amended by Joint Resolution of May 7, 1940, 54 Stat. 179, and First War Powers Act of 1941, § 301, 55 Stat. 839.

[5] Executive Order No. 8389, as amended, provides:

"SECTION 1. All of the following transactions are prohibited, except as specifically authorized by the Secretary of the Treasury by means of regulations, rulings, instructions, licenses, or otherwise, if . . . such transactions involve property in which any foreign country designated in this Order, or any national thereof, has at any time on or

it could not release the accounts.[6] Some sixteen months later, the Custodian petitioned the United States District Court for the Southern District of New York for a declaratory judgment that the petitioners "obtained no lien or other interest in" the attached accounts and that he was entitled to take the entire balances. The District Court granted the relief sought,[7] and the United States Court of Appeals for the Second Circuit affirmed, *per curiam,* solely on the authority of *Propper* v. *Clark,* 337 U. S. 472.[8] We granted certiorari.[9] The question is whether the attachment levies were "transfers" forbidden by Executive Order No. 8389.

I. Rights of the Judgment Creditors Under New York Law.

In the New York courts, petitioners invoked one of several provisional remedies which, from time out of mind, New York has extended to its citizens against their nonresident debtors. These, in appropriate circumstances,

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since the effective date of this Order had any interest of any nature whatsoever, direct or indirect:

"A. All transfers of credit between any banking institutions within the United States . . . ;

"B. All payments by or to any banking institution within the United States;

. . . . . .

"E. All transfers, withdrawals or exportations of, or dealings in, any evidences of indebtedness or evidences of ownership of property by any person within the United States; and

"F. Any transaction for the purpose or which has the effect of evading or avoiding the foregoing prohibitions."

[6] The Attorney General has since succeeded to the functions and powers of the Alien Property Custodian, but, for convenience, the respondent interest will be referred to throughout as the Custodian.

[7] 82 F. Supp. 740.

[8] 182 F. 2d 349.

[9] 340 U. S. 882.

may take the form of receivership [10] or attachment.[11] While these two remedies differ in nature and incidents, they are alike in being available at the commencement or during the pendency of an action, are not independent but auxiliary in character, and are not designed finally to adjudge substantive rights but to secure such judgment as may be rendered. As employed in this case, attachment also was the sole basis of jurisdiction.

The attachment levy on bank balances is perfected by service of a certified copy of the warrant of attachment on the banking institution,[12] which is required to certify to the sheriff making the levy the balance due to the defendant.[13] The levy does not require the sheriff to take physical possession of any property, nor does it require any transfer of title. The effect is prescribed: "Any such person so served with a certified copy of a warrant of attachment is forbidden to make or suffer, any transfer or other disposition of, or interfere with, any such property or interest therein so levied upon, . . . or sell, assign or transfer any right so levied upon, to any person, or persons, other than the sheriff serving the said warrant until ninety days from the date of such service, except upon direction of the sheriff or pursuant to an order of the court." [14] The account attached must, on the sheriff's demand, be paid over to him within ninety days, unless, as here, the time has been extended by order of court, and the sheriff is authorized to institute an action within that time to recover amounts withheld.[15]

These creditors prosecuted their actions to judgments which could be satisfied only from attached property and

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[10] N. Y. Civ. Prac. Act §§ 974–977.

[11] *Id.* §§ 902–973.

[12] *Id.* § 917 (2).

[13] *Id.* § 918.

[14] *Id.* § 917 (2).

[15] *Id.* § 922 (1).

by issuance of executions.[16] An attachment merges in an execution when issued, but it is not annulled until the judgment is paid and remains in force to keep alive the lien on the property. *Castriotis* v. *Guaranty Trust Co.*, 229 N. Y. 74, 79, 127 N. E. 900, 902 (1920).

Execution, if issued, would require a transfer of credit and of funds, but this step has not been taken and, it is admitted, cannot be taken in these cases without a federal license. While requirement of a federal license creates something of a contingency as to satisfaction of the judgments, as matter of New York law this does not deprive the judgment of its validity or the attachment of its lien. *Commission for Polish Relief* v. *Banca Nationala a Rumaniei,* 288 N. Y. 332, 338, 43 N. E. 2d 345, 347 (1942).

Although the provisional remedy of attachment, as used in this case, has served to provide the basis of jurisdiction and has created a lien to secure satisfaction of the judgment, it is clear that it has neither attempted nor accomplished any transfer of possession, for these attachments have been maintained for over nine years, and the accounts are still where they were before the attachments were levied. That there has been no transfer of title to the funds by the proceedings to date also is clear. If the judgment debtors chose to satisfy the judgments by other means, or to substitute an undertaking for the property attached, they could do so, and the accounts would be freed of the lien.[17]

Under state law, the position of these judgment creditors is that they have judgments, secured by attachments on balances owned by German aliens, good as against the debtors, but subject to federal licensing before they can be satisfied by transfer of title or pos-

[16] *Id.* § 520.

[17] *Id.* §§ 952, 953.

session. The Custodian claims, in a collateral attack, that federal courts should pronounce them wholly void and of no effect.

II. Effect of Federal Foreign Funds Control on Attachment.

The Government, in the present action, relies heavily on General Ruling No. 12 under Executive Order No. 8389, issued April 21, 1942, some three to five months after these attachments were levied, and almost two years after issuance of the Executive Order which it purports to interpret.[18] Then, for the first time, an attachment levy was specifically designated as a prohibited "transfer." The Government asks that it be construed to prohibit such attachments as here made and be applied retroactively to these attachments made before its promulgation. Whether an administrative agency could thus lump all attachments as prohibited "transfers," without reference to the nature of the rights acquired or steps taken under the various state laws providing for attachments, presents a question which we need not decide here. Some attachments may well be transfers, and thus prohibited. We deal here only with an attachment under New York law relating specifically to bank accounts.

This General Ruling, as thus interpreted to forbid these attachments, would be not only retroactive but incon-

[18] General Ruling No. 12 under Executive Order No. 8389, 31 CFR, 1943 Cum. Supp., 8849, April 21, 1942, defined a prohibited "transfer" as ". . . any actual or purported act or transaction . . . the purpose, intent, or effect of which is to create, surrender, release, transfer, or alter, directly or indirectly, any right, remedy, power, privilege, or interest with respect to any property and without limitation upon the foregoing shall include . . . the creation or transfer of any lien; the issuance, docketing, filing, or the levy of or under any judgment, decree, attachment, execution, or other judicial or administrative process or order, or the service of any garnishment . . . ."

sistent and irreconcilable with the contentions made one day after its issuance by both the Treasury and the Department of Justice to the New York Court of Appeals. These Departments filed a brief *amicus curiae,* dated April 22, 1942, in the New York Court of Appeals in *Commission for Polish Relief* v. *Banca Nationala a Rumaniei, supra.* The case involved an attachment, identical in state law character with those here, of bank balances in New York of the National Bank of Rumania, which had been frozen by Executive Order prior to levy. The Government's brief was subscribed by the General Counsel of the Treasury and an Assistant Attorney General, both members of the New York bar, presumably familiar with the peculiarities of the New York law of attachment of bank accounts. It specifically called attention to General Ruling No. 12, and, referring to the claim of incompatibility between the attachment and the federal freezing program, it declared: "This is the first occasion in which a court of last resort in this country has been called upon to meet this issue . . . ." [19] It went on to advise the Court of Appeals definitely and comprehensively as to the rights of New York courts to proceed on the basis of the attachment there involved. In view of the Custodian's present contentions, it merits extensive consideration.

The New York courts were advised of five purposes of the Federal Government's program: "1. Protecting property of persons in occupied countries"; "2. Preventing the Axis, now our enemy, from acquiring any benefit from these blocked assets"; "3. Facilitating the use of blocked assets in the United Nations war effort and protecting American banks and business institutions";

[19] Brief of the United States as *amicus curiae,* p. 2, *Commission for Polish Relief* v. *Banca Nationala a Rumaniei,* 288 N. Y. 332, 43 N. E. 2d 345 (1942).

"4. Protecting American creditors"; "5. Foreign relations, including post-war negotiations and settlements." [20]

To accomplish these purposes in relation to over seven billion dollars of blocked foreign assets, it was said that ". . . the Treasury has had to deal with the problem of litigation, particularly attachment actions, as affecting blocked assets," [21] and the position of the Treasury was represented as follows:

> ". . . the Treasury did not want to interfere with the orderly consideration of cases by the courts, including attachment actions, and at the same time it was essential to the Government's program that the results of court proceedings be subject to the same policy considerations from the point of view of freezing control as those arising or recognized through voluntary action of the parties.
>
> "Indeed the Treasury regards the courts as the appropriate place to decide disputed claims and suggested to parties that they adjudicate such claims before applying for a license to permit the transfer of funds. The judgment was then regarded by the Treasury as the equivalent of a voluntary payment order without the creation or transfer of any vested interest, and a license was issued or denied on the same principles of policy as those governing voluntary transfers of blocked assets.
>
> "The Treasury Department did not feel that it could finally pass on an application for a license to transfer blocked assets where the facts were disputed or liability denied. The Treasury felt that it was not practical to pass on the freezing control questions involved in such applications until there was at least a determination of the facts by a court of law. . . ." [22]

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[20] *Id.* at pp. 5, 7, 9, 11, 13.

[21] *Id.* at p. 14.

[22] *Id.* at pp. 14–15.

Notwithstanding this assertion of complete discretion to grant or withhold approval of ultimate transfers, the Government advised the Court of Appeals that, "So far as foreign funds control is concerned there can be an attachable interest under New York law with respect to the blocked assets. . . ." [23] In language applicable to the case before us now, it said:

> "The National Bank of Rumania has property within the jurisdiction. It has not been divested of all its property rights. In fact, its interests today in the blocked assets are perhaps by far the most valuable of all the interests in such assets. This property has not been confiscated by the Government. The National Bank of Rumania is prohibited from exercising powers and privileges which prior to the Executive Order it could exercise. . . . [T]he right of the owner of a blocked account to apply for a license to make payment out of such an account is a most substantial one, and that lawful payment can be made if a license is granted." [24]

And the Government continued:

> "An attachment action against a national's blocked account is an attempt to obtain an unlicensed assignment of the national's interest in the blocked account—nothing more and nothing less.
>
> "In this sense, the attachment action might be regarded as a levy upon the nationals contingent power (*i. e.* contingent upon Treasury authorization) to transfer all his interest in the blocked account to A; any judgment in the attachment action resulting in giving A a contingent interest in the account equivalent to what he would have obtained by voluntary assignment.

[23] *Id.* at p. 42.

[24] *Id.* at p. 50.

"The value of such an interest is of course problematical. Whether it is worthless or worth full value will depend upon whether the transfer sought is in accordance with the Government's policies in administering freezing control.

"Under this analysis of what the nature of any attachment action against a blocked account must be, in the light of the purposes of freezing control, it is suggested that an attachment action of this nature might well be allowed in the New York courts.[25]

. . . . . .

"The Federal Government is anxious to keep to a minimum interference with the normal rights of litigants and the jurisdiction of courts to hear and determine cases, consistent with the most effective prosecution by the Government of total war. Applied to the instant case, this means that the Federal Government must have its hands unfettered in using freezing control, recognizing that it is desirable that private litigants be able to attach some interest with respect to blocked assets in order to clarify their rights and liabilities.

"This has been suggested in this Brief. The Government believes that the interests of private litigants in state courts can be served without interference with the freezing control program. However, the interest of the Government is paramount to the rights of private litigants in this field and should this Court be of the view that under the New York law there cannot be a valid attachment of the limited interests herein suggested, then the Government must reluctantly take the position that in the absence of

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[25] *Id.* at p. 52.

> further authorization under the freezing control, there can be no attachable interest under New York law with respect to blocked assets." [26]

As the Government pointed out in the *Polish Relief* case, the Custodian is charged, among other things, with preserving and distributing blocked assets for the benefit of American creditors. Few claims are not subject to some question, and the Treasury does not pay questionable claims. For those claims to be settled so that they can properly be paid out of blocked assets they must be adjudicated valid by some court of law. Because the debtor rarely is amenable to personal service, any action must be in the nature of a *quasi-in-rem* action preceded by an attachment of property belonging to the debtor within the jurisdiction of the court. If, as the Custodian now contends, the freezing program puts all assets of an alien debtor beyond the reach of an attachment, it is not difficult to see that there can be no adjudications of the validity of American claims and consequently the claims, not being settled, would not be satisfied by the Treasury. The logical end of that course would be complete frustration of a large part of the freezing program. We cannot believe that the President intended the program to reach such a self-generated stalemate.

The New York Court of Appeals took the position urged by the Federal Government. It held that the interest of the debtor, although subject to the licensing contingency, was sufficient as matter of state law to render the levy valid and sufficient as a basis of jurisdiction to decide any issues between the attaching creditor and the foreign debtor. At the same time, it acknowledged that any transfer of the attached funds to satisfy the judgment could only be had if and when the proper license

[26] *Id.* at p. 53.

had been secured. *Commission for Polish Relief* v. *Banca Nationala a Rumaniei, supra.*

What the New York courts have done here is not distinguishable from what the Government urged in the *Polish Relief* case. Indeed, in that case, the Secretary of the Treasury had expressly denied the application of the petitioner for a license for his attachment. In spite of that, however, the Government urged that the attachment was authorized by settled administrative practice:

> "From the very inception of freezing control, litigants, prior to commencing attachment actions against funds belonging to blocked nationals, have requested the Secretary of the Treasury to license a transfer to the sheriff by attachment. In all those cases, running into the hundreds, the Treasury Department has taken a consistent position. The Treasury Department has authorized the bringing of an attachment action. However, the Treasury Department has not licensed a transfer of the blocked funds to the sheriff prior to judgment." [27]

The foregoing is confirmed in this case by a stipulation that consistent administrative practice treated attachments such as we have here as permissible and valid at the time they were levied.[28]

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[27] *Id.* at p. 39.

[28] The stipulation of facts states:

. . . . . .

"5. From the inception of 'freezing' controls, all litigants who, prior to commencing attachment actions against funds belonging to blocked nationals, had requested the Secretary of the Treasury to license an attachment, or levy, received from the Treasury Department a response of the following nature:

> "Under Executive Order No. 8389, as amended, and the Regulations issued thereunder, no attempt is made to limit the bringing of suits in the courts of the United States or of any of the States. However, should you secure a judgment against

The Custodian now asks the federal courts to declare the state court attachments nullities. His request here is not merely that he is entitled to take and administer the fund, but that the attachments are not effective as against the right, title, and interest of the German banks. His request is irreconcilable with the admitted administrative practice and the position urged upon the New York courts in the *Polish Relief* case. He predicates that reversal of position, and so far has been sustained in it, upon the decision of this Court in *Propper* v. *Clark, supra,* to which we accordingly turn.

III.

The essence of the Custodian's argument that *Propper* v. *Clark* requires invalidation of these attachments, as stated in his brief, is that:

> ". . . [I]t is little short of absurd to suggest that, while creditors of an enemy national are precluded from reaching his blocked property in the absence of a license where they proceed by the provisional

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one of the parties referred to in your letter, which is a country covered by the Order, or a national thereof, a license would have to be secured before payment could be made from accounts in banking institutions within the United States in the name of such country or national.

"6. From the inception of 'freezing' controls, the Secretary of the Treasury in administering the 'freezing' control program adopted the position, in response to numerous requests made of him, that the bringing of an action, the issuance of a warrant of attachment therein, and the levy thereunder upon blocked property found within the jurisdiction of the court which issued the warrant were not forbidden but that a license was required to be secured before payment could be made from the blocked account to satisfy any judgment recovered in such action.

"7. . . . A license to institute the action and levy the attachment was in fact not required by the Treasury Department."

remedy of receivership, the opposite result will be permitted where they follow the provisional remedy of attachment." [29]

The answer to this suggested absurdity is that a distinction in New York law, all important here, has eluded the Custodian. The receiver in *Propper* was not a receiver appointed as a provisional remedy but was a special statutory receiver which state law purported to vest with both title and right to possession, which, in case of blocked assets of a foreign corporate debtor, would obviously defeat the scheme of federal controls. As our opinion notes, 337 U. S. at p. 475, Propper's claim, adverse to that of the Custodian, was initiated by a temporary receiver, later made permanent, appointed by a New York state court pursuant to § 977–b of the New York Civil Practice Act, which is entitled, "Receivers to liquidate local assets of foreign corporations." That is a special proceeding added to New York practice by the 1936 Legislature,[30] and provides for appointment of a liquidating receiver of assets within the State owned by a foreign corporation which has been dissolved, liquidated, or nationalized, or which, voluntarily or otherwise, has ceased to do business.[31] Upon application by a creditor of such a corporation, the court appoints a temporary receiver.[32] Title to all such assets vests in him upon appointment,[33] and the statute requires and empowers him to "reduce to his possession any and all assets, credits, choses in action and property" found in the State.[34] If it is established on trial that the corporation has been

[29] Brief for Respondent, pp. 16–17.

[30] L. 1936, c. 917.

[31] N. Y. Civ. Prac. Act § 977–b (1).

[32] *Id.* § 977–b (4).

[33] *Id.* § 977–b (19).

[34] *Id.* § 977–b (4).

dissolved or nationalized or that its charter has been annulled or that it has ceased, for any reason, to do business, the receivership is made permanent [35] and notice is given to all creditors to prove their claims.[36] Those allowed, the receiver pays in accordance with statutory priorities.[37] Any surplus is paid to stockholders of the corporation or, in the discretion of the court, to a receiver or liquidator, if any, appointed in the domicile of the corporation or elsewhere.[38]

This special proceeding, which has nothing but name in common with the traditional provisional remedy of receivership,[39] was introduced to protect resident creditors and shareholders against confiscatory decrees by foreign nations. As one court has said:

> "This section became effective on the 8th day of June, 1936, and marks a distinct change in the policy of this State with respect to the disposition of property situated here but which belongs to a foreign corporation that has ceased to do business for any reason, or has been dissolved, liquidated, or nationalized.

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[35] *Id.* § 977–b (10).

[36] *Id.* § 977–b (11).

[37] *Id.* § 977–b (16).

[38] *Ibid.*

[39] *Id.* §§ 974–977. A receiver appointed as a provisional remedy is not an agent or representative of either party, but holds the property during the litigation pending final judgment. *Weeks* v. *Weeks*, 106 N. Y. 626, 631, 13 N. E. 96, 98 (1887); *People ex rel. Attorney General* v. *Security Life Ins. Co.*, 79 N. Y. 267, 270 (1879). "The receiver acquires no title, but only the right of possession as the officer of the court. The title remains in those in whom it was vested when the appointment was made." *Stokes* v. *Hoffman House*, 167 N. Y. 554, 559–560, 60 N. E. 667, 669 (1901), quoting *Keeney* v. *Home Ins. Co.*, 71 N. Y. 396, 401, 27 Am. Rep. 60, 63 (1877). See also Carmody's Manual of New York Civil Practice (Carr, Finn, Saxe, 1946 ed.) § 609.

"The purpose of this statute, clearly, is to administer the distribution of such assets in this State, irrespective of the scheme of distribution promulgated in any other State inclusive of the domicile of the foreign corporation. . . ." *Oliner* v. *American-Oriental Banking Corp.*, 252 App. Div. 212, 297 N. Y. Supp. 432 (1937) aff'd 277 N. Y. 588, 13 N. E. 2d 783 (1938). See also *Moscow Fire Ins. Co.* v. *Bank of New York & Trust Co.*, 161 Misc. 903, 924, 294 N. Y. Supp. 648, 676 (1937).

Such was the position of the receiver whose claims we rejected in *Propper* v. *Clark*. The courts of New York had themselves recognized that the *Propper* receivership conflicted in principle with federal funds control and had pointed out that in practice it might well defeat the federal policy. It was said, "The principle is well settled that war suspends the right of non-resident alien enemies to prosecute actions in our courts . . . and it cannot be denied that the plaintiff here [Propper], although himself neither an enemy nor an alien nor a non-resident, is seeking to enforce a cause of action which, at least until his appointment, existed, if at all, in favor of a non-resident alien which is also an enemy as the term 'enemy' is defined in the Trading with the Enemy Act. . . . His right to recover must rest upon the rights of such non-resident alien enemy, and while section 977–b of the Civil Practice Act purports to vest a receiver appointed thereunder with title to claims existing in favor of the foreign corporation it also is possible that under that section some proceeds of a recovery herein ultimately may benefit non-resident alien enemies . . . ." *Propper* v. *Buck*, 178 Misc. 76, 78, 33 N. Y. S. 2d 11, 13 (1942).

But, as the Government before that decision so unequivocally urged upon the New York Court of Appeals, attachment proceedings as pursued in these cases have no such consequences. Nothing in these state court pro-

ceedings have purported to frustrate the purposes of the federal freezing program. On the contrary, the effect of the State's action, like that of the federal, was to freeze these funds, to prevent their withdrawal or transfer to use of the German nationals. There is no suggestion that these attachment proceedings could in any manner benefit the enemy. The sole beneficiaries are American citizens whose liens are not derived from the enemy but are adverse to any enemy interests. And, if no federal freeze orders were in existence, these state proceedings would tie up enemy property and reduce the amounts available for enemy disposition. We agree with the Government's assurance to the Court of Appeals in the *Polish Relief* case that these proceedings, in view of the fact that they do not purport to control the Custodian in the exercise of the federal licensing power, or in the power to vest the *res* if he sees fit to do so for administration, are not inconsistent with the freezing program and we think they were not invalidated or considered in *Propper* v. *Clark, supra.* The latter decision is not authority for the judgment asked and obtained by the Custodian here.

IV. The Vesting Order.

The Custodian in this case has only sought to vest in himself the "right, title, and interest" of the German banks. As we understand it, he acknowledges that if the interests acquired by the attachments are valid as against the German banks he is not, under the Vesting Orders involved, as he has chosen to phrase them, entitled to the attached funds, but he takes the position that no valid rights against the German debtors were acquired by the attachments because prohibited by the freezing program.[40] He has, in short, put himself in the shoes of the German banks. As against the German debtors, the attachments

[40] Brief for Respondent, p. 27.

and the judgments they secure are valid under New York law, and cannot be cancelled or annulled under a Vesting Order by which the Custodian takes over only the right, title, and interest of those debtors in the accounts. But, of course, as against the Custodian, exercising the paramount power of the United States, they do not control or limit the federal policy of dealing with alien property and do not prevent a *res* vesting, as sustained in the companion cases, if the Custodian sees fit to take over the entire fund for administration under the Act. In such case, all federal questions as to recognition by the Custodian of the state law lien, or priority of payment, are reserved for decision if and when presented in accordance with the Act.

This result, as we have indicated, in no way impairs federal control over alien property, since the petitioners admit that they cannot secure payment from the attached frozen funds without a license from the Custodian. The case is, therefore, more nearly like *Lyon* v. *Singer,* 339 U. S. 841, 842, where this Court said: "We accept the New York court's determination that under New York law these claims arose from transactions in New York and were entitled to a preference. Since the New York court conditioned enforcement of the claims upon licensing by the Alien Property Custodian, federal control over alien property remains undiminished."

The decision of the court below is

Reversed.

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

MR. JUSTICE DOUGLAS, concurring.

I join in the opinion of the Court since it places control of the public interest phase of the controversy in the licensing power of the Custodian. Payment of claims

requires a license.[1] A license, of course, may be refused when payment would accrue directly or indirectly to the benefit of the enemy. But the policy of the Act is in no way subverted by recognition of a lien which can ripen into a priority only if payment would have no such effect. Denial of the lien could be made only if the Act called for an equality of distribution among claimants, regardless of their innocence or guilt. I can find nothing in the Act which warrants leveling the good faith lien claimant to the unsecured status of the others.[2]

MR. JUSTICE REED, with whom MR. JUSTICE BURTON joins, concurring in part and dissenting in part.

The Court fails to decide the only question of importance presented by this case. This question is whether a state attachment, obtained on assets previously blocked under Executive Order No. 8785, gives the attaching creditor any right in those assets that displaces the power of the Government to make such disposition or use of the assets as it may ultimately determine is for the best interest of the Nation and its citizens. The Court defers all questions as to "recognition by the Custodian of the state law lien, or priority of payment" for later decision. Under today's decision the Alien Property Custodian vests the account in question without knowing what power he has over its handling or disposition. Such uncertainty will hamper administration and be an open invitation to the owners of blocked assets to sell their interests in the blocked property, as the Custodian phrases it, "to friendly speculators willing to buy at a discount and to await payment on the ultimate day of unblocking."

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[1] See § 5 (b) of the Trading With the Enemy Act, 40 Stat. 411, 415, as amended, 54 Stat. 179, 55 Stat. 839, and 8 CFR, c. II, Part 511.

[2] The priority of debt claims contained in § 34 (g), 60 Stat. 925, 928, does not purport to deal with creditors preferred by reason of a lien lawfully acquired in judicial proceedings.

The Custodian sought a determination of this troublesome question. His petition in the District Court asked that court to declare that

> "respondents Zittman and McCarthy, and McCloskey, as sheriff, obtained no lien or other interest in the 'Reichsbank-Direktorium' or the Deutsche Golddiskontbank accounts, or the funds represented thereby, and that by virtue of Vesting Orders Nos. 7792 and 7870 the petitioner is entitled to the entire balances remaining in the 'Reichsbank-Direktorium' and Deutsche Golddiskontbank accounts on the books of the respondent Chase National Bank, together with all accrued dividends and accumulations."

The decree sustained that request on the authority of *Propper* v. *Clark,* 337 U. S. 472. It is to be noted that the prayer referred to liens or other interests in the accounts and asked that the balances be turned over. The Court is of the view that this is not a simple turn-over request but also seeks a declaration "that no valid rights against the German debtors were acquired by the attachments because prohibited by the freezing program."

While such construction of the petition is possible, I read it to seek a rather different decision. The Custodian's complaint prayed a ruling that the attaching creditors obtained no lien or other interest in the accounts that could determine his action in administering or distributing the fund in accordance with the direction of Congress. This is made clear by the statements excerpted from the Custodian's brief in the margin.[1] It

[1] "Petitioners could not thereafter acquire a property interest in the blocked accounts which could prevail against a subsequent vesting by the Custodian." Resp. brief, p. 9.

"Petitioners stress that nothing in the Trading With the Enemy Act or in the freezing regulations prohibits the bringing of suits against enemy nationals in time of war. This is correct. Indeed, the Treasury Department in administering the controls took the position

is substantiated by United States Treasury Department General Ruling No. 12, upon which the Custodian relies.[2]

If the Court has any doubt that anything else was meant by the complaint or decree, the proper course

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from the outset that parties were free to seek adjudications of their rights *vis-a-vis* blocked nationals." *Id.* p. 13.

"Respondent does not contend that the attachments were absolutely [*sic*] void or that they were illegal. He agrees that freezing did not purport to prohibit the resort to judicial process. He states simply that transfers in blocked property were proscribed and that the judicial hand was stayed to that extent. Not attachments, but transfers, were controlled. That means that a fixed or absolute lien (as distinguished from 'a potential right or a contingent lien') could not be created without a release of the property from federal control. Since the perfecting of a fixed lien is characteristically subject to numerous contingencies under state law, *e. g.*, the entry of a judgment in plaintiff's favor, it would seem clear that the imposition of a further condition by operation of federal law—the procurement of a license—is not inconsistent with proceedings by way of attachment.

"In effect, then, the Treasury said this:—Blocked property is subject to a federal injunction against transfer. This does not prevent a state court from issuing a writ which also directs the holder of the blocked property to keep it intact. And if the state court, in these circumstances, regards its own process as offering a sufficient promise of control to warrant an exercise of its juridiction [*sic*], there is no objection to its declaring the rights of a suitor as against the owner of the blocked property. But the state court's power to confer a proprietary interest upon the suitor necessarily awaits a lifting of the federal injunction." *Id.* pp. 49–50.

[2] "(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." 7 Fed. Reg. 2991.

would be to insert in the decree a modifying proviso to the effect that "no lien or other interest, except as between the debtor and creditor, was obtained by the attachment proceedings in the state court." See *Lyon* v. *Singer,* 339 U. S. 841.

In my judgment a valid state attachment, obtained subsequent to the blocking order, is good as between an alien and his creditors. I am also sure that such an attachment has no compelling power upon the Attorney General in his administration of the Trading With the Enemy Act.

Propper v. *Clark,* 337 U. S. 472, 482–486, so holds. It was like the present case—a suit by the Alien Property Custodian, after a vesting order, to get possession of the blocked credits. In *Propper* v. *Clark,* as in this case, there was a claim that an interest had passed to a third party, Propper, as permanent receiver by judicial decree entered between the blocking and vesting orders. There is nothing in the group of cases in *Lyon* v. *Singer,* 339 U. S. 841, to weaken the holding in the *Propper* case. The transactions in those later cases likewise took place after a federal blocking order and before a vesting order by the Alien Property Custodian. The New York Court of Appeals had decided that the claimants had preferred claims under New York law against the assets of the alien. We recognized those claims since they were conditioned upon licensing by the Alien Property Custodian, but we distinctly said that the ruling in *Propper* v. *Clark* was not affected because in the *Propper* case "the liquidator claimed title to frozen assets adversely to the Custodian, and sought to deny the Custodian's paramount power to vest the alien property in the United States." Therefore the clear rule of the *Propper* case that the Custodian vests and administers entirely free from effective interference over any rights or title secured by the attachment stands unimpaired. In such a situation it

does not seem to me that there can be any difference between a title acquired by a receiver, subject to the control of the Custodian as licensor, and the lien acquired by the attaching creditor, subject to the same license limitation. The Court's distinction between *Propper* v. *Clark* and this case should have no effect on the result here.

I disagree, too, with the Court's interpretation of the brief filed by the Government in *Commission for Polish Relief* v. *Banca Nationala a Rumaniei,* 288 N. Y. 332, 43 N. E. 2d 345. The case holds only that the attachment is good between the debtor and creditor. It does not hold it good against the Government nor did the Government brief, as I read it, so concede. The brief merely approved suits between litigants to settle those litigants' personal rights, not to get transfers of or liens on frozen assets effective against the Custodian. That is litigation pursuant to General Ruling No. 12 (4), note 2, *supra.* This is clear from the brief, excerpts from which appear below.[3]

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[3] "Almost from the outset of freezing control the Treasury has had to deal with the problem of litigation, particularly attachment actions, as affecting blocked assets. As will be more fully developed later in this brief, the Treasury did not want to interfere with the orderly consideration of cases by the courts, including attachment actions, and at the same time it was essential to the Government's program that the results of court proceedings be subject to the same policy considerations from the point of view of freezing control as those arising or recognized through voluntary action of the parties.

"Indeed the Treasury regards the courts as the appropriate place to decide disputed claims and suggested to parties that they adjudicate such claims before applying for a license to permit the transfer of funds. The judgment was then regarded by the Treasury as the equivalent of a voluntary payment order without the creation or transfer of any vested interest, and a license was issued or denied on the same principles of policy as those governing voluntary transfers of blocked assets." P. 14.

"The judicial procedure is generally geared to deal only with the rights and liabilities of the parties to the proceeding. The judicial

As the Court does not agree with me on the propriety of making a determination at the present time as above suggested and has left open for future litigation "all federal questions as to recognition by the Custodian of the state law lien, or priority of payment," I forbear from expressing my views at length until this issue is presented.

As indicated above, I think we should modify the judgment entered below by some such insertion as I have heretofore suggested on pp. 467–468, and as so modified affirm that decree.

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procedure is not the most appropriate field to determine the great political questions of national and international magnitude that will inhere in the ultimate disposition of foreign-owned property in this country and in the determination of the rights of groups of American and foreign creditors. These great problems of national policy can be handled adequately only by the Federal Government. The determination of such national policies should not be forced by judicial decisions in particular cases determining the rights and liabilities of the parties to the proceedings. The questions are political and for the executive, not the judiciary. They are federal, not state. They call for uniform treatment with reference to large national policies, not for disparate local treatment to accord with local policies. Moreover Congress and the executive have set up machinery to deal with the problems, a machinery designed to relate the solution to the whole war effort and the inevitable postwar problems." P. 12.

"Freezing control in protecting blocked assets of overrun countries and their nationals had as a further purpose the desire to make such assets available, at least in part, in the war effort against the Axis. Needless to say, if there can be unlicensed transfers of title to blocked property, the true owners of such blocked property may be prevented from using the property in the war effort. . . ." Pp. 9–10.

" 'Blocked dollars' are still valuable dollars. With a license they are 'free dollars.' More than eighty general licenses and 400,000 special licenses have been issued under the freezing control, authorizing the use of blocked dollars for stated purposes. Moreover, 'hope springs eternal in the human breast.' There are always those who are willing to wait for the day when the war is over with the expectation that the freezing control will be lifted." P. 8.

ZITTMAN *v.* McGRATH, ATTORNEY GENERAL, SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN.

NO. 299. CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.*

Argued February 28, 1951.—Decided May 28, 1951.

After "transfers" of assets of German nationals had been forbidden by Executive Orders issued pursuant to the Trading with the Enemy Act, petitioners, American holders of claims against a German bank, levied attachments on accounts of the debtor in a New York bank and prosecuted the claims to judgments in New York state courts. The Alien Property Custodian served on the New York bank Vesting Orders and also a "turnover directive" requiring that all funds in the accounts be turned over to him "to be held, administered and accounted for as provided by law." In an action in the Federal District Court, the Custodian sought a declaratory judgment that he is "entitled to possession" of the funds in the accounts. *Held:* The Custodian is entitled to possession of the funds and to administer them. *Zittman* v. *McGrath, ante,* p. 446, distinguished. Pp. 472–474.

(a) The transfer of possession of the funds in this case does not operate to deprive any class of creditors of rights, but takes over the estate for administration. Pp. 473–474.

(b) All questions as to the petitioners' claims, judgments, or priorities are reserved for decision in the proceedings prescribed by the Act. P. 474.

182 F. 2d 349, affirmed.

In declaratory judgment actions against petitioners by the Alien Property Custodian, the District Court granted the relief sought. 82 F. Supp. 740. The Court of Appeals affirmed. 182 F. 2d 349. This Court granted certiorari. 340 U. S. 882. *Affirmed,* p. 474.

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*Together with No. 315, *McCarthy* v. *McGrath, Attorney General, Successor to the Alien Property Custodian,* also on certiorari to the same court.

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Joseph M. Cohen argued the cause and filed a brief for petitioner in No. 299.

Henry I. Fillman argued the cause for petitioner in No. 315. With him on the brief was *Otto C. Sommerich.*

Ralph S. Spritzer argued the cause for respondent. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Baynton, James L. Morrisson* and *George B. Searls.*

MR. JUSTICE JACKSON delivered the opinion of the Court.

These are companion cases to Nos. 298 and 314, *ante,* p. 446. Here, the petitioners attached the accounts of the Deutsche Reichsbank with the Federal Reserve Bank of New York. The attachments were levied at the same time as those levied on the Chase Bank accounts, and were also followed by state court actions against the Reichsbank, culminating in default judgments that have not been satisfied because of the Federal Government's freezing program. The Alien Property Custodian served on the Federal Reserve Bank Vesting Orders similar to those served on the Chase Bank in Nos. 298 and 314. But he also served on the Federal Reserve Bank a "turn-over directive" describing the specific property which he required to be "turned over to the undersigned to be held, administered and accounted for as provided by law," and calling attention to the protection which § 5 (b) of the Trading With the Enemy Act gives for compliance. No such directive was served on the Chase Bank in the companion cases. The Federal Reserve Bank refused to release to him the portion of the accounts that had been subjected to the attachment levies. The Custodian has been sustained by the courts below, as he was in Nos. 298 and 314, on the basis of *Propper* v. *Clark,* 337 U. S. 472.[1]

[1] 82 F. Supp. 740; 182 F. 2d 349.

All that we have said in subdivisions numbered I, II, and III in Nos. 298 and 314, respecting the nature of the rights acquired under New York law by an attaching creditor, and the position occupied by those rights consistent with the freezing program, is equally applicable to the attachments here involved. The important distinction between these cases and their companions is in the Vesting Orders issued by the Custodian and the nature of the judgment he has sought in each. The only order issued to the Chase Bank was a "right, title, and interest" Vesting Order, which, as we understand the Custodian to concede, put him in the place of the German banks and left open to judicial determination whether any valid interests as against anyone were created by the attachments. In the litigation involving the Chase Bank, the Custodian sought a declaratory judgment that the freezing program precluded attaching creditors from obtaining any interest in the blocked property good as against the debtors.

In these cases the Custodian pursued a different course, not only in that he served on the Federal Reserve Bank a "turnover directive," but also in that the relief asked in this case omits any request for a declaration that the attachments are invalid. He asks a decree only that the Custodian is "entitled to possession" of the accounts in their entirety. In other words, in the actions involving the Chase Bank the Custodian stepped into the shoes of the German banks and sought to free their titles of the state liens; here he seeks to step into the shoes of the Federal Reserve Bank as possessor of the credits and funds, leaving unadjudicated the effect of such substitution of custody upon the attaching creditors' rights.

While the statute under which the funds are to be "held, administered and accounted for" authorizes the vesting of such foreign-owned property in the Custodian and its administration "in the interest of and for the benefit of

the United States," [2] it is not a confiscation measure, but a liquidation measure for the protection of American creditors. It provides for the filing and proving of claims and states that the funds "shall be equitably applied" for the payment of debts.[3] If the Custodian disallows a claim, or if he disallows a claim of priority where claims exceed assets, the claimant may seek relief in the United States District Court for the District of Columbia.[4] The transfer of possession of these funds does not purport to work any automatic deprivation of rights of any class of creditors, but takes over the estate for administration.

In view of these facts, we decide, and decide only, that the Custodian has power to possess himself of these funds and to administer them. To hold otherwise would be incompatible with the federal program. The consequences, if any, that flow from the substitution of the Custodian in place of the Bank as holder of the funds, upon rights derived from valid state court judgments secured by attachment, are not ripe for determination. They may never come into controversy. All questions as to the petitioners' claims, judgments, or priorities are reserved for decision in the proceedings prescribed by statute.

The power of the United States to take and administer the fund is paramount. The judgment below must, therefore, be

Affirmed.

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

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[2] Trading With the Enemy Act of 1917, 40 Stat. 411, as amended, § 5 (b) (1), 55 Stat. 839.

[3] § 34 (a), 60 Stat. 925.

[4] *Id.* § 34 (e), (f).

McCLOSKEY, SHERIFF, *v.* McGRATH, ATTORNEY GENERAL, SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN.

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

No. 324. Argued February 28, 1951.—Decided May 28, 1951.

Petitioner is the sheriff who levied the attachments against accounts of German nationals "frozen" under Executive Orders Nos. 8785 and 8389, which were involved in the two preceding decisions (*Zittman* v. *McGrath, ante,* pp. 446, 471). His claim for his fees was denied by the courts below incidentally to their denial of the rights asserted by the attaching creditors. *Held:* The judgment is reversed insofar as the fees of the sheriff relate to the accounts to which the Custodian was held not entitled to possession, and affirmed insofar as they relate to the accounts to which the Custodian was held entitled to possession—without prejudice to certain rights of the sheriff as indicated in the opinion. Pp. 475–478.

182 F. 2d 349, affirmed in part and reversed in part.

Petitioner's claim to his fees as sheriff were denied by the courts below incidentally to the denial of the rights asserted by the attaching creditors. 82 F. Supp. 740; 182 F. 2d 349. This Court granted certiorari. 340 U. S. 882. *Reversed in part and affirmed in part,* p. 478.

Sidney Posner argued the cause and filed a brief for petitioner.

Ralph S. Spritzer argued the cause for respondent. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Baynton, James L. Morrisson* and *George B. Searls.*

MR. JUSTICE JACKSON delivered the opinion of the Court.

This case is a dependent companion to the four preceding cases, Nos. 298 and 314, *ante,* p. 446, and Nos. 299

and 315, *ante*, p. 471. The petitioner is the sheriff who levied the attachments involved in those cases. He was impleaded by the Custodian as a party defendant, and his amended answer, after adopting the position of his co-defendants and urging dismissal of the Custodian's petition, as an alternative asked: "That if the Court determines that the petitioner is entitled to possession of the property attached by the Sheriff pursuant to the Zittman and McCarthy attachments, any decree to be entered thereon should provide for payment of the Sheriff's statutory poundage fees arising from said attachments . . . ." His claim was denied by the courts below incidentally to their denial of the rights asserted by the attaching creditors. The District Court said only: "Because the attachments by the sheriff did not transfer any right, title or interest in the blocked property, his application for payment of his fees by the Custodian must be denied." [1] The Court of Appeals affirmed, *per curiam*, on the ground stated by the District Court.[2]

The precise status of the sheriff's claims under New York law, if they have been settled, is not made clear to us by the record, and, under the circumstances of this case, we cannot presume to say, nor could the District Court, what the New York courts would allow to the sheriff.[3] Nor can we ascertain from the record the extent

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[1] 82 F. Supp. 740, 742–743.

[2] 182 F. 2d 349.

[3] The judgment creditors were entitled to costs of course when judgment was rendered in their favor. N. Y. Civ. Prac. Act § 1470 (11). They were entitled to include in their bills of costs, and hence in their judgments, necessary disbursements, which may include certain sheriff's fees. *Id.* § 1518. For each attachment levy made, the sheriff is entitled to a specified amount ". . . and, also, such additional compensation for his trouble and expenses in taking possession of and preserving the property as the judge issuing the warrant . . ." allows. *Id.* § 1558 (2). There are also other fees for inventory, mileage, and poundage upon the value of the property

to which his fees have been or may be included in the judgments dealt with in the preceding cases. The record does not disclose that they have been allowed or fixed by the judge who issued the attachment warrants. Although the sheriff has never had the attached funds in his possession, there is authority that such lack of physical possession does not deprive him of his right to poundage.[4] Furthermore, the uncertain values of the levies made, in view of their nature as defined in *Commission for Polish Relief* v. *Banca Nationala a Rumaniei,* 288 N. Y. 332, 43 N. E. 2d 345 (1942), and the inability of the sheriff to seize the attached funds, make the determination of the sheriff's fees a matter for the appropriate New York state court. Also, whether those fees constitute separate claims or are taxable costs which become part of the judgments to which they relate is for state court determination.

We have no doubt that, in one form or another, the proper fees of the sheriff should be treated by federal law in the same manner as the attachments and judgments to which they appertain. Therefore, insofar as the accounts held by the Chase Bank were concerned, the Custodian was not entitled to a declaration that the sheriff's fees did not constitute a valid claim. The Cus-

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attached. *Ibid.* If execution is issued, additional fees accrue, and a schedule of percentages "For collecting money by virtue of an execution, a warrant of attachment, or an attachment for the payment of money in an action or a special proceeding . . ." is provided. *Id.* § 1558 (7). Where "the warrant of attachment is vacated or set aside by order of the court," the sheriff is entitled to poundage and to such additional compensation for taking and preserving the property as the judge who issued the warrant may allow, and the court or judge may issue an order "requiring the party at whose instance the attachment is issued to pay the same to the sheriff." *Id.* § 1558 (18).

[4] *Distillers Factors Corp.* v. *Country Distillers Products,* 81 N. Y. S. 2d 857, 859.

todian sought no such declaration where the accounts held by the Federal Reserve Bank were concerned, but only asserted that the sheriff's claims could not defeat his right of possession. To preserve the paramount authority of the Federal Government over the frozen funds, we hold they could not. Accordingly, the judgment is reversed insofar as the fees of the sheriff relate to the attachments of the accounts held by the Chase Bank and affirmed insofar as they relate to the accounts held by the Federal Reserve Bank.

This, however, is without prejudice to the right of the sheriff to have the New York courts determine the state law status of his fees, and, in the case of the attachments of the accounts held by the Chase Bank, to have them, as fixed, included in the judgments or otherwise given the same position as such judgments. And no prejudice is intended to his rights, in the case of the attachments of the accounts held by the Federal Reserve Bank, to present his fee claims, as settled by the New York courts, to the Custodian in the same manner and subject to the same procedures as the judgment creditors in Nos. 299 and 315.

It is so ordered.

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

HOFFMAN *v.* UNITED STATES.

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

No. 513. Argued April 25, 1951.—Decided May 28, 1951.

1. Claiming that answers might tend to incriminate him of a federal offense, petitioner refused to answer certain questions asked him by a special federal grand jury making a comprehensive investigation of violations of numerous federal criminal statutes and conspiracies to violate them. He had been publicly charged with being known as an underworld character and a racketeer with a 20-year police record, including a prison sentence on a narcotics charge. The questions he refused to answer pertained to the nature of his present occupation and his contacts and connections with, and knowledge of the whereabouts of, a fugitive witness sought by the same grand jury and for whom a bench warrant had been requested. The judge who had impaneled the grand jury and was familiar with these circumstances found no real and substantial danger of incrimination to petitioner and ordered him to answer. Petitioner stated that he would not obey the order, and he was convicted of criminal contempt. *Held:* The conviction is reversed. Pp. 480–490.

(a) The privilege against self-incrimination guaranteed by the Fifth Amendment extends not only to answers that would in themselves support a conviction under a federal criminal statute but also to those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime. *Blau* v. *United States,* 340 U. S. 159. P. 486.

(b) To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result. Pp. 486–487.

(c) In this case, the court should have considered that the chief occupation of some persons involves evasion of federal criminal laws and that truthful answers by petitioner to the questions as to the nature of his business might have disclosed that he was engaged in such proscribed activity. Pp. 487–488.

(d) Answers to the questions as to his contacts and connections with the fugitive witness and knowledge of his whereabouts at the time might have exposed petitioner to peril of prosecution for federal offenses ranging from obstruction to conspiracy. P. 488.

2. Two weeks after his conviction of contempt and denial of bail pending appeal, petitioner filed in the District Court a paper captioned "Petition for Reconsideration of Allowance of Bail Pending Appeal," accompanied by an affidavit and exhibits explaining his refusal to answer the questions and presenting facts to justify his fear that answers would tend to incriminate him. These papers were filed in the Court of Appeals as a supplemental record on appeal; but that Court struck them from the record and affirmed the conviction. *Held:* The supplemental record should have been considered by the Court of Appeals, since it was actually directed to the power of the committing court to discharge the contemnor for good cause—a power which courts should be solicitous to invoke when important constitutional objections are renewed. Pp. 489–490.

185 F. 2d 617, reversed.

In a federal district court, petitioner was convicted of contempt for refusal to answer questions before a federal grand jury. The Court of Appeals affirmed. 185 F. 2d 617. This Court granted certiorari. 340 U. S. 946. *Reversed,* p. 490.

William A. Gray argued the cause for petitioner. With him on the brief was *Lester J. Schaffer.*

John F. Davis argued the cause for the United States. With him on the brief were *Solicitor General Perlman, Assistant Attorney General McInerney* and *J. F. Bishop.*

Mr. Justice Clark delivered the opinion of the Court.

Petitioner has been convicted of criminal contempt for refusing to obey a federal court order requiring him to answer certain questions asked in a grand jury investigation. He raises here important issues as to the application of the privilege against self-incrimination under the Fifth Amendment, claimed to justify his refusal.

A special federal grand jury was convened at Philadelphia on September 14, 1950, to investigate frauds upon the Federal Government, including violations of the customs, narcotics and internal revenue liquor laws of the United States, the White Slave Traffic Act, perjury, bribery, and other federal criminal laws, and conspiracy to commit all such offenses. In response to subpoena petitioner appeared to testify on the day the grand jury was empaneled, and was examined on October 3. The pertinent interrogation, in which he refused to answer, follows:

"Q. What do you do now, Mr. Hoffman?

"A. I refuse to answer.

"Q. Have you been in the same undertaking since the first of the year?

"A. I don't understand the question.

"Q. Have you been doing the same thing you are doing now since the first of the year?

"A. I refuse to answer.

"Q. Do you know Mr. William Weisberg?

"A. I do.

"Q. How long have you known him?

"A. Practically twenty years, I guess.

"Q. When did you last see him?

"A. I refuse to answer.

"Q. Have you seen him this week?

"A. I refuse to answer.

"Q. Do you know that a subpoena has been issued for Mr. Weisberg?

"A. I heard about it in Court.

"Q. Have you talked with him on the telephone this week?

"A. I refuse to answer.

"Q. Do you know where Mr. William Weisberg is now?

"A. I refuse to answer."

It was stipulated that petitioner declined to answer on the ground that his answers might tend to incriminate him of a federal offense.

Petitioner's claim of privilege was challenged by the Government in the Federal District Court for the Eastern District of Pennsylvania, which found no real and substantial danger of incrimination to petitioner and ordered him to return to the grand jury and answer. Petitioner stated in open court that he would not obey the order, and on October 5 was adjudged in criminal contempt and sentenced to five months imprisonment. 18 U. S. C. § 401; Federal Rule of Criminal Procedure 42 (a).

Petitioner appealed to the Court of Appeals for the Third Circuit, where the record was docketed on October 11. After denial by the District Court of his request for bail pending appeal, petitioner on October 20 filed in that court a "Petition for Reconsideration of Allowance of Bail Pending Appeal," alleging that "on the basis of the facts contained in his affidavit, attached . . . , he was justified in his refusal to answer the questions as aforesaid, or, in any event, that there is so substantial a question involved that your petitioner should be released on bail . . . ." In the accompanying affidavit petitioner asserted that

> "He assumed when he refused to answer the questions involved before the Grand Jury, that both it and the Court were cognizant of, and took into consideration, the facts on which he based his refusals to answer.
>
> "He has since been advised, after his commitment, that the Court did not consider any of said facts upon which he relied and, on the contrary, the Court considered only the bare record [of the questions and answers as set out above].

"In the interest of justice and particularly in aid of a proper determination of the above petition, he submits the following in support of his position that he genuinely feared to answer the questions propounded:

"(a) This investigation was stated, in the charge of the Court to the Grand Jury, to cover 'the gamut of all crimes covered by federal statute.' . . .

"(b) Affiant has been publicly charged with being a known underworld character, and a racketeer with a twenty year police record, including a prison sentence on a narcotics charge. . . .

"(c) Affiant, while waiting to testify before the Grand Jury, was photographed with one Joseph N. Bransky, head of the Philadelphia office of the United States Bureau of Narcotics. . . .

"(d) Affiant was questioned concerning the whereabouts of a witness who had not been served with a subpoena and for whom a bench warrant was sought by the Government prosecutor. . . .

"On the basis of the above public facts as well as the facts within his own personal knowledge, affiant avers that he had a real fear that the answers to the questions asked by the Grand Jury would incriminate him of a federal offense."

Included as appendices to the affidavit were clippings from local newspapers, of dates current with the grand-jury proceeding, reporting the facts asserted in the affidavit. On October 23 the District Court allowed bail. On the following day the petition for reconsideration of allowance of bail, including affidavit and appendices, was filed in the Court of Appeals as a supplemental record on appeal. The Government moved to strike this matter on the ground that it was not properly part of the appeal record.

The Court of Appeals granted the motion to strike and affirmed the conviction. 185 F. 2d 617 (1950). With respect to the questions regarding Weisberg, the court held unanimously that "the relationship between possible admissions in answer to the questions . . . and the proscription of [pertinent federal criminal statutes (18 U. S. C. §§ 371, 1501)] would need to be much closer for us to conclude that there was real danger in answering." As to the questions concerning petitioner's business, the court observed that "It is now quite apparent that the appellant could have shown beyond question that the danger was not fanciful." In the court's view the data submitted in the supplemental record "would rather clearly be adequate to establish circumstantially the likelihood that appellant's assertion of fear of incrimination was not mere contumacy." But the Court of Appeals concluded, again unanimously, that the information offered in support of the petition for reconsideration of bail "was not before the court when it found appellant in contempt, and therefore cannot be considered now." Thus limited to the record originally filed, the majority of the court was of the opinion, with respect to the business questions, that "the witness here failed to give the judge any information which would allow the latter to rule intelligently on the claim of privilege for the witness simply refused to say anything and gave no facts to show why he refused to say anything." One judge dissented, concluding that the District Court knew that "the setting of the controversy" was "a grand jury investigation of racketeering and federal crime in the vicinity" and "should have adverted to the fact of common knowledge that there exists a class of persons who live by activity prohibited by federal criminal laws and that some of these persons would be summoned as witnesses in this grand jury investigation."

Petitioner unsuccessfully sought rehearing in the Court of Appeals, urging remand to the District Court to permit reconsideration of the conviction on the basis of data in the supplemental record. We granted certiorari, 340 U. S. 946 (1951).

This is another of five proceedings before this Court during the present Term in each of which the privilege against self-incrimination has been asserted in the course of federal grand-jury investigations.* A number of similar cases have been considered recently by the lower courts. The signal increase in such litigation emphasizes the continuing necessity that prosecutors and courts alike be "alert to repress" any abuses of the investigatory power invoked, bearing in mind that while grand juries "may proceed, either upon their own knowledge or upon the examination of witnesses, to inquire . . . whether a crime cognizable by the court has been committed," *Hale* v. *Henkel,* 201 U. S. 43, 65 (1906), yet "the most valuable function of the grand jury . . . [has been] not only to examine into the commission of crimes, but to stand between the prosecutor and the accused," *id.* at 59. Enforcement officials taking the initiative in grand-jury proceedings and courts charged with their superintendence should be sensitive to the considerations making for wise exercise of such investigatory power, not only where constitutional issues may be involved but also where the noncoercive assistance of other federal agencies may render it unnecessary to invoke the compulsive process of the grand jury.

The Fifth Amendment declares in part that "No person . . . shall be compelled in any criminal case to be a wit-

*(*Patricia*) *Blau* v. *United States,* 340 U. S. 159 (1950); (*Irving*) *Blau* v. *United States,* 340 U. S. 332 (1951); *Rogers* v. *United States,* 340 U. S. 367 (1951); *United States* v. *Greenberg,* 187 F. 2d 35 (C. A. 3d Cir. 1951), petition for writ of certiorari pending. [See *post,* p. 944.]

ness against himself." This guarantee against testimonial compulsion, like other provisions of the Bill of Rights, "was added to the original Constitution in the conviction that too high a price may be paid even for the unhampered enforcement of the criminal law and that, in its attainment, other social objects of a free society should not be sacrificed." *Feldman* v. *United States,* 322 U. S. 487, 489 (1944). This provision of the Amendment must be accorded liberal construction in favor of the right it was intended to secure. *Counselman* v. *Hitchcock,* 142 U. S. 547, 562 (1892); *Arndstein* v. *McCarthy,* 254 U. S. 71, 72–73 (1920).

The privilege afforded not only extends to answers that would in themselves support a conviction under a federal criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime. (*Patricia*) *Blau* v. *United States,* 340 U. S. 159 (1950). But this protection must be confined to instances where the witness has reasonable cause to apprehend danger from a direct answer. *Mason* v. *United States,* 244 U. S. 362, 365 (1917), and cases cited. The witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself—his say-so does not of itself establish the hazard of incrimination. It is for the court to say whether his silence is justified, *Rogers* v. *United States,* 340 U. S. 367 (1951), and to require him to answer if "it clearly appears to the court that he is mistaken." *Temple* v. *Commonwealth,* 75 Va. 892, 899 (1881). However, if the witness, upon interposing his claim, were required to prove the hazard in the sense in which a claim is usually required to be established in court, he would be compelled to surrender the very protection which the privilege is designed to guarantee. To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked,

that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result. The trial judge in appraising the claim "must be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence." See Taft, J., in *Ex parte Irvine,* 74 F. 954, 960 (C. C. S. D. Ohio, 1896).

What were the circumstances which the District Court should have considered in ruling upon petitioner's claim of privilege? This is the background as indicated by the record:

The judge who ruled on the privilege had himself impaneled the special grand jury to investigate "rackets" in the district. He had explained to the jury that "the Attorney General's office has come into this district to conduct an investigation . . . [that] will run the gamut of all crimes covered by federal statute." "If rackets infest or encrust our system of government," he instructed, "just as any blight attacks any other growth, it withers and dies. . . ." Subpoenas had issued for some twenty witnesses, but only eleven had been served; as the prosecutor put it, he was "having trouble finding some big shots." Several of those who did appear and were called into the grand-jury room before petitioner had refused to answer questions until ordered to do so by the court. The prosecutor had requested bench warrants for eight of the nine who had not appeared the first day of the session, one of whom was William Weisberg. Petitioner had admitted having known Weisberg for about twenty years. In addition, counsel for petitioner had advised the court that "It has been broadly published that [petitioner] has a police record."

The court should have considered, in connection with the business questions, that the chief occupation of some persons involves evasion of federal criminal laws, and

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that truthful answers by petitioner to these questions might have disclosed that he was engaged in such proscribed activity.

Also, the court should have recognized, in considering the Weisberg questions, that one person with a police record summoned to testify before a grand jury investigating the rackets might be hiding or helping to hide another person of questionable repute sought as a witness. To be sure, the Government may inquire of witnesses before the grand jury as to the whereabouts of unlocated witnesses; ordinarily the answers to such questions are harmless if not fruitless. But of the seven questions relating to Weisberg (of which three were answered), three were designed to draw information as to petitioner's contacts and connection with the fugitive witness; and the final question, perhaps an afterthought of the prosecutor, inquired of Weisberg's whereabouts at the time. All of them could easily have required answers that would forge links in a chain of facts imperiling petitioner with conviction of a federal crime. The three questions, if answered affirmatively, would establish contacts between petitioner and Weisberg during the crucial period when the latter was eluding the grand jury; and in the context of these inquiries the last question might well have called for disclosure that Weisberg was hiding away on petitioner's premises or with his assistance. Petitioner could reasonably have sensed the peril of prosecution for federal offenses ranging from obstruction to conspiracy.

In this setting it was not "*perfectly clear,* from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answer[s] *cannot possibly* have such tendency" to incriminate. *Temple* v. *Commonwealth,* 75 Va. 892, 898 (1881), cited with approval in *Counselman* v. *Hitchcock,* 142 U. S. 547, 579–

580 (1892). See also, *Arndstein* v. *McCarthy,* 254 U. S. 71 (1920).

This conclusion is buttressed by the supplemental record. It showed that petitioner had a twenty-year police record and had been publicly labeled an "underworld character and racketeer"; that the Senate Crime Investigating Committee had placed his name on a list of "known gangsters" from the Philadelphia area who had made Miami Beach their headquarters; that Philadelphia police officials had described him as "the king of the shore rackets who lives by the gun"; that he had served a sentence on a narcotics charge; and that his previous conviction was dramatized by a picture appearing in the local press while he was waiting to testify, in which petitioner was photographed with the head of the Philadelphia office of the United States Bureau of Narcotics in an accusing pose.

It appears that the petition which comprised the supplemental record, though captioned a "Petition for Reconsideration of Allowance of Bail Pending Appeal," was by its terms an application to the District Court to vacate the contempt order on constitutional grounds, and alternatively a second motion for bail. Clearly this petition, filed but two weeks after the contempt order, was directed to the power of the committing court to discharge the contemnor for good cause—a power which courts should be solicitous to invoke when important constitutional objections are renewed. Cf. *Gouled* v. *United States,* 255 U. S. 298 (1921). The ends of justice require discharge of one having such a right whenever facts appear sufficient to sustain the claim of privilege. Accordingly the supplemental record should have been considered by the Court of Appeals.

For these reasons we cannot agree with the judgments below. If this result adds to the burden of diligence and efficiency resting on enforcement authorities, any other

conclusion would seriously compromise an important constitutional liberty. "The immediate and potential evils of compulsory self-disclosure transcend any difficulties that the exercise of the privilege may impose on society in the detection and prosecution of crime." *United States* v. *White,* 322 U. S. 694, 698 (1944). Pertinent here is the observation of Mr. Justice Brandeis for this Court in *McCarthy* v. *Arndstein,* 266 U. S. 34, 42 (1924): "If Congress should hereafter conclude that a full disclosure . . . by the witnesses is of greater importance than the possibility of punishing them for some crime in the past, it can, as in other cases, confer the power of unrestricted examination by providing complete immunity."

Reversed.

MR. JUSTICE REED dissents. He agrees with the conclusions reached by Judges Goodrich and Kalodner as expressed in the opinion below.

HAMMERSTEIN *v.* SUPERIOR COURT OF CALIFORNIA ET AL.

CERTIORARI TO THE SUPREME COURT OF CALIFORNIA AND TO THE DISTRICT COURT OF APPEAL, SECOND APPELLATE DISTRICT, OF CALIFORNIA.

No. 421. Argued March 9, 1951.—Cause continued March 26, 1951.—Dismissed May 28, 1951.

1. The Supreme Court of California having based its denial of certiorari on petitioner's failure to appeal from the Superior Court's default judgment, this Court has no jurisdiction to review the proceedings arising from the default judgment. P. 492.
2. The California District Court of Appeal's denial of a writ of prohibition in this case being rested on its decision of a federal question and not upon an independent state ground, this Court has jurisdiction to review that judgment. P. 492.
3. Since petitioner could have obtained review of the final adjudication of the merits of this case by appealing from the default judgment, and since the Supreme Court of California apparently refrained from taking action because of the existence of that remedy, this Court deems it advisable not to exercise its discretionary jurisdiction and dismisses the writ of certiorari as improvidently granted. Pp. 492–493.

Writ of certiorari, 340 U. S. 919, dismissed.

Robert E. Kopp and *Milton A. Rudin* for petitioner.

Saul Ross and *E. Loyd Saunders* for respondents.

PER CURIAM.

After argument, we continued this cause to enable the petitioner to apply for a certificate or other expression from the appropriate California courts to show whether the judgments rested on adequate and independent state grounds or whether decision of the federal question was necessary to the judgments rendered. 340 U. S. 622 (1951). Such expressions have been obtained.

The Supreme Court has informed us that its refusal to grant a writ of certiorari from the default judgment entered by the Superior Court was based upon petitioner's failure to utilize the proper channel of review, namely, his failure to appeal from the default judgment. Inasmuch as our jurisdiction to review state court judgments extends only to final judgments rendered "by the highest court of a State in which a decision could be had," 28 U. S. C. § 1257, we have no jurisdiction to review the proceedings arising from the default judgment.

The District Court of Appeal has informed us that the decision of the federal question was essential to its denial of the application for writ of prohibition, and that its judgment did not rest upon an independent state ground. The expression we have received from the California Supreme Court is also susceptible of the interpretation that its denial of a hearing from the judgment of the District Court of Appeal was based upon an adequate state ground. We do not consider the force of that statement since it is clear that the judgment properly before us is that of the District Court of Appeal, which did decide the federal question. See *American Railway Express Co.* v. *Levee,* 263 U. S. 19, 20–21 (1923). We have jurisdiction over that judgment. *Rescue Army* v. *Municipal Court,* 331 U. S. 549, 565–568 (1947); *Bandini Co.* v. *Superior Court,* 284 U. S. 8 (1931), and cases cited at 14.

The presence of jurisdiction upon petition for writ of certiorari does not, of course, determine the exercise of that jurisdiction, for the issuance of the writ is discretionary. In this case petitioner could have obtained review of the final adjudication of the merits by appealing from the default judgment. The California Supreme Court has apparently refrained from taking action because of the existence of that remedy. In these circumstances we think it advisable not to exercise our jurisdiction. The

writ is therefore dismissed as improvidently granted. Cf. *Loftus* v. *Illinois,* 337 U. S. 935 (1949); *Phyle* v. *Duffy,* 334 U. S. 431 (1948); *Hedgebeth* v. *North Carolina,* 334 U. S. 806 (1948).

Writ dismissed.

MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, MR. JUSTICE JACKSON and MR. JUSTICE CLARK dissent.

DENNIS ET AL. *v.* UNITED STATES.

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

No. 336. Argued December 4, 1950.—Decided June 4, 1951.

1. As construed and applied in this case, §§ 2 (a) (1), 2 (a) (3) and 3 of the Smith Act, 54 Stat. 671, making it a crime for any person knowingly or willfully to advocate the overthrow or destruction of the Government of the United States by force or violence, to organize or help to organize any group which does so, or to conspire to do so, do not violate the First Amendment or other provisions of the Bill of Rights and do not violate the First or Fifth Amendments because of indefiniteness. Pp. 495–499, 517.
2. Petitioners, leaders of the Communist Party in this country, were indicted in a federal district court under § 3 of the Smith Act for willfully and knowingly conspiring (1) to organize as the Communist Party a group of persons to teach and advocate the overthrow and destruction of the Government of the United States by force and violence, and (2) knowingly and willfully to advocate and teach the duty and necessity of overthrowing and destroying the Government of the United States by force and violence. The trial judge instructed the jury that they could not convict unless they found that petitioners intended to overthrow the Government "as speedily as circumstances would permit" but that, if they so found, then, as a matter of law, there was sufficient danger of a substantive evil that Congress has a right to prevent to justify application of the statute under the First Amendment. Petitioners were convicted and the convictions were sustained by the Court of Appeals. This Court granted certiorari, limited to the questions: (1) Whether either § 2 or § 3 of the Smith Act, inherently or as construed and applied in the instant case, violates the First Amendment and other provisions of the Bill of Rights; and (2) whether either § 2 or § 3, inherently or as construed and applied in the instant case, violates the First and Fifth Amendments because of indefiniteness. *Held:* The convictions are affirmed. Pp. 495–499, 511–512, 517.

183 F. 2d 201, affirmed.

For the opinions of the Justices constituting the majority of the Court, see:

Opinion of THE CHIEF JUSTICE, joined by MR. JUSTICE REED, MR. JUSTICE BURTON and MR. JUSTICE MINTON, p. 495.
Opinion of MR. JUSTICE FRANKFURTER, p. 517.
Opinion of MR. JUSTICE JACKSON, p. 561.

For the dissenting opinion of MR. JUSTICE BLACK, see p. 579.
For the dissenting opinion of MR. JUSTICE DOUGLAS, see p. 581.

The case is stated in the opinion of THE CHIEF JUSTICE, pp. 495–499. *Affirmed,* p. 517.

George W. Crockett, Jr., Abraham J. Isserman and *Harry Sacher* argued the cause for petitioners. With them on the brief was *Richard Gladstein.*

Solicitor General Perlman and *Irving S. Shapiro* argued the cause for the United States. With them on the brief were *Attorney General McGrath, Assistant Attorney General McInerney, Irving H. Saypol, Robert W. Ginnane, Frank H. Gordon, Edward C. Wallace* and *Lawrence K. Bailey.*

MR. CHIEF JUSTICE VINSON announced the judgment of the Court and an opinion in which MR. JUSTICE REED, MR. JUSTICE BURTON and MR. JUSTICE MINTON join.

Petitioners were indicted in July, 1948, for violation of the conspiracy provisions of the Smith Act, 54 Stat. 671, 18 U. S. C. (1946 ed.) § 11, during the period of April, 1945, to July, 1948. The pretrial motion to quash the indictment on the grounds, *inter alia,* that the statute was unconstitutional was denied, *United States* v. *Foster,* 80 F. Supp. 479, and the case was set for trial on January 17, 1949. A verdict of guilty as to all the petitioners was returned by the jury on October 14, 1949. The Court of Appeals affirmed the convictions. 183 F. 2d 201. We granted certiorari, 340 U. S. 863, limited to the following two questions: (1) Whether either § 2 or § 3 of the Smith

Act, inherently or as construed and applied in the instant case, violates the First Amendment and other provisions of the Bill of Rights; (2) whether either § 2 or § 3 of the Act, inherently or as construed and applied in the instant case, violates the First and Fifth Amendments because of indefiniteness.

Sections 2 and 3 of the Smith Act, 54 Stat. 671, 18 U. S. C. (1946 ed.) §§ 10, 11 (see present 18 U. S. C. § 2385), provide as follows:

> "SEC. 2. (a) It shall be unlawful for any person—
>
> "(1) to knowingly or willfully advocate, abet, advise, or teach the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or by the assassination of any officer of any such government;
>
> "(2) with intent to cause the overthrow or destruction of any government in the United States, to print, publish, edit, issue, circulate, sell, distribute, or publicly display any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence;
>
> "(3) to organize or help to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any government in the United States by force or violence; or to be or become a member of, or affiliate with, any such society, group, or assembly of persons, knowing the purposes thereof.
>
> "(b) For the purposes of this section, the term 'government in the United States' means the Government of the United States, the government of any State, Territory, or possession of the United States, the government of the District of Columbia, or the

government of any political subdivision of any of them.

"SEC. 3. It shall be unlawful for any person to attempt to commit, or to conspire to commit, any of the acts prohibited by the provisions of this title."

The indictment charged the petitioners with wilfully and knowingly conspiring (1) to organize as the Communist Party of the United States of America a society, group and assembly of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence, and (2) knowingly and wilfully to advocate and teach the duty and necessity of overthrowing and destroying the Government of the United States by force and violence. The indictment further alleged that § 2 of the Smith Act proscribes these acts and that any conspiracy to take such action is a violation of § 3 of the Act.

The trial of the case extended over nine months, six of which were devoted to the taking of evidence, resulting in a record of 16,000 pages. Our limited grant of the writ of certiorari has removed from our consideration any question as to the sufficiency of the evidence to support the jury's determination that petitioners are guilty of the offense charged. Whether on this record petitioners did in fact advocate the overthrow of the Government by force and violence is not before us, and we must base any discussion of this point upon the conclusions stated in the opinion of the Court of Appeals, which treated the issue in great detail. That court held that the record in this case amply supports the necessary finding of the jury that petitioners, the leaders of the Communist Party in this country, were unwilling to work within our framework of democracy, but intended to initiate a violent revolution whenever the propitious occasion appeared. Petitioners dispute the meaning to be drawn from the evidence, contending that the Marxist-

Leninist doctrine they advocated taught that force and violence to achieve a Communist form of government in an existing democratic state would be necessary only because the ruling classes of that state would never permit the transformation to be accomplished peacefully, but would use force and violence to defeat any peaceful political and economic gain the Communists could achieve. But the Court of Appeals held that the record supports the following broad conclusions: By virtue of their control over the political apparatus of the Communist Political Association,[1] petitioners were able to transform that organization into the Communist Party; that the policies of the Association were changed from peaceful cooperation with the United States and its economic and political structure to a policy which had existed before the United States and the Soviet Union were fighting a common enemy, namely, a policy which worked for the overthrow of the Government by force and violence; that the Communist Party is a highly disciplined organization, adept at infiltration into strategic positions, use of aliases, and double-meaning language; that the Party is rigidly controlled; that Communists, unlike other political parties, tolerate no dissension from the policy laid down by the guiding forces, but that the approved program is slavishly followed by the members of the Party; that the literature of the Party and the statements and activities of its leaders, petitioners here, advocate, and the general goal of the Party was, during the period in question, to achieve a successful overthrow of the existing order by force and violence.

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[1] Following the dissolution of the Communist International in 1943, the Communist Party of the United States dissolved and was reconstituted as the Communist Political Association. The program of this Association was one of cooperation between labor and management, and, in general, one designed to achieve national unity and peace and prosperity in the post-war period.

I.

It will be helpful in clarifying the issues to treat next the contention that the trial judge improperly interpreted the statute by charging that the statute required an unlawful intent before the jury could convict. More specifically, he charged that the jury could not find the petitioners guilty under the indictment unless they found that petitioners had the intent to "overthrow . . . the Government of the United States by force and violence as speedily as circumstances would permit."

Section 2 (a) (1) makes it unlawful "to knowingly or willfully advocate, . . . or teach the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence . . . ."; Section 2 (a) (3), "to organize or help to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow . . . ." Because of the fact that § 2 (a) (2) expressly requires a specific intent to overthrow the Government, and because of the absence of precise language in the foregoing subsections, it is claimed that Congress deliberately omitted any such requirement. We do not agree. It would require a far greater indication of congressional desire that intent not be made an element of the crime than the use of the disjunctive "knowingly *or* willfully" in § 2 (a) (1), or the omission of exact language in § 2 (a) (3). The structure and purpose of the statute demand the inclusion of intent as an element of the crime. Congress was concerned with those who advocate and organize for the overthrow of the Government. Certainly those who recruit and combine for the purpose of advocating overthrow intend to bring about that overthrow. We hold that the statute requires as an essential element of the crime proof of the intent of those who are charged with its violation to overthrow the Government by force and violence. See

Williams v. *United States,* 341 U. S. 97, 101–102 (1951); *Screws* v. *United States,* 325 U. S. 91, 101–105 (1945); *Cramer* v. *United States,* 325 U. S. 1, 31 (1945).

Nor does the fact that there must be an investigation of a state of mind under this interpretation afford any basis for rejection of that meaning. A survey of Title 18 of the U. S. Code indicates that the vast majority of the crimes designated by that Title require, by express language, proof of the existence of a certain mental state, in words such as "knowingly," "maliciously," "wilfully," "with the purpose of," "with intent to," or combinations or permutations of these and synonymous terms. The existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence. See *American Communications Assn.* v. *Douds,* 339 U. S. 382, 411 (1950).

It has been suggested that the presence of intent makes a difference in the law when an "act otherwise excusable or carrying minor penalties" is accompanied by such an evil intent. Yet the existence of such an intent made the killing condemned in *Screws, supra,* and the beating in *Williams, supra,* both clearly and severely punishable under state law, offenses constitutionally punishable by the Federal Government. In those cases, the Court required the Government to prove that the defendants *intended* to deprive the victim of a constitutional right. If that precise mental state may be an essential element of a crime, surely an intent to overthrow the Government of the United States by advocacy thereof is equally susceptible of proof.[2]

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[2] We have treated this point because of the discussion accorded it by the Court of Appeals and its importance to the administration of this statute, compare *Johnson* v. *United States,* 318 U. S. 189 (1943), although petitioners themselves requested a charge similar to the one given, and under Rule 30 of the Federal Rules of Criminal Procedure would appear to be barred from raising this point on appeal. Cf. *Boyd* v. *United States,* 271 U. S. 104 (1926).

II.

The obvious purpose of the statute is to protect existing Government, not from change by peaceable, lawful and constitutional means, but from change by violence, revolution and terrorism. That it is within the *power* of the Congress to protect the Government of the United States from armed rebellion is a proposition which requires little discussion. Whatever theoretical merit there may be to the argument that there is a "right" to rebellion against dictatorial governments is without force where the existing structure of the government provides for peaceful and orderly change. We reject any principle of governmental helplessness in the face of preparation for revolution, which principle, carried to its logical conclusion, must lead to anarchy. No one could conceive that it is not within the power of Congress to prohibit acts intended to overthrow the Government by force and violence. The question with which we are concerned here is not whether Congress has such *power,* but whether the *means* which it has employed conflict with the First and Fifth Amendments to the Constitution.

One of the bases for the contention that the means which Congress has employed are invalid takes the form of an attack on the face of the statute on the grounds that by its terms it prohibits academic discussion of the merits of Marxism-Leninism, that it stifles ideas and is contrary to all concepts of a free speech and a free press. Although we do not agree that the language itself has that significance, we must bear in mind that it is the duty of the federal courts to interpret federal legislation in a manner not inconsistent with the demands of the Constitution. *American Communications Assn.* v. *Douds,* 339 U. S. 382, 407 (1950). We are not here confronted with cases similar to *Thornhill* v. *Alabama,* 310 U. S. 88 (1940); *Herndon* v. *Lowry,* 301 U. S. 242 (1937); and *De Jonge* v. *Oregon,* 299 U. S. 353 (1937),

where a state court had given a meaning to a state statute which was inconsistent with the Federal Constitution. This is a federal statute which we must interpret as well as judge. Herein lies the fallacy of reliance upon the manner in which this Court has treated judgments of state courts. Where the statute as construed by the state court transgressed the First Amendment, we could not but invalidate the judgments of conviction.

The very language of the Smith Act negates the interpretation which petitioners would have us impose on that Act. It is directed at advocacy, not discussion. Thus, the trial judge properly charged the jury that they could not convict if they found that petitioners did "no more than pursue peaceful studies and discussions or teaching and advocacy in the realm of ideas." He further charged that it was not unlawful "to conduct in an American college or university a course explaining the philosophical theories set forth in the books which have been placed in evidence." Such a charge is in strict accord with the statutory language, and illustrates the meaning to be placed on those words. Congress did not intend to eradicate the free discussion of political theories, to destroy the traditional rights of Americans to discuss and evaluate ideas without fear of governmental sanction. Rather Congress was concerned with the very kind of activity in which the evidence showed these petitioners engaged.

III.

But although the statute is not directed at the hypothetical cases which petitioners have conjured, its application in this case has resulted in convictions for the teaching and advocacy of the overthrow of the Government by force and violence, which, even though coupled with the intent to accomplish that overthrow, contains an element of speech. For this reason, we must pay special

heed to the demands of the First Amendment marking out the boundaries of speech.

We pointed out in *Douds, supra,* that the basis of the First Amendment is the hypothesis that speech can rebut speech, propaganda will answer propaganda, free debate of ideas will result in the wisest governmental policies. It is for this reason that this Court has recognized the inherent value of free discourse. An analysis of the leading cases in this Court which have involved direct limitations on speech, however, will demonstrate that both the majority of the Court and the dissenters in particular cases have recognized that this is not an unlimited, unqualified right, but that the societal value of speech must, on occasion, be subordinated to other values and considerations.

No important case involving free speech was decided by this Court prior to *Schenck* v. *United States,* 249 U. S. 47 (1919). Indeed, the summary treatment accorded an argument based upon an individual's claim that the First Amendment protected certain utterances indicates that the Court at earlier dates placed no unique emphasis upon that right.[3] It was not until the classic dictum of Justice Holmes in the *Schenck* case that speech *per se* received that emphasis in a majority opinion. That case involved a conviction under the Criminal Espionage Act, 40 Stat. 217. The question the Court faced was whether the evidence was sufficient to sustain the conviction. Writing for a unanimous Court, Justice Holmes stated that 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 has a right

[3] *Toledo Newspaper Co.* v. *United States,* 247 U. S. 402 (1918); *Fox* v. *Washington,* 236 U. S. 273 (1915); *Davis* v. *Massachusetts,* 167 U. S. 43 (1897); see *Gompers* v. *Bucks Stove & Range Co.,* 221 U. S. 418, 439 (1911); *Robertson* v. *Baldwin,* 165 U. S. 275, 281 (1897).

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to prevent." 249 U. S. at 52. But the force of even this expression is considerably weakened by the reference at the end of the opinion to *Goldman* v. *United States,* 245 U. S. 474 (1918), a prosecution under the same statute. Said Justice Holmes, "Indeed [*Goldman*] might be said to dispose of the present contention if the precedent covers all *media concludendi.* But as the right to free speech was not referred to specially, we have thought fit to add a few words." 249 U. S. at 52. The fact is inescapable, too, that the phrase bore no connotation that the danger was to be any threat to the safety of the Republic. The charge was causing and attempting to cause insubordination in the military forces and obstruct recruiting. The objectionable document denounced conscription and its most inciting sentence was, "You must do your share to maintain, support and uphold the rights of the people of this country." 249 U. S. at 51. Fifteen thousand copies were printed and some circulated. This insubstantial gesture toward insubordination in 1917 during war was held to be a clear and present danger of bringing about the evil of military insubordination.

In several later cases involving convictions under the Criminal Espionage Act, the nub of the evidence the Court held sufficient to meet the "clear and present danger" test enunciated in *Schenck* was as follows: *Frohwerk* v. *United States,* 249 U. S. 204 (1919)—publication of twelve newspaper articles attacking the war; *Debs* v. *United States,* 249 U. S. 211 (1919)—one speech attacking United States' participation in the war; *Abrams* v. *United States,* 250 U. S. 616 (1919)—circulation of copies of two different socialist circulars attacking the war; *Schaefer* v. *United States,* 251 U. S. 466 (1920)—publication of a German-language newspaper with allegedly false articles, critical of capitalism and the war; *Pierce* v. *United States,* 252 U. S. 239 (1920)—circulation of copies of a four-page pamphlet written by a clergyman, attack-

ing the purposes of the war and United States' participation therein. Justice Holmes wrote the opinions for a unanimous Court in *Schenck, Frohwerk* and *Debs.* He and Justice Brandeis dissented in *Abrams, Schaefer* and *Pierce.* The basis of these dissents was that, because of the protection which the First Amendment gives to speech, the evidence in each case was insufficient to show that the defendants had created the requisite danger under *Schenck.* But these dissents did not mark a change of principle. The dissenters doubted only the probable effectiveness of the puny efforts toward subversion. In *Abrams,* they wrote, "I do not doubt for a moment that by the same reasoning that would justify punishing persuasion to murder, the United States constitutionally may punish speech that produces or is intended to produce a clear and imminent danger that it will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent." 250 U. S. at 627. And in *Schaefer* the test was said to be one of "degree," 251 U. S. at 482, although it is not clear whether "degree" refers to clear and present danger or evil. Perhaps both were meant.

The rule we deduce from these cases is that where an offense is specified by a statute in nonspeech or nonpress terms, a conviction relying upon speech or press as evidence of violation may be sustained only when the speech or publication created a "clear and present danger" of attempting or accomplishing the prohibited crime, *e. g.,* interference with enlistment. The dissents, we repeat, in emphasizing the value of speech, were addressed to the argument of the sufficiency of the evidence.

The next important case [4] before the Court in which free speech was the crux of the conflict was *Gitlow* v. *New York,* 268 U. S. 652 (1925). There New York had

[4] Cf. *Gilbert* v. *Minnesota,* 254 U. S. 325 (1920).

made it a crime to advocate "the necessity or propriety of overthrowing . . . organized government by force . . . ." The evidence of violation of the statute was that the defendant had published a Manifesto attacking the Government and capitalism. The convictions were sustained, Justices Holmes and Brandeis dissenting. The majority refused to apply the "clear and present danger" test to the specific utterance. Its reasoning was as follows: The "clear and present danger" test was applied to the utterance itself in *Schenck* because the question was merely one of sufficiency of evidence under an admittedly constitutional statute. *Gitlow,* however, presented a different question. There a legislature had found that a certain kind of speech was, itself, harmful and unlawful. The constitutionality of such a state statute had to be adjudged by this Court just as it determined the constitutionality of any state statute, namely, whether the statute was "reasonable." Since it was entirely reasonable for a state to attempt to protect itself from violent overthrow, the statute was perforce reasonable. The only question remaining in the case became whether there was evidence to support the conviction, a question which gave the majority no difficulty. Justices Holmes and Brandeis refused to accept this approach, but insisted that wherever speech was the evidence of the violation, it was necessary to show that the speech created the "clear and present danger" of the substantive evil which the legislature had the right to prevent. Justices Holmes and Brandeis, then, made no distinction between a federal statute which made certain acts unlawful, the evidence to support the conviction being speech, and a statute which made speech itself the crime. This approach was emphasized in *Whitney* v. *California,* 274 U. S. 357 (1927), where the Court was confronted with a conviction under the California Criminal Syndicalist statute. The Court sustained the conviction, Justices Brandeis and Holmes

there was a direct restriction upon speech, a "clear and present danger" that the substantive evil would be caused was necessary before the statute in question could be constitutionally applied. And we stated, "[The First] Amendment requires that one be permitted to believe what he will. It requires that one be permitted to advocate what he will unless there is a clear and present danger that a substantial public evil will result therefrom." 339 U. S. at 412. But we further suggested that neither Justice Holmes nor Justice Brandeis ever envisioned that a shorthand phrase should be crystallized into a rigid rule to be applied inflexibly without regard to the circumstances of each case. Speech is not an absolute, above and beyond control by the legislature when its judgment, subject to review here, is that certain kinds of speech are so undesirable as to warrant criminal sanction. Nothing is more certain in modern society than the principle that there are no absolutes, that a name, a phrase, a standard has meaning only when associated with the considerations which gave birth to the nomenclature. See *American Communications Assn.* v. *Douds,* 339 U. S. at 397. To those who would paralyze our Government in the face of impending threat by encasing it in a semantic straitjacket we must reply that all concepts are relative.

In this case we are squarely presented with the application of the "clear and present danger" test, and must decide what that phrase imports. We first note that many of the cases in which this Court has reversed convictions by use of this or similar tests have been based on the fact that the interest which the State was attempting to protect was itself too insubstantial to warrant restriction of speech. In this category we may put such cases as *Schneider* v. *State,* 308 U. S. 147 (1939); *Cantwell* v. *Connecticut,* 310 U. S. 296 (1940); *Martin* v. *Struthers,* 319 U. S. 141 (1943); *West Virginia Board of Educa-*

tion v. *Barnette,* 319 U. S. 624 (1943); *Thomas* v. *Collins,* 323 U. S. 516 (1945); *Marsh* v. *Alabama,* 326 U. S. 501 (1946); but cf. *Prince* v. *Massachusetts,* 321 U. S. 158 (1944); *Cox* v. *New Hampshire,* 312 U. S. 569 (1941). Overthrow of the Government by force and violence is certainly a substantial enough interest for the Government to limit speech. Indeed, this is the ultimate value of any society, for if a society cannot protect its very structure from armed internal attack, it must follow that no subordinate value can be protected. If, then, this interest may be protected, the literal problem which is presented is what has been meant by the use of the phrase "clear and present danger" of the utterances bringing about the evil within the power of Congress to punish.

Obviously, the words cannot mean that before the Government may act, it must wait until the *putsch* is about to be executed, the plans have been laid and the signal is awaited. If Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permit, action by the Government is required. The argument that there is no need for Government to concern itself, for Government is strong, it possesses ample powers to put down a rebellion, it may defeat the revolution with ease needs no answer. For that is not the question. Certainly an attempt to overthrow the Government by force, even though doomed from the outset because of inadequate numbers or power of the revolutionists, is a sufficient evil for Congress to prevent. The damage which such attempts create both physically and politically to a nation makes it impossible to measure the validity in terms of the probability of success, or the immediacy of a successful attempt. In the instant case the trial judge charged the jury that they could not convict unless they found that petitioners intended to overthrow the Gov-

concurring in the result. In their concurrence they repeated that even though the legislature had designated certain speech as criminal, this could not prevent the defendant from showing that there was no danger that the substantive evil would be brought about.

Although no case subsequent to *Whitney* and *Gitlow* has expressly overruled the majority opinions in those cases, there is little doubt that subsequent opinions have inclined toward the Holmes-Brandeis rationale.[5] And in *American Communications Assn.* v. *Douds, supra,* we were called upon to decide the validity of § 9 (h) of the Labor Management Relations Act of 1947. That section required officials of unions which desired to avail themselves of the facilities of the National Labor Relations Board to take oaths that they did not belong to the Communist Party and that they did not believe in the overthrow of the Government by force and violence. We pointed out that Congress did not intend to punish belief, but rather intended to regulate the conduct of union affairs. We therefore held that any indirect sanction on speech which might arise from the oath requirement did not present a proper case for the "clear and present danger" test, for the regulation was aimed at conduct rather than speech. In discussing the proper measure of evaluation of this kind of legislation, we suggested that the Holmes-Brandeis philosophy insisted that where

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[5] *Contempt of court: Craig* v. *Harney,* 331 U. S. 367, 373 (1947); *Pennekamp* v. *Florida,* 328 U. S. 331, 333–336 (1946); *Bridges* v. *California,* 314 U. S. 252, 260–263 (1941).

Validity of state statute: Thomas v. *Collins,* 323 U. S. 516, 530 (1945); *Taylor* v. *Mississippi,* 319 U. S. 583, 589–590 (1943); *Thornhill* v. *Alabama,* 310 U. S. 88, 104–106 (1940).

Validity of local ordinance or regulation: West Virginia Board of Education v. *Barnette,* 319 U. S. 624, 639 (1943); *Carlson* v. *California,* 310 U. S. 106, 113 (1940).

Common law offense: Cantwell v. *Connecticut,* 310 U. S. 296, 308, 311 (1940).

ernment "as speedily as circumstances would permit." This does not mean, and could not properly mean, that they would not strike until there was certainty of success. What was meant was that the revolutionists would strike when they thought the time was ripe. We must therefore reject the contention that success or probability of success is the criterion.

The situation with which Justices Holmes and Brandeis were concerned in *Gitlow* was a comparatively isolated event, bearing little relation in their minds to any substantial threat to the safety of the community. Such also is true of cases like *Fiske* v. *Kansas,* 274 U. S. 380 (1927), and *De Jonge* v. *Oregon,* 299 U. S. 353 (1937); but cf. *Lazar* v. *Pennsylvania,* 286 U. S. 532 (1932). They were not confronted with any situation comparable to the instant one—the development of an apparatus designed and dedicated to the overthrow of the Government, in the context of world crisis after crisis.

Chief Judge Learned Hand, writing for the majority below, interpreted the phrase as follows: "In each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." 183 F. 2d at 212. We adopt this statement of the rule. As articulated by Chief Judge Hand, it is as succinct and inclusive as any other we might devise at this time. It takes into consideration those factors which we deem relevant, and relates their significances. More we cannot expect from words.

Likewise, we are in accord with the court below, which affirmed the trial court's finding that the requisite danger existed. The mere fact that from the period 1945 to 1948 petitioners' activities did not result in an attempt to overthrow the Government by force and violence is of course no answer to the fact that there was a group that was ready to make the attempt. The formation

by petitioners of such a highly organized conspiracy, with rigidly disciplined members subject to call when the leaders, these petitioners, felt that the time had come for action, coupled with the inflammable nature of world conditions, similar uprisings in other countries, and the touch-and-go nature of our relations with countries with whom petitioners were in the very least ideologically attuned, convince us that their convictions were justified on this score. And this analysis disposes of the contention that a conspiracy to advocate, as distinguished from the advocacy itself, cannot be constitutionally restrained, because it comprises only the preparation. It is the existence of the conspiracy which creates the danger. Cf. *Pinkerton* v. *United States,* 328 U. S. 640 (1946); *Goldman* v. *United States,* 245 U. S. 474 (1918); *United States* v. *Rabinowich,* 238 U. S. 78 (1915). If the ingredients of the reaction are present, we cannot bind the Government to wait until the catalyst is added.

IV.

Although we have concluded that the finding that there was a sufficient danger to warrant the application of the statute was justified on the merits, there remains the problem of whether the trial judge's treatment of the issue was correct. He charged the jury, in relevant part, as follows:

> "In further construction and interpretation of the statute I charge you that it is not the abstract doctrine of overthrowing or destroying organized government by unlawful means which is denounced by this law, but the teaching and advocacy of action for the accomplishment of that purpose, by language reasonably and ordinarily calculated to incite persons to such action. Accordingly, you cannot find the defendants or any of them guilty of the crime charged

> unless you are satisfied beyond a reasonable doubt that they conspired to organize a society, group and assembly of persons who teach and advocate the overthrow or destruction of the Government of the United States by force and violence and to advocate and teach the duty and necessity of overthrowing or destroying the Government of the United States by force and violence, with the intent that such teaching and advocacy be of a rule or principle of action and by language reasonably and ordinarily calculated to incite persons to such action, all with the intent to cause the overthrow or destruction of the Government of the United States by force and violence as speedily as circumstances would permit.
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> . . . . .
>
> "If you are satisfied that the evidence establishes beyond a reasonable doubt that the defendants, or any of them, are guilty of a violation of the statute, as I have interpreted it to you, I find as matter of law that there is sufficient danger of a substantive evil that the Congress has a right to prevent to justify the application of the statute under the First Amendment of the Constitution.
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> "This is matter of law about which you have no concern. It is a finding on a matter of law which I deem essential to support my ruling that the case should be submitted to you to pass upon the guilt or innocence of the defendants. . . ."

It is thus clear that he reserved the question of the existence of the danger for his own determination, and the question becomes whether the issue is of such a nature that it should have been submitted to the jury.

The first paragraph of the quoted instructions calls for the jury to find the facts essential to establish the substantive crime, violation of §§ 2 (a) (1) and 2 (a) (3) of

the Smith Act, involved in the conspiracy charge. There can be no doubt that if the jury found those facts against the petitioners violation of the Act would be established. The argument that the action of the trial court is erroneous, in declaring as a matter of law that such violation shows sufficient danger to justify the punishment despite the First Amendment, rests on the theory that a jury must decide a question of the application of the First Amendment. We do not agree.

When facts are found that establish the violation of a statute, the protection against conviction afforded by the First Amendment is a matter of law. The doctrine that there must be a clear and present danger of a substantive evil that Congress has a right to prevent is a judicial rule to be applied as a matter of law by the courts. The guilt is established by proof of facts. Whether the First Amendment protects the activity which constitutes the violation of the statute must depend upon a judicial determination of the scope of the First Amendment applied to the circumstances of the case.

Petitioners' reliance upon Justice Brandeis' language in his concurrence in *Whitney, supra,* is misplaced. In that case Justice Brandeis pointed out that the defendant could have made the existence of the requisite danger the important issue at her trial, but that she had not done so. In discussing this failure, he stated that the defendant could have had the issue determined by the court *or* the jury.[6] No realistic construction of this disjunctive lan-

[6] "Whether in 1919, when Miss Whitney did the things complained of, there was in California such clear and present danger of serious evil, might have been made the important issue in the case. She might have required that the issue be determined either by the *court or the jury*. She claimed below that the statute as applied to her violated the Federal Constitution; but she did not claim that it was void because there was no clear and present danger of serious evil, nor did she request that the existence of these conditions of a valid

guage could arrive at the conclusion that he intended to state that the question was *only* determinable by a jury. Nor is the incidental statement of the majority in *Pierce, supra,* of any more persuasive effect.[7] There the issue of the probable effect of the publication had been submitted to the jury, and the majority was apparently addressing its remarks to the contention of the dissenters that the jury could not reasonably have returned a verdict of guilty on the evidence.[8] Indeed, in the very case in which the phrase was born, *Schenck,* this Court itself examined the record to find whether the requisite danger appeared, and the issue was not submitted to a jury. And in every later case in which the Court has measured the validity of a statute by the "clear and present danger" test, that determination has been by the court, the question of the danger not being submitted to the jury.

The question in this case is whether the statute which the legislature has enacted may be constitutionally applied. In other words, the Court must examine judicially

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measure thus restricting the rights of free speech and assembly be passed upon by *the court or a jury.* On the other hand, there was evidence on which *the court or jury* might have found that such danger existed." (Emphasis added.) 274 U. S. at 379.

[7] "Whether the printed words would in fact produce as a proximate result a material interference with the recruiting or enlistment service, or the operation or success of the forces of the United States, was a question for the jury to decide in view of all the circumstances of the time and considering the place and manner of distribution." 252 U. S. 239, 250 (1920).

[8] A similarly worded expression is found in that part of the majority opinion sustaining the overruling of the defendants' general demurrer to the indictment. 252 U. S. at 244. Since the defendants had not raised the issue of "clear and present danger" at the trial, it is clear that the Court was not faced with the question whether the trial judge erred in not determining, as a conclusive matter, the existence or nonexistence of a "clear and present danger." The only issue to which the remarks were addressed was whether the indictment sufficiently alleged the violation.

the application of the statute to the particular situation, to ascertain if the Constitution prohibits the conviction. We hold that the statute may be applied where there is a "clear and present danger" of the substantive evil which the legislature had the right to prevent. Bearing, as it does, the marks of a "question of law," the issue is properly one for the judge to decide.

V.

There remains to be discussed the question of vagueness—whether the statute as we have interpreted it is too vague, not sufficiently advising those who would speak of the limitations upon their activity. It is urged that such vagueness contravenes the First and Fifth Amendments. This argument is particularly nonpersuasive when presented by petitioners, who, the jury found, intended to overthrow the Government as speedily as circumstances would permit. See *Abrams* v. *United States,* 250 U. S. 616, 627–629 (1919) (dissenting opinion); *Whitney* v. *California,* 274 U. S. 357, 373 (1927) (concurring opinion); *Taylor* v. *Mississippi,* 319 U. S. 583, 589 (1943). A claim of guilelessness ill becomes those with evil intent. *Williams* v. *United States,* 341 U. S. 97, 101–102 (1951); *Jordan* v. *De George,* 341 U. S. 223, 230–232 (1951); *American Communications Assn.* v. *Douds,* 339 U. S. at 413; *Screws* v. *United States,* 325 U. S. 91, 101 (1945).

We agree that the standard as defined is not a neat, mathematical formulary. Like all verbalizations it is subject to criticism on the score of indefiniteness. But petitioners themselves contend that the verbalization "clear and present danger" is the proper standard. We see no difference, from the standpoint of vagueness, whether the standard of "clear and present danger" is one contained *in haec verba* within the statute, or whether it is the judicial measure of constitutional applicability. We

have shown the indeterminate standard the phrase necessarily connotes. We do not think we have rendered that standard any more indefinite by our attempt to sum up the factors which are included within its scope. We think it well serves to indicate to those who would advocate constitutionally prohibited conduct that there is a line beyond which they may not go—a line which they, in full knowledge of what they intend and the circumstances in which their activity takes place, will well appreciate and understand. *Williams, supra,* at 101–102; *Jordan, supra,* at 230–232; *United States* v. *Petrillo,* 332 U. S. 1, 7 (1948); *United States* v. *Wurzbach,* 280 U. S. 396, 399 (1930); *Nash* v. *United States,* 229 U. S. 373, 376–377 (1913). Where there is doubt as to the intent of the defendants, the nature of their activities, or their power to bring about the evil, this Court will review the convictions with the scrupulous care demanded by our Constitution. But we are not convinced that because there may be borderline cases at some time in the future, these convictions should be reversed because of the argument that these petitioners could not know that their activities were constitutionally proscribed by the statute.

We have not discussed many of the questions which could be extracted from the record, although they were treated in detail by the court below. Our limited grant of the writ of certiorari has withdrawn from our consideration at this date those questions, which include, *inter alia,* sufficiency of the evidence, composition of jury, and conduct of the trial.

We hold that §§ 2 (a) (1), 2 (a) (3) and 3 of the Smith Act do not inherently, or as construed or applied in the instant case, violate the First Amendment and other provisions of the Bill of Rights, or the First and Fifth Amendments because of indefiniteness. Petitioners intended to overthrow the Government of the United States as speedily as the circumstances would permit. Their conspiracy

to organize the Communist Party and to teach and advocate the overthrow of the Government of the United States by force and violence created a "clear and present danger" of an attempt to overthrow the Government by force and violence. They were properly and constitutionally convicted for violation of the Smith Act. The judgments of conviction are

Affirmed.

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

MR. JUSTICE FRANKFURTER, concurring in affirmance of the judgment.

The defendants were convicted under § 3 of the Smith Act for conspiring to violate § 2 of that Act, which makes it unlawful "to organize or help to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any government in the United States by force or violence." Act of June 28, 1940, § 2 (a) (3), 54 Stat. 670, 671, 18 U. S. C. § 10, now 18 U. S. C. § 2385. The substance of the indictment is that the defendants between April 1, 1945, and July 20, 1948, agreed to bring about the dissolution of a body known as the Communist Political Association and to organize in its place the Communist Party of the United States; that the aim of the new party was "the overthrow and destruction of the Government of the United States by force and violence"; that the defendants were to assume leadership of the Party and to recruit members for it and that the Party was to publish books and conduct classes, teaching the duty and the necessity of forceful overthrow. The jury found all the defendants guilty. With one exception, each was sentenced to imprisonment for five years and to a fine of $10,000. The convictions were affirmed by the Court of Appeals for the Second

Circuit. 183 F. 2d 201. We were asked to review this affirmance on all the grounds considered by the Court of Appeals. These included not only the scope of the freedom of speech guaranteed by the Constitution, but also serious questions regarding the legal composition of the jury and the fair conduct of the trial. We granted certiorari, strictly limited, however, to the contention that §§ 2 and 3 of the Smith Act, inherently and as applied, violated the First and Fifth Amendments. 340 U. S. 863. No attempt was made to seek an enlargement of the range of questions thus defined, and these alone are now open for our consideration. All others are foreclosed by the decision of the Court of Appeals.

As thus limited, the controversy in this Court turns essentially on the instructions given to the jury for determining guilt or innocence. 9 F. R. D. 367. The first question is whether—wholly apart from constitutional matters—the judge's charge properly explained to the jury what it is that the Smith Act condemns. The conclusion that he did so requires no labored argument. On the basis of the instructions, the jury found, for the purpose of our review, that the advocacy which the defendants conspired to promote was to be a rule of action, by language reasonably calculated to incite persons to such action, and was intended to cause the overthrow of the Government by force and violence as soon as circumstances permit. This brings us to the ultimate issue. In enacting a statute which makes it a crime for the defendants to conspire to do what they have been found to have conspired to do, did Congress exceed its constitutional power?

Few questions of comparable import have come before this Court in recent years. The appellants maintain that they have a right to advocate a political theory, so long, at least, as their advocacy does not create an immediate danger of obvious magnitude to the very existence of

our present scheme of society. On the other hand, the Government asserts the right to safeguard the security of the Nation by such a measure as the Smith Act. Our judgment is thus solicited on a conflict of interests of the utmost concern to the well-being of the country. This conflict of interests cannot be resolved by a dogmatic preference for one or the other, nor by a sonorous formula which is in fact only a euphemistic disguise for an unresolved conflict. If adjudication is to be a rational process, we cannot escape a candid examination of the conflicting claims with full recognition that both are supported by weighty title-deeds.

I.

There come occasions in law, as elsewhere, when the familiar needs to be recalled. Our whole history proves even more decisively than the course of decisions in this Court that the United States has the powers inseparable from a sovereign nation. "America has chosen to be, in many respects, and to many purposes, a nation; and for all these purposes, her government is complete; to all these objects, it is competent." Chief Justice Marshall in *Cohens* v. *Virginia,* 6 Wheat. 264, 414. The right of a government to maintain its existence—self-preservation—is the most pervasive aspect of sovereignty. "Security against foreign danger," wrote Madison, "is one of the primitive objects of civil society." The Federalist, No. 41. The constitutional power to act upon this basic principle has been recognized by this Court at different periods and under diverse circumstances. "To preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation, and to attain these ends nearly all other considerations are to be subordinated. It matters not in what form such aggression and encroachment come . . . . The government, possessing the powers which are to be exercised

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for protection and security, is clothed with authority to determine the occasion on which the powers shall be called forth . . . ." *Chinese Exclusion Case,* 130 U. S. 581, 606. See also *De Lima* v. *Bidwell,* 182 U. S. 1; *Mackenzie* v. *Hare,* 239 U. S. 299; *Missouri* v. *Holland,* 252 U. S. 416; *United States* v. *Curtiss-Wright Corp.,* 299 U. S. 304. The most tragic experience in our history is a poignant reminder that the Nation's continued existence may be threatened from within. To protect itself from such threats, the Federal Government "is invested with all those inherent and implied powers which, at the time of adopting the Constitution, were generally considered to belong to every government as such, and as being essential to the exercise of its functions." Mr. Justice Bradley, concurring in *Legal Tender Cases,* 12 Wall. 457, 554, 556; and see *In re Debs,* 158 U. S. 564, 582.

But even the all-embracing power and duty of self-preservation are not absolute. Like the war power, which is indeed an aspect of the power of self-preservation, it is subject to applicable constitutional limitations. See *Hamilton* v. *Kentucky Distilleries Co.,* 251 U. S. 146, 156. Our Constitution has no provision lifting restrictions upon governmental authority during periods of emergency, although the scope of a restriction may depend on the circumstances in which it is invoked.

The First Amendment is such a restriction. It exacts obedience even during periods of war; it is applicable when war clouds are not figments of the imagination no less than when they are. The First Amendment categorically demands that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." The right of a man to think what he

pleases, to write what he thinks, and to have his thoughts made available for others to hear or read has an engaging ring of universality. The Smith Act and this conviction under it no doubt restrict the exercise of free speech and assembly. Does that, without more, dispose of the matter?

Just as there are those who regard as invulnerable every measure for which the claim of national survival is invoked, there are those who find in the Constitution a wholly unfettered right of expression. Such literalness treats the words of the Constitution as though they were found on a piece of outworn parchment instead of being words that have called into being a nation with a past to be preserved for the future. The soil in which the Bill of Rights grew was not a soil of arid pedantry. The historic antecedents of the First Amendment preclude the notion that its purpose was to give unqualified immunity to every expression that touched on matters within the range of political interest. The Massachusetts Constitution of 1780 guaranteed free speech; yet there are records of at least three convictions for political libels obtained between 1799 and 1803.[1] The Pennsylvania Constitution of 1790 and the Delaware Constitution of 1792 expressly imposed liability for abuse of the right of free speech.[2] Madison's own State put on its books in 1792 a statute confining the abusive exercise of the right of utterance.[3] And it deserves to be noted that in writing to John Adams's wife, Jefferson did not rest his condemnation of the Sedition Act of 1798 on his belief in

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[1] Mass. Const., 1780, Part I, Art. XVI. See Duniway, Freedom of the Press in Massachusetts, 144–146.

[2] Pa. Const., 1790, Art. IX, § 7; Del. Const., 1792, Art. I, § 5.

[3] The General Assembly of Virginia passed a statute on December 26, 1792, directed at establishment of "any government separate from, or independent of the government of *Virginia*, within the limits thereof, unless by act of the legislature of this commonwealth for that

unrestrained utterance as to political matter. The First Amendment, he argued, reflected a limitation upon Federal power, leaving the right to enforce restrictions on speech to the States.[4]

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purpose first obtained." The statute provided that "EVERY person . . . who shall by writing or advised speaking, endeavour to instigate the people of this commonwealth to erect or establish such government without such assent as aforesaid, shall be adjudged guilty of a high crime and misdemeanor . . . ." Va. Code, 1803, c. CXXXVI.

[4] In a letter to Abigail Adams, dated September 11, 1804, Jefferson said with reference to the Sedition Act:

"Nor does the opinion of the unconstitutionality and consequent nullity of that law remove all restraint from the overwhelming torrent of slander which is confounding all vice and virtue, all truth and falsehood in the US. The power to do that is fully possessed by the several state legislatures. It was reserved to them, and was denied to the general government, by the constitution according to our construction of it. While we deny that Congress have a right to controul the freedom of the press, we have ever asserted the right of the states, and their exclusive right, to do so."

The letter will be published in a forthcoming volume of The Papers of Thomas Jefferson (Boyd ed.), to which I am indebted for its reproduction here in its exact form.

The Sedition Act of July 14, 1798, was directed at two types of conduct. Section 1 made it a criminal offense to conspire "to impede the operation of any law of the United States," and to "counsel, advise or attempt to procure any insurrection, riot, unlawful assembly, or combination." Section 2 provided:

"That if any person shall write, print, utter or publish, or shall cause or procure to be written, printed, uttered or published, or shall knowingly and willingly assist or aid in writing, printing, uttering or publishing any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress of the United States, or the President of the United States, with intent to defame the said government, or either house of the said Congress, or the said President, or to bring them, or either of them, into contempt or disrepute; or to excite against them, or either or any of them, the hatred of the good people of the United States, or to stir up sedition within the United States, or to excite any unlawful combinations therein, for opposing or resisting any law of the United

The language of the First Amendment is to be read not as barren words found in a dictionary but as symbols of historic experience illumined by the presuppositions of those who employed them. Not what words did Madison and Hamilton use, but what was it in their minds which they conveyed? Free speech is subject to prohibition of those abuses of expression which a civilized society may forbid. As in the case of every other provision of the Constitution that is not crystallized by the nature of its technical concepts, the fact that the First Amendment is not self-defining and self-enforcing neither impairs its usefulness nor compels its paralysis as a living instrument.

States, or any act of the President of the United States, done in pursuance of any such law, or of the powers in him vested by the constitution of the United States, or to resist, oppose, or defeat any such law or act, or to aid, encourage or abet any hostile designs of any foreign nation against the United States, their people or government, then such person, being thereof convicted before any court of the United States having jurisdiction thereof, shall be punished by a fine not exceeding two thousand dollars, and by imprisonment not exceeding two years." 1 Stat. 596–597.

No substantial objection was raised to § 1 of the Act. The argument against the validity of § 2 is stated most fully in the Virginia Report of 1799–1800. That Report, prepared for the House of Delegates by a committee of which Madison was chairman, attempted to establish that the power to regulate speech was not delegated to the Federal Government by the Constitution, and that the First Amendment had prohibited the National Government from exercising the power. In reply it was urged that power to restrict seditious writing was implicit in the acknowledged power of the Federal Government to prohibit seditious acts, and that the liberty of the press did not extend to the sort of speech restricted by the Act. See the Report of the Committee of the House of Representatives to which were referred memorials from the States, H. R. Rep. No. 110, 5th Cong., 3d Sess., published in American State Papers, Misc. Vol. 1, p. 181. For an extensive contemporary account of the controversy, see St. George Tucker's 1803 edition of Blackstone's Commentaries, Appendix to Vol. First, Part Second, Note G.

"The law is perfectly well settled," this Court said over fifty years ago, "that the first ten amendments to the Constitution, commonly known as the Bill of Rights, were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors, and which had from time immemorial been subject to certain well-recognized exceptions arising from the necessities of the case. In incorporating these principles into the fundamental law there was no intention of disregarding the exceptions, which continued to be recognized as if they had been formally expressed." *Robertson* v. *Baldwin,* 165 U. S. 275, 281. That this represents the authentic view of the Bill of Rights and the spirit in which it must be construed has been recognized again and again in cases that have come here within the last fifty years. See, *e. g., Gompers* v. *United States,* 233 U. S. 604, 610. Absolute rules would inevitably lead to absolute exceptions, and such exceptions would eventually corrode the rules.[5] The demands of free speech in a democratic society as well as the interest

[5] Professor Alexander Meiklejohn is a leading exponent of the absolutist interpretation of the First Amendment. Recognizing that certain forms of speech require regulation, he excludes those forms of expression entirely from the protection accorded by the Amendment. "The constitutional status of a merchant advertising his wares, of a paid lobbyist fighting for the advantage of his client, is utterly different from that of a citizen who is planning for the general welfare." Meiklejohn, Free Speech, 39. "The radio as it now operates among us is not free. Nor is it entitled to the protection of the First Amendment. It is not engaged in the task of enlarging and enriching human communication. It is engaged in making money." *Id.* at 104. Professor Meiklejohn even suggests that scholarship may now require such subvention and control that it no longer is entitled to protection by the First Amendment. See *id.* at 99–100. Professor Chafee in his review of the Meiklejohn book, 62 Harv. L. Rev. 891, has subjected this position to trenchant comment.

in national security are better served by candid and informed weighing of the competing interests, within the confines of the judicial process, than by announcing dogmas too inflexible for the non-Euclidian problems to be solved.

But how are competing interests to be assessed? Since they are not subject to quantitative ascertainment, the issue necessarily resolves itself into asking, who is to make the adjustment?—who is to balance the relevant factors and ascertain which interest is in the circumstances to prevail? Full responsibility for the choice cannot be given to the courts. Courts are not representative bodies. They are not designed to be a good reflex of a democratic society. Their judgment is best informed, and therefore most dependable, within narrow limits. Their essential quality is detachment, founded on independence. History teaches that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic and social pressures.

Primary responsibility for adjusting the interests which compete in the situation before us of necessity belongs to the Congress. The nature of the power to be exercised by this Court has been delineated in decisions not charged with the emotional appeal of situations such as that now before us. We are to set aside the judgment of those whose duty it is to legislate only if there is no reasonable basis for it. *Sinking-Fund Cases,* 99 U. S. 700, 718; *Mugler* v. *Kansas,* 123 U. S. 623, 660–661; *United States* v. *Carolene Products Co.,* 304 U. S. 144. We are to determine whether a statute is sufficiently definite to meet the constitutional requirements of due process, and whether it respects the safeguards against undue concentration of authority secured by separation of power. *United States* v. *Cohen Grocery Co.,* 255 U. S. 81.

We must assure fairness of procedure, allowing full scope to governmental discretion but mindful of its impact on individuals in the context of the problem involved. *Joint Anti-Fascist Refugee Comm.* v. *McGrath,* 341 U. S. 123. And, of course, the proceedings in a particular case before us must have the warrant of substantial proof. Beyond these powers we must not go; we must scrupulously observe the narrow limits of judicial authority even though self-restraint is alone set over us. Above all we must remember that this Court's power of judicial review is not "an exercise of the powers of a super-legislature." Mr. Justice Brandeis and Mr. Justice Holmes, dissenting in *Burns Baking Co.* v. *Bryan,* 264 U. S. 504, 534.

A generation ago this distribution of responsibility would not have been questioned. See *Fox* v. *Washington,* 236 U. S. 273; *Meyer* v. *Nebraska,* 262 U. S. 390; *Bartels* v. *Iowa,* 262 U. S. 404; cf. *New York ex rel. Bryant* v. *Zimmerman,* 278 U. S. 63. But in recent decisions we have made explicit what has long been implicitly recognized. In reviewing statutes which restrict freedoms protected by the First Amendment, we have emphasized the close relation which those freedoms bear to maintenance of a free society. See *Kovacs* v. *Cooper,* 336 U. S. 77, 89, 95 (concurring). Some members of the Court—and at times a majority—have done more. They have suggested that our function in reviewing statutes restricting freedom of expression differs sharply from our normal duty in sitting in judgment on legislation. It has been said that such statutes "must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger. The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice." *Thomas* v. *Collins,* 323 U. S. 516, 530. It has been suggested, with the casualness of a footnote, that such legislation is not

presumptively valid, see *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152, n. 4, and it has been weightily reiterated that freedom of speech has a "preferred position" among constitutional safeguards. *Kovacs* v. *Cooper*, 336 U. S. 77, 88.

The precise meaning intended to be conveyed by these phrases need not now be pursued. It is enough to note that they have recurred in the Court's opinions, and their cumulative force has, not without justification, engendered belief that there is a constitutional principle, expressed by those attractive but imprecise words, prohibiting restriction upon utterance unless it creates a situation of "imminent" peril against which legislation may guard.[6] It is on this body of the Court's pronouncements that the defendants' argument here is based.

In all fairness, the argument cannot be met by reinterpreting the Court's frequent use of "clear" and "present" to mean an entertainable "probability." In giving this meaning to the phrase "clear and present danger," the Court of Appeals was fastidiously confining the rhetoric of opinions to the exact scope of what was decided by them. We have greater responsibility for having given constitutional support, over repeated protests, to uncritical libertarian generalities.

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[6] In *Hartzel* v. *United States*, 322 U. S. 680, 687, the Court reversed a conviction for wilfully causing insubordination in the military forces on the ground that the intent required by the statute was not shown. It added that there was a second element necessary to conviction, "consisting of a clear and present danger that the activities in question will bring about the substantive evils which Congress has a right to prevent. *Schenck* v. *United States*, 249 U. S. 47. Both elements must be proved by the Government beyond a reasonable doubt."

Other passages responsible for attributing to the Court the principle that imminence of the apprehended evil is necessary to conviction in free-speech cases are collected in an Appendix to this opinion, *post*, p. 556.

Nor is the argument of the defendants adequately met by citing isolated cases. Adjustment of clash of interests which are at once subtle and fundamental is not likely to reveal entire consistency in a series of instances presenting the clash. It is not too difficult to find what one seeks in the language of decisions reporting the effort to reconcile free speech with the interests with which it conflicts. The case for the defendants requires that their conviction be tested against the entire body of our relevant decisions. Since the significance of every expression of thought derives from the circumstances evoking it, results reached rather than language employed give the vital meaning. See *Cohens* v. *Virginia,* 6 Wheat. 264, 442; Wambaugh, The Study of Cases, 10.

There is an added reason why we must turn to the decisions. "Great cases," it is appropriate to remember, "like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend." Mr. Justice Holmes, dissenting in *Northern Securities Co.* v. *United States,* 193 U. S. 197, 400–401.

This is such a case. Unless we are to compromise judicial impartiality and subject these defendants to the risk of an *ad hoc* judgment influenced by the impregnating atmosphere of the times, the constitutionality of their conviction must be determined by principles established in cases decided in more tranquil periods. If those decisions are to be used as a guide and not as an argument, it is important to view them as a whole and to distrust the easy generalizations to which some of them lend themselves.

II.

We have recognized and resolved conflicts between speech and competing interests in six different types of cases.[7]

1. The cases involving a conflict between the interest in allowing free expression of ideas in public places and the interest in protection of the public peace and the primary uses of streets and parks, were too recently considered to be rehearsed here. *Niemotko* v. *Maryland,* 340 U. S. 268, 273. It suffices to recall that the result in each case was found to turn on the character of the interest with which the speech clashed, the method used to impose the restriction, and the nature and circumstances of the utterance prohibited. While the decisions recognized the importance of free speech and carefully scrutinized the justification for its regulation, they rejected the notion that vindication of the deep public interest in freedom of expression requires subordination of all conflicting values.

2. A critique of the cases testing restrictions on picketing is made more difficult by the inadequate recognition by the Court from the outset that the loyalties and responses evoked and exacted by picket lines differentiate this form of expression from other modes of communication. See *Thornhill* v. *Alabama,* 310 U. S. 88. But the

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[7] No useful purpose would be served by considering here decisions in which the Court treated the challenged regulation as though it imposed no real restraint on speech or on the press. *E. g., Associated Press* v. *Labor Board,* 301 U. S. 103; *Valentine* v. *Chrestensen,* 316 U. S. 52; *Railway Express Agency* v. *New York,* 336 U. S. 106; *Lewis Publishing Co.* v. *Morgan,* 229 U. S. 288. We recognized that restrictions on speech were involved in *United States ex rel. Milwaukee Publishing Co.* v. *Burleson,* 255 U. S. 407, and *Gilbert* v. *Minnesota,* 254 U. S. 325; but the decisions raised issues so different from those presented here that they too need not be considered in detail. Our decisions in *Stromberg* v. *California,* 283 U. S. 359, and *Winters* v. *New York,* 333 U. S. 507, turned on the indefiniteness of the statutes.

crux of the decision in the *Thornhill* case was that a State could not constitutionally punish peaceful picketing when neither the aim of the picketing nor the manner in which it was carried out conflicted with a substantial interest. In subsequent decisions we sustained restrictions designed to prevent recurrence of violence, *Milk Wagon Drivers Union* v. *Meadowmoor Dairies,* 312 U. S. 287, or reasonably to limit the area of industrial strife, *Carpenters & Joiners Union* v. *Ritter's Cafe,* 315 U. S. 722; cf. *Bakery & Pastry Drivers Local* v. *Wohl,* 315 U. S. 769. We held that a State's policy against restraints of trade justified it in prohibiting picketing which violated that policy, *Giboney* v. *Empire Storage Co.,* 336 U. S. 490; we sustained restrictions designed to encourage self-employed persons, *International Brotherhood of Teamsters Union* v. *Hanke,* 339 U. S. 470; and to prevent racial discrimination, *Hughes* v. *Superior Court,* 339 U. S. 460. The Fourteenth Amendment bars a State from prohibiting picketing when there is no fair justification for the breadth of the restriction imposed. *American Federation of Labor* v. *Swing,* 312 U. S. 321; *Cafeteria Employees Union* v. *Angelos,* 320 U. S. 293. But it does not prevent a State from denying the means of communication that picketing affords in a fair balance between the interests of trade unionism and other interests of the community.

3. In three cases we have considered the scope and application of the power of the Government to exclude, deport, or denaturalize aliens because of their advocacy or their beliefs. In *United States ex rel. Turner* v. *Williams,* 194 U. S. 279, we held that the First Amendment did not disable Congress from directing the exclusion of an alien found in an administrative proceeding to be an anarchist. "[A]s long as human governments endure," we said, "they cannot be denied the power of self-preservation, as that question is presented here."

194 U. S. at 294. In *Schneiderman* v. *United States,* 320 U. S. 118, and *Bridges* v. *Wixon,* 326 U. S. 135, we did not consider the extent of the power of Congress. In each case, by a closely divided Court, we interpreted a statute authorizing denaturalization or deportation to impose on the Government the strictest standards of proof.

4. History regards "freedom of the press" as indispensable for a free society and for its government. We have, therefore, invalidated discriminatory taxation against the press and prior restraints on publication of defamatory matter. *Grosjean* v. *American Press Co.,* 297 U. S. 233; *Near* v. *Minnesota,* 283 U. S. 697.

We have also given clear indication of the importance we attach to dissemination of ideas in reviewing the attempts of States to reconcile freedom of the press with protection of the integrity of the judicial process. In *Pennekamp* v. *Florida,* 328 U. S. 331, the Court agreed that the Fourteenth Amendment barred a State from adjudging in contempt of court the publisher of critical and inaccurate comment about portions of a litigation that for all practical purposes were no longer pending. We likewise agreed, in a minor phase of our decision in *Bridges* v. *California,* 314 U. S. 252, that even when statements in the press relate to matters still pending before a court, convictions for their publication cannot be sustained if their utterance is too trivial to be deemed a substantial threat to the impartial administration of justice.

The Court has, however, sharply divided on what constitutes a sufficient interference with the course of justice. In the first decision, *Patterson* v. *Colorado,* 205 U. S. 454, the Court affirmed a judgment for contempt imposed by a State supreme court for publication of articles reflecting on the conduct of the court in cases still before it on

motions for rehearing. In the *Bridges* case, however, a majority held that a State court could not protect itself from the implied threat of a powerful newspaper that failure of an elected judge to impose a severe sentence would be a "serious mistake." The same case also placed beyond a State's power to punish the publication of a telegram from the president of an important union who threatened a damaging strike in the event of an adverse decision. The majority in *Craig* v. *Harney,* 331 U. S. 367, 376, held that the Fourteenth Amendment protected "strong," "intemperate," "unfair" criticism of the way an elected lay judge was conducting a pending civil case. None of the cases establishes that the public interest in a free press must in all instances prevail over the public interest in dispassionate adjudication. But the *Bridges* and *Craig* decisions, if they survive, tend to require a showing that interference be so imminent and so demonstrable that the power theoretically possessed by the State is largely paralyzed.

5. Our decision in *American Communications Assn.* v. *Douds,* 339 U. S. 382, recognized that the exercise of political rights protected by the First Amendment was necessarily discouraged by the requirement of the Taft-Hartley Act that officers of unions employing the services of the National Labor Relations Board sign affidavits that they are not Communists. But we held that the statute was not for this reason presumptively invalid. The problem, we said, was "one of weighing the probable effects of the statute upon the free exercise of the right of speech and assembly against the congressional determination that political strikes are evils of conduct which cause substantial harm to interstate commerce and that Communists and others identified by § 9 (h) pose continuing threats to that public interest when in positions of union leader-

ship." 339 U. S. at 400. On balance, we decided that the legislative judgment was a permissible one.[8]

6. Statutes prohibiting speech because of its tendency to lead to crime present a conflict of interests which bears directly on the problem now before us. The first case in which we considered this conflict was *Fox* v. *Washington, supra.* The statute there challenged had been interpreted to prohibit publication of matter "encouraging an actual breach of law." We held that the Fourteenth Amendment did not prohibit application of the statute to an article which we concluded incited a breach of laws against indecent exposure. We said that the statute "lays hold of encouragements that, apart from statute, if directed to a particular person's conduct, generally would make him who uttered them guilty of a misdemeanor if not an accomplice or a principal in the crime encouraged, and deals with the publication of them to a wider and less selected audience." 236 U. S. at 277–278. To be sure, the *Fox* case preceded the explicit absorption of the substance of the First Amendment in the Fourteenth. But subsequent decisions extended the *Fox* principle to free-speech situations. They are so important to the problem before us that we must consider them in detail.

(a) The first important application of the principle was made in six cases arising under the Espionage Act of 1917. That Act prohibits conspiracies and attempts

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[8] The Taft-Hartley Act also requires that an officer of a union using the services of the National Labor Relations Board take oath that he "does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods." The Court divided on the validity of this requirement. Test oaths raise such special problems that decisions on their validity are not directly helpful here. See *West Virginia Board of Education* v. *Barnette,* 319 U. S. 624.

to "obstruct the recruiting or enlistment service." In each of the first three cases, Mr. Justice Holmes wrote for a unanimous Court, affirming the convictions. The evidence in *Schenck* v. *United States,* 249 U. S. 47, showed that the defendant had conspired to circulate among men called for the draft 15,000 copies of a circular which asserted a "right" to oppose the draft. The defendant in *Frohwerk* v. *United States,* 249 U. S. 204, was shown to have conspired to publish in a newspaper twelve articles describing the sufferings of American troops and the futility of our war aims. The record was inadequate, and we said that it was therefore "impossible to say that it might not have been found that the circulation of the paper was in quarters where a little breath would be enough to kindle a flame and that the fact was known and relied upon by those who sent the paper out." 249 U. S. at 209. In *Debs* v. *United States,* 249 U. S. 211, the indictment charged that the defendant had delivered a public speech expounding socialism and praising Socialists who had been convicted of abetting violation of the draft laws.

The ground of decision in each case was the same. The First Amendment "cannot have been, and obviously was not, intended to give immunity for every possible use of language. *Robertson* v. *Baldwin,* 165 U. S. 275, 281." *Frohwerk* v. *United States, supra,* at 206. "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 has a right to prevent. It is a question of proximity and degree." *Schenck* v. *United States, supra,* at 52. When "the words used had as their natural tendency and reasonably probable effect to obstruct the recruiting service," and "the defendant had the specific intent to do so in his mind," conviction in wartime is not prohibited by the Constitution. *Debs* v. *United States, supra,* at 216.

In the three succeeding cases Holmes and Brandeis, JJ., dissented from judgments of the Court affirming convictions. The indictment in *Abrams* v. *United States,* 250 U. S. 616, was laid under an amendment to the Espionage Act which prohibited conspiracies to advocate curtailment of production of material necessary to prosecution of the war, with the intent thereby to hinder the United States in the prosecution of the war. It appeared that the defendants were anarchists who had printed circulars and distributed them in New York City. The leaflets repeated standard Marxist slogans, condemned American intervention in Russia, and called for a general strike in protest. In *Schaefer* v. *United States,* 251 U. S. 466, the editors of a German-language newspaper in Philadelphia were charged with obstructing the recruiting service and with wilfully publishing false reports with the intent to promote the success of the enemies of the United States. The evidence showed publication of articles which accused American troops of weakness and mendacity and in one instance misquoted or mistranslated two words of a Senator's speech. The indictment in *Pierce* v. *United States,* 252 U. S. 239, charged that the defendants had attempted to cause insubordination in the armed forces and had conveyed false reports with intent to interfere with military operations. Conviction was based on circulation of a pamphlet which belittled Allied war aims and criticized conscription in strong terms.

In each case both the majority and the dissenting opinions relied on *Schenck* v. *United States.* The Court divided on its view of the evidence. The majority held that the jury could infer the required intent and the probable effect of the articles from their content. Holmes and Brandeis, JJ., thought that only "expressions of opinion and exhortations," 250 U. S. at 631, were involved, that they were "puny anonymities," 250 U. S. at 629, "impotent to produce the evil against which the statute aimed," 251

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U. S. 493, and that from them the specific intent required by the statute could not reasonably be inferred. The Court agreed that an incitement to disobey the draft statute could constitutionally be punished. It disagreed over the proof required to show such an incitement.

(b) In the eyes of a majority of the Court, *Gitlow* v. *New York,* 268 U. S. 652, presented a very different problem. There the defendant had been convicted under a New York statute nearly identical with the Smith Act now before us. The evidence showed that the defendant was an official of the Left Wing Section of the Socialist Party, and that he was responsible for publication of a Left Wing Manifesto. This document repudiated "moderate Socialism," and urged the necessity of a militant "revolutionary Socialism," based on class struggle and revolutionary mass action. No evidence of the effect of the Manifesto was introduced; but the jury were instructed that they could not convict unless they found that the document advocated employing unlawful acts for the purpose of overthrowing organized government.

The conviction was affirmed. The question, the Court held, was entirely different from that involved in *Schenck* v. *United States,* where the statute prohibited acts without reference to language. Here, where "the legislative body has determined generally, in the constitutional exercise of its discretion, that utterances of a certain kind involve such danger of substantive evil that they may be punished, the question whether any specific utterance coming within the prohibited class is likely, in and of itself, to bring about the substantive evil, is not open to consideration." 268 U. S. at 670. It is sufficient that the defendant's conduct falls within the statute, and that the statute is a reasonable exercise of legislative judgment.

This principle was also applied in *Whitney* v. *California,* 274 U. S. 357, to sustain a conviction under a State criminal syndicalism statute. That statute made it a

felony to assist in organizing a group assembled to advocate the commission of crime, sabotage, or unlawful acts of violence as a means of effecting political or industrial change. The defendant was found to have assisted in organizing the Communist Labor Party of California, an organization found to have the specified character. It was held that the legislature was not unreasonable in believing organization of such a party "involves such danger to the public peace and the security of the State, that these acts should be penalized in the exercise of its police power." 274 U. S. at 371.

In neither of these cases did Mr. Justice Holmes and Mr. Justice Brandeis accept the reasoning of the Court. "'The question,'" they said, quoting from *Schenck* v. *United States,* "'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 [the State] has a right to prevent.'" 268 U. S. at 672–673. Since the Manifesto circulated by Gitlow "had no chance of starting a present conflagration," 268 U. S. at 673, they dissented from the affirmance of his conviction. In *Whitney* v. *California,* they concurred in the result reached by the Court, but only because the record contained some evidence that organization of the Communist Labor Party might further a conspiracy to commit immediate serious crimes, and the credibility of the evidence was not put in issue by the defendant.[9]

(c) Subsequent decisions have added little to the principles established in these two groups of cases. In the only case arising under the Espionage Act decided by this Court during the last war, the substantiality of the evidence was the crucial issue. The defendant in *Hartzel*

[9] *Burns* v. *United States,* 274 U. S. 328, adds nothing to the decision in *Whitney* v. *California.*

v. *United States,* 322 U. S. 680, was an educated man and a citizen, not actively affiliated with any political group. In 1942 he wrote three articles condemning our wartime allies and urging that the war be converted into a racial conflict. He mailed the tracts to 600 people, including high-ranking military officers. According to his testimony his intention was to "create sentiment against war amongst the white races." The majority of this Court held that a jury could not reasonably infer from these facts that the defendant had acted with a specific intent to cause insubordination or disloyalty in the armed forces.

Of greater importance is the fact that the issue of law which divided the Court in the *Gitlow* and *Whitney* cases has not again been clearly raised, although in four additional instances we have reviewed convictions under comparable statutes. *Fiske* v. *Kansas,* 274 U. S. 380, involved a criminal syndicalism statute similar to that before us in *Whitney* v. *California.* We reversed a conviction based on evidence that the defendant exhibited an innocuous preamble to the constitution of the Industrial Workers of the World in soliciting members for that organization. In *Herndon* v. *Lowry,* 301 U. S. 242, the defendant had solicited members for the Communist Party, but there was no proof that he had urged or even approved those of the Party's aims which were unlawful. We reversed a conviction obtained under a statute prohibiting an attempt to incite to insurrection by violence, on the ground that the Fourteenth Amendment prohibited conviction where on the evidence a jury could not reasonably infer that the defendant had violated the statute the State sought to apply.[10]

[10] In *Herndon* v. *Georgia,* 295 U. S. 441, the opinion of the Court was concerned solely with a question of procedure. Mr. Justice Brandeis, Mr. Justice Stone, and Mr. Justice Cardozo, however, thought that the problem of *Gitlow* v. *New York* was raised. See 295 U. S. at 446.

The other two decisions go no further than to hold that the statute as construed by the State courts exceeded the bounds of a legislative judgment founded in reason. The statute presented in *De Jonge* v. *Oregon,* 299 U. S. 353, had been construed to apply to anyone who merely assisted in the conduct of a meeting held under the auspices of the Communist Party. In *Taylor* v. *Mississippi,* 319 U. S. 583, the statute prohibited dissemination of printed matter "designed and calculated to encourage violence, sabotage, or disloyalty to the government of the United States, or the state of Mississippi." We reversed a conviction for what we concluded was mere criticism and prophesy, without indicating whether we thought the statute could in any circumstances validly be applied. What the defendants communicated, we said, "is not claimed or shown to have been done with an evil or sinister purpose, to have advocated or incited subversive action against the nation or state, or to have threatened any clear and present danger to our institutions or our Government." 319 U. S. at 589–590.

I must leave to others the ungrateful task of trying to reconcile all these decisions. In some instances we have too readily permitted juries to infer deception from error, or intention from argumentative or critical statements. *Abrams* v. *United States, supra; Schaefer* v. *United States, supra; Pierce* v. *United States, supra; Gilbert* v. *Minnesota,* 254 U. S. 325. In other instances we weighted the interest in free speech so heavily that we permitted essential conflicting values to be destroyed. *Bridges* v. *California, supra; Craig* v. *Harney, supra.* Viewed as a whole, however, the decisions express an attitude toward the judicial function and a standard of values which for me are decisive of the case before us.

First.—Free-speech cases are not an exception to the principle that we are not legislators, that direct policy-making is not our province. How best to reconcile com-

peting interests is the business of legislatures, and the balance they strike is a judgment not to be displaced by ours, but to be respected unless outside the pale of fair judgment.

On occasion we have strained to interpret legislation in order to limit its effect on interests protected by the First Amendment. *Schneiderman* v. *United States, supra; Bridges* v. *Wixon, supra.* In some instances we have denied to States the deference to which I think they are entitled. *Bridges* v. *California, supra; Craig* v. *Harney, supra.* Once in this recent course of decisions the Court refused to permit a jury to draw inferences which seemed to me to be obviously reasonable. *Hartzel* v. *United States, supra.*

But in no case has a majority of this Court held that a legislative judgment, even as to freedom of utterance, may be overturned merely because the Court would have made a different choice between the competing interests had the initial legislative judgment been for it to make. In the cases in which the opinions go farthest towards indicating a total rejection of respect for legislative determinations, the interests between which choice was actually made were such that decision might well have been expressed in the familiar terms of want of reason in the legislative judgment. In *Thomas* v. *Collins,* 323 U. S. 516, for example, decision could not unreasonably have been placed on the ground that no substantial interest justified a State in requiring an out-of-State labor leader to register before speaking in advocacy of the cause of trade unionism. In *Martin* v. *City of Struthers,* 319 U. S. 141, it was broadly held that a municipality was not justified in prohibiting knocking on doors and ringing doorbells for the purpose of delivering handbills. But since the good faith and reasonableness of the regulation were placed in doubt by the fact that the city did not think it necessary also to prohibit door-to-door com-

mercial sales, decision could be sustained on narrower ground. And compare *Breard* v. *Alexandria, post,* p. 622, decided this day.

In other cases, moreover, we have given clear indication that even when free speech is involved we attach great significance to the determination of the legislature. *Gitlow* v. *New York, supra; Whitney* v. *California, supra; American Communications Assn.* v. *Douds, supra;* cf. *Bridges* v. *California,* 314 U. S. at 260. And see *Hughes* v. *Superior Court, supra; International Brotherhood of Teamsters Union* v. *Hanke, supra.*

In *Gitlow* v. *New York,* we put our respect for the legislative judgment in terms which, if they were accepted here, would make decision easy. For that case held that, when the legislature has determined that advocacy of forceful overthrow should be forbidden, a conviction may be sustained without a finding that in the particular case the advocacy had a close relation to a serious attempt at overthrow. We held that it was enough that the statute be a reasonable exercise of the legislative judgment, and that the defendant's conduct fall within the statute.

One of the judges below rested his affirmance on the *Gitlow* decision, and the defendants do not attempt to distinguish the case. They place their argument squarely on the ground that the case has been overruled by subsequent decisions. It has not been explicitly overruled. But it would be disingenuous to deny that the dissent in *Gitlow* has been treated with the respect usually accorded to a decision.

The result of the *Gitlow* decision was to send a left-wing Socialist to jail for publishing a Manifesto expressing Marxist exhortations. It requires excessive tolerance of the legislative judgment to suppose that the *Gitlow* publication in the circumstances could justify serious concern.

In contrast, there is ample justification for a legislative judgment that the conspiracy now before us is a substantial threat to national order and security. If the Smith Act is justified at all, it is justified precisely because it may serve to prohibit the type of conspiracy for which these defendants were convicted. The court below properly held that as a matter of separability the Smith Act may be limited to those situations to which it can constitutionally be applied. See 183 F. 2d at 214–215. Our decision today certainly does not mean that the Smith Act can constitutionally be applied to facts like those in *Gitlow* v. *New York*. While reliance may properly be placed on the attitude of judicial self-restraint which the *Gitlow* decision reflects, it is not necessary to depend on the facts or the full extent of the theory of that case in order to find that the judgment of Congress, as applied to the facts of the case now before us, is not in conflict with the First Amendment.

Second.—A survey of the relevant decisions indicates that the results which we have reached are on the whole those that would ensue from careful weighing of conflicting interests. The complex issues presented by regulation of speech in public places, by picketing, and by legislation prohibiting advocacy of crime have been resolved by scrutiny of many factors besides the imminence and gravity of the evil threatened. The matter has been well summarized by a reflective student of the Court's work. "The truth is that the clear-and-present-danger test is an oversimplified judgment unless it takes account also of a number of other factors: the relative seriousness of the danger in comparison with the value of the occasion for speech or political activity; the availability of more moderate controls than those which the state has imposed; and perhaps the specific intent with which the speech or activity is launched. No matter how rapidly we utter the phrase 'clear and present danger,' or how

closely we hyphenate the words, they are not a substitute for the weighing of values. They tend to convey a delusion of certitude when what is most certain is the complexity of the strands in the web of freedoms which the judge must disentangle." Freund, On Understanding the Supreme Court, 27–28.

It is a familiar experience in the law that new situations do not fit neatly into legal conceptions that arose under different circumstances to satisfy different needs. So it was when the injunction was tortured into an instrument of oppression against labor in industrial conflicts. So it is with the attempt to use the direction of thought lying behind the criterion of "clear and present danger" wholly out of the context in which it originated, and to make of it an absolute dogma and definitive measuring rod for the power of Congress to deal with assaults against security through devices other than overt physical attempts.

Bearing in mind that Mr. Justice Holmes regarded questions under the First Amendment as questions of "proximity and degree," *Schenck* v. *United States,* 249 U. S. at 52, it would be a distortion, indeed a mockery, of his reasoning to compare the "puny anonymities," 250 U. S. at 629, to which he was addressing himself in the *Abrams* case in 1919 or the publication that was "futile and too remote from possible consequences," 268 U. S. at 673, in the *Gitlow* case in 1925 with the setting of events in this case in 1950.

"It does an ill-service to the author of the most quoted judicial phrases regarding freedom of speech, to make him the victim of a tendency which he fought all his life, whereby phrases are made to do service for critical analysis by being turned into dogma. 'It is one of the misfortunes of the law that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis.' Holmes, J., dissenting, in *Hyde* v. *United*

States, 225 U. S. 347, 384, at 391." The phrase "clear and present danger," in its origin, "served to indicate the importance of freedom of speech to a free society but also to emphasize that its exercise must be compatible with the preservation of other freedoms essential to a democracy and guaranteed by our Constitution." *Pennekamp* v. *Florida,* 328 U. S. 331, 350, 352–353 (concurring). It were far better that the phrase be abandoned than that it be sounded once more to hide from the believers in an absolute right of free speech the plain fact that the interest in speech, profoundly important as it is, is no more conclusive in judicial review than other attributes of democracy or than a determination of the people's representatives that a measure is necessary to assure the safety of government itself.

Third.—Not every type of speech occupies the same position on the scale of values. There is no substantial public interest in permitting certain kinds of utterances: "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." *Chaplinsky* v. *New Hampshire,* 315 U. S. 568, 572. We have frequently indicated that the interest in protecting speech depends on the circumstances of the occasion. See cases collected in *Niemotko* v. *Maryland,* 340 U. S. at 275–283. It is pertinent to the decision before us to consider where on the scale of values we have in the past placed the type of speech now claiming constitutional immunity.

The defendants have been convicted of conspiring to organize a party of persons who advocate the overthrow of the Government by force and violence. The jury has found that the object of the conspiracy is advocacy as "a rule or principle of action," "by language reasonably and ordinarily calculated to incite persons to such action,"

and with the intent to cause the overthrow "as speedily as circumstances would permit."

On any scale of values which we have hitherto recognized, speech of this sort ranks low.

Throughout our decisions there has recurred a distinction between the statement of an idea which may prompt its hearers to take unlawful action, and advocacy that such action be taken. The distinction has its root in the conception of the common law, supported by principles of morality, that a person who procures another to do an act is responsible for that act as though he had done it himself. This principle was extended in *Fox* v. *Washington, supra,* to words directed to the public generally which would constitute an incitement were they directed to an individual. It was adapted in *Schenck* v. *United States, supra,* into a rule of evidence designed to restrict application of the Espionage Act. It was relied on by the Court in *Gitlow* v. *New York, supra.* The distinction has been repeated in many of the decisions in which we have upheld the claims of speech. We frequently have distinguished protected forms of expression from statements which "incite to violence and crime and threaten the overthrow of organized government by unlawful means." *Stromberg* v. *California,* 283 U. S. at 369. See also *Near* v. *Minnesota,* 283 U. S. at 716; *De Jonge* v. *Oregon,* 299 U. S. at 365; *Cantwell* v. *Connecticut,* 310 U. S. 296, 308; *Taylor* v. *Mississippi,* 319 U. S. at 589.

It is true that there is no divining rod by which we may locate "advocacy." Exposition of ideas readily merges into advocacy. The same Justice who gave currency to application of the incitement doctrine in this field dissented four times from what he thought was its misapplication. As he said in the *Gitlow* dissent, "Every idea is an incitement." 268 U. S. at 673. Even though advocacy of overthrow deserves little protection, we should hesitate to prohibit it if we thereby inhibit the

interchange of rational ideas so essential to representative government and free society.

But there is underlying validity in the distinction between advocacy and the interchange of ideas, and we do not discard a useful tool because it may be misused. That such a distinction could be used unreasonably by those in power against hostile or unorthodox views does not negate the fact that it may be used reasonably against an organization wielding the power of the centrally controlled international Communist movement. The object of the conspiracy before us is so clear that the chance of error in saying that the defendants conspired to advocate rather than to express ideas is slight. MR. JUSTICE DOUGLAS quite properly points out that the conspiracy before us is not a conspiracy to overthrow the Government. But it would be equally wrong to treat it as a seminar in political theory.

III.

These general considerations underlie decision of the case before us.

On the one hand is the interest in security. The Communist Party was not designed by these defendants as an ordinary political party. For the circumstances of its organization, its aims and methods, and the relation of the defendants to its organization and aims we are concluded by the jury's verdict. The jury found that the Party rejects the basic premise of our political system—that change is to be brought about by nonviolent constitutional process. The jury found that the Party advocates the theory that there is a duty and necessity to overthrow the Government by force and violence. It found that the Party entertains and promotes this view, not as a prophetic insight or as a bit of unworldly specula-

tion, but as a program for winning adherents and as a policy to be translated into action.

In finding that the defendants violated the statute, we may not treat as established fact that the Communist Party in this country is of significant size, well-organized, well-disciplined, conditioned to embark on unlawful activity when given the command. But in determining whether application of the statute to the defendants is within the constitutional powers of Congress, we are not limited to the facts found by the jury. We must view such a question in the light of whatever is relevant to a legislative judgment. We may take judicial notice that the Communist doctrines which these defendants have conspired to advocate are in the ascendency in powerful nations who cannot be acquitted of unfriendliness to the institutions of this country. We may take account of evidence brought forward at this trial and elsewhere, much of which has long been common knowledge. In sum, it would amply justify a legislature in concluding that recruitment of additional members for the Party would create a substantial danger to national security.

In 1947, it has been reliably reported, at least 60,000 members were enrolled in the Party.[11] Evidence was introduced in this case that the membership was organized in small units, linked by an intricate chain of command, and protected by elaborate precautions designed to prevent disclosure of individual identity. There are no reliable data tracing acts of sabotage or espionage directly to these defendants. But a Canadian Royal Commission appointed in 1946 to investigate espionage reported that it was "overwhelmingly established" that

[11] See the testimony of the Director of the Federal Bureau of Investigation. Hearings before the House Committee on Un-American Activities, on H. R. 1884 and H. R. 2122, 80th Cong., 1st Sess., Part 2, p. 37.

"the Communist movement was the principal base within which the espionage network was recruited." [12] The most notorious spy in recent history was led into the service of the Soviet Union through Communist indoctrination.[13] Evidence supports the conclusion that members of the Party seek and occupy positions of importance in political and labor organizations.[14] Congress was not barred by the Constitution from believing that indifference to such experience would be an exercise not of freedom but of irresponsibility.

On the other hand is the interest in free speech. The right to exert all governmental powers in aid of maintaining our institutions and resisting their physical overthrow does not include intolerance of opinions and speech that cannot do harm although opposed and perhaps alien to dominant, traditional opinion. The treatment of its

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[12] Report of the Royal Commission to Investigate Communication of Secret and Confidential Information to Agents of a Foreign Power, June 27, 1946, p. 44. There appears to be little reliable evidence demonstrating directly that the Communist Party in this country has recruited persons willing to engage in espionage or other unlawful activity on behalf of the Soviet Union. The defection of a Soviet diplomatic employee, however, led to a careful investigation of an espionage network in Canada, and has disclosed the effectiveness of the Canadian Communist Party in conditioning its members to disclose to Soviet agents vital information of a secret character. According to the Report of the Royal Commission investigating the network, conspiratorial characteristics of the Party similar to those shown in the evidence now before us were instrumental in developing the necessary motivation to cooperate in the espionage. See pp. 43–83 of the Report.

[13] The Communist background of Dr. Klaus Fuchs was brought out in the proceedings against him. See The [London] Times, Mar. 2, 1950, p. 2, col. 6.

[14] See *American Communications Assn.* v. *Douds,* 339 U. S. 382. Former Senator Robert M. La Follette, Jr., has reported his experience with infiltration of Communist sympathizers into congressional committee staffs. Collier's, Feb. 8, 1947, p. 22.

minorities, especially their legal position, is among the most searching tests of the level of civilization attained by a society. It is better for those who have almost unlimited power of government in their hands to err on the side of freedom. We have enjoyed so much freedom for so long that we are perhaps in danger of forgetting how much blood it cost to establish the Bill of Rights.

Of course no government can recognize a "right" of revolution, or a "right" to incite revolution if the incitement has no other purpose or effect. But speech is seldom restricted to a single purpose, and its effects may be manifold. A public interest is not wanting in granting freedom to speak their minds even to those who advocate the overthrow of the Government by force. For, as the evidence in this case abundantly illustrates, coupled with such advocacy is criticism of defects in our society. Criticism is the spur to reform; and Burke's admonition that a healthy society must reform in order to conserve has not lost its force. Astute observers have remarked that one of the characteristics of the American Republic is indifference to fundamental criticism. Bryce, The American Commonwealth, c. 84. It is a commonplace that there may be a grain of truth in the most uncouth doctrine, however false and repellent the balance may be. Suppressing advocates of overthrow inevitably will also silence critics who do not advocate overthrow but fear that their criticism may be so construed. No matter how clear we may be that the defendants now before us are preparing to overthrow our Government at the propitious moment, it is self-delusion to think that we can punish them for their advocacy without adding to the risks run by loyal citizens who honestly believe in some of the reforms these defendants advance. It is a sobering fact that in sustaining the convictions before us we can hardly escape restriction on the interchange of ideas.

We must not overlook the value of that interchange. Freedom of expression is the well-spring of our civilization—the civilization we seek to maintain and further by recognizing the right of Congress to put some limitation upon expression. Such are the paradoxes of life. For social development of trial and error, the fullest possible opportunity for the free play of the human mind is an indispensable prerequisite. The history of civilization is in considerable measure the displacement of error which once held sway as official truth by beliefs which in turn have yielded to other truths. Therefore the liberty of man to search for truth ought not to be fettered, no matter what orthodoxies he may challenge. Liberty of thought soon shrivels without freedom of expression. Nor can truth be pursued in an atmosphere hostile to the endeavor or under dangers which are hazarded only by heroes.

"The interest, which [the First Amendment] guards, and which gives it its importance, presupposes that there are no orthodoxies—religious, political, economic, or scientific—which are immune from debate and dispute. Back of that is the assumption—itself an orthodoxy, and the one permissible exception—that truth will be most likely to emerge, if no limitations are imposed upon utterances that can with any plausibility be regarded as efforts to present grounds for accepting or rejecting propositions whose truth the utterer asserts, or denies." *International Brotherhood of Electrical Workers* v. *Labor Board,* 181 F. 2d 34, 40. In the last analysis it is on the validity of this faith that our national security is staked.

It is not for us to decide how we would adjust the clash of interests which this case presents were the primary responsibility for reconciling it ours. Congress has determined that the danger created by advocacy of overthrow justifies the ensuing restriction on freedom of speech. The determination was made after due deliberation, and

the seriousness of the congressional purpose is attested by the volume of legislation passed to effectuate the same ends.[15]

Can we then say that the judgment Congress exercised was denied it by the Constitution? Can we establish a constitutional doctrine which forbids the elected representatives of the people to make this choice? Can we hold that the First Amendment deprives Congress of what it deemed necessary for the Government's protection?

To make validity of legislation depend on judicial reading of events still in the womb of time—a forecast, that is, of the outcome of forces at best appreciated only with knowledge of the topmost secrets of nations—is to charge the judiciary with duties beyond its equipment. We do not expect courts to pronounce historic verdicts on bygone events. Even historians have conflicting views to this day on the origins and conduct of the French Revolution, or, for that matter, varying interpretations of "the glorious Revolution" of 1688. It is as absurd to be confident that we can measure the present clash of forces and

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[15] Immigration laws require, for instance, exclusion and deportation of aliens who advocate the overthrow of the Government by force and violence, and declare ineligible for naturalization aliens who are members of organizations so advocating. Act of Feb. 5, 1917, § 19, 39 Stat. 889, 8 U. S. C. § 155; Act of Oct. 16, 1918, 40 Stat. 1012, 8 U. S. C. § 137; Act of Oct. 14, 1940, § 305, 54 Stat. 1141, 8 U. S. C. § 705. The Hatch Act prohibits employment by any Government agency of members of organizations advocating overthrow of "our constitutional form of government." Act of Aug. 2, 1939, § 9A, 53 Stat. 1148, 5 U. S. C. (Supp. III) § 118j. The Voorhis Act of Oct. 17, 1940, was passed to require registration of organizations subject to foreign control which engage in political activity. 54 Stat. 1201, 18 U. S. C. § 2386. The Taft-Hartley Act contains a section designed to exclude Communists from positions of leadership in labor organizations. Act of June 23, 1947, § 9 (h), 61 Stat. 146, 29 U. S. C. (Supp. III) § 159 (h). And, most recently, the McCarran Act requires registration of "Communist-action" and "Communist-front" organizations. Act of Sept. 23, 1950, § 7, 64 Stat. 987, 993.

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their outcome as to ask us to read history still enveloped in clouds of controversy.

In the light of their experience, the Framers of the Constitution chose to keep the judiciary dissociated from direct participation in the legislative process. In asserting the power to pass on the constitutionality of legislation, Marshall and his Court expressed the purposes of the Founders. See Charles A. Beard, The Supreme Court and the Constitution. But the extent to which the exercise of this power would interpenetrate matters of policy could hardly have been foreseen by the most prescient. The distinction which the Founders drew between the Court's duty to pass on the power of Congress and its complementary duty not to enter directly the domain of policy is fundamental. But in its actual operation it is rather subtle, certainly to the common understanding. Our duty to abstain from confounding policy with constitutionality demands perceptive humility as well as self-restraint in not declaring unconstitutional what in a judge's private judgment is deemed unwise and even dangerous.

Even when moving strictly within the limits of constitutional adjudication, judges are concerned with issues that may be said to involve vital finalities. The too easy transition from disapproval of what is undesirable to condemnation as unconstitutional, has led some of the wisest judges to question the wisdom of our scheme in lodging such authority in courts. But it is relevant to remind that in sustaining the power of Congress in a case like this nothing irrevocable is done. The democratic process at all events is not impaired or restricted. Power and responsibility remain with the people and immediately with their representatives. All the Court says is that Congress was not forbidden by the Constitution to pass this enactment and that a prosecution under it may be brought against a conspiracy such as the one before us.

IV.

The wisdom of the assumptions underlying the legislation and prosecution is another matter. In finding that Congress has acted within its power, a judge does not remotely imply that he favors the implications that lie beneath the legal issues. Considerations there enter which go beyond the criteria that are binding upon judges within the narrow confines of their legitimate authority. The legislation we are here considering is but a truncated aspect of a deeper issue. For me it has been most illuminatingly expressed by one in whom responsibility and experience have fructified native insight, the Director-General of the British Broadcasting Corporation:

> "We have to face up to the fact that there are powerful forces in the world today misusing the privileges of liberty in order to destroy her. The question must be asked, however, whether suppression of information or opinion is the true defense. We may have come a long way from Mill's famous dictum that:
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> > " 'If all mankind minus one were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind,'
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> but Mill's reminders from history as to what has happened when suppression was most virulently exercised ought to warn us that no debate is ever permanently won by shutting one's ears or by even the most Draconian policy of silencing opponents. The *debate* must be won. And it must be won with full information. Where there are lies, they must be shown for what they are. Where there are errors, they must be refuted. It would be a major defeat if the enemies of democracy forced us to abandon our faith in the power of informed discussion and so brought us down

to their own level. Mankind is so constituted, moreover, that if, where expression and discussion are concerned, the enemies of liberty are met with a denial of liberty, many men of goodwill will come to suspect there is something in the proscribed doctrine after all. Erroneous doctrines thrive on being expunged. They die if exposed." Sir William Haley, What Standards for Broadcasting? Measure, Vol. I, No. 3, Summer 1950, pp. 211–212.

In the context of this deeper struggle, another voice has indicated the limitations of what we decide today. No one is better equipped than George F. Kennan to speak on the meaning of the menace of Communism and the spirit in which we should meet it.

"If our handling of the problem of Communist influence in our midst is not carefully moderated—if we permit it, that is, to become an emotional preoccupation and to blind us to the more important positive tasks before us—we can do a damage to our national purpose beyond comparison greater than anything that threatens us today from the Communist side. The American Communist party is today, by and large, an external danger. It represents a tiny minority in our country; it has no real contact with the feelings of the mass of our people; and its position as the agency of a hostile foreign power is clearly recognized by the overwhelming mass of our citizens.

"But the subjective emotional stresses and temptations to which we are exposed in our attempt to deal with this domestic problem are not an external danger: they represent a danger within ourselves—a danger that something may occur in our own minds and souls which will make us no longer like the persons by whose efforts this republic was founded and held together, but rather like the representatives

of that very power we are trying to combat: intolerant, secretive, suspicious, cruel, and terrified of internal dissension because we have lost our own belief in ourselves and in the power of our ideals. The worst thing that our Communists could do to us, and the thing we have most to fear from their activities, is that we should become like them.

"That our country is beset with external dangers I readily concede. But these dangers, at their worst, are ones of physical destruction, of the disruption of our world security, of expense and inconvenience and sacrifice. These are serious, and sometimes terrible things, but they are all things that we can take and still remain Americans.

"The internal danger is of a different order. America is not just territory and people. There is lots of territory elsewhere, and there are lots of people; but it does not add up to America. America is something in our minds and our habits of outlook which causes us to believe in certain things and to behave in certain ways, and by which, in its totality, we hold ourselves distinguished from others. If that once goes there will be no America to defend. And that can go too easily if we yield to the primitive human instinct to escape from our frustrations into the realms of mass emotion and hatred and to find scapegoats for our difficulties in individual fellow-citizens who are, or have at one time been, disoriented or confused." George F. Kennan, Where Do You Stand on Communism? New York Times Magazine, May 27, 1951, pp. 7, 53, 55.

Civil liberties draw at best only limited strength from legal guaranties. Preoccupation by our people with the constitutionality, instead of with the wisdom, of legislation or of executive action is preoccupation with a false value. Even those who would most freely use the judicial

brake on the democratic process by invalidating legislation that goes deeply against their grain, acknowledge, at least by paying lip service, that constitutionality does not exact a sense of proportion or the sanity of humor or an absence of fear. Focusing attention on constitutionality tends to make constitutionality synonymous with wisdom. When legislation touches freedom of thought and freedom of speech, such a tendency is a formidable enemy of the free spirit. Much that should be rejected as illiberal, because repressive and envenoming, may well be not unconstitutional. The ultimate reliance for the deepest needs of civilization must be found outside their vindication in courts of law; apart from all else, judges, howsoever they may conscientiously seek to discipline themselves against it, unconsciously are too apt to be moved by the deep undercurrents of public feeling. A persistent, positive translation of the liberating faith into the feelings and thoughts and actions of men and women is the real protection against attempts to strait-jacket the human mind. Such temptations will have their way, if fear and hatred are not exorcized. The mark of a truly civilized man is confidence in the strength and security derived from the inquiring mind. We may be grateful for such honest comforts as it supports, but we must be unafraid of its incertitudes. Without open minds there can be no open society. And if society be not open the spirit of man is mutilated and becomes enslaved.

APPENDIX TO OPINION OF MR. JUSTICE FRANKFURTER.

Opinions responsible for the view that speech could not constitutionally be restricted unless there would result from it an imminent—*i. e.,* close at hand—substantive evil.

1. *Thornhill* v. *Alabama,* 310 U. S. 88, 104–105 (State statute prohibiting picketing held invalid): ". . . Every

expression of opinion on matters that are important has the potentiality of inducing action in the interests of one rather than another group in society. But the group in power at any moment may not impose penal sanctions on peaceful and truthful discussion of matters of public interest merely on a showing that others may thereby be persuaded to take action inconsistent with its interests. Abridgment of the liberty of such discussion can be justified only where the clear danger of substantive evils arises under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion. . . .

". . . [N]o clear and present danger of destruction of life or property, or invasion of the right of privacy, or breach of the peace can be thought to be inherent in the activities of every person who approaches the premises of an employer and publicizes the facts of a labor dispute involving the latter."

2. *Bridges* v. *California,* 314 U. S. 252, 262–263 (convictions for contempt of court reversed): ". . . [T]he 'clear and present danger' language of the *Schenck* case has afforded practical guidance in a great variety of cases in which the scope of constitutional protections of freedom of expression was in issue. It has been utilized by either a majority or minority of this Court in passing upon the constitutionality of convictions under espionage acts, *Schenck* v. *United States, supra* [249 U. S. 47]; *Abrams* v. *United States,* 250 U. S. 616; under a criminal syndicalism act, *Whitney* v. *California, supra* [274 U. S. 357]; under an 'anti-insurrection' act, *Herndon* v. *Lowry, supra* [301 U. S. 242]; and for breach of the peace at common law, *Cantwell* v. *Connecticut, supra* [310 U. S. 296]. And very recently we have also suggested that 'clear and present danger' is an appropriate guide in determining the constitutionality of restrictions upon expression where the substantive evil sought to be prevented

by the restriction is 'destruction of life or property, or invasion of the right of privacy.' *Thornhill* v. *Alabama,* 310 U. S. 88, 105.

. . . . . .

"What finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished. Those cases do not purport to mark the furthermost constitutional boundaries of protected expression, nor do we here. They do no more than recognize a minimum compulsion of the Bill of Rights. For the First Amendment does not speak equivocally. It prohibits any law 'abridging the freedom of speech, or of the press.' It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow."

3. *West Virginia Board of Education* v. *Barnette,* 319 U. S. 624, 639 (flag-salute requirement for school children held invalid): "In weighing arguments of the parties it is important to distinguish between the due process clause of the Fourteenth Amendment as an instrument for transmitting the principles of the First Amendment and those cases in which it is applied for its own sake. The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First, is much more definite than the test when only the Fourteenth is involved. Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard. The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a 'rational basis' for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are suscep-

tible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect. It is important to note that while it is the Fourteenth Amendment which bears directly upon the State it is the more specific limiting principles of the First Amendment that finally govern this case."

4. *Thomas* v. *Collins,* 323 U. S. 516, 529–530 (State statute requiring registration of labor organizers held invalid as applied): "The case confronts us again with the duty our system places on this Court to say where the individual's freedom ends and the State's power begins. Choice on that border, now as always delicate, is perhaps more so where the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment. Cf. *Schneider* v. *State,* 308 U. S. 147; *Cantwell* v. *Connecticut,* 310 U. S. 296; *Prince* v. *Massachusetts,* 321 U. S. 158. That priority gives these liberties a sanctity and a sanction not permitting dubious intrusions. And it is the character of the right, not of the limitation, which determines what standard governs the choice. Compare *United States* v. *Carolene Products Co.,* 304 U. S. 144, 152–153.

"For these reasons any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger. The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice. These rights rest on firmer foundation. Accordingly, whatever occasion would restrain orderly discussion and persuasion, at appropriate time and place, must have clear support in public danger, actual or impending. Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation."

5. *Craig* v. *Harney,* 331 U. S. 367, 376 (conviction for contempt of court reversed): "The fires which [the language] kindles must constitute an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil."

6. *Giboney* v. *Empire Storage Co.,* 336 U. S. 490, 503 (injunction against picketing upheld): ". . . There was clear danger, imminent and immediate, that unless restrained, appellants would succeed in making [the State's policy against restraints of trade] a dead letter insofar as purchases by nonunion men were concerned. . . ."

7. *Terminiello* v. *Chicago,* 337 U. S. 1, 4–5 (conviction for disorderly conduct reversed): "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,* [315 U. S. 568] 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."

8. *American Communications Assn.* v. *Douds,* 339 U. S. 382, 396, 412 ("Non-Communist affidavit" provision of Taft-Hartley Act upheld): "Speech may be fought with speech. Falsehoods and fallacies must be exposed, not suppressed, unless there is not sufficient time to avert the evil consequences of noxious doctrine by argument and education. That is the command of the First Amendment." And again, "[The First] Amendment requires

that one be permitted to believe what he will. It requires that one be permitted to advocate what he will unless there is a clear and present danger that a substantial public evil will result therefrom."

MR. JUSTICE JACKSON, concurring.

This prosecution is the latest of never-ending, because never successful, quests for some legal formula that will secure an existing order against revolutionary radicalism. It requires us to reappraise, in the light of our own times and conditions, constitutional doctrines devised under other circumstances to strike a balance between authority and liberty.

Activity here charged to be criminal is conspiracy—that defendants conspired to teach and advocate, and to organize the Communist Party to teach and advocate, overthrow and destruction of the Government by force and violence. There is no charge of actual violence or attempt at overthrow.[1]

The principal reliance of the defense in this Court is that the conviction cannot stand under the Constitution because the conspiracy of these defendants presents no "clear and present danger" of imminent or foreseeable overthrow.

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[1] The Government's own summary of its charge is: "The indictment charged that from April 1, 1945, to the date of the indictment petitioners unlawfully, wilfully, and knowingly conspired with each other and with other persons unknown to the grand jury (1) to organize as the Communist Party of the United States of America a society, group and assembly of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence, and (2) knowingly and wilfully to advocate and teach the duty and necessity of overthrowing and destroying the Government of the United States by force and violence. The indictment alleged that Section 2 of the Smith Act proscribes these acts and that the conspiracy to take such action is a violation of Section 3 of the act (18 U. S. C. 10, 11 (1946 ed.))."

I.

The statute before us repeats a pattern, originally devised to combat the wave of anarchistic terrorism that plagued this country about the turn of the century,[2] which lags at least two generations behind Communist Party techniques.

Anarchism taught a philosophy of extreme individualism and hostility to government and property. Its avowed aim was a more just order, to be achieved by violent destruction of all government.[3] Anarchism's sporadic and uncoordinated acts of terror were not integrated with an effective revolutionary machine, but the Chicago Haymarket riots of 1886,[4] attempted murder of the industrialist Frick, attacks on state officials, and

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[2] The Government says this Act before us was modeled after the New York Act of 1909, sustained by this Court in *Gitlow* v. *New York*, 268 U. S. 652. That, in turn, as the Court pointed out, followed an earlier New York Act of 1902. Shortly after the assassination of President McKinley by an anarchist, Congress adopted the same concepts in the Immigration Act of March 3, 1903. 32 Stat. 1213, § 2. Some germs of the same concept can be found in some reconstruction legislation, such as the Enforcement Act of 1871, 17 Stat. 13. The Espionage Act of 1917, 40 Stat. 217, tit. 1, § 3, which gave rise to a series of civil-rights decisions, applied only during war and defined as criminal "false statements with intent" to interfere with our war effort or cause insubordination in the armed forces or obstruct recruiting. However, a wave of "criminal syndicalism statutes" were enacted by the States. They were generally upheld, *Whitney* v. *California*, 274 U. S. 357, and prosecutions under them were active from 1919 to 1924. In California alone, 531 indictments were returned and 164 persons convicted. 4 Encyc. Soc. Sci. 582, 583. The Smith Act followed closely the terminology designed to incriminate the methods of terroristic anarchism.

[3] Elementary texts amplify the theory and practice of these movements which must be greatly oversimplified in this opinion. See Anarchism, 2 Encyc. Soc. Sci. 46; Nihilism, 11 Encyc. Soc. Sci. 377.

[4] *Spies v. Illinois*, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898.

assassination of President McKinley in 1901, were fruits of its preaching.

However, extreme individualism was not conducive to cohesive and disciplined organization. Anarchism fell into disfavor among incendiary radicals, many of whom shifted their allegiance to the rising Communist Party. Meanwhile, in Europe anarchism had been displaced by Bolshevism as the doctrine and strategy of social and political upheaval. Led by intellectuals hardened by revolutionary experience, it was a more sophisticated, dynamic and realistic movement. Establishing a base in the Soviet Union, it founded an aggressive international Communist apparatus which has modeled and directed a revolutionary movement able only to harass our own country. But it has seized control of a dozen other countries.

Communism, the antithesis of anarchism,[5] appears today as a closed system of thought representing Stalin's

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[5] Prof. Beard demonstrates this antithesis by quoting the Russian anarchist leader Bakunin, as follows:

"'Marx is an authoritarian and centralizing communist. He wishes what we wish: the complete triumph of economic and social equality, however, within the state and through the power of the state, through the dictatorship of a very strong and, so to speak, despotic provisional government, that is, by the negation of liberty. His economic ideal is the state as the sole owner of land and capital, tilling the soil by means of agricultural associations, under the management of its engineers, and directing through the agency of capital all industrial and commercial associations.

"'We demand the same triumph of economic and social equality through the abolition of the state and everything called juridical right, which is according to our view the permanent negation of human right. We wish the reconstruction of society and the establishment of the unity of mankind not from above downward through authority, through socialistic officials, engineers and public technicians, but from below upward through the voluntary federation of labor associations of all kinds emancipated entirely from the yoke of the state.'" Beard, Individualism and Capitalism, 1 Encyc. Soc. Sci. 145, 158.

version of Lenin's version of Marxism. As an ideology, it is not one of spontaneous protest arising from American working-class experience. It is a complicated system of assumptions, based on European history and conditions, shrouded in an obscure and ambiguous vocabulary, which allures our ultrasophisticated intelligentsia more than our hard-headed working people. From time to time it champions all manner of causes and grievances and makes alliances that may add to its foothold in government or embarrass the authorities.

The Communist Party, nevertheless, does not seek its strength primarily in numbers. Its aim is a relatively small party whose strength is in selected, dedicated, indoctrinated, and rigidly disciplined members. From established policy it tolerates no deviation and no debate. It seeks members that are, or may be, secreted in strategic posts in transportation, communications, industry, government, and especially in labor unions where it can compel employers to accept and retain its members.[6] It also seeks to infiltrate and control organizations of professional and other groups. Through these placements in positions of power it seeks a leverage over society that will make up in power of coercion what it lacks in power of persuasion.

The Communists have no scruples against sabotage, terrorism, assassination, or mob disorder; but violence is not with them, as with the anarchists, an end in itself. The Communist Party advocates force only when prudent and profitable. Their strategy of stealth precludes premature or uncoordinated outbursts of violence, except, of course, when the blame will be placed on shoulders other than their own. They resort to violence as to truth, not

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[6] For methods and objects of infiltration of labor unions, see *American Communications Assn.* v. *Douds,* 339 U. S. 382, 422.

as a principle but as an expedient. Force or violence, as they would resort to it, may never be necessary, because infiltration and deception may be enough.

Force would be utilized by the Communist Party not to destroy government but for its capture. The Communist recognizes that an established government in control of modern technology cannot be overthrown by force until it is about ready to fall of its own weight. Concerted uprising, therefore, is to await that contingency and revolution is seen, not as a sudden episode, but as the consummation of a long process.

The United States, fortunately, has experienced Communism only in its preparatory stages and for its pattern of final action must look abroad. Russia, of course, was the pilot Communist revolution, which to the Marxist confirms the Party's assumptions and points its destiny.[7]

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[7] The Czar's government, in February 1917, literally gave up, almost without violence, to the Provisional Government, because it was ready to fall apart from its corruption, ineptitude, superstition, oppression and defeat. The revolutionary parties had little to do with this and regarded it as a *bourgeoisie* triumph. Lenin was an exile in Switzerland, Trotsky in the United States, and Stalin was in Siberia. The Provisional Government attempted to continue the war against Germany, but it, too, was unable to solve internal problems and its Galician campaign failed with heavy losses. By October, its prestige and influence sank so low that it could not continue. Meanwhile, Lenin and Trotsky had returned and consolidated the Bolshevik position around the Soviets, or trade unions. They simply took over power in an almost bloodless revolution between October 25 and November 7, 1917. That Lenin and Trotsky represented only a minority was demonstrated in November elections, in which the Bolsheviks secured less than a quarter of the seats. Then began the series of opportunistic movements to entrench themselves in power. Faced by invasion of the allies, by counterrevolution, and the attempted assassination of Lenin, terrorism was resorted to on a large scale and all the devices of the Czar's police state were reestablished. See 1 Carr, The Bolshevik Revolution 1917–1923, 99–110, and Moore, Soviet Politics—The Dilemma of Power, 117–139.

But Communist technique in the overturn of a free government was disclosed by the *coup d'etat* in which they seized power in Czechoslovakia.[8] There the Communist Party during its preparatory stage claimed and received protection for its freedoms of speech, press, and assembly. Pretending to be but another political party, it eventually was conceded participation in government, where it entrenched reliable members chiefly in control of police and information services. When the government faced a foreign and domestic crisis, the Communist Party had established a leverage strong enough to threaten civil war. In a period of confusion the Communist plan unfolded and the underground organization came to the surface throughout the country in the form chiefly of labor "action committees." Communist officers of the unions took over transportation and allowed only persons with party permits to travel. Communist printers took over the newspapers and radio and put out only party-approved versions of events. Possession was taken of telegraph and telephone systems and communications were cut off wherever directed by party heads. Communist unions took over the factories, and in the cities a partisan distribution of food was managed by the Communist organization. A virtually bloodless abdication by the elected government admitted the Communists to power, whereupon they instituted a reign of oppression and terror, and ruthlessly denied to all others the freedoms which had sheltered their conspiracy.

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[8] Duchacek, The Strategy of Communist Infiltration: Czechoslovakia, 1944–1948, World Politics, Vol. II, No. 3 (April 1950), 345–372; and The February Coup in Czechoslovakia, *id.*, July 1950, 511–532; see also Kertesz, The Methods of Communist Conquest: Hungary, 1944–1947, *id.*, October 1950, 20–54; Lasswell, The Strategy of Soviet Propaganda, 24 Acad. Pol. Sci. Proc. 214, 221. See also Friedman, The Break-up of Czech Democracy.

II.

The foregoing is enough to indicate that, either by accident or design, the Communist stratagem outwits the anti-anarchist pattern of statute aimed against "overthrow by force and violence" if qualified by the doctrine that only "clear and present danger" of accomplishing that result will sustain the prosecution.

The "clear and present danger" test was an innovation by Mr. Justice Holmes in the *Schenck* case,[9] reiterated and refined by him and Mr. Justice Brandeis in later cases,[10] all arising before the era of World War II revealed the subtlety and efficacy of modernized revolutionary techniques used by totalitarian parties. In those cases, they were faced with convictions under so-called criminal syndicalism statutes aimed at anarchists but which, loosely construed, had been applied to punish socialism, pacifism, and left-wing ideologies, the charges often resting on far-

[9] *Schenck* v. *United States,* 249 U. S. 47. This doctrine has been attacked as one which "annuls the most significant purpose of the First Amendment. It destroys the intellectual basis of our plan of self-government." Meiklejohn, Free Speech And Its Relation to Self-Government, 29. It has been praised: "The concept of freedom of speech received for the first time an authoritative judicial interpretation in accord with the purpose of the framers of the Constitution." Chafee, Free Speech in the United States, 82. In either event, it is the only original judicial thought on the subject, all later cases having made only extensions of its application. All agree that it means something very important, but no two seem to agree on what it is. See concurring opinion, MR. JUSTICE FRANKFURTER, *Kovacs* v. *Cooper,* 336 U. S. 77, 89.

[10] *Gitlow* v. *New York,* 268 U. S. 652; *Whitney* v. *California,* 274 U. S. 357. Holmes' comment on the former, in his letters to Sir Frederick Pollock of June 2 and 18, 1925, as "a case in which conscience and judgment are a little in doubt," and description of his dissent as one "in favor of the rights of an anarchist (so-called) to talk drool in favor of the proletarian dictatorship" show the tentative nature of his test, even as applied to a trivial case. Holmes-Pollock Letters (Howe ed. 1946).

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fetched inferences which, if true, would establish only technical or trivial violations. They proposed "clear and present danger" as a test for the sufficiency of evidence in particular cases.

I would save it, unmodified, for application as a "rule of reason" [11] in the kind of case for which it was devised. When the issue is criminality of a hot-headed speech on a street corner, or circulation of a few incendiary pamphlets, or parading by some zealots behind a red flag, or refusal of a handful of school children to salute our flag, it is not beyond the capacity of the judicial process to gather, comprehend, and weigh the necessary materials for decision whether it is a clear and present danger of substantive evil or a harmless letting off of steam. It is not a prophecy, for the danger in such cases has matured by the time of trial or it was never present. The test applies and has meaning where a conviction is sought to be based on a speech or writing which does not directly or explicitly advocate a crime but to which such tendency is sought to be attributed by construction or by implication from external circumstances. The formula in such cases favors freedoms that are vital to our society, and, even if sometimes applied too generously, the consequences cannot be grave. But its recent expansion has extended, in particular to Communists, unprecedented immunities.[12] Unless we are to hold our Government captive in a judge-made verbal trap, we must approach the problem of a well-organized, nation-wide conspiracy, such as I have

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[11] So characterized by Mr. Justice Brandeis in *Schaefer* v. *United States*, 251 U. S. 466, 482.

[12] Recent cases have pushed the "clear and present danger" doctrine to greater extremes. While Mr. Justice Brandeis said only that the evil to be feared must be "imminent" and "relatively serious," *Whitney* v. *California*, 274 U. S. 357, 376 and 377, more recently it was required "that the substantive evil must be *extremely* serious and the

described, as realistically as our predecessors faced the trivialities that were being prosecuted until they were checked with a rule of reason.

I think reason is lacking for applying that test to this case.

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degree of imminence extremely high before utterances can be punished." *Bridges* v. *California*, 314 U. S. 252, 263. (Italics supplied.)

Schneiderman v. *United States*, 320 U. S. 118, overruled earlier holdings that the courts could take judicial notice that the Communist Party does advocate overthrow of the Government by force and violence. This Court reviewed much of the basic Communist literature that is before us now, and held that it was within "the area of allowable thought," *id.*, at 139, that it does not show lack of attachment to the Constitution, and that success of the Communist Party would not necessarily mean the end of representative government. The Court declared further that "A tenable conclusion from the foregoing is that the Party in 1927 desired to achieve its purpose by peaceful and democratic means, and as a theoretical matter justified the use of force and violence only as a method of preventing an attempted forcible counter-overthrow once the Party had obtained control in a peaceful manner, or as a method of last resort to enforce the majority will if at some indefinite future time because of peculiar circumstances constitutional or peaceful channels were no longer open." *Id.*, at 157. Moreover, the Court considered that this "mere doctrinal justification or prediction of the use of force under hypothetical conditions at some indefinite future time—prediction that is not calculated or intended to be presently acted upon, ..." *ibid.*, was within the realm of free speech. A dissent by Mr. Chief Justice Stone, for himself and Justices Roberts and Frankfurter, challenged these naive conclusions, as they did again in *Bridges* v. *Wixon*, 326 U. S. 135, in which the Court again set aside an Attorney General's deportation order. Here Mr. Justice Murphy, without whom there would not have been a majority for the decision, speaking for himself in a concurring opinion, pronounced the whole deportation statute unconstitutional, as applied to Communists, under the "clear and present danger test," because, "Not the slightest evidence was introduced to show that either Bridges or the Communist Party seriously and imminently threatens to uproot the Government by force or violence." 326 U. S. at 165.

If we must decide that this Act and its application are constitutional only if we are convinced that petitioner's conduct creates a "clear and present danger" of violent overthrow, we must appraise imponderables, including international and national phenomena which baffle the best informed foreign offices and our most experienced politicians. We would have to foresee and predict the effectiveness of Communist propaganda, opportunities for infiltration, whether, and when, a time will come that they consider propitious for action, and whether and how fast our existing government will deteriorate. And we would have to speculate as to whether an approaching Communist *coup* would not be anticipated by a nationalistic fascist movement. No doctrine can be sound whose application requires us to make a prophecy of that sort in the guise of a legal decision. The judicial process simply is not adequate to a trial of such far-flung issues. The answers given would reflect our own political predilections and nothing more.

The authors of the clear and present danger test never applied it to a case like this, nor would I. If applied as it is proposed here, it means that the Communist plotting is protected during its period of incubation; its preliminary stages of organization and preparation are immune from the law; the Government can move only after imminent action is manifest, when it would, of course, be too late.

III.

The highest degree of constitutional protection is due to the individual acting without conspiracy. But even an individual cannot claim that the Constitution protects him in advocating or teaching overthrow of government by force or violence. I should suppose no one would doubt that Congress has power to make such attempted

overthrow a crime. But the contention is that one has the constitutional right to work up a public desire and will to do what it is a crime to attempt. I think direct incitement by speech or writing can be made a crime, and I think there can be a conviction without also proving that the odds favored its success by 99 to 1, or some other extremely high ratio.

The names of Mr. Justice Holmes and Mr. Justice Brandeis cannot be associated with such a doctrine of governmental disability. After the *Schenck* case, in which they set forth the clear and present danger test, they joined in these words of Mr. Justice Holmes, spoken for a unanimous Court:

> ". . . [T]he First Amendment while prohibiting legislation against free speech as such cannot have been, and obviously was not, intended to give immunity for every possible use of language. *Robertson* v. *Baldwin,* 165 U. S. 275, 281. We venture to believe that neither Hamilton nor Madison, nor any other competent person then or later, ever supposed that to make criminal the counselling of a murder within the jurisdiction of Congress would be an unconstitutional interference with free speech." *Frohwerk* v. *United States,* 249 U. S. 204, 206.

The same doctrine was earlier stated in *Fox* v. *Washington,* 236 U. S. 273, 277, and that case was recently and with approval cited in *Giboney* v. *Empire Storage & Ice Co.,* 336 U. S. 490, 502.

As aptly stated by Judge Learned Hand in *Masses Publishing Co.* v. *Patten,* 244 F. 535, 540: "One may not counsel or advise others to violate the law as it stands. Words are not only the keys of persuasion, but the triggers of action, and those which have no purport but to counsel the violation of law cannot by any latitude of interpretation be a part of that public opinion which is the final source of government in a democratic state."

Of course, it is not always easy to distinguish teaching or advocacy in the sense of incitement from teaching or advocacy in the sense of exposition or explanation. It is a question of fact in each case.

IV.

What really is under review here is a conviction of conspiracy, after a trial for conspiracy, on an indictment charging conspiracy, brought under a statute outlawing conspiracy. With due respect to my colleagues, they seem to me to discuss anything under the sun except the law of conspiracy. One of the dissenting opinions even appears to chide me for "invoking the law of conspiracy." As that is the case before us, it may be more amazing that its reversal can be proposed without even considering the law of conspiracy.

The Constitution does not make conspiracy a civil right. The Court has never before done so and I think it should not do so now. Conspiracies of labor unions, trade associations, and news agencies have been condemned, although accomplished, evidenced and carried out, like the conspiracy here, chiefly by letter-writing, meetings, speeches and organization. Indeed, this Court seems, particularly in cases where the conspiracy has economic ends, to be applying its doctrines with increasing severity. While I consider criminal conspiracy a dragnet device capable of perversion into an instrument of injustice in the hands of a partisan or complacent judiciary, it has an established place in our system of law, and no reason appears for applying it only to concerted action claimed to disturb interstate commerce and withholding it from those claimed to undermine our whole Government.[13]

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[13] These dangers were more fully set out in *Krulewitch* v. *United States*, 336 U. S. 440, 445.

The basic rationale of the law of conspiracy is that a conspiracy may be an evil in itself, independently of any other evil it seeks to accomplish. Thus, we recently held in *Pinkerton* v. *United States,* 328 U. S. 640, 643–644, "It has been long and consistently recognized by the Court that the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses. The power of Congress to separate the two and to affix to each a different penalty is well established. . . . And the plea of double jeopardy is no defense to a conviction for both offenses. . . ."

So far does this doctrine reach that it is well settled that Congress may make it a crime to conspire with others to do what an individual may lawfully do on his own. This principle is illustrated in conspiracies that violate the antitrust laws as sustained and applied by this Court. Although one may raise the prices of his own products, and many, acting without concert, may do so, the moment they conspire to that end they are punishable. The same principle is applied to organized labor. Any workman may quit his work for any reason, but concerted actions to the same end are in some circumstances forbidden. National Labor Relations Act, as amended, 61 Stat. 136, § 8 (b), 29 U. S. C. § 158 (b).

The reasons underlying the doctrine that conspiracy may be a substantive evil in itself, apart from any evil it may threaten, attempt, or accomplish, are peculiarly appropriate to conspiratorial Communism.

> "The reason for finding criminal liability in case of a combination to effect an unlawful end or to use unlawful means, where none would exist, even though the act contemplated were actually committed by an individual, is that a combination of persons to commit a wrong, either as an end or as a means to an end, is so much more dangerous, because of its increased power to do wrong, because it is more difficult

> to guard against and prevent the evil designs of a group of persons than of a single person, and because of the terror which fear of such a combination tends to create in the minds of people." [14]

There is lamentation in the dissents about the injustice of conviction in the absence of some overt act. Of course, there has been no general uprising against the Government, but the record is replete with acts to carry out the conspiracy alleged, acts such as always are held sufficient to consummate the crime where the statute requires an overt act.

But the shorter answer is that no overt act is or need be required. The Court, in antitrust cases, early upheld the power of Congress to adopt the ancient common law that makes conspiracy itself a crime. Through Mr. Justice Holmes, it said: "Coming next to the objection that no overt act is laid, the answer is that the Sherman Act punishes the conspiracies at which it is aimed on the common law footing—that is to say, it does not make the doing of any act other than the act of conspiring a condition of liability." *Nash* v. *United States,* 229 U. S. 373, 378. Reiterated, *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 252. It is not to be supposed that the power of Congress to protect the Nation's existence is more limited than its power to protect interstate commerce.

Also, it is urged that since the conviction is for conspiracy to teach and advocate, and to organize the Communist Party to teach and advocate, the First Amendment is violated, because freedoms of speech and press protect teaching and advocacy regardless of what is taught or advocated. I have never thought that to be the law.

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[14] Miller on Criminal Law, 110. Similar reasons have been reiterated by this Court. *United States* v. *Rabinowich,* 238 U. S. 78, 88; *Pinkerton* v. *United States,* 328 U. S. 640, 643–644.

I do not suggest that Congress could punish conspiracy to advocate something, the doing of which it may not punish. Advocacy or exposition of the doctrine of communal property ownership, or any political philosophy unassociated with advocacy of its imposition by force or seizure of government by unlawful means could not be reached through conspiracy prosecution. But it is not forbidden to put down force or violence, it is not forbidden to punish its teaching or advocacy, and the end being punishable, there is no doubt of the power to punish conspiracy for the purpose.

The defense of freedom of speech or press has often been raised in conspiracy cases, because, whether committed by Communists, by businessmen, or by common criminals, it usually consists of words written or spoken, evidenced by letters, conversations, speeches or documents. Communication is the essence of every conspiracy, for only by it can common purpose and concert of action be brought about or be proved. However, when labor unions raised the defense of free speech against a conspiracy charge, we unanimously said:

> "It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute. We reject the contention now. . . .
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> ". . . It is true that the agreements and course of conduct here were as in most instances brought about through speaking or writing. But it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed. . . . Such an expansive interpreta-

tion of the constitutional guaranties of speech and press would make it practically impossible ever to enforce laws against agreements in restraint of trade as well as many other agreements and conspiracies deemed injurious to society." *Giboney* v. *Empire Storage & Ice Co.*, 336 U. S. 490, 498, 502.

A contention by the press itself, in a conspiracy case, that it was entitled to the benefits of the "clear and present danger" test, was curtly rebuffed by this Court, saying: "Nor is a publisher who engages in business practices made unlawful by the Sherman Act entitled to a partial immunity by reason of the 'clear and present danger' doctrine . . . . Formulated as it was to protect liberty of thought and of expression, it would degrade the clear and present danger doctrine to fashion from it a shield for business publishers who engage in business practices condemned by the Sherman Act. . . ." *Associated Press* v. *United States*, 326 U. S. 1, 7. I should think it at least as "degrading" to fashion of it a shield for conspirators whose ultimate purpose is to capture or overthrow the Government.

In conspiracy cases the Court not only has dispensed with proof of clear and present danger but even of power to create a danger: "It long has been settled, however, that a 'conspiracy to commit a crime is a different offense from the crime that is the object of the conspiracy.' . . . Petitioners, for example, might have been convicted here of a conspiracy to monopolize without ever having acquired the power to carry out the object of the conspiracy . . . ." *American Tobacco Co.* v. *United States*, 328 U. S. 781, 789.

Having held that a conspiracy alone is a crime and its consummation is another, it would be weird legal reasoning to hold that Congress could punish the one only if there was "clear and present danger" of the second. This

would compel the Government to prove two crimes in order to convict for one.

When our constitutional provisions were written, the chief forces recognized as antagonists in the struggle between authority and liberty were the Government on the one hand and the individual citizen on the other. It was thought that if the state could be kept in its place the individual could take care of himself.

In more recent times these problems have been complicated by the intervention between the state and the citizen of permanently organized, well-financed, semisecret and highly disciplined political organizations. Totalitarian groups here and abroad perfected the technique of creating private paramilitary organizations to coerce both the public government and its citizens. These organizations assert as against our Government all of the constitutional rights and immunities of individuals and at the same time exercise over their followers much of the authority which they deny to the Government. The Communist Party realistically is a state within a state, an authoritarian dictatorship within a republic. It demands these freedoms, not for its members, but for the organized party. It denies to its own members at the same time the freedom to dissent, to debate, to deviate from the party line, and enforces its authoritarian rule by crude purges, if nothing more violent.

The law of conspiracy has been the chief means at the Government's disposal to deal with the growing problems created by such organizations. I happen to think it is an awkward and inept remedy, but I find no constitutional authority for taking this weapon from the Government. There is no constitutional right to "gang up" on the Government.

While I think there was power in Congress to enact this statute and that, as applied in this case, it cannot be

held unconstitutional,[15] I add that I have little faith in the long-range effectiveness of this conviction to stop the rise of the Communist movement. Communism will not go to jail with these Communists. No decision by this Court can forestall revolution whenever the existing government fails to command the respect and loyalty of the people and sufficient distress and discontent is allowed to grow up among the masses. Many failures by fallen governments attest that no government can long prevent revolution by outlawry.[16] Corruption, ineptitude, inflation, oppressive taxation, militarization, injustice, and loss of leadership capable of intellectual initiative in domestic or foreign affairs are allies on which the Com-

[15] The defendants have had the benefit so far in this case of all the doubts and confusions afforded by attempts to apply the "clear and present danger" doctrine. While I think it has no proper application to the case, these efforts have been in response to their own contentions and favored rather than prejudiced them. There is no call for reversal on account of it.

[16] The pathetically ineffective efforts of free European states to overcome feebleness of the Executive and decomposition of the Legislative branches of government by legal proscriptions are reviewed in Loewenstein, Legislative Control of Political Extremism in European Democracies, 38 Col. L. Rev. 591, 725 (1938). The Nazi Party seizure of power in Germany occurred while both it and its Communist counterpart were under sentence of illegality from the courts of the Weimar Republic. The German Criminal Code struck directly at the disciplinary system of totalitarian parties. It provided:

"The participation in an organization the existence, constitution, or purposes of which are to be kept secret from the Government, or in which obedience to unknown superiors or unconditional obedience to known superiors is pledged, is punishable by imprisonment up to six months for the members and from one month to one year for the founders and officers. Public officials may be deprived of the right to hold public office for a period of from one to five years." 2 Nazi Conspiracy and Aggression (GPO 1946) 11.

The Czar's government of Russia fell while the Communist leaders were in exile. See n. 7. Instances of similar failures could be multiplied indefinitely.

munists count to bring opportunity knocking to their door. Sometimes I think they may be mistaken. But the Communists are not building just for today—the rest of us might profit by their example.

MR. JUSTICE BLACK, dissenting.

Here again, as in *Breard* v. *Alexandria, post,* p. 622, decided this day, my basic disagreement with the Court is not as to how we should explain or reconcile what was said in prior decisions but springs from a fundamental difference in constitutional approach. Consequently, it would serve no useful purpose to state my position at length.

At the outset I want to emphasize what the crime involved in this case is, and what it is not. These petitioners were not charged with an attempt to overthrow the Government. They were not charged with overt acts of any kind designed to overthrow the Government. They were not even charged with saying anything or writing anything designed to overthrow the Government. The charge was that they agreed to assemble and to talk and publish certain ideas at a later date: The indictment is that they conspired to organize the Communist Party and to use speech or newspapers and other publications in the future to teach and advocate the forcible overthrow of the Government. No matter how it is worded, this is a virulent form of prior censorship of speech and press, which I believe the First Amendment forbids. I would hold § 3 of the Smith Act authorizing this prior restraint unconstitutional on its face and as applied.

But let us assume, contrary to all constitutional ideas of fair criminal procedure, that petitioners although not indicted for the crime of actual advocacy, may be punished for it. Even on this radical assumption, the other opinions in this case show that the only way to affirm

these convictions is to repudiate directly or indirectly the established "clear and present danger" rule. This the Court does in a way which greatly restricts the protections afforded by the First Amendment. The opinions for affirmance indicate that the chief reason for jettisoning the rule is the expressed fear that advocacy of Communist doctrine endangers the safety of the Republic. Undoubtedly, a governmental policy of unfettered communication of ideas does entail dangers. To the Founders of this Nation, however, the benefits derived from free expression were worth the risk. They embodied this philosophy in the First Amendment's command that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." I have always believed that the First Amendment is the keystone of our Government, that the freedoms it guarantees provide the best insurance against destruction of all freedom. At least as to speech in the realm of public matters, I believe that the "clear and present danger" test does not "mark the furthermost constitutional boundaries of protected expression" but does "no more than recognize a minimum compulsion of the Bill of Rights." *Bridges* v. *California,* 314 U. S. 252, 263.

So long as this Court exercises the power of judicial review of legislation, I cannot agree that the First Amendment permits us to sustain laws suppressing freedom of speech and press on the basis of Congress' or our own notions of mere "reasonableness." Such a doctrine waters down the First Amendment so that it amounts to little more than an admonition to Congress. The Amendment as so construed is not likely to protect any but those "safe" or orthodox views which rarely need its protection. I must also express my objection to the holding because, as MR. JUSTICE DOUGLAS' dissent shows, it sanctions the determination of a crucial issue of fact by the judge rather than by the jury. Nor can I let this opportunity

pass without expressing my objection to the severely limited grant of certiorari in this case which precluded consideration here of at least two other reasons for reversing these convictions: (1) the record shows a discriminatory selection of the jury panel which prevented trial before a representative cross-section of the community; (2) the record shows that one member of the trial jury was violently hostile to petitioners before and during the trial.

Public opinion being what it now is, few will protest the conviction of these Communist petitioners. There is hope, however, that in calmer times, when present pressures, passions and fears subside, this or some later Court will restore the First Amendment liberties to the high preferred place where they belong in a free society.

MR. JUSTICE DOUGLAS, dissenting.

If this were a case where those who claimed protection under the First Amendment were teaching the techniques of sabotage, the assassination of the President, the filching of documents from public files, the planting of bombs, the art of street warfare, and the like, I would have no doubts. The freedom to speak is not absolute; the teaching of methods of terror and other seditious conduct should be beyond the pale along with obscenity and immorality. This case was argued as if those were the facts. The argument imported much seditious conduct into the record. That is easy and it has popular appeal, for the activities of Communists in plotting and scheming against the free world are common knowledge. But the fact is that no such evidence was introduced at the trial. There is a statute which makes a seditious conspiracy unlawful.[1] Petitioners, however, were not

[1] 18 U. S. C. § 2384 provides: "If two or more persons in any State or Territory, or in any place subject to the jurisdiction of the United States, conspire to overthrow, put down, or to destroy by force the

charged with a "conspiracy to overthrow" the Government. They were charged with a conspiracy to form a party and groups and assemblies of people who teach and advocate the overthrow of our Government by force or violence and with a conspiracy to advocate and teach its overthrow by force and violence.[2] It may well be that indoctrination in the techniques of terror to destroy the Government would be indictable under either statute. But the teaching which is condemned here is of a different character.

So far as the present record is concerned, what petitioners did was to organize people to teach and themselves teach the Marxist-Leninist doctrine contained chiefly in four books:[3] Stalin, Foundations of Leninism (1924); Marx and Engels, Manifesto of the Communist Party (1848); Lenin, The State and Revolution (1917); History of the Communist Party of the Soviet Union (B.) (1939).

Those books are to Soviet Communism what Mein Kampf was to Nazism. If they are understood, the ugliness of Communism is revealed, its deceit and cunning are exposed, the nature of its activities becomes apparent, and the chances of its success less likely. That is not, of course, the reason why petitioners chose these books for their classrooms. They are fervent Communists to whom these volumes are gospel. They preached the creed with the hope that some day it would be acted upon.

Government of the United States, or to levy war against them, or to oppose by force the authority thereof, or by force to prevent, hinder, or delay the execution of any law of the United States, or by force to seize, take, or possess any property of the United States contrary to the authority thereof, they shall each be fined not more than $5,000 or imprisoned not more than six years, or both."

[2] 54 Stat. 671, 18 U. S. C. §§ 10, 11.

[3] Other books taught were Stalin, Problems of Leninism, Strategy and Tactics of World Communism (H. R. Doc. No. 619, 80th Cong., 2d Sess.), and Program of the Communist International.

The opinion of the Court does not outlaw these texts nor condemn them to the fire, as the Communists do literature offensive to their creed. But if the books themselves are not outlawed, if they can lawfully remain on library shelves, by what reasoning does their use in a classroom become a crime? It would not be a crime under the Act to introduce these books to a class, though that would be teaching what the creed of violent overthrow of the Government is. The Act, as construed, requires the element of intent—that those who teach the creed believe in it. The crime then depends not on what is taught but on who the teacher is. That is to make freedom of speech turn not on *what is said,* but on the *intent* with which it is said. Once we start down that road we enter territory dangerous to the liberties of every citizen.

There was a time in England when the concept of constructive treason flourished. Men were punished not for raising a hand against the king but for thinking murderous thoughts about him. The Framers of the Constitution were alive to that abuse and took steps to see that the practice would not flourish here. Treason was defined to require overt acts—the evolution of a plot against the country into an actual project. The present case is not one of treason. But the analogy is close when the illegality is made to turn on intent, not on the nature of the act. We then start probing men's minds for motive and purpose; they become entangled in the law not for what they did but *for what they thought;* they get convicted not for what they said but for the purpose with which they said it.

Intent, of course, often makes the difference in the law. An act otherwise excusable or carrying minor penalties may grow to an abhorrent thing if the evil intent is present. We deal here, however, not with ordinary acts but with speech, to which the Constitution has given a special sanction.

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The vice of treating speech as the equivalent of overt acts of a treasonable or seditious character is emphasized by a concurring opinion, which by invoking the law of conspiracy makes speech do service for deeds which are dangerous to society. The doctrine of conspiracy has served divers and oppressive purposes and in its broad reach can be made to do great evil. But never until today has anyone seriously thought that the ancient law of conspiracy could constitutionally be used to turn speech into seditious conduct. Yet that is precisely what is suggested. I repeat that we deal here with speech alone, not with speech *plus* acts of sabotage or unlawful conduct. Not a single seditious act is charged in the indictment. To make a lawful speech unlawful because two men conceive it is to raise the law of conspiracy to appalling proportions. That course is to make a radical break with the past and to violate one of the cardinal principles of our constitutional scheme.

Free speech has occupied an exalted position because of the high service it has given our society. Its protection is essential to the very existence of a democracy. The airing of ideas releases pressures which otherwise might become destructive. When ideas compete in the market for acceptance, full and free discussion exposes the false and they gain few adherents. Full and free discussion even of ideas we hate encourages the testing of our own prejudices and preconceptions. Full and free discussion keeps a society from becoming stagnant and unprepared for the stresses and strains that work to tear all civilizations apart.

Full and free discussion has indeed been the first article of our faith. We have founded our political system on it. It has been the safeguard of every religious, political, philosophical, economic, and racial group amongst us. We have counted on it to keep us from embracing what is cheap and false; we have trusted the common sense of our

people to choose the doctrine true to our genius and to reject the rest. This has been the one single outstanding tenet that has made our institutions the symbol of freedom and equality. We have deemed it more costly to liberty to suppress a despised minority than to let them vent their spleen. We have above all else feared the political censor. We have wanted a land where our people can be exposed to all the diverse creeds and cultures of the world.

There comes a time when even speech loses its constitutional immunity. Speech innocuous one year may at another time fan such destructive flames that it must be halted in the interests of the safety of the Republic. That is the meaning of the clear and present danger test. When conditions are so critical that there will be no time to avoid the evil that the speech threatens, it is time to call a halt. Otherwise, free speech which is the strength of the Nation will be the cause of its destruction.

Yet free speech is the rule, not the exception. The restraint to be constitutional must be based on more than fear, on more than passionate opposition against the speech, on more than a revolted dislike for its contents. There must be some immediate injury to society that is likely if speech is allowed. The classic statement of these conditions was made by Mr. Justice Brandeis in his concurring opinion in *Whitney* v. *California,* 274 U. S. 357, 376–377,

> "Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears. To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger ap-

prehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one. Every denunciation of existing law tends in some measure to increase the probability that there will be violation of it. Condonation of a breach enhances the probability. Expressions of approval add to the probability. Propagation of the criminal state of mind by teaching syndicalism increases it. Advocacy of law-breaking heightens it still further. But even advocacy of violation, however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on. The wide difference between advocacy and incitement, between preparation and attempt, between assembling and conspiracy, must be borne in mind. In order to support a finding of clear and present danger it must be shown either that immediate serious violence was to be expected or was advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated.

"Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. *If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.*" (Italics added.)

I had assumed that the question of the clear and present danger, being so critical an issue in the case, would be a matter for submission to the jury. It was squarely held in *Pierce* v. *United States,* 252 U. S. 239, 244, to be a jury question. Mr. Justice Pitney, speaking for the Court, said, "Whether the statement contained in the pamphlet had a natural tendency to produce the forbidden consequences, as alleged, was a question to be determined not upon demurrer but by the jury at the trial." That is the only time the Court has passed on the issue. None of our other decisions is contrary. Nothing said in any of the nonjury cases has detracted from that ruling.[4] The statement in *Pierce* v. *United States, supra,* states the law as it has been and as it should be. The Court, I think, errs when it treats the question as one of law.

Yet, whether the question is one for the Court or the jury, there should be evidence of record on the issue. This record, however, contains no evidence whatsoever showing that the acts charged, *viz.,* the teaching of the Soviet theory of revolution with the hope that it will be realized, have created any clear and present danger to the Nation. The Court, however, rules to the contrary. It says, "The formation by petitioners of such a highly organized conspiracy, with rigidly disciplined members subject to call when the leaders, these petitioners, felt that the time had come for action, coupled with the inflammable nature of world conditions, similar uprisings in other countries, and the touch-and-go nature of our relations with countries with whom petitioners were in the very least ideologically attuned, convince us that their convictions were justified on this score."

That ruling is in my view not responsive to the issue in the case. We might as well say that the speech of

[4] The cases which reached the Court are analyzed in the Appendix attached to this opinion, *post,* p. 591.

petitioners is outlawed because Soviet Russia and her Red Army are a threat to world peace.

The nature of Communism as a force on the world scene would, of course, be relevant to the issue of clear and present danger of petitioners' advocacy within the United States. But the primary consideration is the strength and tactical position of petitioners and their converts in this country. On that there is no evidence in the record. If we are to take judicial notice of the threat of Communists within the nation, it should not be difficult to conclude that *as a political party* they are of little consequence. Communists in this country have never made a respectable or serious showing in any election. I would doubt that there is a village, let alone a city or county or state, which the Communists could carry. Communism in the world scene is no bogeyman; but Communism as a political faction or party in this country plainly is. Communism has been so thoroughly exposed in this country that it has been crippled as a political force. Free speech has destroyed it as an effective political party. It is inconceivable that those who went up and down this country preaching the doctrine of revolution which petitioners espouse would have any success. In days of trouble and confusion, when bread lines were long, when the unemployed walked the streets, when people were starving, the advocates of a short-cut by revolution might have a chance to gain adherents. But today there are no such conditions. The country is not in despair; the people know Soviet Communism; the doctrine of Soviet revolution is exposed in all of its ugliness and the American people want none of it.

How it can be said that there is a clear and present danger that this advocacy will succeed is, therefore, a mystery. Some nations less resilient than the United States, where illiteracy is high and where democratic traditions are only budding, might have to take drastic

steps and jail these men for merely speaking their creed. But in America they are miserable merchants of unwanted ideas; their wares remain unsold. The fact that their ideas are abhorrent does not make them powerful.

The political impotence of the Communists in this country does not, of course, dispose of the problem. Their numbers; their positions in industry and government; the extent to which they have in fact infiltrated the police, the armed services, transportation, stevedoring, power plants, munitions works, and other critical places—these facts all bear on the likelihood that their advocacy of the Soviet theory of revolution will endanger the Republic. But the record is silent on these facts. If we are to proceed on the basis of judicial notice, it is impossible for me to say that the Communists in this country are so potent or so strategically deployed that they must be suppressed for their speech. I could not so hold unless I were willing to conclude that the activities in recent years of committees of Congress, of the Attorney General, of labor unions, of state legislatures, and of Loyalty Boards were so futile as to leave the country on the edge of grave peril. To believe that petitioners and their following are placed in such critical positions as to endanger the Nation is to believe the incredible. It is safe to say that the followers of the creed of Soviet Communism are known to the F. B. I.; that in case of war with Russia they will be picked up overnight as were all prospective saboteurs at the commencement of World War II; that the invisible army of petitioners is the best known, the most beset, and the least thriving of any fifth column in history. Only those held by fear and panic could think otherwise.

This is my view if we are to act on the basis of judicial notice. But the mere statement of the opposing views indicates how important it is that we know the facts before we act. Neither prejudice nor hate nor senseless

fear should be the basis of this solemn act. Free speech—the glory of our system of government—should not be sacrificed on anything less than plain and objective proof of danger that the evil advocated is imminent. On this record no one can say that petitioners and their converts are in such a strategic position as to have even the slightest chance of achieving their aims.

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." The Constitution provides no exception. This does not mean, however, that the Nation need hold its hand until it is in such weakened condition that there is no time to protect itself from incitement to revolution. Seditious conduct can always be punished. But the command of the First Amendment is so clear that we should not allow Congress to call a halt to free speech except in the extreme case of peril from the speech itself. The First Amendment makes confidence in the common sense of our people and in their maturity of judgment the great postulate of our democracy. Its philosophy is that violence is rarely, if ever, stopped by denying civil liberties to those advocating resort to force. The First Amendment reflects the philosophy of Jefferson "that it is time enough for the rightful purposes of civil government, for its officers to interfere when principles break out into overt acts against peace and good order." [5] The political censor has no place in our public debates. Unless and until extreme and necessitous circumstances are shown, our aim should be to keep speech unfettered and to allow the processes

[5] 12 Hening's Stat. (Virginia 1823), c. 34, p. 84. Whipple, Our Ancient Liberties (1927), p. 95, states: "This idea that the limit on freedom of speech or press should be set only by an actual overt act was not new. It had been asserted by a long line of distinguished thinkers including John Locke, Montesquieu in his *The Spirit of the Laws* ('Words do not constitute an overt act'), the Rev. Phillip Furneaux, James Madison, and Thomas Jefferson."

of law to be invoked only when the provocateurs among us move from speech to action.

Vishinsky wrote in 1938 in The Law of the Soviet State, "In our state, naturally, there is and can be no place for freedom of speech, press, and so on for the foes of socialism."

Our concern should be that we accept no such standard for the United States. Our faith should be that our people will never give support to these advocates of revolution, so long as we remain loyal to the purposes for which our Nation was founded.

APPENDIX TO OPINION OF MR. JUSTICE DOUGLAS.

There have been numerous First Amendment cases before the Court raising the issue of clear and present danger since Mr. Justice Holmes first formulated the test in *Schenck* v. *United States,* 249 U. S. 47, 52. Most of them, however, have not involved jury trials.

The cases which may be deemed at all relevant to our problem can be classified as follows:

CONVICTIONS FOR CONTEMPT OF COURT (NON-JURY): *Near* v. *Minnesota,* 283 U. S. 697; *Bridges* v. *California,* 314 U. S. 252; *Thomas* v. *Collins,* 323 U. S. 516; *Pennekamp* v. *Florida,* 328 U. S. 331; *Craig* v. *Harney,* 331 U. S. 367.

CONVICTIONS BY STATE COURTS SITTING WITHOUT JURIES, GENERALLY FOR VIOLATIONS OF LOCAL ORDINANCES: *Lovell* v. *Griffin,* 303 U. S. 444; *Schneider* v. *State,* 308 U. S. 147; *Cantwell* v. *Connecticut,* 310 U. S. 296; *Marsh* v. *Alabama,* 326 U. S. 501; *Tucker* v. *Texas,* 326 U. S. 517; *Winters* v. *New York,* 333 U. S. 507; *Saia* v. *New York,* 334 U. S. 558; *Kovacs* v. *Cooper,* 336 U. S. 77; *Kunz* v. *New York,* 340 U. S. 290; *Feiner* v. *New York,* 340 U. S. 315.

INJUNCTIONS AGAINST ENFORCEMENT OF STATE OR LOCAL LAWS (NON-JURY): *Grosjean* v. *American Press Co.,* 297

U. S. 233; *Hague* v. *C. I. O.*, 307 U. S. 496; *Minersville School District* v. *Gobitis*, 310 U. S. 586; *West Virginia Board of Education* v. *Barnette*, 319 U. S. 624.

ADMINISTRATIVE PROCEEDINGS (NON-JURY): *Bridges* v. *Wixon*, 326 U. S. 135; *Schneiderman* v. *United States*, 320 U. S. 118; *American Communications Association* v. *Douds*, 339 U. S. 382.

CASES TRIED BEFORE JURIES FOR VIOLATIONS OF STATE LAWS DIRECTED AGAINST ADVOCACY OF ANARCHY, CRIMINAL SYNDICALISM, ETC.: *Gilbert* v. *Minnesota*, 254 U. S. 325; *Gitlow* v. *New York*, 268 U. S. 652; *Whitney* v. *California*, 274 U. S. 357; *Fiske* v. *Kansas*, 274 U. S. 380; *Stromberg* v. *California*, 283 U. S. 359; *De Jonge* v. *Oregon*, 299 U. S. 353; *Herndon* v. *Lowry*, 301 U. S. 242; *Taylor* v. *Mississippi*, 319 U. S. 583; or for minor local offenses: *Cox* v. *New Hampshire*, 312 U. S. 569; *Chaplinsky* v. *New Hampshire*, 315 U. S. 568; *Terminiello* v. *Chicago*, 337 U. S. 1; *Niemotko* v. *Maryland*, 340 U. S. 268.

FEDERAL PROSECUTIONS BEFORE JURIES UNDER THE ESPIONAGE ACT OF 1917 FOLLOWING WORLD WAR I: *Schenck* v. *United States*, 249 U. S. 47; *Frohwerk* v. *United States*, 249 U. S. 204; *Debs* v. *United States*, 249 U. S. 211; *Abrams* v. *United States*, 250 U. S. 616; *Schaefer* v. *United States*, 251 U. S. 466; *Pierce* v. *United States*, 252 U. S. 239. *Pierce* v. *United States* ruled that the question of clear and present danger was for the jury. In the other cases in this group the question whether the issue was for the court or the jury was not raised or passed upon.

FEDERAL PROSECUTION BEFORE A JURY UNDER THE ESPIONAGE ACT OF 1917 FOLLOWING WORLD WAR II: *Hartzel* v. *United States*, 322 U. S. 680. The jury was instructed on clear and present danger in terms drawn from the language of Mr. Justice Holmes in *Schenck* v. *United States, supra*, p. 52. The Court reversed the conviction on the ground that there had not been sufficient evidence for submission of the case to the jury.

TIMKEN ROLLER BEARING CO. *v.* UNITED STATES.

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

No. 352. Argued April 24, 1951.—Decided June 4, 1951.

In a civil action brought by the United States against appellant, a domestic corporation, to enjoin alleged violations of the Sherman Act, the complaint charged that appellant had combined and conspired with a British corporation and a French corporation, in each of which it had a financial interest, to restrain interstate and foreign commerce in the manufacture and sale of antifriction bearings. The District Court found that under agreements between them the corporations had allocated trade territories among themselves; fixed prices on products of one sold in the territory of the others; cooperated to protect each other's markets and to eliminate outside competition; and participated in cartels to restrict imports to, and exports from, the United States. The court concluded that appellant had violated the Sherman Act as charged, and entered a comprehensive decree designed to bar future violations. *Held:*

1. The District Court's material findings of fact are not "clearly erroneous," and are accepted here. Fed. Rules Civ. Proc., 52 (a). Pp. 596–597.

2. The opinion of the District Court sufficiently complies with the requirements of Rule 52 (a) relative to findings of fact and conclusions of law. P. 597, n. 7.

3. Agreements between legally separate persons and companies to suppress competition among themselves cannot be justified by characterizing the project as a "joint venture." Pp. 597–598.

(a) Agreements providing for an aggregation of trade restraints such as those existing in this case are prohibited by the Act, whether or not incidental to a "joint venture." P. 598.

(b) Common ownership or control of the contracting corporations does not liberate them from the impact of the antitrust laws. P. 598.

4. Nor can the restraints be justified as reasonable steps taken to implement a valid trademark licensing system, since the trademark provisions of the agreements were secondary to the central purpose of allocating trade territory, and since the agreements provided

for control of the manufacture and sale of antifriction bearings whether carrying the trademark or not. Pp. 598–599.

(a) A trademark cannot lawfully be used as a device for violating the Sherman Act, and its use therefor is penalized by the Trade Mark Act of 1946. P. 599.

5. The suggestion that what appellant has done is reasonable in view of current foreign trade conditions, and that therefore the Sherman Act should not be enforced in this case, is rejected. P. 599.

6. The decree of the District Court properly enjoined continuation or repetition of the conduct which it found to be illegal. P. 600.

7. The relief which a district court may grant in a Sherman Act case need not be confined to the narrow limits of the proven violation. P. 600.

8. The District Court should not have ordered appellant to divest itself of its stockholdings and all other financial interests in the British and French corporations, and the decree is modified so as to eliminate provisions directed to that end. Pp. 600–601.

83 F. Supp. 284, modified and affirmed.

In a civil action brought by the United States against appellant, to restrain alleged violations of the Sherman Act, the District Court found that appellant had violated the Act and a decree of injunction was entered. 83 F. Supp. 284. On direct appeal to this Court, the decree is *modified and, as modified, affirmed,* p. 601.

Luther Day and *John G. Ketterer* argued the cause and filed a brief for appellant.

W. Perry Epes argued the cause for the United States. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Morison, Charles H. Weston* and *J. Roger Wollenberg.*

MR. JUSTICE BLACK delivered the opinion of the Court.

The United States brought this civil action to prevent and restrain violations of the Sherman Act [1] by appellant,

[1] 26 Stat. 209, 15 U. S. C. §§ 1–4.

Timken Roller Bearing Co., an Ohio corporation. The complaint charged that appellant, in violation of §§ 1 and 3 of the Act,[2] combined, conspired and acted with British Timken, Ltd. (British Timken), and Societe Anonyme Française Timken (French Timken) to restrain interstate and foreign commerce by eliminating competition in the manufacture and sale of antifriction bearings in the markets of the world. After a trial of more than a month the District Court made detailed findings of fact which may be summarized as follows:

As early as 1909 appellant and British Timken's predecessor had made comprehensive agreements providing for a territorial division of the world markets for antifriction bearings. These arrangements were somewhat modified and extended in 1920, 1924 and 1925. Again in 1927 the agreements were substantially renewed in connection with a transaction by which appellant and one Dewar, an English businessman, cooperated in purchasing all the stock of British Timken. Later some British Timken stock was sold to the public with the result that appellant now holds about 30% of the outstanding shares while Dewar owns about 24%.[3] In 1928 appellant and Dewar organized French Timken and since that date have together owned all the stock in the French company. Beginning in that year, appellant, British Timken and French Timken have continuously kept operative "business agreements" regulating the manufacture and sale of antifriction bearings by the three companies and providing for the use by the British and French corporations of the trademark "Timken."[4] Under these agreements

[2] These sections declare illegal all contracts, combinations or conspiracies in restraint of trade or commerce among the states and territories or with foreign nations.

[3] Dewar died while the appeal in this case was pending. See note 10, *infra*.

[4] The most recent of these agreements, which was to have governed the conduct of the parties until 1965, is dated November 28, 1938.

the contracting parties have (1) allocated trade territories among themselves; (2) fixed prices on products of one sold in the territory of the others; (3) cooperated to protect each other's markets and to eliminate outside competition; and (4) participated in cartels to restrict imports to, and exports from, the United States.

On these findings, the District Court concluded that appellant had violated the Sherman Act as charged, and entered a comprehensive decree designed to bar future violations. 83 F. Supp. 284. The case is before us on appellant's direct appeal under 15 U. S. C. § 29.

Although appellant has indiscriminately challenged the District Court's judgment and decree in over 200 separate assignments of error, the real grounds relied on for reversal are only a few in number.[5] In the first place, appellant contends that most of the District Court's material findings of fact are without evidential support, that they "ignore or fail properly to evaluate" evidence supporting appellant's position, and that it was error for the court to refuse to make additional findings. For the most part, this shotgun approach is actually only a dispute as to the proper inferences to be drawn from the evidence in the record;[6] in effect, it is an invitation for

[5] Appellant originally attacked the decision below in 206 assignments of error, including 69 alleged errors in the District Court's findings of fact, 26 in its conclusions of law, and 62 based on the court's refusal to make new and additional findings. (Later appellant abandoned 5 of the assignments.) These assignments are unduly repetitious, some are frivolous, and the excessive number obscures the actual grounds on which appellant relies for reversal. As the Government pointed out in its motion to dismiss the appeal, our prior cases justify dismissal in such situations. See *Local 167* v. *United States*, 291 U. S. 293, 296; *Phillips & Colby Construction Co.* v. *Seymour*, 91 U. S. 646, 648. We do not take that action, however, since appellant in its brief opposing the Government's motion has sufficiently spelled out the few real objections it raises here.

[6] This is well illustrated by the following portion of the "Summary of Argument" which appears in the appellant's brief: "The evidence

us to try the case *de novo*. This Court must decline such an invitation just as it does when the Government makes the same request. *United States* v. *Yellow Cab Co.*, 338 U. S. 338. In the present case, the trial judge after a patient hearing carefully analyzed the evidence in an opinion prepared with obvious care.[7] Appellant's lengthy brief has failed to establish that there was error in making any crucial, or even important, ultimate or subsidiary finding. Since we cannot say the findings are "clearly erroneous," we accept them. Fed. Rules Civ. Proc., 52 (a).

Appellant next contends that the restraints of trade so clearly revealed by the District Court's findings can be justified as "reasonable," and therefore not in violation of the Sherman Act, because they are "ancillary" to allegedly "legal main transactions," namely, (1) a "joint venture" between appellant and Dewar, and (2) an exercise of appellant's right to license the trademark "Timken."

We cannot accept the "joint venture" contention. That the trade restraints were merely incidental to an otherwise legitimate "joint venture" is, to say the least, doubtful. The District Court found that the dominant purpose of the restrictive agreements into which appellant, British Timken and French Timken entered was to avoid all competition either among themselves or with

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relied upon by the district court as demonstrating conduct of an intentional restraint of trade by the three Timken companies from 1928 on is just as reconcilable with the conduct of a legal joint adventure as with the conduct of a combination for the purpose of suppressing competition and controlling world trade in tapered roller bearings, and therefore the district court's decision to the contrary is clearly erroneous." Brief for Appellant, pp. 78–79.

[7] Appellant claims the District Court's findings of fact and conclusions of law failed to comply with Rule 52 (a) of the Federal Rules of Civil Procedure. We think that the opinion below meets all the requirements of the Rule.

others. Regardless of this, however, appellant's argument must be rejected. Our prior decisions plainly establish that agreements providing for an aggregation of trade restraints such as those existing in this case are illegal under the Act. *Kiefer-Stewart Co.* v. *Seagram & Sons,* 340 U. S. 211, 213; *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 223–224 and note 59; *United States* v. *National Lead Co.,* 63 F. Supp. 513, affirmed, 332 U. S. 319; *United States* v. *American Tobacco Co.,* 221 U. S. 106, 180–184; *Associated Press* v. *United States,* 326 U. S. 1, 15. See also *United States* v. *Aluminum Co. of America,* 148 F. 2d 416, 439–445. The fact that there is common ownership or control of the contracting corporations does not liberate them from the impact of the antitrust laws. *E. g., Keifer-Stewart Co.* v. *Seagram & Sons, supra* at 215. Nor do we find any support in reason or authority for the proposition that agreements between legally separate persons and companies to suppress competition among themselves and others can be justified by labeling the project a "joint venture." Perhaps every agreement and combination to restrain trade could be so labeled.

Nor can the restraints of trade be justified as reasonable steps taken to implement a valid trademark licensing system, even if we assume with appellant that it is the owner of the trademark "Timken" in the trade areas allocated to the British and French corporations. Appellant's premise that the trade restraints are only incidental to the trademark contracts is refuted by the District Court's finding that the "trade mark provisions [in the agreements] were subsidiary and secondary to the central purpose of allocating trade territories." Furthermore, while a trademark merely affords protection to a name, the agreements in the present case went far beyond protection of the name "Timken" and provided for control of the manufacture and sale of antifriction bearings

whether carrying the mark or not. A trademark cannot be legally used as a device for Sherman Act violation. Indeed, the Trade Mark Act of 1946 itself penalizes use of a mark "to violate the antitrust laws of the United States." [8]

We also reject the suggestion that the Sherman Act should not be enforced in this case because what appellant has done is reasonable in view of current foreign trade conditions. The argument in this regard seems to be that tariffs, quota restrictions and the like are now such that the export and import of antifriction bearings can no longer be expected as a practical matter; that appellant cannot successfully sell its American-made goods abroad; and that the only way it can profit from business in England, France and other countries is through the ownership of stock in companies organized and manufacturing there. This position ignores the fact that the provisions in the Sherman Act against restraints of foreign trade are based on the assumption, and reflect the policy, that export and import trade in commodities is both possible and desirable. Those provisions of the Act are wholly inconsistent with appellant's argument that American business must be left free to participate in international cartels, that free foreign commerce in goods must be sacrificed in order to foster export of American dollars for investment in foreign factories which sell abroad. Acceptance of appellant's view would make the Sherman Act a dead letter insofar as it prohibits contracts and conspiracies in restraint of foreign trade. If such a drastic change is to be made in the statute, Congress is the one to do it.

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[8] 60 Stat. 427, 439, § 33 (b) (7), 15 U. S. C. §§ 1051, 1115 (b) (7). The reason for the penalty provision was that "trade-marks have been misused. . . . have been used in connection with cartel agreements." 92 Cong. Rec. 7872.

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Finally, appellant attacks the District Court's decree as being too broad in scope. The decree enjoins continuation or repetition of the conduct found illegal. This is clearly correct. *Ethyl Gasoline Corp.* v. *United States,* 309 U. S. 436, 461. It also contains certain other restraining provisions which were within the court's discretion because "relief, to be effective, must go beyond the narrow limits of the proven violation." *United States* v. *United States Gypsum Co.,* 340 U. S. 76, 90. The most vigorous objection, however, is made to those portions of the decree relating to divestiture of appellant's stockholdings and other financial interests in British and French Timken.

Mr. Justice Douglas, Mr. Justice Minton and I believe that the decree properly ordered divestiture. Our views on this point are as follows: Appellant's interests in the British and French companies were obtained as part of a plan to promote the illegal trade restraints. If not severed, the intercompany relationships will provide in the future, as they have in the past, the temptation and means to engage in the prohibited conduct. These considerations alone should be enough to support the divestiture order. *United States* v. *Paramount Pictures, Inc.,* 334 U. S. 131, 152–153; *United States* v. *National Lead Co.,* 332 U. S. 319, 363. But there are other considerations as well. The decree should not be overturned unless we can say that the District Court abused its discretion. Absent divestiture, it is difficult to see where other parts of the decree forbidding trade restraints would add much to what the Sherman Act by itself already prohibits.[9] And obviously the most effec-

[9] We would reject the argument that divestiture is unwise in light of current foreign trade conditions for substantially the same reasons we rejected it in connection with appellant's contention that there was no violation of the Sherman Act.

tive way to suppress further Sherman Act violations is to end the intercorporate relationship which has been the core of the conspiracy. For these reasons, MR. JUSTICE DOUGLAS, MR. JUSTICE MINTON and I cannot say that the District Court abused its discretion in ordering divestiture.[10]

Nevertheless, a majority of this Court, for reasons set forth in other opinions filed in this case, believe that divestiture should not have been ordered by the District Court. Therefore, it becomes necessary to strike from the decree §§ VIII, IVB, and the phrase "or B" in § IVC. As so modified, the judgment of the District Court is affirmed.

It is so ordered.

MR. JUSTICE BURTON and MR. JUSTICE CLARK took no part in the consideration or decision of this case.

MR. JUSTICE REED, with whom THE CHIEF JUSTICE joins, concurring.

It seems to me there can be no valid objection to that part of the opinion which approves the finding of the District Court that the Timken Roller Bearing Company has violated §§ 1 and 3 of the Sherman Act. It may seem

[10] Dewar died while this appeal was pending. Were it not for the present litigation, appellant, under the contracts between it and Dewar, would be entitled to purchase Dewar's interest in British Timken (which would give appellant a 54% stock interest in that corporation); appellant also has a right of first refusal as to Dewar's 50% stock interest in French Timken (which, if exercised, would give appellant 100% ownership of that company). Appellant moved in the District Court to reopen the record to admit evidence of these changed circumstances caused by Dewar's death and for a reconsideration of the divestiture provisions of the decree. The District Court denied the motion. MR. JUSTICE DOUGLAS, MR. JUSTICE MINTON and I would hold that this ruling was within its discretion.

strange to have a conspiracy for the division of territory for marketing between one corporation and another in which it has a large or even a major interest, but any other conclusion would open wide the doors for violation of the Sherman Act at home and in foreign fields. My disagreement with the opinion is based on the suggested requirement that American Timken divest itself of all interest in British Timken and French Timken as required by paragraph VIII of the decree set out below.[1] My reasons for this disagreement follow.

There are no specific statutory provisions authorizing courts to employ the harsh remedy of divestiture in civil proceedings to restrain violations of the Sherman Act. Fines and imprisonment may follow criminal convictions, 15 U. S. C. § 1, and divestiture of property has been used

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[1] "VIII. A. Within two years from the date of this judgment, defendant shall divest itself of all stock holdings and other financial interests, direct or indirect, in British Timken and French Timken. Within one year from the date of this judgment, defendant shall present to the Court for its approval a plan for such divestiture.

"B. Defendant is hereby enjoined and restrained, from the date of this judgment, from:

"1. Acquiring, directly or indirectly, any ownership interest in (by purchase or acquisition of assets or securities, or through the exercise of any option, or otherwise), or any control over, British Timken or French Timken, or any subsidiary, successor or assign thereof;

"2. Exercising any influence or control over the production, sales or other business policies of British Timken or French Timken, or any subsidiary, successor, assign, agent, sales representative, or distributor thereof;

"3. Causing, authorizing or knowingly permitting any officer, director, or employee of defendant or its subsidiaries to serve as an officer, director, or employee of British Timken or French Timken or of any subsidiary, successor, assign, agent, sales representative, or distributor thereof."

in decrees, not as punishment, but to assure effective enforcement of the laws against restraint of trade.[2]

Since divestiture is a remedy to restore competition and not to punish those who restrain trade, it is not to be used indiscriminately, without regard to the type of violation or whether other effective methods, less harsh, are available. That judicial restraint should follow such lines is exemplified by our recent rulings in *United States* v. *National Lead Co.*, 332 U. S. 319, where we approved divestiture of some properties belonging to the conspirators and denied it as to others, pp. 348–353. While the decree here does not call for confiscation, it does call for divestiture. I think that requirement is unnecessary.[3]

In this case the prohibited plan grew out of the effort to implement a patent monopoly. The difficulties of cultivating a foreign market for our manufactured goods obviously entered into creation of the British and French companies so as to enjoy a right of distribution into areas where otherwise restrictions, because of tariffs, quotas and exchange, might be expected. We fail to see such propensity toward restraint of trade as is evidenced in the *Crescent* case.

What we have is an American corporation, dominant in the field of tapered roller bearings, producing between 70 and 80 percent of the American output. In 1947 its gross sales were over $77,000,000. This is a distinctive type of bearing, competing successfully for adoption by industry with other antifriction bearings. Timken pro-

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[2] *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 189; *United States* v. *Paramount Pictures*, 334 U. S. 131, 166 (Third); 85 F. Supp. 881, 895, affirmed *sub nom. United States* v. *Loew's, Inc.*, 339 U. S. 974; *United States* v. *Aluminum Co. of America*, 91 F. Supp. 333, 392 (Aluminum Limited) at 418–419.

[3] Cf. *Hartford-Empire Co.* v. *United States*, 323 U. S. 386, 413 *et seq.*

duces about 25% of all United States antifriction bearings. As there were no findings of facts tending to show violation of the Sherman Act otherwise than through formal agreements for partition of territory, we assume appellant's conduct was otherwise lawful.

In such circumstances, there was, of course, no occasion for the lower court to order any splitting up of a consolidated entity. Cf. *Standard Oil Co.* v. *United States,* 221 U. S. 1; *United States* v. *American Tobacco Co.,* 221 U. S. 106. There has been no effort to create numerous smaller companies out of Timken so that there will be no dominant individual in the tapered roller bearing field. The American company had had a normal growth and development. Its relations with English and French Timken were close and American Timken had stock and contracts for further stock in both foreign companies of value in the development of its foreign business. Such business arrangements should not be destroyed unless necessary to do away with the prohibited evil.

An injunction was entered by the District Court to prohibit the continuation of the objectionable contracts. Violation of that injunction would threaten the appellant and its officers with civil and criminal contempt. *United States* v. *Goldman,* 277 U. S. 229, and *Hill* v. *Weiner,* 300 U. S. 105. The paucity of cases dealing with contempt of Sherman Act injunctions is, I think, an indication of how carefully the decrees are obeyed. The injunction is a far stronger sanction against further violation than the Sherman Act alone. Once in possession of facts showing violation, the Government would obtain a quick and summary punishment of the violator. Furthermore this case remains on the docket for the purpose of "enforcement of compliance" and "punishment of violations." This provision should leave power in the court to enforce divestiture, if the injunction alone fails. Prompt and full compliance with the decree should be anticipated.

This Court is hesitant, always, to interfere with the scope of the trial court's decree.[4] However, in this case it seems appropriate to indicate my disapproval of the requirement of divestiture and to suggest a direction to the District Court that provisions leading to that result be eliminated from the decree. Such remand would also give opportunity for reconsideration of the changes necessary in the decree because of the remand and the death of Mr. Dewar.

In my view such an order should be entered.

MR. JUSTICE FRANKFURTER, dissenting.

The force of the reasoning against divestiture in this case fortifies the doubts which I felt about the Government's position at the close of argument and persuades me to associate myself, in substance, with the dissenting views expressed by MR. JUSTICE JACKSON. Even "cartel" is not a talismanic word, so as to displace the rule of reason by which breaches of the Sherman Law are determined. Nor is "division of territory" so self-operating a category of Sherman Law violations as to dispense with analysis of the practical consequences of what on paper is a geographic division of territory.

While *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347, presented a wholly different set of facts from those before us, the decision in that case does point to the fact that the circumstances of foreign trade may alter the incidence of what in the setting of domestic commerce would be a clear case of unreasonable restraint of trade.

Of course, it is not for this Court to formulate economic policy as to foreign commerce. But the conditions controlling foreign commerce may be relevant here. When as a matter of cold fact the legal, financial, and governmental policies deny opportunities for exportation from

[4] See *United States* v. *United States Gypsum Co.*, 340 U. S. 76, 89.

this country and importation into it, arrangements that afford such opportunities to American enterprise may not fall under the ban of a fair construction of the Sherman Law because comparable arrangements regarding domestic commerce come within its condemnation.

MR. JUSTICE JACKSON, dissenting.

I doubt that it should be regarded as an unreasonable restraint of trade for an American industrial concern to organize foreign subsidiaries, each limited to serving a particular market area. If so, it seems to preclude the only practical means of reaching foreign markets by many American industries.

The fundamental issue here concerns a severely technical application to foreign commerce of the concept of conspiracy. It is admitted that if Timken had, within its own corporate organization, set up separate departments to operate plants in France and Great Britain, as well as in the United States, "that would not be a conspiracy. You must have two entities to have a conspiracy." [1] Thus, although a single American producer, of course, would not compete with itself, either abroad or at home, and could determine prices and allot territories with the same effect as here, that would not be a violation of the Act, because a corporation cannot conspire with itself. Government counsel answered affirmatively the question of the Chief Justice: "Your theory is that if you have a separate corporation, that makes the difference?" [2] Thus, the Court applies the well-established conspiracy doctrine that what it would not be illegal for Timken to do alone may be illegal as a conspiracy when done by two legally separate persons. The doctrine now applied to foreign commerce is that foreign subsidiaries organized by an

[1] Argument of government counsel reported 19 L. W. 3291 *et seq.*

[2] See note 1, *supra.*

American corporation are "separate persons," and any arrangement between them and the parent corporation to do that which is legal for the parent alone is an unlawful conspiracy. I think that result places too much weight on labels.

But if we apply the most strict conspiracy doctrine, we still have the question whether the arrangement is an unreasonable restraint of trade or a method and means of carrying on competition in trade. Timken did not sit down with competitors and divide an existing market between them. It has at all times, in all places, had powerful rivals. It was not effectively meeting their competition in foreign markets, and so it joined others in creating a British subsidiary to go after business best reachable through such a concern and a French one to exploit French markets. Of course, in doing so, it allotted appropriate territory to each and none was to enter into competition with the other or with the parent. Since many foreign governments prohibit or handicap American corporations from owning plants, entering into contracts, or engaging in business directly, this seems the only practical way of waging competition in those areas.

The philosophy of the Government, adopted by the Court, is that Timken's conduct is conspiracy to restrain trade solely because the venture made use of subsidiaries. It is forbidden thus to deal with and utilize subsidiaries to exploit foreign territories, because "parent and subsidiary corporations must accept the consequences of maintaining separate corporate entities," [3] and that consequence is conspiracy to restrain trade. But not all agreements are conspiracies and not all restraints of trade are unlawful. In a world of tariffs, trade barriers, empire or domestic preferences, and various forms of parochialism from which we are by no means free, I think a rule that it

[3] See note 1, *supra*.

is restraint of trade to enter a foreign market through a separate subsidiary of limited scope is virtually to foreclose foreign commerce of many kinds. It is one thing for competitors or a parent and its subsidiaries to divide the United States domestic market which is an economic and legal unit; it is another for an industry to recognize that foreign markets consist of many legal and economic units and to go after each through separate means. I think this decision will restrain more trade than it will make free.

Syllabus.

HUGHES, ADMINISTRATOR, *v.* FETTER ET AL.

APPEAL FROM THE SUPREME COURT OF WISCONSIN.

No. 355. Argued March 1–2, 1951.—Decided June 4, 1951.

Appellant administrator brought this action in a Wisconsin state court to recover damages for the death of a decedent who was fatally injured in an automobile accident in Illinois. The complaint was based on the Illinois wrongful death statute, and named as defendants the allegedly negligent driver and an insurance company. Appellant, the decedent, and the individual defendant were residents of Wisconsin; appellant had been appointed administrator under Wisconsin laws; and the insurance company was a Wisconsin corporation. The trial court dismissed the complaint, pursuant to a Wisconsin statute which creates a right of action only for deaths caused in that State, and which establishes a local public policy against Wisconsin courts entertaining suits brought under the wrongful death acts of other states. *Held:* The statutory policy of Wisconsin which excludes from its courts this Illinois cause of action is in contravention of the Full Faith and Credit Clause of the Federal Constitution. Pp. 610–614.

(a) The Illinois statute is a "public act" within the meaning of the federal constitutional provision that "Full Faith and Credit shall be given in each State to the public Acts . . . of every other State." P. 611.

(b) Wisconsin cannot escape its constitutional obligation to enforce the rights and duties validly created under the laws of other states by the simple device of removing jurisdiction from courts otherwise competent. P. 611.

(c) Wisconsin's policy against entertaining suits under the wrongful death acts of other states must give way, in the circumstances of this case, to the strong unifying principle embodied in the Full Faith and Credit Clause looking toward maximum enforcement in each state of the obligations or rights created or recognized by the statutes of sister states. Pp. 611–613.

(d) Assuming that the doctrine of *forum non conveniens* might under some circumstances justify a forum state in refusing to accord full faith and credit to acts of sister states, the Wisconsin statutory policy cannot be considered as an application of that doctrine, since this case is not one which lacks a close relationship with Wisconsin. Pp. 612–613.

257 Wis. 35, 42 N. W. 2d 452, reversed.

Appellant's action in a Wisconsin court, to recover damages for a wrongful death arising out of an accident which occurred in Illinois, was dismissed pursuant to the provisions of a Wisconsin statute. The State Supreme Court affirmed. 257 Wis. 35, 42 N. W. 2d 452. On appeal to this Court, *reversed and remanded*, p. 614.

Samuel Goldenberg argued the cause and filed a brief for appellant.

Herbert L. Wible argued the cause for appellees. With him on the brief was *Robert H. Hollander*.

Mr. Justice Black delivered the opinion of the Court.

Basing his complaint on the Illinois wrongful death statute,[1] appellant administrator brought this action in the Wisconsin state court to recover damages for the death of Harold Hughes, who was fatally injured in an automobile accident in Illinois. The allegedly negligent driver and an insurance company were named as defendants. On their motion the trial court entered summary judgment "dismissing the complaint on the merits." It held that a Wisconsin statute, which creates a right of action only for deaths caused in that state, establishes a local public policy against Wisconsin's entertaining suits brought under the wrongful death acts of other states.[2] The Wisconsin Supreme Court affirmed, notwithstanding the contention that the local statute so construed violated the Full Faith and Credit Clause of Art. IV, § 1 of the Constitution.[3] The case is properly here on appeal under 28 U. S. C. § 1257.

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[1] Smith-Hurd's Ill. Ann. Stat., 1936, c. 70, §§ 1, 2.

[2] Wis. Stat., 1949, § 331.03. This section contains language typically found in wrongful death acts but concludes as follows: "provided, that such action shall be brought for a death caused in this state."

[3] 257 Wis. 35, 42 N. W. 2d 452.

We are called upon to decide the narrow question whether Wisconsin, over the objection raised, can close the doors of its courts to the cause of action created by the Illinois wrongful death act.[4] Prior decisions have established that the Illinois statute is a "public act" within the provision of Art. IV, § 1 that "Full Faith and Credit shall be given in each State to the public Acts . . . of every other State."[5] It is also settled that Wisconsin cannot escape this constitutional obligation to enforce the rights and duties validly created under the laws of other states by the simple device of removing jurisdiction from courts otherwise competent.[6] We have recognized, however, that full faith and credit does not automatically compel a forum state to subordinate its own statutory policy to a conflicting public act of another state; rather, it is for this Court to choose in each case between the competing public policies involved.[7] The clash of interests in cases of this type has usually been described as a conflict be-

[4] The parties concede, as they must, that if the same cause of action had previously been reduced to judgment, the Full Faith and Credit Clause would compel the courts of Wisconsin to entertain an action to enforce it. *Kenney* v. *Supreme Lodge,* 252 U. S. 411.

[5] *E. g., Broderick* v. *Rosner,* 294 U. S. 629, 644; *Bradford Elec. Co.* v. *Clapper,* 286 U. S. 145, 154–155; *John Hancock Ins. Co.* v. *Yates,* 299 U. S. 178, 183.

[6] *E. g., Broderick* v. *Rosner,* 294 U. S. 629, 642–643; *Converse* v. *Hamilton,* 224 U. S. 243, 260–261; cf. *Kenney* v. *Supreme Lodge,* 252 U. S. 411, 415; *Angel* v. *Bullington,* 330 U. S. 183, 188. The reliance of the Supreme Court of Wisconsin on *Chambers* v. *Baltimore & O. R. Co.,* 207 U. S. 142, was misplaced. That case does not hold that one state, consistently with Art. IV, § 1, can exclude from its courts causes of action created by another state for, as pointed out in *Broderick* v. *Rosner, supra* at 642, n. 3, in *Chambers* "no claim was made under the full faith and credit clause."

[7] *E. g., Pink* v. *A. A. A. Highway Express,* 314 U. S. 201, 210–211; *Pacific Ins. Co.* v. *Commission,* 306 U. S. 493, 502; *Alaska Packers Assn.* v. *Commission,* 294 U. S. 532, 547.

tween the public policies of two or more states.[8] The more basic conflict involved in the present appeal, however, is as follows: On the one hand is the strong unifying principle embodied in the Full Faith and Credit Clause looking toward maximum enforcement in each state of the obligations or rights created or recognized by the statutes of sister states; [9] on the other hand is the policy of Wisconsin, as interpreted by its highest court, against permitting Wisconsin courts to entertain this wrongful death action.[10]

We hold that Wisconsin's policy must give way. That state has no real feeling of antagonism against wrongful death suits in general.[11] To the contrary, a forum is regularly provided for cases of this nature, the exclusionary rule extending only so far as to bar actions for death not caused locally.[12] The Wisconsin policy, moreover, cannot

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[8] See, *e. g., Alaska Packers Assn.* v. *Commission,* 294 U. S. 532, 547–550.

[9] This clause "altered the status of the several states as independent foreign sovereignties, each free to ignore rights and obligations created under the laws or established by the judicial proceedings of the others, by making each an integral part of a single nation . . . ." *Magnolia Petroleum Co.* v. *Hunt,* 320 U. S. 430, 439. See also *Milwaukee County* v. *White Co.,* 296 U. S. 268, 276–277; *Order of Travelers* v. *Wolfe,* 331 U. S. 586.

[10] The present case is not one where Wisconsin, having entertained appellant's lawsuit, chose to apply its own instead of Illinois' statute to measure the substantive rights involved. This distinguishes the present case from those where we have said that "*Prima facie* every state is entitled to enforce in its own courts its own statutes, lawfully enacted." *Alaska Packers Assn.* v. *Commission,* 294 U. S. 532, 547; see also, *Williams* v. *North Carolina,* 317 U. S. 287, 295–296.

[11] It may well be that the wrongful death acts of Wisconsin and Illinois contain different provisions in regard to such matters as maximum recovery and disposition of the proceeds of suit. Such differences, however, are generally considered unimportant. See cases collected 77 A. L. R. 1311, 1317–1324.

[12] See note 2, *supra.*

be considered as an application of the *forum non conveniens* doctrine, whatever effect that doctrine might be given if its use resulted in denying enforcement to public acts of other states. Even if we assume that Wisconsin could refuse, by reason of particular circumstances, to hear foreign controversies to which nonresidents were parties,[13] the present case is not one lacking a close relationship with the state. For not only were appellant, the decedent and the individual defendant all residents of Wisconsin, but also appellant was appointed administrator and the corporate defendant was created under Wisconsin laws. We also think it relevant, although not crucial here, that Wisconsin may well be the only jurisdiction in which service could be had as an original matter on the insurance company defendant.[14] And while in the present case jurisdiction over the individual defendant apparently could be had in Illinois by substituted service,[15] in other cases Wisconsin's exclusionary statute might amount to a deprivation of all opportunity to enforce valid death claims created by another state.

Under these circumstances, we conclude that Wisconsin's statutory policy which excludes this Illinois cause of action is forbidden by the national policy of the Full Faith and Credit Clause.[16] The judgment is

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[13] See *Broderick* v. *Rosner,* 294 U. S. 629, 643; compare *Anglo-American Provision Co.* v. *Davis Co.,* 191 U. S. 373, with *Kenney* v. *Supreme Lodge,* 252 U. S. 411.

[14] Cf. *Tennessee Coal Co.* v. *George,* 233 U. S. 354, 359–360.

[15] Smith-Hurd's Ill. Ann. Stat., 1950, c. 95½, § 23.

[16] In certain previous cases, *e. g., Pacific Ins. Co.* v. *Commission,* 306 U. S. 493, 502; *Alaska Packers Assn.* v. *Commission,* 294 U. S. 532, 547, this Court suggested that under the Full Faith and Credit Clause a forum state might make a distinction between statutes and judgments of sister states because of Congress' failure to prescribe the extra-state effect to be accorded public acts. Subsequent to these decisions the Judicial Code was revised so as to provide: "*Such Acts*

reversed and the cause is remanded to the Supreme Court of Wisconsin for proceedings not inconsistent with this opinion.

Reversed and remanded.

MR. JUSTICE FRANKFURTER, whom MR. JUSTICE REED, MR. JUSTICE JACKSON, and MR. JUSTICE MINTON join, dissenting.

This is an action brought in the Wisconsin State courts to recover for the wrongful death of Harold G. Hughes. Hughes was killed in an automobile accident in Illinois. An Illinois statute provides that an action may be brought to recover damages for a wrongful death occurring in that State. Smith-Hurd's Ill. Ann. Stat., 1936, c. 70, §§ 1, 2. A Wisconsin statute provides that an action may not be brought in the courts of that State for a wrongful death occurring outside Wisconsin. Wis. Stat., 1949, § 331.03. The Wisconsin courts, obeying the command of the Wisconsin statute, dismissed the action. I cannot agree that the Wisconsin statute, so applied, is contrary to Art. IV, § 1 of the United States Constitution: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."

The Full Faith and Credit Clause was derived from a similar provision in the Articles of Confederation. Art. 4, § 3. The only clue to its meaning in the available records of the Constitutional Convention is a notation

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[of the legislature of any state] . . . and judicial proceedings . . . shall have the same full faith and credit in every court within the United States . . . as they have . . . in the courts of such State . . . from which they are taken." (Italics added.) 28 U. S. C. (1946 ed., Supp. III) § 1738. In deciding the present appeal, however, we have found it unnecessary to rely on any changes accomplished by the Judicial Code revision.

in Madison's Debates that "Mr. Wilson & Docr. Johnson [who became members of the committee to which the provision was referred] supposed the meaning to be that Judgments in one State should be the ground of actions in other States, & that acts of the Legislatures should be included, for the sake of Acts of insolvency &c—." II Farrand, The Records of the Federal Convention, 447. This Court has, with good reason, gone far in requiring that the courts of a State respect judgments entered by courts of other States. *Fauntleroy* v. *Lum,* 210 U. S. 230; *Kenney* v. *Supreme Lodge,* 252 U. S. 411; *Milwaukee County* v. *M. E. White Co.,* 296 U. S. 268; cf. *Magnolia Petroleum Co.* v. *Hunt,* 320 U. S. 430. But the extent to which a State must recognize and enforce the rights of action created by other States is not so clear.

1. In the field of commercial law—where certainty is of high importance—we have often imposed a rather rigid rule that a State must defer to the law of the State of incorporation, or to the law of the place of contract. Thus, in *Broderick* v. *Rosner,* 294 U. S. 629, we held that New Jersey could not close its courts to suits which involved stockholder liability arising under the laws of New York. We had already said, in *Converse* v. *Hamilton,* 224 U. S. 243, 260, that such liability was "peculiarly within the regulatory power" of the State of incorporation; "so much so that no other State properly can be said to have any public policy thereon." In *John Hancock Insurance Co.* v. *Yates,* 299 U. S. 178, we held that the Georgia courts had to give full faith and credit to a New York parole evidence statute which prevented recovery on an insurance contract made in New York. In both these cases, the Court, speaking through Mr. Justice Brandeis, emphasized that it was the particular relationship involved which made the Full Faith and Credit Clause applicable.

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In *Pink* v. *A. A. A. Highway Express,* 314 U. S. 201, the Court found that the Full Faith and Credit Clause did not require the courts of the forum to enforce, against local policyholders, assessments valid under the laws of the state of incorporation of a mutual insurance company. In *Griffin* v. *McCoach,* 313 U. S. 498, we decided that the forum may decline to enforce an insurance policy in favor of beneficiaries who have no insurable interest under local law. *Order of Travelers* v. *Wolfe,* 331 U. S. 586, seems to have made it clear, however, that these decisions did not represent a radical departure from the earlier cases. We held in the *Wolfe* case that the forum was required to give full faith and credit to a law of the state of incorporation allowing a fraternal benefit society to limit the duration of its liability. It is not merely a bit of rhetoric to caution against imposing on the courts of the forum a "state of vassalage." *Hawkins* v. *Barney's Lessee,* 5 Pet. 457, 467, quoted in *Order of Travelers* v. *Wolfe, supra,* at 627 (dissenting opinion). But this consideration of autonomy is not sufficient to overcome the advantages to be obtained from a degree of certainty in corporate and commercial law.

2. In cases involving workmen's compensation, there is also a pre-existing relationship between the employer and employee that makes certainty of result desirable. The possible interest of the forum in protecting the workman, however, has made this Court reluctant to impose rigid rules. In *Bradford Electric Co.* v. *Clapper,* 286 U. S. 145, suit was brought in New Hampshire to recover for the wrongful death of an employee occurring in New Hampshire. We held, in an opinion by Mr. Justice Brandeis, that the court sitting in New Hampshire would have to dismiss the action because workmen's compensation was an exclusive remedy under the laws of Vermont, where the contract of employment was made, where the employment was usually carried on, and where both the employer

and the employee were domiciled. Mr. Justice Stone concurred on the ground that the New Hampshire courts would apply the Vermont law on principles of comity. He thought the Full Faith and Credit Clause "should be interpreted as leaving the courts of New Hampshire free, in the circumstances now presented, either to apply or refuse to apply the law of Vermont, in accordance with their own interpretation of New Hampshire policy and law." 286 U. S. at 164–165.

In *Alaska Packers Assn.* v. *Commission,* 294 U. S. 532, we held that California—where the contract of employment was entered into—was free to apply the terms of its own workmen's compensation statute to an employee injured in Alaska, although an Alaska statute purported to give an exclusive remedy to persons injured there. In *Pacific Insurance Co.* v. *Commission,* 306 U. S. 493, we held that the California courts need not give full faith and credit to the exclusive remedy provisions of the Massachusetts Workmen's compensation statute, although Massachusetts was the place of contract and the usual place of employment.

Mr. Justice Stone, who wrote the opinions in the latter two cases, specifically limited the *Clapper* decision: "The *Clapper* case cannot be said to have decided more than that a state statute applicable to employer and employee within the state, which by its terms provides compensation for the employee if he is injured in the course of his employment while temporarily in another state, will be given full faith and credit in the latter when not obnoxious to its policy." 306 U. S. at 504.

3. In the tort action before us, there is little reason to impose a "state of vassalage" on the forum. The liability here imposed does not rest on a pre-existing relationship between the plaintiff and defendant. There is consequently no need for fixed rules which would enable parties,

at the time they enter into a transaction, to predict its consequences.

The Court, in the *Clapper* case, stressed that New Hampshire had opened its courts to the action, but had refused to recognize a substantive defense. Indeed, the Court indicated that a State may be free to close its courts to suits based on the tort liability created by the statutes of other States: "It is true that the full faith and credit clause does not require the enforcement of every right conferred by a statute of another State. There is room for some play of conflicting policies. Thus, a plaintiff suing in New Hampshire on a statutory cause of action arising in Vermont might be denied relief because the forum fails to provide a court with jurisdiction of the controversy; see *Chambers* v. *Baltimore & Ohio R. Co.*, 207 U. S. 142, 148, 149; compare *Douglas* v. *New York, N. H. & H. R. Co.*, 279 U. S. 377 . . . . A State may, on occasion, decline to enforce a foreign cause of action. In so doing, it merely denies a remedy, leaving unimpaired the plaintiff's substantive right, so that he is free to enforce it elsewhere." 286 U. S. at 160.

This Court should certainly not require that the forum deny its own law and follow the tort law of another State where there is a reasonable basis for the forum to close its courts to the foreign cause of action. The decision of Wisconsin to open its courts to actions for wrongful deaths within the State but close them to actions for deaths outside the State may not satisfy everyone's notion of wise policy. See *Loucks* v. *Standard Oil Co.*, 224 N. Y. 99, 120 N. E. 198 (1918). But it is neither novel nor without reason. Compare the similar Illinois statute which was before this Court in *Kenney* v. *Supreme Lodge, supra.* Wisconsin may be willing to grant a right of action where witnesses will be available in Wisconsin and the courts are acquainted with a detailed local statute and cases construing it. It may not wish to subject residents to

suit where out-of-state witnesses will be difficult to bring before the court, and where the court will be faced with the alternative of applying a complex foreign statute—perhaps inconsistent with that of Wisconsin on important issues—or fitting the statute to the Wisconsin pattern. The legislature may well feel that it is better to allow the courts of the State where the accident occurred to construe and apply its own statute, and that the exceptional case where the defendant cannot be served in the State where the accident occurred does not warrant a general statute allowing suit in the Wisconsin courts. The various wrongful death statutes are inconsistent on such issues as beneficiaries, the party who may bring suit, limitations on liability, comparative negligence, and the measure of damages. See Report of the Special Commission to Study the Method of Assessing Damages in Actions for Death (Mass. Sen. No. 430, Dec. 31, 1942) 21 *et seq.;* Note, 1950 Wis. L. Rev. 354, 360, 363. The measure of damages and the relation of wrongful death actions to actions for injury surviving death have raised extremely complicated problems, even for a court applying the familiar statute of its own State. See Note, 91 U. of Pa. L. Rev. 68 (1942); Oppenheim, The Survival of Tort Actions and the Action for Wrongful Death—A Survey and a Proposal, 16 Tulane L. Rev. 386 (1942). These diversities reasonably suggest application by local judges versed in them. Compare *Burford* v. *Sun Oil Co.,* 319 U. S. 315; *Alabama Public Service Comm'n* v. *Southern R. Co.,* 341 U. S. 341.

No claim is made that Wisconsin has discriminated against the citizens of other States and thus violated Art. IV, § 2 of the Constitution. Compare *Douglas* v. *New York, N. H. & H. R. Co.,* 279 U. S. 377. Nor is a claim made that the lack of a forum in Wisconsin deprives the plaintiff of due process. Compare *Brinkerhoff-Faris Co.* v. *Hill,* 281 U. S. 673; *Missouri* v. *Lewis,* 101 U. S. 22, 30.

Nor is it argued that Wisconsin is flouting a federal statute. Compare *Atlantic Coast Line R. Co.* v. *Burnette,* 239 U. S. 199, 201. The only question before us is how far the Full Faith and Credit Clause undercuts the purpose of the Constitution, made explicit by the Tenth Amendment, to leave the conduct of domestic affairs to the States. Few interests are of more dominant local concern than matters governing the administration of law. This vital interest of the States should not be sacrificed in the interest of a merely literal reading of the Full Faith and Credit Clause.

There is no support, either in reason or in the cases, for holding that this Court is to make a *de novo* choice between the policies underlying the laws of Wisconsin and Illinois. I cannot believe that the Full Faith and Credit Clause provided a "writer's inkhorn" so that this Court might separate right from wrong. *"Prima facie* every state is entitled to enforce in its own courts its own statutes, lawfully enacted. One who challenges that right, because of the force given to a conflicting statute of another state by the full faith and credit clause, assumes the burden of showing, upon some rational basis, that of the conflicting interests involved those of the foreign state are superior to those of the forum." Mr. Justice Stone, in *Alaska Packers Assn.* v. *Commission, supra,* at 547–548. In the present case, the decedent, the plaintiff, and the individual defendant were residents of Wisconsin. The corporate defendant was created under Wisconsin law. The suit was brought in the Wisconsin courts. No reason is apparent—and none is vouchsafed in the opinion of the Court—why the interest of Illinois is so great that it can force the courts of Wisconsin to grant relief in defiance of their own law.

Finally, it may be noted that there is no conflict here in the policies underlying the statute of Wisconsin and that of Illinois. The Illinois wrongful death statute has a proviso that "no action shall be brought or prosecuted

in this State to recover damages for a death occurring outside of this State where a right of action for such death exists under the laws of the place where such death occurred and service of process in such suit may be had upon the defendant in such place." Smith-Hurd's Ill. Ann. Stat., 1936, c. 70, § 2. The opinion of the Court concedes that "jurisdiction over the individual defendant apparently could be had in Illinois by substituted service." Smith-Hurd's Ill. Ann. Stat., 1950, c. 95½, § 23. Thus, in the converse of the case at bar—if Hughes had been killed in Wisconsin and suit had been brought in Illinois—the Illinois courts would apparently have dismissed the suit. There is no need to be "more Roman than the Romans."*

*Compare Freund, Chief Justice Stone and the Conflict of Laws, 59 Harv. L. Rev. 1210, 1220 (1946).

BREARD *v.* ALEXANDRIA.

APPEAL FROM THE SUPREME COURT OF LOUISIANA.

No. 399. Argued March 7–8, 1951.—Decided June 4, 1951.

A so-called "Green River ordinance" of a municipality forbids the practice of going in and upon private residences for the purpose of soliciting orders for the sale of goods, without prior consent of the owners or occupants. Appellant, representing a foreign corporation, was engaged in door-to-door soliciting of subscriptions for nationally known magazines and periodicals. Subscriptions were acknowledged by a card sent from the home office of the corporation and the publications were delivered by the publishers in interstate commerce through the mails. Appellant was convicted of a violation of the ordinance solely because he had not obtained the prior consent of the owners or occupants of the residences he solicited. *Held:*

1. The ordinance is not invalid under the Due Process Clause of the Fourteenth Amendment. Pp. 629–633.

(a) The ordinance can be characterized as prohibitory of appellant's legitimate business of obtaining subscriptions to periodicals only in the limited sense of subscriptions by house-to-house canvass without invitation. It leaves open the usual methods of solicitation—by radio, periodicals, mail and local agencies. Pp. 631–632.

(b) The Constitution's protection of property rights does not render a state or city impotent to guard its citizens against the annoyances of life because the regulation may restrict the manner of doing a legitimate business. Pp. 632–633.

2. The ordinance does not so burden or impede interstate commerce as to violate the Commerce Clause of the Federal Constitution. Pp. 633–641.

(a) The ordinance does not discriminate against interstate business and is a valid local regulation of solicitation. *Hood & Sons* v. *Du Mond*, 336 U. S. 525, and *Dean Milk Co.* v. *Madison*, 340 U. S. 349, distinguished. Pp. 633–641.

(b) Appellant, as a publishers' representative or in his own right as a door-to-door canvasser, is no more free to violate local regulations to protect privacy than are other solicitors. Pp. 637–641.

(c) When there is a reasonable basis for legislation to protect the social, as distinguished from the economic, welfare of a community, it is not for this Court because of the Commerce Clause to deny the exercise locally of the sovereign power of the state. Pp. 640–641.

3. The ordinance does not abridge the freedom of speech and press guaranteed by the First and Fourteenth Amendments. Pp. 641–645.

(a) The fact that periodicals are sold does not put them beyond the protection of the First Amendment. Pp. 641–642.

(b) The constitutional guaranties of free speech and free press are not absolutes. P. 642.

(c) *Martin* v. *Struthers,* 319 U. S. 141; *Marsh* v. *Alabama,* 326 U. S. 501; and *Tucker* v. *Texas,* 326 U. S. 517, distinguished. Pp. 642–644.

(d) It would be a misuse of the great guaranties of free speech and free press to use them to force a community to admit the solicitors of publications to the home premises of its residents. P. 645.

217 La. 820, 47 So. 2d 553, affirmed.

Appellant's conviction of a violation of a municipal ordinance, challenged as violative of his rights under the Federal Constitution, was affirmed by the State Supreme Court. 217 La. 820, 47 So. 2d 553. On appeal to this Court, *affirmed,* p. 645.

E. Russell Shockley argued the cause for appellant. With him on the brief was *J. Harry Wagner, Jr.*

Frank H. Peterman argued the cause and filed a brief for appellee.

Briefs of *amici curiae* supporting appellant were filed by *Robert E. Coulson* and *Forbes D. Shaw* for the National Association of Magazine Publishers, Inc.; *Clark M. Clifford* for the P. F. Collier & Son Corporation et al.; and *J. M. George* for the National Association of Direct Selling Companies.

MR. JUSTICE REED delivered the opinion of the Court.

The appellant here, Jack H. Breard, a regional representative of Keystone Readers Service, Inc., a Pennsylvania corporation, was arrested while going from door to door in the City of Alexandria, Louisiana, soliciting subscriptions for nationally known magazines. The arrest was solely on the ground that he had violated an ordinance because he had not obtained the prior consent of the owners of the residences solicited. Breard, a resident of Texas, was in charge of a crew of solicitors who go from house to house in the various cities and towns in the area under Breard's management and solicit subscriptions for nationally known magazines and periodicals, including among others the Saturday Evening Post, Ladies' Home Journal, Country Gentleman, Holiday, Newsweek, American Home, Cosmopolitan, Esquire, Pic, Parents, Today's Woman and True. These solicitors spend only a few days in each city, depending upon its size. Keystone sends a card from its home office to the new subscribers acknowledging receipt of the subscription and thereafter the periodical is forwarded to the subscriber by the publisher in interstate commerce through the mails.

The ordinance under which the arrest was made, so far as is here pertinent, reads as follows:

> "Section 1. Be it Ordained by the Council of the City of Alexandria, Louisiana, in legal session convened that the practice of going in and upon private residences in the City of Alexandria, Louisiana by solicitors, peddlers, hawkers, itinerant merchants or transient vendors of merchandise not having been requested or invited so to do by the owner or owners, occupant or occupants of said private residences for the purpose of soliciting orders for the sale of goods, wares and merchandise and/or disposing of and/or

> peddling or hawking the same is declared to be a nuisance and punishable as such nuisance as a misdemeanor."

It, or one of similar import, has been on the statute books of Alexandria for many years. It is stipulated that:

> "Such ordinance was enacted by the City Council, among other reasons, because some householders complained to those in authority that in some instances, for one reason or another, solicitors were undesirable or discourteous, and some householders complained that, whether a solicitor was courteous or not, they did not desire any uninvited intrusion into the privacy of their home."

The protective purposes of the ordinance were underscored by the Supreme Court of Louisiana in its opinion. 217 La. 820, at 825–828, 47 So. 2d 553, at 555.

At appellant's trial for violation of the ordinance, there was a motion to quash on the ground that the ordinance violates the Due Process Clause of the Fourteenth Amendment to the Federal Constitution; that it violates the Federal Commerce Clause; and that it violates the guarantees of the First Amendment of freedom of speech and of the press, made applicable to the states by the Fourteenth Amendment to the Constitution of the United States. Appellant's motion to quash was overruled by the trial court and he was found guilty and sentenced to pay a $25 fine or serve 30 days in jail. The Supreme Court of Louisiana affirmed appellant's conviction and expressly rejected the federal constitutional objections. 217 La. 820, 47 So. 2d 553. The case is here on appeal, 28 U. S. C. § 1257; *Jamison* v. *Texas,* 318 U. S. 413.

All declare for liberty and proceed to disagree among themselves as to its true meaning. There is equal unanimity that opportunists, for private gain, cannot be per-

mitted to arm themselves with an acceptable principle, such as that of a right to work, a privilege to engage in interstate commerce, or a free press, and proceed to use it as an iron standard to smooth their path by crushing the living rights of others to privacy and repose. This case calls for an adjustment of constitutional rights in the light of the particular living conditions of the time and place. Everyone cannot have his own way and each must yield something to the reasonable satisfaction of the needs of all.

It is true that the knocker on the front door is treated as an invitation or license to attempt an entry, justifying ingress to the home by solicitors, hawkers and peddlers for all kinds of salable articles.[1] When such visitors are barred from premises by notice or order, however, subsequent trespasses have been punished.[2] Door-to-door canvassing has flourished increasingly in recent years with the ready market furnished by the rapid concentration of housing. The infrequent and still welcome solicitor to the rural home became to some a recurring nuisance in towns when the visits were multiplied.[3] Unwanted

[1] Restatement, Torts, § 167; Cooley on Torts (4th ed.) § 248.

[2] *Hall* v. *Commonwealth*, 188 Va. 72, 49 S. E. 2d 369, appeal dismissed, 335 U. S. 875; statutes collected, *Martin* v. *Struthers*, 319 U. S. 141, 147, n. 10.

[3] "We must assume that the practice existed in the town as the first section states, and that it had become annoying and disturbing and objectionable to at least some of the citizens. We think like practices have become so general and common as to be of judicial knowledge, and that the frequent ringing of doorbells of private residences by itinerant vendors and solicitors is in fact a nuisance to the occupants of homes. It is not appellee and its solicitors and their methods alone that must be considered in determining the reasonableness of the ordinance, but many others as well who seek in the same way to dispose of their wares. One follows another until the ringing doorbells disturb the quietude of the home and become a constant annoyance." *Town of Green River* v. *Fuller Brush Co.*, 65 F. 2d 112, 114.

knocks on the door by day or night are a nuisance, or worse, to peace and quiet. The local retail merchant, too, has not been unmindful of the effective competition furnished by house-to-house selling in many lines. As a matter of business fairness, it may be thought not really sporting to corner the quarry in his home and through his open door put pressure on the prospect to purchase. As the exigencies of trade are not ordinarily expected to have a higher rating constitutionally than the tranquillity of the fireside, responsible municipal officers have sought a way to curb the annoyances while preserving complete freedom for desirable visitors to the homes. The idea of barring classified salesmen from homes by means of notices posted by individual householders was rejected early as less practical than an ordinance regulating solicitors.[4]

The Town of Green River, Wyoming, undertook in 1931 to remedy by ordinance the irritating incidents of house-to-house canvassing for sales. The substance of that ordinance, so far as here material, is the same as that of Alexandria, Louisiana.[5] The Green River ordinance was sustained by the Circuit Court of Appeals of the Tenth Circuit in 1933 against an attack by a nonresident corporation, a solicitor of orders, through a bill for an injunction to prohibit its enforcement, on the federal constitutional grounds of interference with interstate commerce, deprivation of property without due process of law, and denial of the equal protection of the laws. *Town*

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[4] *Town of Green River* v. *Bunger,* 50 Wyo. 52, 70, 58 P. 2d 456, 462; cf. *Real Silk Hosiery Mills* v. *City of Richmond,* 298 F. 126.

[5] The ordinance now under consideration, § 3, does not apply to "the sale, or soliciting of orders for the sale, of milk, dairy products, vegetables, poultry, eggs and other farm and garden produce . . . ." Appellant makes no point against the present ordinance on the ground of invalid classification. Cf. *Tigner* v. *Texas,* 310 U. S. 141; *Williams* v. *Arkansas,* 217 U. S. 79, 90.

of Green River v. *Fuller Brush Co.*, 65 F. 2d 112. No review of that decision was sought. An employee of the Brush Company challenged the same ordinance again in the courts of Wyoming in 1936 on a prosecution by the town for the misdemeanor of violating its terms. On this attack certain purely state grounds were relied upon, which we need not notice, and the charges of violation of the Federal Constitution were repeated. The ordinance was held valid by the Supreme Court of Wyoming. *Town of Green River* v. *Bunger*, 50 Wyo. 52, 58 P. 2d 456.[6]

[6] The validity of Green River ordinances has also been considered in a number of state courts. Five states—Colorado, Louisiana (in cases previous to the instant one), New Mexico, New York, and Wyoming—have upheld the ordinance, against objections that it was beyond the scope of the police power, deprived vendors of property rights without due process of law, deprived them of the equal protection of the laws, and infringed upon the Commerce Clause and the First and Fourteenth Amendments. *McCormick* v. *City of Montrose*, 105 Colo. 493, 99 P. 2d 969; *Shreveport* v. *Cunningham*, 190 La. 481, 182 So. 649; *Alexandria* v. *Jones*, 216 La. 923, 45 So. 2d 79; *Green* v. *Gallup*, 46 N. M. 71, 120 P. 2d 619; *People* v. *Bohnke*, 287 N. Y. 154, 38 N. E. 2d 478; *Green River* v. *Bunger*, 50 Wyo. 52, 58 P. 2d 456.

Eleven states, on the other hand, have held such ordinances invalid. All of these states acted in part at least on nonfederal grounds, and the only federal constitutional argument, which was considered by three states, was that based on the Due Process Clause. No state court, in voiding the ordinance, has reached the Commerce Clause or the First Amendment issues urged here. The principal grounds relied on have been that the prohibited conduct amounted at most only to a private nuisance and not a public one; that there was no showing of injury to public health or safety by the prohibited conduct; that there was a vested right in a lawful occupation, so that it was subject only to regulation but not to prohibition; and that the ordinance was beyond the delegated powers of the municipality. *Prior* v. *White*, 132 Fla. 1, 180 So. 347 (not more than a private nuisance); *Clay* v. *Mathews*, 185 Ga. 279, 194 S. E. 172 (affirming without opinion by an evenly divided court); *DeBerry* v. *LaGrange*, 62 Ga. App. 74, 8 S. E. 2d 146 (not a nuisance; invades an inalienable right to the occupation of soliciting); *Osceola* v. *Blair*, 231 Iowa 770, 2 N. W. 2d 83 (not a nuisance, deprives persons of a property right in

Due Process.—On appeal to this Court, appellant urged particularly the unconstitutionality under the Fourteenth Amendment Due Process Clause of such unreasonable restraints as the Green River ordinance placed on "the right to engage in one of the common occupations of life," citing, *inter alia, New State Ice Co.* v. *Liebmann,* 285 U. S. 262, 278, and *Adams* v. *Tanner,* 244 U. S. 590. He also relied upon the alleged prohibition of interstate commerce under the guise of a police regulation.[7]

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their occupation); *Mt. Sterling* v. *Donaldson Baking Co.,* 287 Ky. 781, 155 S. W. 2d 237 (not a public nuisance, beyond the scope of the municipal police power); *Jewel Tea Co.* v. *Bel Air,* 172 Md. 536, 192 A. 417 (not a nuisance, not within delegated powers of municipality); *Jewel Tea Co.* v. *Geneva,* 137 Neb. 768, 291 N. W. 664 (not a public nuisance, arbitrary, violates Due Process Clause, citing *Jay Burns Baking Co.* v. *Bryan,* 264 U. S. 504); *N. J. Good Humor, Inc.* v. *Board of Commissioners,* 124 N. J. L. 162, 11 A. 2d 113 (not a valid police regulation, beyond powers of municipality); *McAlester* v. *Grand Union Tea Co.,* 186 Okla. 487, 98 P. 2d 924 (only a private nuisance); *Orangeburg* v. *Farmer,* 181 S. C. 143, 186 S. E. 783 (unreasonable, prohibits a lawful occupation, in violation of state and federal due process, enacted with improper motive); *Ex parte Faulkner,* 143 Tex. Cr. R. 272, 158 S. W. 2d 525 (beyond the powers of the municipality); *White* v. *Culpeper,* 172 Va. 630, 1 S. E. 2d 269 (not a public nuisance).

The ordinances in the *Bel Air* and *Culpeper* cases contained discriminatory provisions not involved in the instant case. It should be noted also that while New York upheld the ordinance in *Bohnke, supra,* as applied to distribution of religious tracts, that case was decided before this Court's decision in *Martin* v. *Struthers,* 319 U. S. 141. Enforcement of Green River ordinances has subsequently been enjoined as against members of the Jehovah's Witnesses sect, in *Donley* v. *Colorado Springs,* 40 F. Supp. 15, and *Zimmerman* v. *London* (Ohio), 38 F. Supp. 582.

[7] He cited: *Real Silk Hosiery Mills* v. *Portland,* 268 U. S. 325; *Di Santo* v. *Pennsylvania,* 273 U. S. 34; *International Textbook Co.* v. *Pigg,* 217 U. S. 91; *Rogers* v. *Arkansas,* 227 U. S. 401; *Robbins* v. *Shelby Taxing District,* 120 U. S. 489; *Baldwin* v. *Seelig, Inc.,* 294 U. S. 511; *Stewart* v. *Michigan,* 232 U. S. 665.

Here this Court dismissed for want of a substantial federal question. 300 U. S. 638. For an answer to the argument that the ordinance denied due process because of its unreasonable restraint on the right to engage in a legitimate occupation, this Court cited three cases: *Gundling* v. *Chicago,* 177 U. S. 183;[8] *Western Turf Association* v. *Greenberg,* 204 U. S. 359;[9] and *Williams* v. *Arkansas,* 217 U. S. 79.[10]

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[8] An ordinance forbidding the sale of cigarettes without a license was upheld.

"Regulations respecting the pursuit of a lawful trade or business are of very frequent occurrence in the various cities of the country, and what such regulations shall be and to what particular trade, business or occupation they shall apply, are questions for the State to determine, and their determination comes within the proper exercise of the police power by the State, and unless the regulations are so utterly unreasonable and extravagant in their nature and purpose that the property and personal rights of the citizen are unnecessarily, and in a manner wholly arbitrary, interfered with or destroyed without due process of law, they do not extend beyond the power of the State to pass, and they form no subject for Federal interference." 177 U. S. at 188.

[9] A statute making it unlawful to refuse a purchaser of a ticket admission to a place of public entertainment except in certain circumstances relating to drunkenness and vice, was upheld.

"Does the statute deprive the defendant of any property right without due process of law? We answer this question in the negative. Decisions of this court, familiar to all, and which need not be cited, recognize the possession, by each State, of powers never surrendered to the General Government; which powers the State, except as restrained by its own constitution or the Constitution of the United States, may exert not only for the public health, the public morals and the public safety, but for the general or common good, for the well-being, comfort and good order of the people." 204 U. S. at 363.

"Such a regulation, in itself just, is likewise promotive of peace and good order among those who attend places of public entertainment or amusement." *Id.* at 364.

[10] The following sections of a statute of Arkansas were upheld:

" 'SEC. 1. That it shall be unlawful for any person or persons, except as hereinafter provided in section 2 of this act, to drum or solicit

The opinions of this Court since this *Green River* case have not given any ground to argue that the police power of a state over soliciting has constitutional infirmities under the due process principle embodied in the concept of freedom to carry on an inoffensive trade or business. Decisions such as *Liebmann* and *Tanner, supra,* invalidating legislative action, are hardly in point here. The former required a certificate of convenience and necessity to manufacture ice, and the latter prohibited employment agencies from receiving remuneration for their services. The Green River ordinance can be characterized as prohibitory of appellant's legitimate business of obtaining subscriptions to periodicals only in the limited sense of forbidding solicitation of subscriptions by house-to-house canvass without invitation. All regulatory legislation is prohibitory in that sense. The usual methods of solici-

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business or patronage for any hotel, lodging house, eating house, bath house, physician, masseur, surgeon, or other medical practitioner, on the train, cars, or depots of any railroad or common carrier operating or running within the State of Arkansas.

. . . . . .

" 'SEC. 2. That it shall be unlawful for any railroad or common carrier operating a line within the State of Arkansas knowingly to permit its trains, cars or depots within the State to be used by any person or persons for drumming or soliciting business or patronage for any hotel, lodging house, eating house, bath house, physician, masseur, surgeon, or other medical practitioner, or drumming or soliciting for any business or profession whatsoever; . . . .' " 217 U. S. 86.

This Court quoted the Supreme Court of Arkansas as saying:

" 'Drummers who swarm through the trains soliciting for physicians, bath houses, hotels, etc., make existence a burden to those who are subjected to their repeated solicitations. It is true that the traveler may turn a deaf ear to these importunities, but this does not render it any the less unpleasant and annoying. The drummer may keep within the law against disorderly conduct, and still render himself a source of annoyance to travelers by his much beseeching to be allowed to lead the way to a doctor or a hotel.' " *Id.* 89.

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tation—radio, periodicals, mail, local agencies—are open.[11] Furthermore, neither case is in as strong a position today as it was when Bunger appealed. See *Olsen* v. *Nebraska*, 313 U. S. 236, 243 *et seq.*, and *Lincoln Union* v. *Northwestern Co.*, 335 U. S. 525, 535.

The Constitution's protection of property rights does not make a state or a city impotent to guard its citizens against the annoyances of life because the regulation may restrict the manner of doing a legitimate business.[12] The question of a man's right to carry on with propriety a standard method of selling is presented here in its most appealing form—an assertion by a door-to-door solicitor that the Due Process Clause of the Fourteenth Amendment does not permit a state or its subdivisions to deprive a specialist in door-to-door selling of his means of livelihood. But putting aside the argument that after all it is the commerce, *i. e.*, sales of periodicals, and not the methods, that is petitioner's business, we think that even a legitimate occupation may be restricted

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[11] But cf. Jensen, Burdening Interstate Direct Selling, 12 Rocky Mt. L. Rev. 257, 275: "To disclaim this economic effect of upholding the ordinance and to suggest other methods of merchandising to direct-selling businesses short of local retailing, as was done by the Tenth Circuit Court of Appeals [65 F. 2d 112], shows a woeful lack of knowledge of the actual problems of direct-to-consumer merchandising."

[12] *Nebbia* v. *New York*, 291 U. S. 502, 523:

"Under our form of government the use of property and the making of contracts are normally matters of private and not of public concern. The general rule is that both shall be free of governmental interference. But neither property rights nor contract rights are absolute; for government cannot exist if the citizen may at will use his property to the detriment of his fellows, or exercise his freedom of contract to work them harm. Equally fundamental with the private right is that of the public to regulate it in the common interest." *Railway Express Agency* v. *New York*, 336 U. S. 106; *Daniel* v. *Family Security Life Ins. Co.*, 336 U. S. 220.

or prohibited in the public interest. See the dissent in *New State Ice Co.* v. *Liebmann,* 285 U. S. 262, 280, 303. The problem is legislative where there are reasonable bases for legislative action.[13] We hold that this ordinance is not invalid under the Due Process Clause of the Fourteenth Amendment.

Commerce Clause.—Nor did this Court in *Bunger* consider the Green River ordinance invalid under the Commerce Clause as an unreasonable burden upon or an interference with interstate commerce.[14] As against the cases cited in Bunger's behalf, this Court relied upon *Asbell* v. *Kansas,* 209 U. S. 251, 254, 255 (allowing Kansas to have its own inspection for cattle imported into the state, except for immediate slaughter); *Savage* v. *Jones,* 225 U. S. 501, 525 (allowing a state to regulate the sale and require a formula for stock feeds); *Hartford Indemnity Co.* v. *Illinois,* 298 U. S. 155, 158 (upholding an Illinois statute requiring commission merchants to keep record of out-of-state consignments and obtain a license and give a bond).[15]

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[13] *Arizona* v. *California,* 283 U. S. 423, 454–455; *Henneford* v. *Silas Mason Co.,* 300 U. S. 577, 586.

[14] Constitution, Art. I, § 8.

[15] The cases cited for Bunger may be easily distinguished. The cases of the Shelby County Taxing District, *Rogers* v. *Arkansas,* 227 U. S. 401, and *Stewart* v. *Michigan,* 232 U. S. 665, relate to taxes upon or licenses to do an interstate business. The same is true of *Real Silk Hosiery Mills* v. *Portland,* 268 U. S. 325. There is, however, in this latter case a statement that should be noticed: "Nor can we accept the theory that an expressed purpose to prevent possible frauds is enough to justify legislation which really interferes with the free flow of legitimate interstate commerce. See *Shafer* v. *Farmers Grain Co.,* 268 U. S. 189." P. 336. That should be read as a comment on an ordinance requiring a license and a bond to carry on interstate business. Cf. *Parker* v. *Brown,* 317 U. S. 341, 361.

The statute held invalid in the *International Textbook* case, 217 U. S. 91, was one construed to require a license to transact interstate

Appellant does not, of course, argue that the Commerce Clause forbids all local regulation of solicitation for interstate business.

> "Under our constitutional system, there necessarily remains to the States, until Congress acts, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction although interstate commerce may be affected. . . . States are thus enabled to deal with local exigencies and to exert in the absence of conflict with federal legislation an essential protective power." [16]

Such state power has long been recognized.[17] Appellant argues that the ordinance violates the Commerce Clause "because the practical operation of the ordinance, as applied to appellant and others similarly situated, imposes

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business. *Baldwin* v. *Seelig*, 294 U. S. 511, held invalid a state law prohibiting the sale of milk imported from another state unless the price paid in the selling state reached the minimum price requirement of sellers in the regulating state. The *Di Santo* case, 273 U. S. 34, holding invalid as a direct burden on commerce a state law requiring steamship agents to procure a license, can no longer be cited as authority for such a ruling. *California* v. *Thompson*, 313 U. S. 109, 115.

None of these cases reach the problem here under consideration of local regulation of solicitor's conduct.

[16] *Kelly* v. *Washington*, 302 U. S. 1, 9–10.

[17] *Cooley* v. *Board of Wardens*, 12 How. 299; *Emert* v. *Missouri*, 156 U. S. 296; *Austin* v. *Tennessee*, 179 U. S. 343; *Minnesota Rate Cases*, 230 U. S. 352, 402, 408; *South Carolina Dept.* v. *Barnwell Bros.*, 303 U. S. 177, 187; *California* v. *Thompson*, 313 U. S. 109; *Parker* v. *Brown*, 317 U. S. 341, 359, 362; *Toomer* v. *Witsell*, 334 U. S. 385, 394; *Panhandle Eastern Pipe Line Co.* v. *Michigan Pub. Serv. Comm'n*, 341 U. S. 329.

"As has been so often stated but nevertheless seems to require constant repetition, not all burdens upon commerce, but only undue or discriminatory ones, are forbidden. For, though 'interstate business must pay its way,' a State consistently with the commerce clause cannot put a barrier around its borders to bar out trade from other

an undue and discriminatory burden upon interstate commerce and in effect is tantamount to a prohibition of such commerce." The attempt to secure the householder's consent is said to be too costly and the results negligible. The extent of this interstate business, as stipulated, is large.[18] Appellant asserts that *Green River* v. *Bunger, supra,* is inapplicable to the commerce issue, although the point was made and met, because the effect of the ordinance at that date, 1936, upon commerce was "incidental" [19] and because it was decided "before the

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States and thus bring to naught the great constitutional purpose of the fathers in giving to Congress the power 'To regulate Commerce with foreign Nations, and among the several States . . .' Nor may the prohibition be accomplished in the guise of taxation which produces the excluding or discriminatory effect." *Nippert* v. *Richmond,* 327 U. S. 416, 425–426.

And cf. *Nelson* v. *Sears, Roebuck & Co.,* 312 U. S. 359, where the maintenance of retail stores within a state by a corporation engaged in direct mail selling was held to permit the state to tax such sales to its residents, even though none of the corporation's agents within the state had any connection with the sales.

[18] "The solicitation of subscriptions in the field regularly accounts for from 50% to 60% of the total annual subscription circulation of nationally-distributed magazines which submit verified circulation reports to the Audit Bureau of Circulations . . . . During the period from 1925 to date, the average circulation per issue of such magazines attributable to field subscription solicitation, . . . has amounted to more than 30% of the total average annual circulation per issue . . . ." The total subscription value obtained by Keystone Readers Service, appellant's employer, in 1948 was $5,319,423.40. There is a national association of magazine publishers, a trade organization whose members publish some 400 nationally distributed magazines with a combined circulation of 140 million copies. This association sponsors and maintains a central registry plan to which agencies like Keystone, soliciting subscriptions, belong.

[19] "Incidental" as a test has not continued as a useful manner for determining the validity of local regulation of matters affecting interstate commerce.

"Such regulations by the state are to be sustained, not because they are 'indirect' rather than 'direct,' . . . not because they control inter-

widespread enactment of Green River Ordinances and before their actual and cumulative effect upon interstate commerce could possibly be forecast." It is urged that our recent cases of *Hood & Sons* v. *Du Mond,* 336 U. S. 525, and *Dean Milk Co.* v. *City of Madison,* 340 U. S. 349, demonstrate that this Court will not permit local interests to protect themselves against out-of-state competition by curtailing interstate business.[20]

It was partly because the regulation in *Dean Milk Co.* discriminated against interstate commerce that it was struck down.

> "In thus erecting an economic barrier protecting a major local industry against competition from without the State, Madison plainly discriminates against interstate commerce. This it cannot do, even in the exercise of its unquestioned power to protect the health and safety of its people, if reasonable nondiscriminatory alternatives, adequate to conserve legitimate local interests, are available." *Id.* at 354.

Nor does the clause as to alternatives apply to the Alexandria ordinance. Interstate commerce itself knocks on the local door. It is only by regulating that knock that the interests of the home may be protected by public

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state activities in such a manner as only to affect the commerce rather than to command its operations. But they are to be upheld because upon a consideration of all the relevant facts and circumstances it appears that the matter is one which may appropriately be regulated in the interest of the safety, health and well-being of local communities, and which, because of its local character, and the practical difficulties involved, may never be adequately dealt with by Congress." *Parker* v. *Brown,* 317 U. S. 341, 362–363.

[20] So far as this argument seeks to blame the passage of the ordinance on local retailers, we disregard it. Such arguments should be presented to legislators, not to courts. *Arizona* v. *California,* 283 U. S. 423, 455. See p. 639, *infra.*

as distinct from private action.[21] Likewise in *Hood & Sons* v. *Du Mond* it was the discrimination against out-of-state dealers that invalidated the order refusing a license to buy milk to an out-of-state distributor.[22] Where no discrimination existed, in a somewhat similar situation, we upheld the state regulation as a permissible burden on commerce.[23] See in accord, *Panhandle Eastern Pipe Line Co.* v. *Michigan Pub. Serv. Comm'n,* 341 U. S. 329, 336.

We recognize the importance to publishers of our many periodicals of the house-to-house method of selling by solicitation. As a matter of constitutional law, however, they in their business operations are in no different position so far as the Commerce Clause is concerned than the sellers of other wares.[24] Appellant, as their repre-

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[21] 340 U. S. at 354–355:

"If the City of Madison prefers to rely upon its own officials for inspection of distant milk sources, such inspection is readily open to it without hardship for it could charge the actual and reasonable cost of such inspection to the importing producers and processors."

[22] 336 U. S. 525, 531–532, 533:

"It [the opinion in *Baldwin* v. *Seelig,* 294 U. S. 511] recognized, as do we, broad power in the State to protect its inhabitants against perils to health or safety, fraudulent traders and highway hazards, even by use of measures which bear adversely upon interstate commerce. But it laid repeated emphasis upon the principle that the State may not promote its own economic advantages by curtailment or burdening of interstate commerce.

. . . . . .

"This distinction between the power of the State to shelter its people from menaces to their health or safety and from fraud, even when those dangers emanate from interstate commerce, and its lack of power to retard, burden or constrict the flow of such commerce for their economic advantage, is one deeply rooted in both our history and our law."

[23] *Milk Control Board* v. *Eisenberg Farm Products,* 306 U. S. 346.

[24] *Giragi* v. *Moore,* 301 U. S. 670, 48 Ariz. 33, 58 P. 2d 1249, 49 Ariz. 74, 64 P. 2d 819; *Associated Press* v. *Labor Board,* 301 U. S. 103, 132–133; *Associated Press* v. *United States,* 326 U. S. 1, 7.

sentative or in his own right as a door-to-door canvasser, is no more free to violate local regulations to protect privacy than are other solicitors. As we said above, the usual methods of seeking business are left open by the ordinance. That such methods do not produce as much business as house-to-house canvassing is, constitutionally, immaterial and a matter for adjustment at the local level in the absence of federal legislation. Cf. *Prudential Ins. Co.* v. *Benjamin,* 328 U. S. 408. Taxation that threatens interstate commerce with prohibition or discrimination is bad, *Nippert* v. *Richmond,* 327 U. S. 416, 434, but regulation that leaves out-of-state sellers on the same basis as local sellers cannot be invalid for that reason.

While taxation and licensing of hawking or peddling, defined as selling and delivering in the state, has long been thought to show no violation of the Commerce Clause, solicitation of orders with subsequent interstate shipment has been immune from such an exaction.[25] These decisions have been explained by this Court as embodying a protection of commerce against discrimination made most apparent by fixed-sum licenses regardless of sales.[26] Where the legislation is not an added financial burden upon sales in commerce or an exaction for the privilege of doing interstate commerce but a regulation of local matters, different considerations apply.

We think Alexandria's ordinance falls in the classification of regulation. The economic effects on interstate commerce in door-to-door soliciting cannot be gainsaid.

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[25] *Emert* v. *Missouri,* 156 U. S. 296; see *Commonwealth* v. *Ober,* 12 Cush. (Mass.) 493; *Crenshaw* v. *Arkansas,* 227 U. S. 389, 399–400; *Rogers* v. *Arkansas,* 227 U. S. 401; *Caskey Baking Co.* v. *Virginia,* 313 U. S. 117, 119.

[26] *McGoldrick* v. *Berwind-White Co.,* 309 U. S. 33, 55–57; *Nippert* v. *Richmond,* 327 U. S. 416, 421–425.

To solicitors so engaged, ordinances such as this compel the development of a new technique of approach to prospects. Their local retail competitors gain advantages from the location of their stores and investments in their stock but the solicitor retains his flexibility of movement and freedom from heavy investment.

The general use of the Green River type of ordinance shows its adaptation to the needs of the many communities that have enacted it. We are not willing even to appraise the suggestion, unsupported in the record, that such wide use springs predominantly from the selfish influence of local merchants.

Even before this Court's decision in *Martin* v. *Struthers*, 319 U. S. 141, holding invalid, when applied to a person distributing leaflets advertising a religious meeting, an ordinance of the City of Struthers, Ohio, forbidding the summoning of the occupants of a residence to the door, our less extreme cases had created comment. See Chafee, Free Speech in the United States (1941), 406.[27]

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[27] "House to house canvassing raises more serious problems. Of all the methods of spreading unpopular ideas, this seems the least entitled to extensive protection. The possibilities of persuasion are slight compared with the certainties of annoyance. Great as is the value of exposing citizens to novel views, home is one place where a man ought to be able to shut himself up in his own ideas if he desires. There he should be free not only from unreasonable searches and seizures but also from hearing uninvited strangers expound distasteful doctrines. A doorbell cannot be disregarded like a handbill. It takes several minutes to ascertain the purpose of a propagandist and at least several more to get rid of him. . . . Moreover, hospitable housewives dislike to leave a visitor on a windy doorstep while he explains his errand, yet once he is inside the house robbery or worse may happen. So peddlers of ideas and salesmen of salvation in odd brands seem to call for regulation as much as the regular run of commercial canvassers. . . . Freedom of the home is as important as freedom of speech. I cannot help wondering whether the Justices

To the city council falls the duty of protecting its citizens against the practices deemed subversive of privacy and of quiet. A householder depends for protection on his city board rather than churlishly guarding his entrances with orders forbidding the entrance of solicitors. A sign would have to be a small billboard to make the differentiations between the welcome and unwelcome that can be written in an ordinance once cheaply for all homes.

> "The police power of a state extends beyond health, morals and safety, and comprehends the duty, within constitutional limitations, to protect the well-being and tranquility of a community." [28]

When there is a reasonable basis for legislation to protect the social, as distinguished from the economic, welfare of a community, it is not for this Court because of the Commerce Clause to deny the exercise locally of the sovereign power of Louisiana.[29] Changing living conditions or vari-

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of the Supreme Court are quite aware of the effect of organized front-door intrusions upon people who are not sheltered from zealots and impostors by a staff of servants or the locked entrance of an apartment house."

[28] *Kovacs* v. *Cooper,* 336 U. S. 77, 83.

[29] *United States* v. *Carolene Products Co.,* 304 U. S. 144, 154: "But by their very nature such inquiries, where the legislative judgment is drawn in question, must be restricted to the issue whether any state of facts either known or which could reasonably be assumed affords support for it. Here the demurrer challenges the validity of the statute on its face and it is evident from all the considerations presented to Congress, and those of which we may take judicial notice, that the question is at least debatable whether commerce in filled milk should be left unregulated, or in some measure restricted, or wholly prohibited. As that decision was for Congress, neither the finding of a court arrived at by weighing the evidence, nor the verdict of a jury can be substituted for it."

See *Jamison* v. *Texas,* 318 U. S. 413; *Skiriotes* v. *Florida,* 313 U. S. 69, 79; *Hebert* v. *Louisiana,* 272 U. S. 312, 316.

ations in the experiences or habits of different communities may well call for different legislative regulations as to methods and manners of doing business. Powers of municipalities are subject to control by the states. Their judgment of local needs is made from a more intimate knowledge of local conditions than that of any other legislative body. We cannot say that this ordinance of Alexandria so burdens or impedes interstate commerce as to exceed the regulatory powers of that city.

First Amendment.—Finally we come to a point not heretofore urged in this Court as a ground for the invalidation of a Green River ordinance. This is that such an ordinance is an abridgment of freedom of speech and the press. Only the press or oral advocates of ideas could urge this point. It was not open to the solicitors for gadgets or brushes. The point is not that the press is free of the ordinary restraints and regulations of the modern state, such as taxation or labor regulation, referred to above at n. 24, but, as stated in appellant's brief, "because the ordinance places an arbitrary, unreasonable and undue burden upon a well established and essential method of distribution and circulation of lawful magazines and periodicals and, in effect, is tantamount to a prohibition of the utilization of such method." Regulation necessarily has elements of prohibition. Thus the argument is not that the money-making activities of the solicitor entitle him to go "in or upon private residences" at will, but that the distribution of periodicals through door-to-door canvassing is entitled to First Amendment protection.[30] This kind of distribution is said to be protected because the mere fact that money is made out of the distribution does not bar

[30] Cf. *Martin* v. *Struthers,* 319 U. S. 141, 146; *Lovell* v. *City of Griffin,* 303 U. S. 444, 452.

the publications from First Amendment protection.[31] We agree that the fact that periodicals are sold does not put them beyond the protection of the First Amendment.[32] The selling, however, brings into the transaction a commercial feature.

The First and Fourteenth Amendments have never been treated as absolutes.[33] Freedom of speech or press does not mean that one can talk or distribute where, when and how one chooses. Rights other than those of the advocates are involved. By adjustment of rights, we can have both full liberty of expression and an orderly life.

The case that comes nearest to supporting appellant's contention is *Martin* v. *Struthers,* 319 U. S. 141. There a municipal ordinance forbidding anyone summoning the occupants of a residence to the door to receive advertisements was held invalid as applied to the free distribution of dodgers "advertising a religious meeting." Attention was directed in n. 1 of that case to the fact that the ordinance was not aimed "solely at commercial advertising." It was said:

> "The ordinance does not control anything but the distribution of literature, and in that respect it substitutes the judgment of the community for the judgment of the individual householder." Pp. 143–144.

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[31] *Thomas* v. *Collins,* 323 U. S. 516, 531.

[32] Cf. *Kovacs* v. *Cooper,* 336 U. S. 77, 88, n. 14; concurrence at 90. See n. 24, *supra.*

[33] *Cantwell* v. *Connecticut,* 310 U. S. 296, 303, 304; *Cox* v. *New Hampshire,* 312 U. S. 569; *Chaplinsky* v. *New Hampshire,* 315 U. S. 568; *Murdock* v. *Pennsylvania,* 319 U. S. 105, 109–110; *Prince* v. *Massachusetts,* 321 U. S. 158, 166; *Saia* v. *New York,* 334 U. S. 558, 561; *Feiner* v. *New York,* 340 U. S. 315. See the collection of cases in *Niemotko* v. *Maryland,* 340 U. S. 268, at p. 276 ff.

The decision to release the distributor was because:

> "Freedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society that, putting aside reasonable police and health regulations of time and manner of distribution, it must be fully preserved." Pp. 146–147.

There was dissent even to this carefully phrased application of the principles of the First Amendment. As no element of the commercial entered into this free solicitation and the opinion was narrowly limited to the precise fact of the free distribution of an invitation to religious services, we feel that it is not necessarily inconsistent with the conclusion reached in this case.

In *Marsh* v. *Alabama,* 326 U. S. 501, and *Tucker* v. *Texas,* 326 U. S. 517,[34] a state was held by this Court unable to punish for trespass, after notice under a state criminal statute, certain distributors of printed matter, more religious than commercial. The statute was held invalid under the principles of the First Amendment. In the *Marsh* case it was a private corporation, in the *Tucker* case the United States, that owned the property used as permissive passways in company and government-owned towns. In neither case was there dedication to public use but it seems fair to say that the permissive use of the ways was considered equal to such dedication. Such protection was not extended to colporteurs offending against similar state trespass laws by distributing, after notice to desist, like publications to the tenants in a private apartment house. *Hall* v. *Commonwealth,* 188 Va. 72, 49 S. E. 2d 369, appeal, after conviction, on the ground of denial of First Amendment rights, dismissed on motion of ap-

[34] These cases called forth numerous Notes, *e. g.*, 46 Col. L. Rev. 457; 34 Geo. L. J. 244; 44 Mich. L. Rev. 848.

pellee to dismiss because of lack of substance in the question, 335 U. S. 875, 912; see n. 2, *supra.*

Since it is not private individuals but the local and federal governments that are prohibited by the First and Fourteenth Amendments from abridging free speech or press, *Hall* v. *Virginia* does not rule a conviction for trespass after notice by ordinance. However, if as we have shown above, p. 640, a city council may speak for the citizens on matters subject to the police power, we would have in the present prosecution the time-honored offense of trespass on private grounds after notice. Thus the *Marsh* and *Tucker* cases are not applicable here.

This makes the constitutionality of Alexandria's ordinance turn upon a balancing of the conveniences between some householders' desire for privacy and the publisher's right to distribute publications in the precise way that those soliciting for him think brings the best results. The issue brings into collision the rights of the hospitable housewife, peering on Monday morning around her chained door, with those of Mr. Breard's courteous, well-trained but possibly persistent solicitor, offering a bargain on culture and information through a joint subscription to the Saturday Evening Post, Pic and Today's Woman. Behind the housewife are many housewives and home-owners in the towns where Green River ordinances offer their aid. Behind Mr. Breard are "Keystone" with an annual business of $5,000,000 in subscriptions and the periodicals with their use of house-to-house canvassing to secure subscribers for their valuable publications, together with other housewives who desire solicitors to offer them the opportunity and remind and help them, at their doors, to subscribe for publications.

Subscriptions may be made by anyone interested in receiving the magazines without the annoyances of house-to-house canvassing. We think those communities that

have found these methods of sale obnoxious may control them by ordinance. It would be, it seems to us, a misuse of the great guarantees of free speech and free press to use those guarantees to force a community to admit the solicitors of publications to the home premises of its residents. We see no abridgment of the principles of the First Amendment in this ordinance.

Affirmed.

MR. CHIEF JUSTICE VINSON, with whom MR. JUSTICE DOUGLAS joins, dissenting.

The ordinance before us makes criminal the hitherto legitimate business practice of soliciting magazine subscriptions from door to door without prior invitation of the homeowner. Looking only to the face of that ordinance, the Court sustains it as against objections under the Due Process Clause, the Commerce Clause and the First Amendment. I dissent and would reverse the judgment below without reaching all of the issues raised, for, in my opinion, the ordinance constitutes an undue and discriminatory burden on interstate commerce.

The Court holds that because the "ordinance falls in the classification of regulation," the city council is free to burden interstate commerce. *Ante,* p. 638. In my view, the ordinance is a flat prohibition of solicitation. The Louisiana Supreme Court recognized this fact when it characterized the ordinance as "provid[ing] for a blanket prohibition of solicitation without invitation, save for food vendors, who are specifically exempt." 217 La. at 828, 47 So. 2d at 556. Unlike this Court, the state court acknowledged the prohibitory character of the ordinance in rejecting appellant's claim under the Commerce Clause in the following portion of its opinion:

> "The ordinance imposes no tax, no license. It is a prohibition of an activity on local territory,

> involving the *problematical* sale of a commodity originating in another state, which is actually distributed through the United States Mails. It imposes no burden on the distribution itself, nor on the manufacture of the commodity, nor on any phase of the transportation from one place to another of that commodity." (Emphasis in original.) 217 La. at 829, 47 So. 2d at 556.

At least since the decision in *Robbins* v. *Shelby County Taxing District,* 120 U. S. 489, 497 (1887), this Court has regarded the process of soliciting orders for goods to be shipped across state lines as being interstate commerce as much as the transportation itself. Under the line of cases following this principle, reexamined and reaffirmed in *Nippert* v. *Richmond,* 327 U. S. 416 (1946), the process of solicitation for interstate commerce cannot be subjected to taxes, licenses or bonding requirements that in their practical operation discriminate against or unduly burden interstate commerce. The Court does not today purport to overrule this line of decisions. And it acknowledges, as it must, that the Court has sharply distinguished the process of solicitation of interstate business from the essentially local retailing operations of hawking and peddling. See *Wagner* v. *Covington,* 251 U. S. 95, 103–104 (1919), and cases cited therein. Nor does the opinion dispute that this ordinance has a severe economic impact upon the substantial interstate business of appellant's employer, as well as the entire magazine industry which derives 50% to 60% of its annual subscription circulation from the very type of solicitation prohibited by this ordinance. I disagree with the Court in its holding that an ordinance imposing a "blanket prohibition" can be sustained under the Commerce Clause as mere regulation.

Congress is given the power "To regulate Commerce . . . among the several States." U. S. Const., Art. I, § 8, cl. 3. The doctrine of *Cooley* v. *Board of Wardens,* 12 How. 299 (1851), permits a state to exercise its police powers in a manner impinging upon interstate commerce only where the subject of regulation is essentially local and then only when there is no discrimination against or undue burden on interstate commerce. This is an approach grounded in the practical, an approach which imposes upon this Court the "duty to determine whether the statute [or ordinance] under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce." *Best & Co.* v. *Maxwell,* 311 U. S. 454, 455–456 (1940). That this ordinance, on its face, professes to protect the home does not relieve us of our duty to weigh the practical effect of the ordinance upon interstate commerce. Lack of discrimination on its face has not heretofore been regarded as sufficient to sustain an ordinance without inquiry into its practical effects upon interstate commerce. *E. g., Dean Milk Co.* v. *Madison,* 340 U. S. 349, 354 (1951) (prohibition against sale of milk pasteurized more than five miles from city); *Real Silk Hosiery Mills* v. *Portland,* 268 U. S. 325, 336 (1925) (requirement that solicitors file bond); *Minnesota* v. *Barber,* 136 U. S. 313 (1890) (statute requiring inspection of meat within state).

In passing upon other ordinances affecting solicitors, this Court has not hesitated in noting the economic fact that "the 'real competitors' of [solicitors] are, among others, the local retail merchants." *Nippert* v. *Richmond, supra,* at 433, citing *Best & Co.* v. *Maxwell, supra.* See also *Robbins* v. *Shelby County Taxing District, supra,* at 498. The Court acknowledges "effective competition" between solicitors and the local retail merchants, *ante,* p. 627, but is deliberate in its refusal to appraise the

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practical effect of this ordinance as a deterrent to interstate commerce, *ante,* p. 639. I think it plain that a "blanket prohibition" upon appellant's solicitation discriminates against and unduly burdens interstate commerce in favoring local retail merchants. "Whether or not it was so intended, those are its necessary effects." *Nippert* v. *Richmond, supra,* at 434. The fact that this ordinance exempts solicitation by the essentially local purveyors of farm products shows that local economic interests are relieved of the burdensome effects of the ordinance. No one doubts that protection of the home is a proper subject of legislation, but that end can be served without prohibiting interstate commerce. Our prior decisions cannot be avoided by limiting their authority to the limited categories of tax and license. On the contrary, we must guard against state action which, "in any form or under any guise, directly burden[s] the prosecution of interstate business." *Baldwin* v. *Seelig,* 294 U. S. 511, 522 (1935), citing *International Textbook Co.* v. *Pigg,* 217 U. S. 91, 112 (1910). See also *Hood & Sons* v. *Du Mond,* 336 U. S. 525 (1949). I cannot agree that this Court should defer to the City Council of Alexandria as though we had before us an act of Congress regulating commerce. See *ante,* p. 640. "[T]his Court, and not the state legislature [or the city council], is under the commerce clause the final arbiter of the competing demands of state [or local] and national interests." *Southern Pacific Co.* v. *Arizona,* 325 U. S. 761, 769 (1945).

The Court relies upon *Bunger* v. *Green River,* 300 U. S. 638 (1937), where the conviction of a Fuller Brush man was sustained under an ordinance akin to the one before us. The order was entered without argument, without opinion and with citation of the three cases discussed by the Court, *ante,* at p. 633, each of which cases sustained as "incidental" to interstate commerce state action regu-

lating local inspection and feeding of cattle, and the sale of produce.*

I would apply to this case the principles so recently announced in *Dean Milk Co.* v. *Madison,* 340 U. S. 349 (1951). In the course of its discussion of our *Dean Milk* decision, the Court remarks that in the instant case "Interstate commerce itself knocks on the local door." *Ante,* p. 636. As I read the prior decisions of this Court, that fact, far from justifying avoidance of *Dean Milk,* buttresses my conclusion that the ordinance cannot consistently with the Commerce Clause be applied to appellant.

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

On May 3, 1943, this Court held that cities and states could not enforce laws which impose flat taxes on the privilege of door-to-door sales of religious literature, *Jones* v. *Opelika,* 319 U. S. 103; *Murdock* v. *Pennsylvania,* 319 U. S. 105, or which make it unlawful for persons to go from home to home knocking on doors and ringing doorbells to invite occupants to religious, political or other kinds of public meetings. *Martin* v. *Struthers,* 319 U. S. 141. Over strong dissents, these laws were held to invade liberty of speech, press and religion in violation of the First and Fourteenth Amendments. Today a new majority adopts the position of the former dissenters and sustains a city ordinance forbidding door-to-door solicitation of subscriptions to the Saturday Evening Post, Newsweek and other magazines. Since this decision cannot

*It is passing strange that, after relying on three cases grounded solely on "incidental" as a test of validity under the Commerce Clause, the Court should itself state that such a test "has not continued as a useful manner for determining the validity of local regulation of matters affecting interstate commerce." *Ante,* p. 635, n. 19.

be reconciled with the *Jones, Murdock* and *Martin* v. *Struthers* cases, it seems to me that good judicial practice calls for their forthright overruling. But whether this is done or not, it should be plain that my disagreement with the majority of the Court as now constituted stems basically from a different concept of the reach of the constitutional liberty of the press rather than from any difference of opinion as to what former cases have held.

Today's decision marks a revitalization of the judicial views which prevailed before this Court embraced the philosophy that the First Amendment gives a preferred status to the liberties it protects. I adhere to that preferred position philosophy. It is my belief that the freedom of the people of this Nation cannot survive even a little governmental hobbling of religious or political ideas, whether they be communicated orally or through the press.

The constitutional sanctuary for the press must necessarily include liberty to publish and circulate. In view of our economic system, it must also include freedom to solicit paying subscribers. Of course homeowners can if they wish forbid newsboys, reporters or magazine solicitors to ring their doorbells. But when the homeowner himself has not done this, I believe that the First Amendment, interpreted with due regard for the freedoms it guarantees, bars laws like the present ordinance which punish persons who peacefully go from door to door as agents of the press.*

*Of course I believe that the present ordinance could constitutionally be applied to a "merchant" who goes from door to door "selling pots." Compare *Martin* v. *Struthers,* 319 U. S. 141, 144 with *Valentine* v. *Chrestensen,* 316 U. S. 52.

Syllabus.

COLLINS ET AL. *v.* HARDYMAN ET AL.

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

No. 217. Argued January 8–9, 1951.—Decided June 4, 1951.

A complaint in an action to recover damages under 8 U. S. C. § 47 (3) alleged that the plaintiffs were members of a political club which planned a meeting to adopt a resolution opposing the Marshall Plan; that defendants conspired to deprive plaintiffs of their rights as citizens of the United States peaceably to assemble and to equal privileges and immunities under the laws of the United States; that, in furtherance of the conspiracy, defendants proceeded to plaintiffs' meeting place and, by threats and violence, broke up the meeting, thus interfering with the right of plaintiffs to petition the Government for redress of grievances; and that defendants did not interfere or conspire to interfere with meetings of other groups with whose opinions defendants agreed. There was no averment that defendants were state officers or acted under color of state law. *Held:* The complaint did not state a cause of action under 8 U. S. C. § 47 (3). Pp. 652–663.

(a) Assuming, without deciding, that the facts alleged show that defendants deprived plaintiffs "of having and exercising" a federal right, the facts alleged did not show that the conspiracy was "for the purpose of *depriving* [them] of the *equal protection of the laws*, or of *equal privileges and immunities under the laws*"; and therefore, in this case, a cause of action under 8 U. S. C. § 47 (3) was not stated. Pp. 660–663.

(b) Section 47 (3) does not attempt to reach a conspiracy to deprive one of rights, unless it is a deprivation of equality, of "equal protection of the law" or of "equal privileges and immunities under the law." Pp. 660–661.

(c) The fact that the defendants broke up plaintiffs' meeting but did not interfere with the meetings of those who shared defendants' views is not inequality before the law unless there is some manipulation of the law or its agencies to give sanction or sanctuary for doing so. P. 661.

(d) Although plaintiffs' rights were invaded, disregarded and lawlessly violated, neither their rights nor their equality of rights under the law have been, or were intended to be, denied or impaired. Pp. 661–662.

183 F. 2d 308, reversed.

In an action brought by respondents against petitioners to recover damages under 8 U. S. C. § 47 (3), the District Court dismissed the complaint. 80 F. Supp. 501. The Court of Appeals reversed. 183 F. 2d 308. This Court granted certiorari. 340 U. S. 809. *Reversed*, p. 663.

Aubrey N. Irwin argued the cause and filed a brief for petitioners.

A. L. Wirin and *Loren Miller* argued the cause for respondents. With *Mr. Wirin* on the brief were *Fred Okrand, William Egan Colby, Edward J. Ennis, Osmond K. Fraenkel, Will Maslow, Joseph B. Robison* and *Clore Warne.*

Briefs of *amici curiae* urging affirmance were filed by *Arthur J. Goldberg* and *Thomas E. Harris* for the Congress of Industrial Organizations; and *Loren Miller* and *Thurgood Marshall* for the National Association for the Advancement of Colored People.

MR. JUSTICE JACKSON delivered the opinion of the Court.

This controversy arises under 8 U. S. C. § 47 (3), which provides civil remedies for certain conspiracies.[1] A motion to dismiss the amended complaint raises the issue of its sufficiency and, of course, requires us to accept its well-pleaded facts as the hypothesis for decision.

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[1] 17 Stat. 13, 8 U. S. C. § 47 (3) reads:

"If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any

Its essential allegations are that plaintiffs are citizens of the United States, residents of California, and members or officers of a voluntary association or political club organized for the purpose of participating in the election of officers of the United States, petitioning the national government for redress of grievances, and engaging in public meetings for the discussion of national public issues. It planned a public meeting for November 14, 1947, on the subject, "The Cominform and the Marshall Plan," at which it was intended to adopt a resolution opposing said Marshall Plan, to be forwarded, by way of a petition for the redress of grievances, to appropriate federal officials.

The conspiracy charged as being within the Act is that defendants, with knowledge of the meeting and its pur-

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citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

This paragraph should be read in the context of other paragraphs of the same section, and note should also be taken of 8 U. S. C. § 43, which reads:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

poses, entered into an agreement to deprive the plaintiffs, "as citizens of the United States, of privileges and immunities, as citizens of the United States, of the rights peaceably to assemble for the purpose of discussing and communicating upon national public issues . . . ." And further, "to deprive the plaintiffs as well as the members of said club, as citizens of the United States, of equal privileges and immunities under the laws of the United States . . . ." This is amplified by allegations that defendants knew of many public meetings in the locality, at which resolutions were adopted by groups with whose opinions defendants agreed, and with which defendants did not interfere or conspire to interfere. "With respect to the meeting aforesaid on November 14, 1947, however, the defendants conspired to interfere with said meeting for the reason that the defendants opposed the views of the plaintiffs . . . ."

In the effort to bring the case within the statute, the pleader also alleged that defendants conspired "to go in disguise upon the highways" and that they did in fact go in disguise "consisting of the unlawful and unauthorized wearing of caps of the American Legion." The District Court disposed of this part of the complaint by holding that wearing such headgear did not constitute the disguise or concealment of identity contemplated by the Act. Plaintiffs thereupon abandoned that part of the complaint and do not here rely upon it to support their claims.

The complaint then separately sets out the overt acts of injury and damage relied upon to meet the requirements of the Act. To carry out the conspiracy, it is alleged, defendants proceeded to the meeting place and, by force and threats of force, did assault and intimidate plaintiffs and those present at the meeting and thereby broke up the meeting, thus interfering with the right of the plaintiffs to petition the Government for

redress of grievances. Both compensatory and punitive damages are demanded.

It is averred that the cause of action arises under the statute cited and under the Constitution of the United States. But apparently the draftsman was scrupulously cautious not to allege that it arose under the Fourteenth Amendment, or that defendants had conspired to deprive plaintiffs of rights secured by that Amendment, thus seeking to avoid the effect of earlier decisions of this Court in Fourteenth Amendment cases.

The complaint makes no claim that the conspiracy or the overt acts involved any action by state officials, or that defendants even pretended to act under color of state law. It is not shown that defendants had or claimed any protection or immunity from the law of the State, or that they in fact enjoyed such because of any act or omission by state authorities. Indeed, the trial court found that the acts alleged are punishable under the laws of California relating to disturbance of the peace, assault, and trespass, and are also civilly actionable.[2]

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[2] The opinion of District Judge Yankwich for this cites in his notes, 80 F. Supp. 501, 510:

"39. Cal. Penal Code, Section 415 (disturbance of the peace of neighborhood or person); Section 403 (disturbance of public meetings)

"40. Cal. Penal Code, Section 602 (j) (illegal entry for the purpose of injuring property or property rights or interfering or obstructing lawful business of another).

"41. Cal. Penal Code, Sections 240, 241 (assault); sections 242, 243 (battery). Among the corresponding civil sections relating to civil remedies are California Civil Code, Section 43 (guarantee against personal bodily harm or restraint); Government Code, Section 241 (defining as citizens all persons born or residing within the state); California Code of Civil Procedure, Section 338 (3) [Section 338 (2)] (action for trespass to real property may be brought within three years); section 340 (3) (action for assault and battery may be brought within one year). And for the state civil rights provisions, see California Civil Code, Sections 51–54."

The District Judge held that the statute does not and cannot constitutionally afford redress for invasions of civil rights at the hands of individuals, but can only be applied to injuries to civil rights by persons acting pursuant to or under color of state law.[3] In reversing the District Court's dismissal of the complaint, the Court of Appeals for the Ninth Circuit held otherwise, one judge dissenting.[4] The Court of Appeals for the Eighth Circuit, in *Love* v. *Chandler,* 124 F. 2d 785, has ruled in accord with the District Judge and the dissenting Court of Appeals Judge here.[5] To resolve the conflict, we granted certiorari.[6]

This statutory provision has long been dormant. It was introduced into the federal statutes by the Act of April 20, 1871, entitled, "An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes." [7] The Act was among the last of the reconstruction legislation to be based on the "conquered province" theory which prevailed in Congress for a period following the Civil War. This statute, without separability provisions, established the civil liability with which we are here concerned as well as other civil liabilities, together with parallel criminal liabilities. It also provided that unlawful combinations and conspiracies named in the Act might be deemed rebellions, and authorized the President to employ the militia to suppress them. The President was also authorized to suspend the privilege of the writ of habeas corpus. It prohibited any person from being a federal grand or

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[3] 80 F. Supp. 501.

[4] 183 F. 2d 308.

[5] Other recent cases involving the statute are *Viles* v. *Symes,* 129 F. 2d 828; *Robeson* v. *Fanelli,* 94 F. Supp. 62; and *Ferrer* v. *Fronton Exhibition Co.,* 188 F. 2d 954.

[6] 340 U. S. 809.

[7] 17 Stat. 13.

petit juror in any case arising under the Act unless he took and subscribed an oath in open court "that he has never, directly or indirectly, counselled, advised, or voluntarily aided any such combination or conspiracy." Heavy penalties and liabilities were laid upon any person who, with knowledge of such conspiracies, aided them or failed to do what he could to suppress them.

The Act, popularly known as the Ku Klux Act, was passed by a partisan vote in a highly inflamed atmosphere. It was preceded by spirited debate which pointed out its grave character and susceptibility to abuse, and its defects were soon realized when its execution brought about a severe reaction.[8]

The provision establishing criminal conspiracies in language indistinguishable from that used to describe civil conspiracies came to judgment in *United States* v. *Harris*, 106 U. S. 629.[9] It was held unconstitutional. This decision was in harmony with that of other important decisions during that period[10] by a Court, every member of

[8] The background of this Act, the nature of the debates which preceded its passage, and the reaction it produced are set forth in Bowers, The Tragic Era, 340–348.

[9] R. S. § 5519, under which the prosecution was brought, provided: "If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; each of such persons shall be punished by a fine of not less than five hundred nor more than five thousand dollars, or by imprisonment, with or without hard labor, not less than six months nor more than six years, or by both such fine and imprisonment."

[10] *Slaughter-House Cases*, 16 Wall. 36; *United States* v. *Reese*, 92 U. S. 214; *United States* v. *Cruikshank*, 92 U. S. 542; *Civil Rights Cases*, 109 U. S. 3.

which had been appointed by President Lincoln, Grant, Hayes, Garfield or Arthur—all indoctrinated in the cause which produced the Fourteenth Amendment, but convinced that it was not to be used to centralize power so as to upset the federal system.

While we have not been in agreement as to the interpretation and application of some of the post-Civil War legislation,[11] the Court recently unanimously declared, through the Chief Justice:

> "Since the decision of this Court in the *Civil Rights Cases,* 109 U. S. 3 (1883), the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful." [12]

And MR. JUSTICE DOUGLAS, dissenting, has quoted with approval from the *Cruikshank* case, " 'The fourteenth amendment prohibits a State from denying to any person within its jurisdiction the equal protection of the laws; but this provision does not, any more than the one which precedes it . . . add anything to the rights which one citizen has under the Constitution against another.' 92 U. S. at pp. 554–555." And " 'The only obligation resting upon the United States is to see that the States do not deny the right. This the amendment guarantees, but no more. The power of the national government is limited to the enforcement of this guaranty.' " He summed up: "The Fourteenth Amendment protects the individual against *state action,* not against wrongs done by *individuals.* . . ." [13]

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[11] *Screws* v. *United States,* 325 U. S. 91.

[12] *Shelley* v. *Kraemer,* 334 U. S. 1, 13.

[13] *United States* v. *Williams,* 341 U. S. 70, 92.

It is apparent that, if this complaint meets the requirements of this Act, it raises constitutional problems of the first magnitude that, in the light of history, are not without difficulty. These would include issues as to congressional power under and apart from the Fourteenth Amendment, the reserved power of the States, the content of rights derived from national as distinguished from state citizenship, and the question of separability of the Act in its application to those two classes of rights. The latter question was long ago decided adversely to the plaintiffs. *Baldwin* v. *Franks,* 120 U. S. 678. Before we embark upon such a constitutional inquiry, it is necessary to satisfy ourselves that the attempt to allege a cause of action within the purview of the statute has been successful.

The section under which this action is brought falls into two divisions. The forepart defines conspiracies that may become the basis of liability, and the latter portion defines overt acts necessary to consummate the conspiracy as an actionable wrong. While a mere unlawful agreement or conspiracy may be made a federal crime, as it was at common law,[14] this statute does not make the mere agreement or understanding for concerted action which constitutes the forbidden conspiracy an actionable wrong unless it matures into some action that inflicts injury. That, we think, is the significance of the second division of the section.

The provision with reference to the overt act will bear repeating, with emphasis supplied: ". . . [I]n any case of *conspiracy set forth in this section,* if one or more persons engaged therein do, or cause to be done, *any act in furtherance of the object of such conspiracy,* whereby an-

[14] *Nash* v. *United States,* 229 U. S. 373, 378; *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 252.

other is *injured* in his person or property, or *deprived of having and exercising any right or privilege of a citizen of the United States,* the party so injured or deprived may have an action for the recovery of damages . . . ."

In the light of the dictum in *United States* v. *Cruikshank,* 92 U. S. 542, 552, we assume, without deciding, that the facts pleaded show that defendants did deprive plaintiffs "of having and exercising" a federal right which, provided the defendants were engaged in a "conspiracy set forth in this section," would bring the case within the Act.

The "conspiracy" required is differently stated from the required overt act and we think the difference is not accidental but significant. Its essentials, with emphasis supplied, are that two or more persons must conspire (1) for the purpose of *depriving* any person or class of persons of the *equal protection of the laws,* or of *equal privileges and immunities under the law;* or (2) for the purpose of preventing or hindering the constituted authorities from giving or securing to all persons the equal protection of the laws; or (3) to prevent by force, intimidation, or threat, any citizen entitled to vote from giving his support or advocacy in a legal manner toward election of an elector for President or a member of Congress; or (4) to injure any citizen in person or property on account of such support or advocacy. There is no claim that any allegation brings this case within the provisions that we have numbered (2), (3), and (4), so we may eliminate any consideration of those categories. The complaint is within the statute only if it alleges a conspiracy of the first described class. It is apparent that this part of the Act defines conspiracies of a very limited character. They must, we repeat, be "for the purpose of *depriving* . . . of the *equal protection of the laws,* or of *equal privileges and immunities under the laws.*" (Italics supplied.)

Passing the argument, fully developed in the *Civil Rights Cases,* that an individual or group of individuals not in office cannot *deprive* anybody of constitutional rights, though they may invade or violate those rights, it is clear that this statute does not attempt to reach a conspiracy to deprive one of rights, unless it is a deprivation of equality, of "equal protection of the law," or of "equal privileges and immunities under the law." That accords with the purpose of the Act to put the lately freed Negro on an equal footing before the law with his former master. The Act apparently deemed that adequate and went no further.

What we have here is not a conspiracy to affect in any way these plaintiffs' equality of protection by the law, or their equality of privileges and immunities under the law. There is not the slightest allegation that defendants were conscious of or trying to influence the law, or were endeavoring to obstruct or interfere with it. The only inequality suggested is that the defendants broke up plaintiffs' meeting and did not break up meetings of others with whose sentiments they agreed. To be sure, this is not equal injury, but it is no more a deprivation of "equal protection" or of "equal privileges and immunities" than it would be for one to assault one neighbor without assaulting them all, or to libel some persons without mention of others. Such private discrimination is not inequality before the law unless there is some manipulation of the law or its agencies to give sanction or sanctuary for doing so. Plaintiffs' rights were certainly invaded, disregarded and lawlessly violated, but neither their rights nor their equality of rights under the law have been, or were intended to be, denied or impaired. Their rights *under the laws* and to *protection of the laws* remain untouched and equal to the rights of every other Californian, and may be vindicated in the same way and with the same effect as

those of any other citizen who suffers violence at the hands of a mob.

We do not say that no conspiracy by private individuals could be of such magnitude and effect as to work a deprivation of equal protection of the laws, or of equal privileges and immunities under laws. Indeed, the post-Civil War Ku Klux Klan, against which this Act was fashioned, may have, or may reasonably have been thought to have, done so. It is estimated to have had a membership of around 550,000, and thus to have included "nearly the entire adult male white population of the South." [15] It may well be that a conspiracy, so far-flung and embracing such numbers, with a purpose to dominate and set at naught the "carpetbag" and "scalawag" governments of the day, was able effectively to deprive Negroes of their legal rights and to close all avenues of redress or vindication, in view of the then disparity of position, education and opportunity between them and those who made up the Ku Klux Klan. We do not know. But here nothing of that sort appears. We have a case of a lawless political brawl, precipitated by a handful of white citizens against other white citizens. California courts are open to plaintiffs and its laws offer redress for their injury and vindication for their rights.

We say nothing of the power of Congress to authorize such civil actions as respondents have commenced or otherwise to redress such grievances as they assert. We think that Congress has not, in the narrow class of conspiracies defined by this statute, included the conspiracy charged here. We therefore reach no constitutional questions. The facts alleged fall short of a conspiracy to alter, impair or deny equality of rights under the law, though they do show a lawless invasion of rights for which

[15] 8 Encyc. Soc. Sci. 606, 607.

there are remedies in the law of California. It is not for this Court to compete with Congress or attempt to replace it as the Nation's law-making body.

The judgment of the Court of Appeals is

Reversed.

MR. JUSTICE BURTON, with whom MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS concur, dissenting.

I cannot agree that the respondents in their complaint have failed to state a cause of action under R. S. § 1980 (3), 8 U. S. C. § 47 (3).

The right alleged to have been violated is the right to petition the Federal Government for a redress of grievances. This right is expressly recognized by the First Amendment and this Court has said that "The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances." *United States* v. *Cruikshank*, 92 U. S. 542, 552, and see *In re Quarles and Butler*, 158 U. S. 532, 535. The source of the right in this case is not the Fourteenth Amendment. The complaint alleges that petitioners "knowingly" did not interfere with the "many public meetings" whose objectives they agreed with, but that they did conspire to break up respondents' meeting because petitioners were opposed to respondents' views, which were expected to be there expressed. Such conduct does not differ materially from the specific conspiracies which the Court recognizes that the statute was intended to reach.

The language of the statute refutes the suggestion that action under color of state law is a necessary ingredient of the cause of action which it recognizes. R. S. § 1980 (3) speaks of "two or more persons in any State or Territory" conspiring. That clause is not limited to state

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officials. Still more obviously, where the section speaks of persons going "in disguise on the highway . . . for the purpose of depriving . . . any person or class of persons of the equal protection of the laws," it certainly does not limit its reference to actions of that kind by state officials. When Congress, at this period, did intend to limit comparable civil rights legislation to action under color of state law, it said so in unmistakable terms. In fact, R. S. § 1980 (3) originally was § 2 of the Act of April 20, 1871, and § 1 of that same Act said "That any person who, *under color of any law,* statute, ordinance, regulation, custom, or usage of any State, shall subject . . . any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall . . . be liable to the party injured . . . ." (Emphasis added.) 17 Stat. 13.

Congress certainly has the power to create a federal cause of action in favor of persons injured by private individuals through the abridgment of federally created constitutional rights. It seems to me that Congress has done just this in R. S. § 1980 (3). This is not inconsistent with the principle underlying the Fourteenth Amendment. That amendment prohibits the respective states from making laws abridging the privileges or immunities of citizens of the United States or denying to any person within the jurisdiction of a state the equal protection of the laws. Cases holding that those clauses are directed only at state action are not authority for the contention that Congress may not pass laws supporting rights which exist apart from the Fourteenth Amendment.

Accordingly, I would affirm the judgment of the Court of Appeals.

Syllabus.

NATIONAL LABOR RELATIONS BOARD *v.* INTERNATIONAL RICE MILLING CO., INC. ET AL.

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

No. 313. Argued February 27, 1951.—Decided June 4, 1951.

Although the union here involved was not certified or recognized as the representative of the employees of a certain mill engaged in interstate commerce, its agents picketed the mill with the object of securing recognition of the union as the collective bargaining representative of the mill's employees. In the course of their picketing, the agents sought to influence two men in charge of a truck of a neutral customer to refuse, in the course of their employment, to go to the mill for an order of goods; and they threw rocks at the truck when it proceeded to the mill by a detour. *Held:* Such action did not violate the "secondary boycott" provisions of § 8 (b) (4) of the National Labor Relations Act, as amended by the Labor Management Relations Act, 1947. Pp. 666–674.

(a) The union's picketing and its encouragement of the men on the truck did not amount to such an inducement or encouragement to "concerted" activities as the section proscribes. Pp. 670–671.

(b) It is the object of union encouragement that is proscribed by § 8 (b) (4), rather than the means adopted to make it felt; and violence on the picket line is not material in this case, since the complaint was not based upon that violence as such and did not rely upon § 8 (b) (1) (A). P. 672.

(c) Congress did not seek by § 8 (b) (4) to interfere with ordinary strikes. Pp. 672–673.

(d) By § 13, Congress has made it clear that § 8 (b) (4), and all other parts of the Act which otherwise might be read so as to interfere with, impede or diminish a union's traditional right to strike, may be so read only if such interference, impediment or diminution is "specifically provided for" in the Act. P. 673.

183 F. 2d 21, reversed.

The National Labor Relations Board dismissed a complaint of an alleged violation of § 8 (b) (4) of the National Labor Relations Act, as amended by the Labor

Management Relations Act, 1947. 84 N. L. R. B. 360. The Court of Appeals set aside the dismissal and remanded the case for further proceedings. 183 F. 2d 21. This Court granted certiorari. 340 U. S. 902. *Reversed,* p. 674.

David P. Findling argued the cause for petitioner. With him on the brief were *Solicitor General Perlman, Mozart G. Ratner* and *Bernard Dunau.*

Conrad Meyer, III argued the cause and filed a brief for respondents.

Herman Phleger, Gregory A. Harrison and *Marion B. Plant* filed a brief for the Di Giorgio Fruit Corporation, as *amicus curiae,* urging affirmance.

MR. JUSTICE BURTON delivered the opinion of the Court.

The question presented is whether a union violated § 8 (b) (4) of the National Labor Relations Act, 49 Stat. 449, 29 U. S. C. § 151, as amended by the Labor Management Relations Act, 1947,[1] under the following circum-

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[1] "SEC. 8. . . .

"(b) It shall be an unfair labor practice for a labor organization or its agents—

. . . . . .

"(4) to engage in, or *to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment* to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or *to perform any services, where an object thereof is:* (A) *forcing or requiring* any employer or self-employed person to join any labor or employer organization or *any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person;* (B) *forcing or requiring any other employer to recognize or bargain*

stances: Although not certified or recognized as the representative of the employees of a certain mill engaged in interstate commerce, the agents of the union picketed the mill with the object of securing recognition of the union as the collective bargaining representative of the mill employees. In the course of their picketing, the agents sought to influence, or in the language of the statute they "encouraged," two men in charge of a truck of a neutral customer of the mill to refuse, in the course of their employment, to go to the mill for an order of goods. For the reasons hereinafter stated, we hold that such conduct did not violate § 8 (b) (4).

This case was heard here with No. 393, *Labor Board* v. *Denver Building Trades Council, post,* p. 675; No. 108,

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with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9; (C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9; (D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work: *Provided,* That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act; . . . ." (Emphasis supplied.) 61 Stat. 140–142, 29 U. S. C. (Supp. III) § 158 (b) (4).

The above provisions, together with those of § 303, 61 Stat. 158, 29 U. S. C. (Supp. III) § 187, have been referred to by Congress and the courts as the "secondary boycott sections" of the Act.

International Brotherhood of Electrical Workers v. *Labor Board, post,* p. 694; and No. 85, *Local 74, United Brotherhood of Carpenters* v. *Labor Board, post,* p. 707. Its facts, however, distinguish it from those cases.

This review is confined to the single incident described in the complaint issued by the Acting Regional Director of the National Labor Relations Board against the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 201, A. F. L., herein called the union. The complaint originally was based upon four charges made against the union by several rice mills engaged in interstate commerce near the center of the Louisiana rice industry. The mills included the International Rice Milling Company, Inc., which gives its name to this proceeding, and the Kaplan Rice Mills, Inc., a Louisiana corporation, which operated the mill at Kaplan, Louisiana, where the incident now before us occurred. The complaint charged that the union or its agents, by their conduct toward two employees of a neutral customer of the Kaplan Rice Mills, engaged in an unfair labor practice contrary to § 8 (b) (4). The Board, with one member not participating, adopted the findings and conclusions of its trial examiner as to the facts but disagreed with his recommendation that those facts constituted a violation of § 8 (b) (4) (A) or (B). The Board dismissed the complaint but attached the trial examiner's intermediate report to its decision. 84 N. L. R. B. 360. The Court of Appeals set aside the dismissal and remanded the case for further proceedings. 183 F. 2d 21. We granted certiorari because of the importance of the principle involved and because of the conflicting views of several circuits as to the meaning of § 8 (b) (4). 340 U. S. 902.[2]

[2] While the complaint charged no unfair labor practice on the part of the union in its relations with employees of the Kaplan Mill,

The findings adopted by the Board show that the incident before us occurred at the union's picket line near the Kaplan Mill in October, 1947. The pickets generally carried signs, one being "This job is unfair to" the union. The goal of the pickets was recognition of the union as the collective bargaining representative of the mill employees, but none of those employees took part in the picketing. Late one afternoon two employees of The Sales and Service House, which was a customer of the mill, came in a truck to the Kaplan Mill to obtain rice or bran for their employer. The union had no grievance against the customer and the latter was a neutral in the dispute between the union and the mill. The pickets formed a line across the road and walked toward the truck. When the truck stopped, the pickets told its occupants there was a strike on and that the truck would have to go back. Those on the truck agreed, went back to the highway and stopped. There one got out and went to the mill across the street. At that time a vice president of the Kaplan Mill came out and asked whether the truck was on its way to the mill and whether its occupants wanted to get the order they came for. The man on the truck explained that he was not the driver and that he would have to see the driver. On the driver's return, the truck proceeded,

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it did charge that the union also violated § 8 (b) (4) (A) by its conduct in inducing and encouraging employees of two neutral railroads to engage in a concerted refusal, in the course of their employment, to transport or otherwise handle articles shipped to or from some of the respective mills, including the Kaplan Mill. Not only did the encouragement of concerted action which was alleged in that charge differ substantially from the conduct which is before us but the Board found that the railroad employees were not employees within the meaning of § 8 (b) (4). 84 N. L. R. B. 360. The Court of Appeals held to the contrary and remanded the charge for further proceedings. 183 F. 2d 21, 24–26. The Board, however, does not seek a review of that order.

with the vice president, to the mill by a short detour. The pickets ran toward the truck and threw stones at it. The truck entered the mill, but the findings do not disclose whether the articles sought there were obtained. The Board adopted the finding that "the stopping of the Sales House truck drivers and the use of force in connection with the stoppage were within the 'scope of the employment' of the pickets as agents of the respondent [union] and that such activities are attributable to the respondent." 84 N. L. R. B. 360, 372.

The most that can be concluded from the foregoing, to establish a violation of § 8 (b) (4), is that the union, in the course of picketing the Kaplan Mill, did encourage two employees of a neutral customer to turn back from an intended trip to the mill and thus to refuse, in the course of their employment, to transport articles or perform certain services for their employer. We may assume, without the necessity of adopting the Board's findings to that effect, that the objects of such conduct on the part of the union and its agents were (1) to force Kaplan's customer to cease handling, transporting or otherwise dealing in products of the mill or to cease doing business with Kaplan, at that time and place, and (2) to add to the pressure on Kaplan to recognize the union as the bargaining representative of the mill employees.

A sufficient answer to this claimed violation of the section is that the union's picketing and its encouragement of the men on the truck did not amount to such an inducement or encouragement to "concerted" activity as the section proscribes. While each case must be considered in the light of its surrounding circumstances, yet the applicable proscriptions of § 8 (b) (4) are expressly limited to the inducement or encouragement of *concerted*

conduct by the employees of the neutral employer.[3] That language contemplates inducement or encouragement to some concert of action greater than is evidenced by the pickets' request to a driver of a single truck to discontinue a pending trip to a picketed mill. There was no attempt by the union to induce any action by the employees of the neutral customer which would be more widespread than that already described. There were no inducements or encouragements applied elsewhere than on the picket line. The limitation of the complaint to an incident in the geographically restricted area near the mill is significant, although not necessarily conclusive. The picketing was directed at the Kaplan employees and at their employer in a manner traditional in labor disputes. Clearly, that, in itself, was not proscribed by § 8 (b) (4). Insofar as the union's efforts were directed beyond that and toward the employees of anyone other than Kaplan, there is no suggestion that the union sought *concerted* conduct by such other employees. Such efforts also fall short of the proscriptions in § 8 (b) (4). In this case, therefore, we need not determine the specific objects toward which a union's encouragement of concerted conduct must be directed in order to amount to an unfair labor practice under subsection (A) or (B) of § 8 (b) (4). A union's inducements or encouragements reaching individual employees of neutral employers only as they happen to approach the picketed place of business generally are not aimed at concerted, as distinguished from individual, conduct by such employees. Generally, therefore, such actions do not come within the proscription of § 8 (b) (4), and they do not here.

[3] It is not charged here that the union or its agents themselves engaged in a strike or concerted activity for an object proscribed by § 8 (b) (4).

In the instant case the violence on the picket line is not material. The complaint was not based upon that violence, as such. To reach it, the complaint more properly would have relied upon § 8 (b) (1) (A) [4] or would have addressed itself to local authorities. The substitution of violent coercion in place of peaceful persuasion would not in itself bring the complained-of conduct into conflict with § 8 (b) (4). It is the object of union encouragement that is proscribed by that section, rather than the means adopted to make it felt.[5]

That Congress did not seek, by § 8 (b) (4), to interfere with the ordinary strike has been indicated recently by this Court.[6] This is emphasized in § 13 as follows:

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[4] "SEC. 8. . . .

"(b) It shall be an unfair labor practice for a labor organization or its agents—

"(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: . . . ." 61 Stat. 140–141, 29 U. S. C. (Supp. III) § 158 (b) (1) (A).

"SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities . . . ." 61 Stat. 140, 29 U. S. C. (Supp. III) § 157.

[5] ". . . The Labor Management Relations Act declared it to be an unfair labor practice for a union to induce or engage in a strike or concerted refusal to work where an object thereof is any of certain enumerated ones. § 8 (b) (4) . . . . While the Federal Board is empowered to forbid a strike, when and because its purpose is one that the Federal Act made illegal, it has been given no power to forbid one because its method is illegal—even if the illegality were to consist of actual or threatened violence to persons or destruction of property." *International Union* v. *Wisconsin Board,* 336 U. S. 245, 253.

[6] In this Act "Congress safeguarded the exercise by employees of 'concerted activities' and expressly recognized the right to strike." *International Union* v. *O'Brien,* 339 U. S. 454, 457; see also, *Amal-*

> "Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right." 61 Stat. 151, 29 U. S. C. (Supp. III) § 163.

By § 13, Congress has made it clear that § 8 (b) (4), and all other parts of the Act which otherwise might be read so as to interfere with, impede or diminish the union's traditional right to strike, may be so read only if such interference, impediment or diminution is "specifically provided for" in the Act.[7] No such specific provision in § 8 (b) (4) reaches the incident here. The material legislative history supports this view.[8]

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gamated Assn. of Employees v. *Wisconsin Board,* 340 U. S. 383, 389, 404; *United Electrical & Machine Workers,* 85 N. L. R. B. 417, 418; *Oil Workers International Union,* 84 N. L. R. B. 315, 318–320.

[7] See also, the protection given to the right to engage in concerted activities by § 7 of the Act, note 4, *supra.* As to both §§ 13 and 7, see *International Union* v. *Wisconsin Board, supra,* at 258–264.

The character of the problem of reconciliation of the right to strike with the limitations expressed in § 8 (b) (4) is not unlike that which confronted the Court in *Allen Bradley Co.* v. *Local Union No. 3,* 325 U. S. 797, 806:

"The result of all this is that we have two declared congressional policies which it is our responsibility to try to reconcile. The one seeks to preserve a competitive business economy; the other to preserve the rights of labor to organize to better its conditions through the agency of collective bargaining. We must determine here how far Congress intended activities under one of these policies to neutralize the results envisioned by the other."

[8] Senator Taft, Chairman of the Senate Committee on Labor and Public Welfare, and floor manager for the bill in the Senate, said: "So far as the bill is concerned, we have proceeded on the theory that there is a right to strike and that labor peace must be based on free collective bargaining. We have done nothing to outlaw strikes for basic wages, hours, and working conditions after proper opportunity for mediation." 93 Cong. Rec. 3835. Similar state-

On the single issue before us, we sustain the action of the Board and the judgment of the Court of Appeals, accordingly, is

Reversed.

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ments by Senator Taft appear at 93 Cong. Rec. 3838, 4198, 4867, 6446, 7537. Several other members of the Committee expressed like views: Senator Ellender at 93 Cong. Rec. 4131–4132; Senator Ball at 4834, 4838, 7529–7530; Senator Aiken at 4860; and Senator Morse at 4864, 4871–4873.

See also, "the primary strike for recognition (without a Board certification) is not proscribed." S. Rep. No. 105, 80th Cong., 1st Sess. (Pt. 1) 22, and see H. R. Rep. No. 510, 80th Cong., 1st Sess. 43.

In discussing the effect of § 8 (b) (4), and in showing its application only to circumstances other than those involved in this case, Senator Taft said further:

"The Senator will find a great many decisions . . . which hold that under the common law a secondary boycott is unlawful. . . . under the provisions of the Norris-LaGuardia Act, it became impossible to stop a secondary boycott or any other kind of a strike, no matter how unlawful it may have been at common law. All this provision of the bill [§ 8 (b) (4)] does is to reverse the effect of the law as to secondary boycotts." 93 Cong. Rec. 4198.

Syllabus.

NATIONAL LABOR RELATIONS BOARD *v.* DENVER BUILDING & CONSTRUCTION TRADES COUNCIL ET AL.

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

No. 393. Argued February 27, 1951.—Decided June 4, 1951.

1. A decision of a district court in a preliminary proceeding under § 10 (l) of the National Labor Relations Act, as amended, that the activities complained of did not affect interstate commerce and were therefore not within the jurisdiction of the Board, was not *res judicata* of that issue in a proceeding on the merits under § 10 (e) and (f). Pp. 681–683.
2. A subcontractor engaged by a general contractor to do the electrical work on a building being constructed purchased $86,560 of raw materials during the year, $55,745 of which were purchased outside the state. It performed no services outside the state but shipped $5,000 of its products outside the state. It had expended $315 for labor and $350 for materials on the project when its services were terminated because of a strike. Both the National Labor Relations Board and the Court of Appeals found that the strike affected interstate commerce. *Held:* This conclusion is sustained. Pp. 683–685.

   (a) The fact that the instant building, after its completion, might be used only for local purposes does not alter the fact that its construction, as distinguished from its later use, affected interstate commerce. P. 684.

   (b) The maxim *de minimis non curat lex* did not require the Board to refuse to take jurisdiction of the instant case. P. 685.
3. The National Labor Relations Board found that, by engaging in a strike an object of which was to force the general contractor on a construction project to terminate its contract with a subcontractor employing nonunion labor on the project, respondent labor organization committed an unfair labor practice within the meaning of § 8 (b) (4) (A) of the National Labor Relations Act, as amended by the Labor Management Relations Act, 1947. *Held:* This finding is sustained. *Labor Board* v. *Rice Milling Co.*, *ante*, p. 665, distinguished. Pp. 685–692.

   (a) It was an object of the strike to force the contractor to terminate the contract of the electrical subcontractor. Pp. 687–689.

(b) A strike with such an object is an unfair labor practice within the meaning of § 8 (b) (4) (A), even though that may not be the *sole* object. Pp. 689–690.

(c) Section 8 (c) safeguarding freedom of speech has no significant application to the picket's placard in this case and does not immunize respondent's action against the specific provisions of § 8 (b) (4) (A). See *Electrical Workers* v. *Labor Board, post,* p. 694. Pp. 690–691.

(d) The Board's findings on questions of fact in this field are conclusive when supported by substantial evidence on the record as a whole; and the Board's interpretation and application of the Act in doubtful situations are entitled to weight. Pp. 691–692.

(e) As applied in this case, the views of the Board conform with the dual congressional objective of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own. P. 692.

87 U. S. App. D. C. 293, 186 F. 2d 326, reversed.

The National Labor Relations Board found respondents guilty of an unfair labor practice within the meaning of § 8 (b) (4) (A) of the National Labor Relations Act, as amended by the Labor Management Relations Act, 1947, and ordered it to cease and desist. 82 N. L. R. B. 1195. The Court of Appeals denied enforcement. 87 U. S. App. D. C. 293, 186 F. 2d 326. This Court granted certiorari. 340 U. S. 902. *Reversed,* p. 692.

David P. Findling argued the cause for petitioner. With him on the brief were *Solicitor General Perlman, Mozart G. Ratner* and *Dominick L. Manoli.*

Wm. E. Leahy argued the cause for respondents. With him on the brief were *Wm. J. Hughes, Jr., Louis Sherman, Martin F. O'Donoghue, Thomas X. Dunn* and *Philip Hornbein, Jr.*

Clif Langsdale filed a brief for the United Brotherhood of Carpenters & Joiners of America, A. F. of L., et al., as *amici curiae,* supporting respondents.

MR. JUSTICE BURTON delivered the opinion of the Court.

The principal question here is whether a labor organization committed an unfair labor practice, within the meaning of § 8 (b) (4) (A) of the National Labor Relations Act, 49 Stat. 449, 29 U. S. C. § 151, as amended by the Labor Management Relations Act, 1947,[1] by engaging in a strike, an object of which was to force the general contractor on a construction project to terminate its contract with a certain subcontractor on that project. For the reasons hereafter stated, we hold that such an unfair labor practice was committed.

In September, 1947, Doose & Lintner was the general contractor for the construction of a commercial building in Denver, Colorado. It awarded a subcontract for electrical work on the building, in an estimated amount of $2,300, to Gould & Preisner, a firm which for 20 years had employed nonunion workmen on construction work in that city. The latter's employees proved to be the only nonunion workmen on the project. Those of the general contractor and of the other subcontractors were members of unions affiliated with the respondent Denver Building and Construction Trades Council (here called the Coun-

[1] "SEC. 8. . . .

"(b) It shall be an unfair labor practice for a labor organization or its agents—

. . . . . .

"(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; . . . ." 61 Stat. 140–141, 29 U. S. C. (Supp. III) § 158 (b) (4) (A).

cil). In November a representative of one of those unions told Gould that he did not see how the job could progress with Gould's nonunion men on it. Gould insisted that they would complete the electrical work unless bodily put off. The representative replied that the situation would be difficult for both Gould & Preisner and Doose & Lintner.

January 8, 1948, the Council's Board of Business Agents instructed the Council's representative "to place a picket on the job stating that the job was unfair" to it.[2] In keeping with the Council's practice,[3] each affiliate was notified of that decision. That notice was a signal in the nature of an order to the members of the affiliated unions to leave the job and remain away until otherwise

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[2] *Denver Building Trades Council*, 82 N. L. R. B. 1195, 1210.

[3] The Council's by-laws provided in part:

"ARTICLE I–B

"Section 1. It shall be the duty of this Council to stand for absolute *closed shop* conditions on all jobs in the City of Denver and jurisdictional surroundings. . . . [Emphasis in original.]

"Section 2. The Board of Business Agents . . . shall have the power to declare a job unfair and remove all men from the job. They shall also have the power to place the men back on the job when satisfactory arrangements have been made.

"Section 3. Any craft refusing to leave a job which has been declared unfair or returning to the job before being ordered back by the Council or its Board of Agents shall be tried, and if found guilty, shall be fined the sum of $25.00.

"Section 4. Refusal of any organization to pay said fine shall be followed by expulsion from this Council. An organization so expelled shall pay said fine and one complete back quarter dues and per capita before being reinstated.

"ARTICLE XI–B

"Section 1. Strikes must be called by the Council or the Board of Agents in conformity with Article I–B, Sections 1–2. When strikes are called the Council shall have full jurisdiction over the same, and any contractor, who works on a struck job, or employs

ordered. Representatives of the Council and each of the respondent unions visited the project and reminded the contractor that Gould & Preisner employed nonunion workmen and said that union men could not work on the job with nonunion men. They further advised that if Gould & Preisner's men did work on the job, the Council and its affiliates would put a picket on it to notify their members that nonunion men were working on it and that the job was unfair. All parties stood their ground.

January 9, the Council posted a picket at the project carrying a placard stating "This Job Unfair to Denver Building and Construction Trades Council."[4] He was paid by the Council and his picketing continued from January 9 through January 22. During that time the only persons who reported for work were the nonunion electricians of Gould & Preisner. January 22, before Gould & Preisner had completed its subcontract, the general contractor notified it to get off the job so that Doose & Lintner could continue with the project. January 23, the Council removed its picket and shortly thereafter the union employees resumed work on the project. Gould & Preisner protested this treatment but its workmen were denied entrance to the job.

On charges filed by Gould & Preisner, the Regional Director of the National Labor Relations Board issued the complaint in this case against the Council and the

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non-union men to work on a struck job, shall be declared unfair and all union men shall be called off from his work or shop.

"Section 2. The representative of the Council shall have the power to order all strikes when instructed to do so by the Council or Board of Agents. . . . All employees on a struck job shall leave the same when ordered to do so by the Council Agent and remain away from the same until such time as a settlement is made, or otherwise ordered." 82 N. L. R. B. at 1214–1215.

[4] 82 N. L. R. B. at 1211.

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respondent unions.[5] It alleged that they had engaged in a strike or had caused strike action to be taken on the project by employees of the general contractor and of other subcontractors, an object of which was to force the general contractor to cease doing business with Gould & Preisner on that project.

Between the Board's receipt of the charges and the filing of the complaint based upon them, the Regional Director of the Board petitioned the United States District Court for the District of Colorado for injunctive relief.[6] That petition was dismissed on the jurisdictional ground that the activities complained of did not affect interstate commerce. *Sperry* v. *Denver Building Trades Council,* 77 F. Supp. 321. Such action will be discussed later under the heading of *res judicata.* Hearings were held by the Board's trial examiner on the merits of the complaint. The Board adopted its examiner's findings, conclusions and recommendations, with minor additions and modifications not here material. It attached the examiner's intermediate report to its decision and ordered respondents to cease and desist from engaging in the activities charged. 82 N. L. R. B. 1195. Respondents petitioned the United States Court of Appeals for the District of Columbia Circuit for a review under § 10 (f).[7] The Board answered and asked for enforcement of its order. That court held, with one judge dissenting, that

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[5] Originally the complaint was directed also against another union and included incidents at two other construction projects in Denver on which Gould & Preisner had subcontracted to do electrical work. The trial examiner recommended that the Board issue a cease and desist order based upon one of those incidents, but the Board dismissed the complaint as to all conduct except that on the project before us.

[6] Under § 10 (l), 61 Stat. 149–150, 29 U. S. C. (Supp. III) § 160 (*l*).

[7] 61 Stat. 148–149, 29 U. S. C. (Supp. III) § 160 (f).

the conduct complained of affected interstate commerce sufficiently to give the Board jurisdiction over it, but the court unanimously set aside the order of the Board and said: "Convinced that the action in the circumstances of this case is primary and not secondary we are obliged to refuse to enforce the order based on § 8 (b) (4) (A)." 87 U. S. App. D. C. 293, 304, 186 F. 2d 326, 337. The Board claimed a conflict between that conclusion and the reasoning of the Court of Appeals for the Second Circuit in No. 108, *International Brotherhood of Electrical Workers* v. *Labor Board,* 181 F. 2d 34, and of that for the Sixth Circuit in No. 85, *Labor Board* v. *Local 74, United Brotherhood of Carpenters,* 181 F. 2d 126. We granted certiorari in each case, 340 U. S. 902–903, and all were argued with No. 313, *Labor Board* v. *International Rice Milling Co., ante,* p. 665.[8] In another companion case, No. 387, *United Brotherhood of Carpenters* v. *Labor Board,* decided by the Court of Appeals for the Tenth Circuit, 184 F. 2d 60, certiorari has been denied this day, *post,* p. 947.

I. *Res Judicata.*—Respondents not only attack the jurisdiction of the Board on the ground that the actions complained of did not affect interstate commerce, but they contend that the decision rendered on that point by the District Court for the District of Colorado in *Sperry* v. *Denver Building Trades Council, supra,* has made the issue *res judicata.*[9] We do not agree. The District Court did not have before it the record on the

[8] For a collection and review of the Board and lower court cases dealing with these and related issues under § 8 (b) (4), see Dennis, The Boycott Under the Taft-Hartley Act, N. Y. U. Third Annual Conference on Labor (1950) 367–460.

[9] An appeal to the Court of Appeals in that proceeding was dismissed by the Board with that court's consent.

merits. It proceeded under § 10 (l) [10] which is designed to assist a preliminary investigation of the charges before the filing of a complaint. If the officer or regional attorney to whom the matter is referred has reasonable cause to believe that a charge is true and that a complaint should issue, the statute says that he shall petition an appropriate District Court for injunctive relief, pending the final adjudication of the Board. Such proceeding is independent of that on the merits under § 10 (a)–(d). There is a separate provision for securing injunctive relief after the filing of the complaint. § 10 (j). Court review is authorized in § 10 (e) and (f). As held by the Board, 82 N. L. R. B. at 1203–1204, and the court below, 87 U. S. App. D. C. at 297, 299, 186 F. 2d at 330, 332, the very scheme of the statute accordingly contemplates that a decision on jurisdiction made in the independent preliminary proceeding for interlocutory relief,

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[10] "(l) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (A), (B), or (C) of section 8 (b), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any district court of the United States (including the District Court of the United States for the District of Columbia) within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: . . . ." 61 Stat. 149, 29 U. S. C. (Supp. III) § 160 (*l*).

under § 10 (l), shall not foreclose a proceeding on the merits such as is now before us.[11]

II. *Effect on Interstate Commerce.*—The activities complained of must affect interstate commerce in order to bring them within the jurisdiction of the Board.[12] The Board here found that their effect was sufficient to sustain its jurisdiction and the Court of Appeals was satisfied. We see no justification for reversing that conclusion.

The Board found that, in 1947, Gould & Preisner purchased $86,560.30 of raw materials, of which $55,745.25, or about 65%, were purchased outside of Colorado. Also, most of the merchandise it purchased in Colorado had been produced outside of that State. While Gould & Preisner performed no services outside of Colorado, it shipped $5,000 of its products outside of that State. Up to the time when its services were discontinued on the instant project, it had expended on it about $315 for labor and about $350 for materials. On a 65% basis, $225 of those materials would be from out of the State. The Board adopted its examiner's finding that any widespread

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[11] See also, *Labor Board* v. *Local 74, United Brotherhood of Carpenters,* 181 F. 2d 126, aff'd in No. 85, *post,* p. 707; *Denver Building Trades Council,* 82 N. L. R. B. 93.

[12] "SEC. 10. (a) The Board is empowered . . . to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. . . ." 61 Stat. 146, 29 U. S. C. (Supp. III) § 160 (a).

"SEC. 2. When used in this Act—

. . . . . .

"(6) The term 'commerce' means trade, traffic, commerce, transportation, or communication among the several States . . . .

"(7) The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce. . . ." 61 Stat. 137–138, 29 U. S. C. (Supp. III) § 152 (6) (7).

application of the practices here charged might well result in substantially decreasing the influx of materials into Colorado from outside the State and it recognized that Gould & Preisner's annual purchase of over $55,000 of such materials was not negligible.

The Board also adopted the finding that the activities complained of had a close, intimate and substantial relation to trade, traffic and commerce among the states and that they tended to lead, and had led, to labor disputes burdening and obstructing commerce and the free flow of commerce. The fact that the instant building, after its completion, might be used only for local purposes does not alter the fact that its construction, as distinguished from its later use, affected interstate commerce.

Even when the effect of activities on interstate commerce is sufficient to enable the Board to take jurisdiction of a complaint, the Board sometimes properly declines to do so, stating that the policies of the Act would not be effectuated by its assertion of jurisdiction in that case. Here, however, the Board not only upheld the filing of the complaint but it sustained the charges made in it.

The same jurisdictional language as that now in effect appeared in the National Labor Relations Act of 1935 [13] and this Court said of it in that connection:

> "Examining the Act in the light of its purpose and of the circumstances in which it must be applied we can perceive no basis for inferring any intention of Congress to make the operation of the Act depend on any particular volume of commerce affected more than that to which courts would apply the maxim *de minimis.*" *Labor Board* v. *Fainblatt,* 306 U. S. 601, 607; see also, *Labor Board* v. *Jones & Laughlin Steel Corp.,* 301 U. S. 1.

[13] 49 Stat. 450, 29 U. S. C. § 152 (6) and (7).

The maxim *de minimis non curat lex* does not require the Board to refuse to take jurisdiction of the instant case.[14]

III. *The Secondary Boycott.*—We now reach the merits. They require a study of the objectives of the strike and a determination whether the strike came within the definition of an unfair labor practice stated in § 8 (b) (4) (A).

The language of that section which is here essential is as follows:

> "(b) It shall be an unfair labor practice for a labor organization . . .
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> . . . . . .
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> "(4) to engage in . . . a strike . . . where an object thereof is: (A) forcing or requiring . . . any employer or other person . . . to cease

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[14] ". . . Congress gave the Board authority to prevent practices 'tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.' . . . Congress therefore left it to the Board to ascertain whether proscribed practices would in particular situations adversely affect commerce when judged by the full reach of the constitutional power of Congress. Whether or no practices may be deemed by Congress to affect interstate commerce is not to be determined by confining judgment to the quantitative effect of the activities immediately before the Board. Appropriate for judgment is the fact that the immediate situation is representative of many others throughout the country, the total incidence of which if left unchecked may well become far-reaching in its harm to commerce." *Polish Alliance* v. *Labor Board,* 322 U. S. 643, 648. See also, *United Brotherhood of Carpenters* v. *Sperry,* 170 F. 2d 863, 867–868.

For the current practice see Mimeograph Release of National Labor Relations Board, dated October 6, 1950, entitled "N. L. R. B. Clarifies and Defines Areas In Which It Will and Will Not Exercise Jurisdiction." See also, *Hotel Assn. of St. Louis,* 92 N. L. R. B. 1388, 27 LRR Man. 1243.

> doing business with any other person; . . . ." 61 Stat. 141, 29 U. S. C. (Supp. III) § 158 (b) (4) (A).

While § 8 (b) (4) does not expressly mention "primary" or "secondary" disputes, strikes or boycotts, that section often is referred to in the Act's legislative history as one of the Act's "secondary boycott sections." The other is § 303, 61 Stat. 158, 29 U. S. C. (Supp. III) § 187, which uses the same language in defining the basis for private actions for damages caused by these proscribed activities.

Senator Taft, who was the sponsor of the bill in the Senate and was the Chairman of the Senate Committee on Labor and Public Welfare in charge of the bill, said, in discussing this section:

> ". . . under the provisions of the Norris-LaGuardia Act, it became impossible to stop a secondary boycott or any other kind of a strike, no matter how unlawful it may have been at common law. All this provision of the bill does is to reverse the effect of the law as to secondary boycotts. It has been set forth that there are good secondary boycotts and bad secondary boycotts. Our committee heard evidence for weeks and never succeeded in having anyone tell us any difference between different kinds of secondary boycotts. So we have so broadened the provision dealing with secondary boycotts as to make them an unfair labor practice." 93 Cong. Rec. 4198.

The Conference Report to the House of Representatives said:

> "Under clause (A) [of § 8 (b) (4)] strikes or boycotts, or attempts to induce or encourage such action, were made unfair labor practices if the purpose was to force an employer or other person to cease using,

> selling, handling, transporting, or otherwise dealing in the products of another, or to cease doing business with any other person. Thus it was made an unfair labor practice for a union to engage in a strike against employer A for the purpose of forcing that employer to cease doing business with employer B. Similarly it would not be lawful for a union to boycott employer A because employer A uses or otherwise deals in the goods of, or does business with, employer B." H. R. Rep. No. 510, 80th Cong., 1st Sess. 43.[15]

At the same time that §§ 7 and 13 [16] safeguard collective bargaining, concerted activities and strikes between the primary parties to a labor dispute, § 8 (b) (4) restricts a labor organization and its agents in the use of economic pressure where an object of it is to force an employer or other person to boycott someone else.

A. We must first determine whether the strike in this case had a proscribed object. The conduct which the Board here condemned is readily distinguishable from that which it declined to condemn in the *Rice Milling* case, *ante*, p. 665. There the accused union sought merely to obtain its own recognition by the operator of a mill, and the union's pickets near the mill sought to influence two employees of a customer of the mill not to cross the picket line. In that case we supported the Board in its conclusion that such conduct was no more than was traditional and permissible in a primary strike. The union did not engage in a strike against the customer. It did not encourage concerted action by the customer's

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[15] See also, Hearings before the Senate Committee on Labor and Public Welfare on S. 55 and S. J. Res. 22, 80th Cong., 1st Sess. 14, 568, 688, 983, 1614, 1814, 1838; S. Rep. No. 105, 80th Cong., 1st Sess. (Pt. 1) 3, 22, 54, (Pt. 2) 19; 93 Cong. Rec. 4844, 4845, 4858.

[16] 61 Stat. 140, 151, 29 U. S. C. (Supp. III) §§ 157, 163.

employees to force the customer to boycott the mill. It did not commit any unfair labor practice proscribed by § 8 (b) (4).

In the background of the instant case there was a long-standing labor dispute between the Council and Gould & Preisner due to the latter's practice of employing non-union workmen on construction jobs in Denver. The respondent labor organizations contend that they engaged in a primary dispute with Doose & Lintner alone, and that they sought simply to force Doose & Lintner to make the project an all-union job. If there had been no contract between Doose & Lintner and Gould & Preisner there might be substance in their contention that the dispute involved no boycott. If, for example, Doose & Lintner had been doing all the electrical work on this project through its own nonunion employees, it could have replaced them with union men and thus disposed of the dispute. However, the existence of the Gould & Preisner subcontract presented a materially different situation. The nonunion employees were employees of Gould & Preisner. The only way that respondents could attain their purpose was to force Gould & Preisner itself off the job. This, in turn, could be done only through Doose & Lintner's termination of Gould & Preisner's subcontract. The result is that the Council's strike, in order to attain its ultimate purpose, must have included among its objects that of forcing Doose & Lintner to terminate that subcontract. On that point, the Board adopted the following finding:

> "That *an* object, if not the only object, of what transpired with respect to . . . Doose & Lintner was to force or require them to cease doing business with Gould & Preisner seems scarcely open to question, in view of all of the facts. And it is clear at least

> as to Doose & Lintner, that that purpose was achieved." (Emphasis supplied.) 82 N. L. R. B. at 1212.[17]

We accept this crucial finding. It was an object of the strike to force the contractor to terminate Gould & Preisner's subcontract.

B. We hold also that a strike with such an object was an unfair labor practice within the meaning of § 8 (b) (4) (A).

It is not necessary to find that the *sole* object of the strike was that of forcing the contractor to terminate the subcontractor's contract. This is emphasized in the legislative history of the section.[18] See also, *Labor Board* v. *Wine, Liquor & Distillery Workers Union,* 178 F. 2d 584, 586.

We agree with the Board also in its conclusion that the fact that the contractor and subcontractor were engaged on the same construction project, and that the contractor had some supervision over the subcontractor's work, did not eliminate the status of each as an independent con-

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[17] The Board further stated:

"2. The Trial Examiner found that the Council and the other three Respondents, by picketing Doose & Lintner's . . . project as alleged in the complaint and thereby causing members of local unions affiliated with the Council to quit work on that project, with an object of forcing Doose & Lintner to cease doing business with Gould & Preisner, engaged in strike action in violation of Section 8 (b) (4) (A). We find merit in the Respondents' exceptions only with respect to Carpenters [not involved here], and otherwise agree in substance with the Trial's Examiner's finding." 82 N. L. R. B. at 1196.

[18] Senator Taft, sponsor of the bill, stated in his supplementary analysis of it as passed: "Section 8 (b) (4), relating to illegal strikes and boycotts, was amended in conference by striking out the words 'for the purpose of' and inserting the clause 'where an object thereof is.'" 93 Cong. Rec. 6859.

tractor or make the employees of one the employees of the other. The business relationship between independent contractors is too well established in the law to be overridden without clear language doing so. The Board found that the relationship between Doose & Lintner and Gould & Preisner was one of "doing business" and we find no adequate reason for upsetting that conclusion.[19]

Finally, § 8 (c) [20] safeguarding freedom of speech has no significant application to the picket's placard in this case. Section 8 (c) does not apply to a mere signal by a labor organization to its members, or to the members of its affiliates, to engage in an unfair labor practice such as a strike proscribed by § 8 (b) (4) (A). That the placard was merely such a signal, tantamount to a direction to strike, was found by the Board.

> ". . . the issues in this case turn upon acts by labor organizations which are tantamount to directions and instructions to their members to engage in strike action. The protection afforded by Section 8 (c) of the Act to the expression of 'any views, argument or opinion' does not pertain where, as here, the issues

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[19] See note 17, *supra*, and see also:

"What the issue really boils down to is this: Does Section 8 (b) (4) (A) apply to normal business dealings between a contractor and subcontractor, both engaged in the same general business, where boycott pressure is applied against the subcontractor in aid of a dispute with the principal contractor? Clearly it does under the wording of the statute." *Metal Polishers Union*, 86 N. L. R. B. 1243, 1252.

And see *Labor Board* v. *Wine, Liquor & Distillery Workers Union*, 178 F. 2d 584.

[20] "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit." 61 Stat. 142, 29 U. S. C. (Supp. III) § 158 (c).

raised under Section 8 (b) (4) (A) turn on official directions or instructions to a union's own members." 82 N. L. R. B. at 1213.[21]

The further conclusion that § 8 (c) does not immunize action against the specific provisions of § 8 (b) (4) (A) has been announced in other cases. See No. 108, *International Brotherhood of Electrical Workers* v. *Labor Board, post,* p. 694.[22]

Not only are the findings of the Board conclusive with respect to questions of fact in this field when supported by substantial evidence on the record as a whole,[23] but

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[21] "This strike action, of which the picketing was an integral and inseparable part, had the planned and expected effect of denying the services of all union workmen to Doose & Lintner while they continued to utilize the services of Gould & Preisner. Yet as soon as the illegal objective of the Respondents' strike action had been achieved, the picket, the signal to union workmen that a strike was in progress, was removed. Thereupon union workmen were again available to Doose & Lintner. Thus the joint enterprise of the Respondents was accomplished within the framework and intent of the Council's bylaws but in violation of Section 8 (b) (4) (A) of the Act." 82 N. L. R. B. at 1216. And see reference to this finding by the same trial examiner in *International Brotherhood of Electrical Workers,* 82 N. L. R. B. 1028, 1046, n. 55.

[22] "We therefore conclude that Section 8 (b) (4) (A) prohibits peaceful picketing, as well as other peaceful means of inducement and encouragement, in furtherance of an objective proscribed therein and that Section 8 (c) does not immunize such conduct." *United Brotherhood of Carpenters,* 81 N. L. R. B. 802, 815; see also, pp. 807–816; enforcement order issued in *Labor Board* v. *United Brotherhood of Carpenters,* 184 F. 2d 60, certiorari denied this day as No. 387, *post,* p. 947. See *United Brotherhood of Carpenters* v. *Sperry,* 170 F. 2d 863, 868–869; *Printing Specialties Union,* 82 N. L. R. B. 271, 290; *Bricklayers Union,* 82 N. L. R. B. 228; *Local 1796, United Brotherhood of Carpenters,* 82 N. L. R. B. 211.

[23] *Universal Camera Corp.* v. *Labor Board,* 340 U. S. 474; *Labor Board* v. *Pittsburgh Steamship Co.,* 340 U. S. 498.

the Board's interpretation of the Act and the Board's application of it in doubtful situations are entitled to weight. In the views of the Board as applied to this case we find conformity with the dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own.

For these reasons we conclude that the conduct of respondents constituted an unfair labor practice within the meaning of § 8 (b) (4) (A). The judgment of the Court of Appeals accordingly is reversed and the case is remanded to it for procedure not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE JACKSON would affirm the judgment of the Court of Appeals.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE REED joins, dissenting.

The employment of union and nonunion men on the same job is a basic protest in trade union history. That was the protest here. The union was not out to destroy the contractor because of his antiunion attitude. The union was not pursuing the contractor to other jobs. All the union asked was that union men not be compelled to work alongside nonunion men on the same job. As Judge Rifkind stated in an analogous case, "the union was not extending its activity to a front remote from the immediate dispute but to one intimately and indeed inextricably united to it."[1]

The picketing would undoubtedly have been legal if there had been no subcontractor involved—if the general

[1] *Douds* v. *Metropolitan Federation,* 75 F. Supp. 672, 677.

contractor had put nonunion men on the job. The presence of a subcontractor does not alter one whit the realities of the situation; the protest of the union is precisely the same. In each the union was trying to protect the job on which union men were employed. If that is forbidden, the Taft-Hartley Act makes the right to strike, guaranteed by § 13, dependent on fortuitous business arrangements that have no significance so far as the evils of the secondary boycott are concerned. I would give scope to both § 8 (b) (4) and § 13 by reading the restrictions of § 8 (b) (4) to reach the case where an industrial dispute spreads from the job to another front.[2]

[2] See the opinion of Judge Fahy below, 87 U. S. App. D. C. 293, 186 F. 2d 326; and the dissenting opinion of Judge Clark, *International Brotherhood* v. *Labor Board,* 181 F. 2d 34, 40.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS ET AL. *v.* NATIONAL LABOR RELATIONS BOARD.

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

No. 108. Argued February 26–27, 1951.—Decided June 4, 1951.

By peaceful picketing, the agent of a labor organization induced union employees of a carpentry subcontractor on a construction project to engage in a strike in the course of their employment. An object of such inducement was to force the general contractor to terminate its contract with the electrical subcontractor, who was employing nonunion workmen. The National Labor Relations Board found that the labor organization and its agent (petitioners here) had committed an unfair labor practice within the meaning of § 8 (b) (4) (A) of the National Labor Relations Act, as amended by the Labor Management Relations Act, 1947, and ordered them to cease and desist. *Held:* This finding and the order are sustained. See *Labor Board* v. *Denver Building Trades Council, ante,* p. 675. Pp. 695–706.

1. The actions complained of had sufficient effect upon interstate commerce to sustain the jurisdiction of the Board. P. 699.

2. The findings demonstrate that the picketing was directed at the union employees of the carpentry subcontractor to induce them to strike and thus force the carpentry subcontractor to force the general contractor to terminate the contract of the electrical subcontractor. Pp. 699–700.

3. It was sufficient that *an* objective, although *not necessarily the only* objective, of the picketing was to force the general contractor to terminate the contract of the electrical subcontractor. P. 700.

4. Section 8 (c) does not immunize peaceful picketing which induces a secondary boycott made unlawful by § 8 (b) (4). Pp. 700–705.

5. The prohibition of inducement or encouragement of secondary pressure by § 8 (b) (4) (A) carries no unconstitutional abridgment of free speech. P. 705.

6. The order issued by the Board in this case properly enjoined petitioners from exerting this pressure upon the electrical subcontractor through other employers, as well as through the general contractor and the carpentry subcontractor. Pp. 705–706.

181 F. 2d 34, affirmed.

The National Labor Relations Board found that petitioners had committed an unfair labor practice within the meaning of § 8 (b) (4) (A) of the National Labor Relations Act, as amended by the Labor Management Relations Act, 1947, and ordered them to cease and desist. 82 N. L. R. B. 1028. The Court of Appeals ordered enforcement. 181 F. 2d 34. This Court granted certiorari. 340 U. S. 902. *Affirmed,* p. 706.

Louis Sherman argued the cause for petitioners. With him on the brief was *Philip R. Collins.*

Mozart G. Ratner argued the cause for respondent. With him on the brief were *Solicitor General Perlman, David P. Findling* and *Bernard Dunau.*

Clif Langsdale filed a brief for the United Brotherhood of Carpenters & Joiners of America, A. F. of L., et al., as *amici curiae,* supporting petitioners.

Mr. Justice Burton delivered the opinion of the Court.

This is a companion case to No. 393, *Labor Board* v. *Denver Building Trades Council* (the *Denver* case), *ante,* p. 675, and No. 85, *Local 74, United Brotherhood of Carpenters* v. *Labor Board* (the *Chattanooga* case), *post,* p. 707.

The principal question here is whether a labor organization and its agent committed an unfair labor practice, within the meaning of § 8 (b) (4) (A) of the National Labor Relations Act, 49 Stat. 449, 29 U. S. C. § 151, as

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amended by the Labor Management Relations Act, 1947,[1] when, by peaceful picketing, the agent induced employees of a subcontractor on a construction project to engage in a strike in the course of their employment, where an object of such inducement was to force the general contractor to terminate its contract with another subcontractor. For the reasons hereafter stated, we hold that an unfair labor practice was committed.

In December, 1947, the Giorgi Construction Company, a partnership (here called Giorgi), having its principal place of business at Port Chester, New York, contracted to build a private dwelling in Greenwich, Connecticut. The contract price was $15,200. Giorgi did part of the work with its own employees but subcontracted the electrical work to Samuel Langer and the carpentry work to Nicholas Deltorto, the principal place of business of each of whom was also at Port Chester. Langer's subcontract was for $325.

Langer in the past had employed union men but, prior to this project, had become involved in a dispute with petitioner, International Brotherhood of Electrical Workers, Local 501, A. F. of L., here called the Electricians Union, because of his employment of nonunion men. By the middle of April, 1948, Langer's two electricians, neither of whom was a member of the Electricians Union, had completed the roughing in of the electrical work which was necessary before the walls of the house could be completed. At that point, on two days when no employees of Langer were present on the project, but before the completion of Langer's subcontract, William Patterson, the other petitioner herein, visited the project in his capacity of agent and business repre-

[1] 61 Stat. 140–141, 29 U. S. C. (Supp. III) § 158 (b) (4) (A). For text see *Labor Board* v. *Denver Building Trades Council, ante,* p. 677, note 1.

sentative of the Electricians Union. The only workmen then present were Deltorto and his two carpenters, each of whom was a member of Local 543, United Brotherhood of Carpenters & Joiners of America, A. F. of L., here called the Carpenters Union. Patterson informed Deltorto and one or both of his workmen that the electrical work on the job was being done by nonunion men. Deltorto and his men expressed ignorance of that fact, but Patterson, on the second day of his visits, repeated the statement and proceeded to picket the premises himself, carrying a placard which read "This job is unfair to organized labor: I. B. E. W. 501 A. F. L." Deltorto and his men thereupon stopped work and left the project. Deltorto promptly telephoned Giorgi, the general contractor, that his carpenters had walked off the job because the electrical delegate had picketed it. Patterson also telephoned Giorgi saying that Langer was "unfair" and that Giorgi would have to replace Langer with a union contractor in order to complete the job. He added that if Giorgi did not replace Langer, he would not receive any skilled trades to finish the rest of the work.

No communication was had with Langer by either of petitioners. The next day, Giorgi recited these circumstances to Langer and the latter released Giorgi from the electrical subcontract, saying that he would step aside so that a union subcontractor could take over. He did no further work on the project. Giorgi informed Deltorto that the trouble had been straightened out, and the latter's carpenters returned to the project.

On a charge filed by Langer, based upon these events, the Regional Director of the National Labor Relations Board issued a complaint against the Electricians Union and Patterson. It alleged that they had induced and encouraged the employees of Deltorto to engage in a strike or a concerted refusal in the course of their employment to perform services for him, an object thereof

being to force or require Giorgi to cease doing business with Langer in violation of § 8 (b) (4) (A).[2]

With the consent of the present petitioners, a restraining order was issued against them by the United States District Court for the Southern District of New York, pursuant to § 10 (l).[3] The complaint was referred to the same trial examiner who heard the *Denver* case, *ante*, p. 675. He distinguished the action of petitioners from that which he had found in the *Denver* case to constitute a strike signal, and recommended dismissal of the complaint on the ground that petitioners' action here was permissible under § 8 (c), despite the provisions of § 8 (b) (4) (A). The Board, with two members dissenting, upheld its jurisdiction of the complaint against a claim that the actions complained of did not sufficiently affect interstate commerce. The majority of the Board so holding then affirmed the rulings which the examiner had made during the hearings, adopted certain of his findings, conclusions and recommendations, attached his intermediate report to its decision, but declined to follow his recommendation to dismiss the complaint. The Board expressly held that § 8 (c) did not immunize petitioners' conduct from the proscriptions of § 8 (b) (4) (A). 82 N. L. R. B. 1028. It ordered petitioners to—

> "Cease and desist from inducing or encouraging the employees of Nicholas Deltorto or any employer, by picketing or related conduct, to engage in a strike or a concerted refusal in the course of their employment to perform any services, where an ob-

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[2] The complaint referred originally not only to the unfair labor practice here considered but also to coercion in violation of § 8 (b) (1) (A), and to threats of action addressed to other employers. Those charges were dismissed by the Board and are not before us.

[3] 61 Stat. 149–150, 29 U. S. C. (Supp. III) § 160 (*l*). For text see *Labor Board* v. *Denver Building Trades Council*, *ante*, p. 682, note 10.

> ject thereof is to force or require Giorgi Construction Co. or any other employer or person to cease doing business with Samuel Langer." *Id.*, at 1030.

Petitioners asked the United States Court of Appeals, under § 10 (f),[4] to review and set aside that order. The Board answered and asked enforcement of it. With one judge dissenting, the court below ordered enforcement. 181 F. 2d 34. We granted certiorari. 340 U. S. 902. See *Labor Board* v. *Denver Building Trades Council, ante,* p. 675.

1. Petitioners contest the jurisdiction of the Board on the ground of the insufficiency of the effect of the actions complained of upon interstate commerce. The facts, which were found in detail in the intermediate report, approved by the Board and upheld by the court below, are in our opinion sufficient to sustain that jurisdiction on the grounds stated in the *Denver* case, *ante,* p. 675. In addition, the contractor and both subcontractors in the instant case had their principal places of business in New York. The performance of their contractual obligations on this project in Connecticut accordingly emphasizes the interstate movement of the services and materials which they here supplied.

2. The secondary character of the activities here complained of and their objectives also come within the pattern of the *Denver* case. In the instant case, a labor dispute had been pending for some time between Langer and the Electricians Union, but no demands were made upon him directly by either of petitioners in connection with this project. There are no findings that the picketing was aimed at Langer to force him to employ union workmen on this job. On the contrary, the findings demonstrate that the picketing was directed at Deltorto's employees to induce them to strike and thus force Deltorto,

[4] 61 Stat. 148–149, 29 U. S. C. (Supp. III) § 160 (f).

the carpentry subcontractor, to force Giorgi, the general contractor, to terminate Langer's electrical subcontract.

3. The *Denver* case also covers the point that it was sufficient that *an* objective of the picketing, although *not necessarily the only* objective of the picketing, was to force Giorgi to terminate Langer's uncompleted contract and thus cease doing business with him on the project.

4. The principal feature of the instant case, not squarely covered by the *Denver* case, is that there is no finding here that the picketing and other activities of petitioners were mere signals in starting and stopping a strike in accordance with by-laws or other controlling practices of the Electricians and Carpenters Unions. The complaint here is not that petitioners, like the Trades Council in the *Denver* case, themselves *engaged in* or called a strike of Deltorto's carpenters in order to force the general contractor to cease doing business with the electrical subcontractor. Here the complaint is that petitioners, by peaceful picketing, rather than by prearranged signal, induced or encouraged the employees of Deltorto to strike (or to engage in a concerted refusal to perform any services for Deltorto) in the course of their employment to force Giorgi, the contractor, to cease doing business with Langer, the electrical subcontractor.

While in the *Denver* case we have held that § 8 (c) [5] had no application to a strike signal, there are other considerations that enter into the decision here. The question here is what effect, if any, shall be given to § 8 (c) in its application to peaceful picketing conducted by a labor organization or its agents merely as an induce-

[5] "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit." 61 Stat. 142, 29 U. S. C. (Supp. III) § 158 (c).

ment or encouragement of employees to engage in a secondary boycott. Petitioners contend that § 8 (c) immunizes peaceful picketing, even though the picketing induces a secondary boycott made unlawful by § 8 (b) (4). The Board reached the opposite conclusion and the court below approved the Board's order as applied to the facts of this case which it recognized as amounting to "bare instigation" of the secondary boycott.[6] We agree with the Board.

a. To exempt peaceful picketing from the condemnation of § 8 (b) (4) (A) as a means of bringing about a secondary boycott is contrary to the language and purpose of that section. The words "induce or encourage" are broad enough to include in them every form of influence

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[6] This issue is extensively reviewed and determined in favor of the view that § 8 (c) does not immunize otherwise unfair labor practice against § 8 (b) (4) (A) in *United Brotherhood of Carpenters,* 81 N. L. R. B. 802, 807–816. In affirming that conclusion the Court of Appeals for the Tenth Circuit said:

"They established a picket at the building project of Klassen. And they placed Klassen on a so-called blacklist and gave wide circulation of the fact among those particularly interested in the building industry, all for the purpose of compelling Klassen to cease doing business with Wadsworth. There is nothing in the language or legislative history of section 8 (c) which indicates persuasively a Congressional intent to create an asylum of immunity from the proscription of section 8 (b) (4) (A) for acts and conduct of that kind." *Labor Board* v. *United Brotherhood of Carpenters,* 184 F. 2d 60, 62.

Petition for certiorari was filed in this Court and action on the petition was withheld pending decision of the instant cases. The United Brotherhood of Carpenters filed a brief as *amicus curiae* in connection with the hearings of these cases and the petition of certiorari is this day being denied, *post,* p. 947. See also, *United Brotherhood of Carpenters* v. *Sperry,* 170 F. 2d 863, 868–869; *Printing Specialties Union,* 82 N. L. R. B. 271; *Bricklayers Union,* 82 N. L. R. B. 228; *Local 1796, United Brotherhood of Carpenters,* 82 N. L. R. B. 211; Dennis, The Boycott Under the Taft-Hartley Act, N. Y. U. Third Annual Conference on Labor (1950), 367, 382–386.

and persuasion.[7] There is no legislative history to justify an interpretation that Congress by those terms has limited its proscription of secondary boycotting to cases where the means of inducement or encouragement amount to a "threat of reprisal or force or promise of benefit." Such an interpretation would give more significance to the means used than to the end sought. If such were the case there would have been little need for § 8 (b) (4) defining the proscribed objectives, because the use of "restraint and coercion" for any purpose was prohibited in this whole field by § 8 (b) (1) (A).

"Induce or encourage" appear in like context in § 303. The action proscribed by the terms of § 8 (b) (4) is made in § 303 the basis for the recovery of damages in a civil action. Because § 8 (c) is in terms limited to unfair labor practice proceedings and § 303 refers only to civil actions for damages,[8] it seems clear that § 8 (c) does not apply to an action under § 303. That section does not mention unfair labor practices through which alone the

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[7] Induce: "1. To lead on; to influence; to prevail on; to move by persuasion or influence."

Encourage: "1. To give courage to; to inspire with courage, spirit, or hope; to raise the confidence of; to animate; hearten; . . . .

"2. To embolden, incite, or induce as by inspiration, recommendation, etc.; hence, to advise; . . . .

"3. To give help or patronage to, as an industry; to foster; . . . ." Webster's New Int'l Dict., Unabridged (2d ed. 1945).

[8] "SEC. 303. (a) It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is—

"(1) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other

provisions of § 8 (c) can become applicable. If § 8 (c) were given the effect which petitioners urge, it would limit § 8 (b) (4) (A) so as to give the words "induce or encourage" a meaning in that section different than they have in § 303. We think that the words are entitled to the same meaning in §§ 8 (b) (4) and 303.

b. The intended breadth of the words "induce or encourage" in § 8 (b) (4) (A) is emphasized by their contrast with the restricted phrases used in other parts of § 8 (b). For example, the unfair labor practice described in § 8 (b) (1) is one "to restrain or coerce" employees; in § 8 (b) (2) it is to "cause or attempt to cause an employer"; in § 8 (b) (5) it is to "require of employees"; and in § 8 (b) (6) it is to "cause or attempt to cause an employer." The scope of "induce" and especially of "encourage" goes beyond each of them.

c. To exempt peaceful picketing from the reach of § 8 (b) (4) would be to open the door to the customary means of enlisting the support of employees to bring economic pressure to bear on their employer. The Board quickly recognized that to do so would be destructive of the purpose of § 8 (b) (4) (A). It said "To find that peaceful picketing was not thereby proscribed would be to impute to Congress an incongruous intent to permit, through indirection, the accomplishment of an objective

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person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person;

. . . . . .

"(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefor in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit." 61 Stat. 158–159, 29 U. S. C. (Supp. III) § 187.

which it forbade to be accomplished directly." *United Brotherhood of Carpenters,* 81 N. L. R. B. 802, 811. Also—

> "It was the *objective* of the unions' secondary activities . . . and not the *quality of the means* employed to accomplish that objective, which was the dominant factor motivating Congress in enacting that provision. . . . In these circumstances, to construe Section 8 (b) (4) (A) as qualified by Section 8 (c) would practically vitiate its underlying purpose and amount to imputing to Congress an unrealistic approach to the problem." (Emphasis in original.) *Id.,* at 812.

The legislative history does not sustain a congressional purpose to outlaw secondary boycotts under § 8 (b) (4) and yet in effect to sanction them under § 8 (c).

d. We find no indication that Congress thought that the kind of picketing and related conduct which was used in this case to induce or encourage a strike for an unlawful object was any less objectionable than engaging directly in that strike. The court below, after finding that there was "bare instigation" here rather than an appeal to reason by "the expressing of any views, argument, or opinion," traced the development of the doctrine that he who provokes or instigates a wrong makes himself a party to it. That court then reached the conclusion that it is "highly unlikely that by § 8 (c) Congress meant to abolish a doctrine, so deeply embedded in our civil and criminal law." 181 F. 2d at 39.

e. The remedial function of § 8 (c) is to protect noncoercive speech by employer and labor organization alike in furtherance of a lawful object. It serves that purpose adequately without extending its protection to speech or picketing in furtherance of unfair labor practices such as are defined in § 8 (b) (4). The general terms of § 8 (c)

appropriately give way to the specific provisions of § 8 (b) (4).

5. The prohibition of inducement or encouragement of secondary pressure by § 8 (b) (4) (A) carries no unconstitutional abridgment of free speech. The inducement or encouragement in the instant case took the form of picketing followed by a telephone call emphasizing its purpose. The constitutionality of § 8 (b) (4) (A) is here questioned only as to its possible relation to the freedom of speech guaranteed by the First Amendment. This provision has been sustained by several Courts of Appeals.[9] The substantive evil condemned by Congress in § 8 (b) (4) is the secondary boycott and we recently have recognized the constitutional right of states to proscribe picketing in furtherance of comparably unlawful objectives.[10] There is no reason why Congress may not do likewise.

6. Petitioners object to the breadth of the Board's order as stated in 82 N. L. R. B. at 1030, *supra*, pp. 698–699. They contend that its language prohibits inducement not only of employees of Deltorto but also the inducement of employees of any other employer to strike, where an object thereof is to force Giorgi or any other employer or person to cease doing business with Langer. To confine the order solely to secondary pressure through Giorgi or Deltorto would leave Langer and other employers who

[9] See *Labor Board* v. *United Brotherhood of Carpenters*, 184 F. 2d 60, 62, certiorari denied this day as No. 387, *post*, p. 947; *Labor Board* v. *Local 74, United Brotherhood of Carpenters*, 181 F. 2d 126, 132, aff'd as No. 85, *post*, p. 707; *Labor Board* v. *Wine, Liquor & Distillery Workers Union*, 178 F. 2d 584, 587–588; *Printing Specialties Union* v. *Le Baron*, 171 F. 2d 331, 334–335; *United Brotherhood of Carpenters* v. *Sperry*, 170 F. 2d 863, 868–869. See also, as to § 8 (b) (4) (C), *Douds* v. *Local 1250*, 170 F. 2d 700, 701.

[10] See *Building Service Union* v. *Gazzam*, 339 U. S. 532; *International Brotherhood of Teamsters* v. *Hanke*, 339 U. S. 470; *Hughes* v. *Superior Court*, 339 U. S. 460; *Giboney* v. *Empire Storage Co.*, 336 U. S. 490.

do business with him exposed to the same type of pressure through other comparable channels. The order properly enjoins petitioners from exerting this pressure upon Langer, through other employers, as well as through Giorgi and Deltorto. We may well apply here the principle stated in *International Salt Co.* v. *United States,* 332 U. S. 392, 400: "When the purpose to restrain trade appears from a clear violation of law, it is not necessary that all of the untraveled roads to that end be left open and that only the worn one be closed." And see *United States* v. *United States Gypsum Co.,* 340 U. S. 76, 90.

The judgment of the Court of Appeals accordingly is

Affirmed.

MR. JUSTICE REED, MR. JUSTICE DOUGLAS and MR. JUSTICE JACKSON would reverse the judgment of the Court of Appeals.

Syllabus.

LOCAL 74, UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, A. F. OF L., ET AL. *v.* NATIONAL LABOR RELATIONS BOARD.

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

No. 85. Argued February 26, 1951.—Decided June 4, 1951.

On the day before the effective date of the Labor Management Relations Act, 1947, amending the National Labor Relations Act, a union ordered its members, who were working on a dwelling renovation project, to strike. They did so, and the strike continued after the effective date of the amendment. One of the objects was to force the owner of the dwelling to cancel a contract for the installation of wall and floor coverings by a merchant using nonunion workmen in their installation. The National Labor Relations Board found that the union and its agent (petitioners here) had engaged in an unfair labor practice within the meaning of § 8 (b) (4) (A) of the Act and ordered them to cease and desist. *Held:* Its finding and order are sustained. Pp. 708–715.

1. On the record in this case, the actions complained of had sufficient effect on interstate commerce to sustain the Board's jurisdiction. P. 712.

2. Section 8 (c) is not applicable. Pp. 712–713.

3. It is enough that one of the objects of the action complained of was to force the owner of the dwelling to cancel the merchant's contract; and it does not immunize such action from § 8 (b) (4) (A) to show that another object was to enforce a rule of the union that its members should not work on a project on which nonunion men were employed. P. 713.

4. It is immaterial that the strike had its origin before the effective date of the amended Act, since it was prolonged after the effective date, for the same objective. Pp. 713–714.

5. The case has not been rendered moot by the completion of the renovation project. P. 715.

181 F. 2d 126, affirmed.

The National Labor Relations Board found that petitioners had committed an unfair labor practice within the meaning of § 8 (b) (4) (A) of the National Labor Rela-

tions Act, as amended by the Labor Management Relations Act, 1947, and ordered them to cease and desist. 80 N. L. R. B. 533. The Court of Appeals ordered enforcement. 181 F. 2d 126. This Court granted certiorari. 340 U. S. 902. *Affirmed,* p. 715.

Charles H. Tuttle argued the cause for petitioners. With him on the brief was *Frank X. Ward.*

Mozart G. Ratner argued the cause for respondent. With him on the brief were *Solicitor General Perlman, David P. Findling* and *Dominick L. Manoli.*

Clif Langsdale filed a brief for the United Brotherhood of Carpenters & Joiners of America, A. F. of L., et al., as *amici curiae,* supporting petitioners.

MR. JUSTICE BURTON delivered the opinion of the Court.

This is a companion case to No. 393, *Labor Board* v. *Denver Building Trades Council* (the *Denver* case), *ante,* p. 675, and No. 108, *International Brotherhood of Electrical Workers* v. *Labor Board* (the *Greenwich* case), *ante,* p. 694.

The principal question is whether, under the following circumstances, a union engaged in an unfair labor practice within the meaning of § 8 (b) (4) (A) of the National Labor Relations Act, 49 Stat. 449, 29 U. S. C. § 151, as amended by the Labor Management Relations Act, 1947:[1] On the day before the effective date of that amendment, the union ordered its members, who were working on a dwelling renovation project, to engage in a strike, where an object thereof was to force the owner of the dwelling to cancel a contract for the installation of wall and floor coverings; and then for several days, on and

[1] 61 Stat. 140–141, 29 U. S. C. (Supp. III) § 158 (b) (4) (A). For text see *Labor Board* v. *Denver Building Trades Council, ante,* p. 677, note 1.

after the effective date of the amendment, the strike was continued under the same conditions which created it and for the same objective. For the reasons hereafter stated, we hold that an unfair labor practice was engaged in on and after the effective date of the amendment.

For some years before March, 1947, Ira A. Watson Company, a Rhode Island corporation (here called Watson's), operated a general retail store in Chattanooga, Tennessee, including a department for the sale and installation of wall and floor coverings. Since that time Watson's has operated a specialty store devoted to those activities. At about the same time, Local 74, United Brotherhood of Carpenters and Joiners of America, A. F. of L. (here called the union), and its business agent, Jack Henderson (respectively the petitioners in the instant case), asked Watson's to enter into a closed-shop agreement with the union recognizing it as the bargaining agent of Watson's installation employees. None of its employees were members of the union and Watson's declined to enter the agreement. Thereupon, from the latter part of March until about August 28, 1947, petitioners maintained a picket in front of Watson's store carrying a placard. This announced, over the name of the union, that Watson's was "unfair to organized labor" or later "This store employs non-union labor." Watson's sometimes sold wall or floor coverings without installing them and, at other times, it insisted upon installing such coverings as a condition of their sale. When the installations were made by Watson's, the work was done by nonunion men.

August 7, 1947, George D. Stanley, who owned a dwelling near Chattanooga, contracted with D. F. Parker to improve and renovate it. Parker was to furnish and supervise the workmen and select the materials. Stanley was to pay the wages of the workmen, the cost of the materials, and a ten per cent commission to Parker on both.

Parker was a member of the union and he hired union members to do the carpentry work. If the wall and floor coverings desired by Stanley had been available in Chattanooga elsewhere than at Watson's, Parker would have purchased them from such source and would have employed union men to install them. However, neither Parker nor Stanley could find such coverings in Chattanooga except at Watson's and Watson's insisted on installing them as a condition of their sale. Although knowing that Watson's would use nonunion men to make the installations, Stanley, with Parker's implied consent, contracted with Watson's for the purchase and installation of the coverings. Watson's began its installation Sunday, August 17, when there were no other workmen present. Monday and Tuesday, apparently with Parker's approval, the installation continued during regular working hours. Wednesday, two of the union carpenters stopped work for half an hour because of the presence on the job of the nonunion installation workers. Parker, however, induced the carpenters to resume work. This situation came to the attention of the union and, on Thursday, August 21, Henderson came to the project and told the four union carpenters who were working there that they could not continue to work with nonunion men or where nonunion men were employed. At that hour, none of Watson's men were present but the installation of coverings contracted for by Stanley with Watson's had not been completed. The union men finished their day's work but, in compliance with the instructions thus issued by petitioners, did not return on the following days. Watson's men returned and completed their work by August 28, and the entire renovation was finished by the end of August. The unfinished carpentry work was done by two of the four union men who had been on the job and who returned without the knowledge or

consent of petitioners. On August 22, 1947, § 8 (b) (4) (A) took effect.[2]

Watson's promptly filed a charge with the National Labor Relations Board based upon the continuance of the above strike by petitioners on and after August 22. The Regional Director issued a complaint charging the union and Henderson with engaging in an unfair labor practice as defined in § 8 (b) (4) (A).[3] Pursuant to § 10 (l),[4] the Regional Director petitioned the United States District Court for the Eastern District of Tennessee for injunctive relief. This relief was denied on the ground that the conduct complained of took place before August 22 and was at that time lawful. 74 F. Supp. 499.

After hearings before an examiner, the Board, with one member dissenting, affirmed the rulings of its examiner, attached his intermediate report to its decision, 80 N. L. R. B. 533, 540, and adopted his findings, conclusions and recommendations with additions and modifications. It ordered the union and Henderson to—

> "Cease and desist from engaging in or inducing the members of Local 74 to engage in a strike or a concerted refusal in the course of their employment to perform services for any employer, where an object thereof is to require any employer or other person to cease doing business with Ira A. Watson, doing business as Watson's Specialty Store." *Id.*, at 539.

The dissent was on the ground that the effect of the actions complained of upon interstate commerce was so

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[2] The Labor Management Relations Act, 1947, was enacted into law June 23, 1947, but Title I, containing § 8 (b) (4) (A), took effect 60 days later. 61 Stat. 152, 162, 29 U. S. C. (Supp. III), note following § 151.

[3] The complaint originally also charged violations of § 8 (b) (1) (A) but the Board dismissed those allegations and they are not before us.

[4] 61 Stat. 149–150, 29 U. S. C. (Supp. III) § 160 (*l*). For text see *Labor Board v. Denver Building Trades Council, ante,* p. 682, note 10.

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remote and insubstantial and the controversy was so local in character that it was undesirable for the Board to exercise federal power in relation to it. *Id.*, at 540. On a review under § 10 (e),[5] the Court of Appeals for the Sixth Circuit ordered enforcement of the order. 181 F. 2d 126. We granted certiorari. 340 U. S. 902. See *Labor Board* v. *Denver Building Trades Council, ante,* at p. 681.

1. Petitioners contest the jurisdiction of the Board on the ground of the insufficiency of the effect of the actions complained of upon interstate commerce. We conclude that the findings in the intermediate report, adopted by the Board and accepted by the court below, are sufficient to sustain the Board's jurisdiction. *Denver* case, *ante,* at pp. 683–685. From March to September, 1947, Watson's purchased about $93,000 worth of goods. Thirty-three percent was shipped to it in interstate business. Thirty percent more had been manufactured outside of Tennessee. Watson's sales and installation jobs came to about $100,000 of which eight percent represented sales and installations outside of the State. The Board also referred to the fact that Watson's operated a system of 26 or 27 retail stores in seven different states, of which the Chattanooga store apparently was an integral part.

2. The complaint was not against the picketing at Watson's store from March to August 28, 1947. See *Labor Board* v. *International Rice Milling Co., ante,* p. 665. The complaint was directed against petitioners' extension of their activities to the Stanley project by there ordering a strike, or concerted cessation of work, on the part of Stanley's union carpenters[6] with an object of forcing Stanley to cancel his installation contract with Watson's.

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[5] 61 Stat. 147–148, 29 U. S. C. (Supp. III) § 160 (e).

[6] The examiner expressed doubt as to whether the carpenters were employees of Parker or of Stanley but decided to assume that they were employees of Stanley. 80 N. L. R. B. at 544, n. 12.

Section 8 (c) [7] is not applicable. This strike was ordered by Henderson in person. The union and he both engaged in and ordered the strike. The carpenters as individual employees are not charged with an unfair labor practice. The charge is confined to the actions of the labor organization and its agent in engaging in, ordering and continuing a strike for a proscribed object after Congress had made such conduct an unfair labor practice.

3. As determined in the *Denver* case, it is enough that one of the objects of the action complained of was to force Stanley to cancel Watson's contract. It does not immunize such action from § 8 (b) (4) (A) to show that it also had as an object the enforcement of a rule of the union that its members should not work on a project on which nonunion men were employed.[8] The statute did not require the individual carpenters to remain on this job. It did, however, make it an unfair labor practice for the union or its agent to engage in a strike, as they did here, when an object of doing so was to force the project owner to cancel his installation contract with Watson's.

4. Even assuming that, if petitioners had engaged in such a strike or had induced the union carpenters to take part in it on and after August 22, 1947, it would have been an unfair labor practice under the new amendment,

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[7] 61 Stat. 142, 29 U. S. C. (Supp. III) § 158 (c). For text see the *Denver* case, *ante*, p. 690, note 20.

[8] The examiner found that Henderson testified credibly that this rule applied whether or not the nonunion men were physically present at the moment. It was enough that nonunion men were employed on the project. Henderson, therefore, applied the rule here because, although Watson's men were absent from the project on August 21, 1947, Watson's installation contract was not yet complete, and it was clear that its completion would mean the return of nonunion men to the project. Henderson testified also that the rule applied even to the employment of nonunion labor which did not come under the jurisdiction of Local 74. 80 N. L. R. B. at 546, 553, n. 33.

petitioners contend that their actions all took place before August 22, and that they did nothing on or after that date which is proscribed by § 8 (b) (4) (A).[9] The answer turns on what actually took place on and after August 22. As to that the Board concluded:

> "Nor is it material . . . that the labor dispute had its origin before the effective date of the amended Act, for we are convinced that it was continued and prolonged after the effective date by the very same factors which originally created it and for the same original objective which, as found above, Section 8 (b) (4) (A) declares unlawful. Thus, at material times both before and after the effective date of the amendments . . . (2) the Respondents' [here petitioners] strike order, which admittedly was never rescinded, was outstanding and effectively prevented the carpenters from officially working on the job as long as Watson's men were also working; . . . ." 80 N. L. R. B. at 537–538.[10]

We agree with the court below in sustaining that conclusion.[11]

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[9] In the proceedings for an injunction under § 10 (l) the District Court so held. Its decision, however, was based upon the affidavits before it rather than upon the record before the Board, and its conclusion did not bind the Board in the proceeding on the merits. 74 F. Supp. 499, and see *Labor Board* v. *Denver Building Trades Council, ante,* pp. 681–683.

[10] Petitioners gain nothing from § 102: "No provision of this title [which includes § 8 (b) (4) (A)] shall be deemed to make an unfair labor practice any act which was performed prior to the date of the enactment of this Act [June 23, 1947] which did not constitute an unfair labor practice prior thereto . . . ." 61 Stat. 152, 29 U. S. C. (Supp. III), note following § 158.

[11] For a comparable result relating to a labor dispute which commenced before the taking effect of the National Labor Relations Act of 1935, see *Jeffery-De Witt Insulator Co.* v. *Labor Board,* 91 F. 2d 134.

5. We have considered the remaining questions raised by petitioners, based on constitutional or other grounds, and have resolved them in favor of sustaining the Board and the court below. This case has not been rendered moot by the completion of the renovation project. The complaint was against petitioners' use of secondary pressure upon Watson's in a manner proscribed by the statute. The use of such pressure on this renovation project was merely a sample of what might be repeated elsewhere if not prohibited. The underlying dispute between petitioners and Watson's has not been shown to have been resolved.

The judgment of the Court of Appeals accordingly is

Affirmed.

MR. JUSTICE REED, MR. JUSTICE DOUGLAS and MR. JUSTICE JACKSON are of the opinion that the judgment should be reversed.

GARNER ET AL. *v.* BOARD OF PUBLIC WORKS OF LOS ANGELES ET AL.

CERTIORARI TO THE DISTRICT COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT.

No. 453. Argued April 25, 1951.—Decided June 4, 1951.

1. The Federal Constitution does not forbid a municipality to require its employees to execute affidavits disclosing whether or not they are or ever have been members of the Communist Party or the Communist Political Association. P. 720.
2. In 1941, the California Legislature amended the Charter of the City of Los Angeles so as to provide, in substance, that no person shall hold or retain or be eligible for any public office or employment in the service of the City (1) who advises, advocates or teaches the overthrow by force or violence of the State or Federal Government or belongs to an organization which does so, or (2) who, within the five years prior to the effective date, had so advised, advocated or taught or had belonged to an organization which did so. In 1948, the City passed an ordinance requiring each of its officers and employees to take an oath that he has not within the five years preceding the effective date of the ordinance, does not now, and will not while in the service of the City, advise, advocate or teach the overthrow by force, violence or other unlawful means, of the State or Federal Government or belong to an organization which does so or has done so within such five-year period. *Held:* The ordinance is not a bill of attainder or *ex post facto* law, nor, as here construed, does it violate the Due Process Clause of the Fourteenth Amendment. Pp. 720–724.

   (a) The Charter amendment is valid under the Federal Constitution to the extent that it bars from the City's public service persons who, since its adoption in 1941, advise, advocate or teach the violent overthrow of the Government or who are or become affiliated with any group doing so, since the provisions thus operating prospectively are a reasonable regulation to protect the municipal service. The question of its validity insofar as it purported to apply retrospectively for a five-year period prior to its effective date is not here involved. Pp. 720–721.

   (b) The ordinance clearly is not *ex post facto,* since the activity covered by the oath had been proscribed by the Charter in the same terms, for the same purpose, and to the same effect over

seven years before, and two years prior to the period covered by the oath. P. 721.

(c) The ordinance is not a bill of attainder, since no punishment is imposed by a general regulation which merely provides standards of qualification and eligibility for public employment. *Lovett* v. *United States,* 328 U. S. 303, distinguished. Pp. 722–723.

(d) It is assumed here that the oath will not be construed as affecting adversely persons who during their affiliation with a proscribed organization were innocent of its purpose, or those who severed their relations with any such organization when its character became apparent, or those who were affiliated with organizations which were not engaged in proscribed activities at the time of their affiliation; and that, if this interpretation of the oath is correct, the City will give those petitioners who heretofore refused to take the oath an opportunity to take it as interpreted and resume their employment. As thus construed, the requirement of the oath does not violate the Due Process Clause of the Fourteenth Amendment. Pp. 723–724.

98 Cal. App. 2d 493, 220 P. 2d 958, affirmed.

In a suit by discharged employees of a city for reinstatement and unpaid salaries, the state court denied relief. 98 Cal. App. 2d 493, 220 P. 2d 958. This Court granted certiorari. 340 U. S. 941. *Affirmed,* p. 724.

Charles J. Katz and *Samuel Rosenwein* argued the cause for petitioners. With them on the brief was *John T. McTernan.*

Alan G. Campbell argued the cause for respondents. With him on the brief were *Ray L. Chesebro, Bourke Jones* and *A. L. Lawson.*

A. L. Wirin, Fred Okrand, Loren Miller and *Clore Warne* filed a brief for the American Civil Liberties Union, as *amicus curiae,* urging reversal.

Mr. Justice Clark delivered the opinion of the Court.

In 1941 the California Legislature amended the Charter of the City of Los Angeles to provide in part as follows:

". . . no person shall hold or retain or be eligible for any public office or employment in the service

of the City of Los Angeles, in any office or department thereof, either elective or appointive, who has within five (5) years prior to the effective date of this section advised, advocated or taught, or who may, after this section becomes effective [April 28, 1941], advise, advocate or teach, or who is now or has been within five (5) years prior to the effective date of this section, or who may, after this section becomes effective, become a member of or affiliated with any group, society, association, organization or party which advises, advocates or teaches, or has, within said period of five (5) years, advised, advocated or taught the overthrow by force or violence of the government of the United States of America or of the State of California.

"In so far as this section may be held by any court of competent jurisdiction not to be self-executing, the City Council is hereby given power and authority to adopt appropriate legislation for the purpose of effectuating the objects hereof." Cal. Stat. 1941, c. 67.

Pursuant to the authority thus conferred, the City of Los Angeles in 1948 passed Ordinance No. 94,004, requiring every person who held an office or position in the service of the city to take an oath prior to January 6, 1949. In relevant part the oath was as follows:

"I further swear (or affirm) that I do not advise, advocate or teach, and have not within the period beginning five (5) years prior to the effective date of the ordinance requiring the making of this oath or affirmation, advised, advocated or taught, the overthrow by force, violence or other unlawful means, of the Government of the United States of America or of the State of California and that I am not now and have not, within said period, been or become a mem-

> ber of or affiliated with any group, society, association, organization or party which advises, advocates or teaches, or has, within said period, advised, advocated or taught, the overthrow by force, violence or other unlawful means of the Government of the United States of America, or of the State of California. I further swear (or affirm) that I will not, while I am in the service of the City of Los Angeles, advise, advocate or teach, or be or become a member of or affiliated with any group, association, society, organization or party which advises, advocates or teaches, or has within said period, advised, advocated or taught, the overthrow by force, violence or other unlawful means, of the Government of the United States of America or of the State of California . . . ."

The ordinance also required every employee to execute an affidavit "stating whether or not he is or ever was a member of the Communist Party of the United States of America or of the Communist Political Association, and if he is or was such a member, stating the dates when he became, and the periods during which he was, such a member . . . ."

On the final date for filing of the oath and affidavit petitioners were civil service employees of the City of Los Angeles. Petitioners Pacifico and Schwartz took the oath but refused to execute the affidavit. The remaining fifteen petitioners refused to do either. All were discharged for such cause, after administrative hearing, as of January 6, 1949. In this action they sue for reinstatement and unpaid salaries. The District Court of Appeal denied relief. 98 Cal. App. 2d 493, 220 P. 2d 958 (1950). We granted certiorari, 340 U. S. 941 (1951).

Petitioners attack the ordinance as violative of the provision of Art. I, § 10 of the Federal Constitution that "No State shall . . . pass any Bill of Attainder, [or] ex post facto Law . . . ." They also contend that the ordinance

deprives them of freedom of speech and assembly and of the right to petition for redress of grievances.

Petitioners have assumed that the oath and affidavit provisions of the ordinance present similar constitutional considerations and stand or fall together. We think, however, that separate disposition is indicated.

1. The affidavit raises the issue whether the City of Los Angeles is constitutionally forbidden to require that its employees disclose their past or present membership in the Communist Party or the Communist Political Association. Not before us is the question whether the city may determine that an employee's disclosure of such political affiliation justifies his discharge.

We think that a municipal employer is not disabled because it is an agency of the State from inquiring of its employees as to matters that may prove relevant to their fitness and suitability for the public service. Past conduct may well relate to present fitness; past loyalty may have a reasonable relationship to present and future trust. Both are commonly inquired into in determining fitness for both high and low positions in private industry and are not less relevant in public employment. The affidavit requirement is valid.

2. In our view the validity of the oath turns upon the nature of the Charter amendment (1941) and the relation of the ordinance (1948) to this amendment. Immaterial here is any opinion we might have as to the Charter provision insofar as it purported to apply retrospectively for a five-year period prior to its effective date. We assume that under the Federal Constitution the Charter amendment is valid to the extent that it bars from the city's public service persons who, subsequent to its adoption in 1941, advise, advocate, or teach the violent overthrow of the Government or who are or become affiliated with any group doing so. The provisions operating thus prospectively were a reasonable regulation

to protect the municipal service by establishing an employment qualification of loyalty to the State and the United States. Cf. *Gerende* v. *Board of Supervisors of Elections,* 341 U. S. 56 (1951). Likewise, as a regulation of political activity of municipal employees, the amendment was reasonably designed to protect the integrity and competency of the service. This Court has held that Congress may reasonably restrict the political activity of federal civil service employees for such a purpose, *United Public Workers* v. *Mitchell,* 330 U. S. 75, 102–103 (1947), and a State is not without power to do as much.

The Charter amendment defined standards of eligibility for employees and specifically denied city employment to those persons who thereafter should not comply with these standards. While the amendment deprived no one of employment with or without trial, yet from its effective date it terminated any privilege to work for the city in the case of persons who thereafter engaged in the activity proscribed.

The ordinance provided for administrative implementation of the provisions of the Charter amendment. The oath imposed by the ordinance proscribed to employees activity which had been denied them in identical terms and with identical sanctions in the Charter provision effective in 1941. The five-year period provided by the oath extended back only to 1943.

The ordinance would be *ex post facto* if it imposed punishment for past conduct lawful at the time it was engaged in. Passing for the moment the question whether separation of petitioners from their employment must be considered as punishment, the ordinance clearly is not *ex post facto.* The activity covered by the oath had been proscribed by the Charter in the same terms, for the same purpose, and to the same effect over seven years before, and two years prior to the period embraced in the oath. Not the law but the fact was posterior.

Bills of attainder are "legislative acts . . . that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial . . . ." *United States* v. *Lovett,* 328 U. S. 303, 315 (1946). Punishment is a prerequisite. See concurring opinion in *Lovett, supra,* at 318, 324. Whether legislative action curtailing a privilege previously enjoyed amounts to punishment depends upon "the circumstances attending and the causes of the deprivation." *Cummings* v. *Missouri,* 4 Wall. 277, 320 (1867). We are unable to conclude that punishment is imposed by a general regulation which merely provides standards of qualification and eligibility for employment.

Cummings v. *Missouri,* 4 Wall. 277 (1867), and *Ex parte Garland,* 4 Wall. 333 (1867), the leading cases in this Court applying the federal constitutional prohibitions against bills of attainder, recognized that the guarantees against such legislation were not intended to preclude legislative definition of standards of qualification for public or professional employment. Carefully distinguishing an instance of legislative "infliction of punishment" from the exercise of "the power of Congress to prescribe qualifications," the Court said in *Garland's* case: "The legislature may undoubtedly prescribe qualifications for the office, to which he must conform, as it may, where it has exclusive jurisdiction, prescribe qualifications for the pursuit of any of the ordinary avocations of life." 4 Wall. at 379–380. See also, *Cummings* v. *Missouri, supra,* at 318–319. This doctrine was reaffirmed in *Dent* v. *West Virginia,* 129 U. S. 114 (1889), in which Mr. Justice Field, who had written the *Cummings* and *Garland* opinions, wrote for a unanimous Court upholding a statute elevating standards of qualification to practice medicine. And in *Hawker* v. *New York,* 170 U. S. 189 (1898), the Court upheld a statute forbidding

the practice of medicine by any person who had been convicted of a felony. Both *Dent* and *Hawker* distinguished the *Cummings* and *Garland* cases as inapplicable when the legislature establishes reasonable qualifications for a vocational pursuit with the necessary effect of disqualifying some persons presently engaged in it.

Petitioners rely heavily upon *United States* v. *Lovett,* 328 U. S. 303 (1946), in which a legislative act effectively separating certain public servants from their positions was held to be a bill of attainder. Unlike the provisions of the Charter and ordinance under which petitioners were removed, the statute in the *Lovett* case did not declare general and prospectively operative standards of qualification and eligibility for public employment. Rather, by its terms it prohibited any further payment of compensation to named individual employees. Under these circumstances, viewed against the legislative background, the statute was held to have imposed penalties without judicial trial.

Nor are we impressed by the contention that the oath denies due process because its negation is not limited to affiliations with organizations known to the employee to be in the proscribed class. We have no reason to suppose that the oath is or will be construed by the City of Los Angeles or by California courts as affecting adversely those persons who during their affiliation with a proscribed organization were innocent of its purpose, or those who severed their relations with any such organization when its character became apparent, or those who were affiliated with organizations which at one time or another during the period covered by the ordinance were engaged in proscribed activity but not at the time of affiant's affiliation.*

*In interpreting local legislation proscribing affiliation with defective organizations, the Supreme Court of California has gone beyond the literal text of a statute so as to require knowledge of the character of the organization, as of the time of affiliation, by the person

We assume that scienter is implicit in each clause of the oath. As the city has done nothing to negative this interpretation, we take for granted that the ordinance will be so read to avoid raising difficult constitutional problems which any other application would present. *Fox* v. *Washington,* 236 U. S. 273, 277 (1915). It appears from correspondence of record between the city and petitioners that although the city welcomed inquiry as to its construction of the oath, the interpretation upon which we have proceeded may not have been explicitly called to the attention of petitioners before their refusal. We assume that, if our interpretation of the oath is correct, the City of Los Angeles will give those petitioners who heretofore refused to take the oath an opportunity to take it as interpreted and resume their employment.

The judgment as to Pacifico and Schwartz is affirmed. The judgment as to the remaining petitioners is affirmed on the basis of the interpretation of the ordinance which we have felt justified in assuming.

Affirmed.

MR. JUSTICE FRANKFURTER, concurring in part and dissenting in part.

The Constitution does not guarantee public employment. City, State and Nation are not confined to making provisions appropriate for securing competent professional discharge of the functions pertaining to diverse

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whose affiliation is in question. In *People* v. *Steelik,* 187 Cal. 361, 203 P. 78 (1921), the Court upheld a conviction under the Criminal Syndicalism Act of 1919 which made one guilty of a felony who "is" a member of any one of a certain class of proscribed organizations. The indictment in relevant part alleged that defendants "are and each of them is" a member of a proscribed organization. The court interpreted the statute as defining and the indictment as charging "the offense of criminal syndicalism in that he *knowingly* belonged" to a proscribed organization. (Emphasis added.) 187 Cal. at 376, 203 P. at 84.

governmental jobs. They may also assure themselves of fidelity to the very presuppositions of our scheme of government on the part of those who seek to serve it. No unit of government can be denied the right to keep out of its employ those who seek to overthrow the government by force or violence, or are knowingly members of an organization engaged in such endeavor. See *Gerende* v. *Board of Supervisors of Elections*, 341 U. S. 56.

But it does not at all follow that because the Constitution does not guarantee a right to public employment, a city or a State may resort to any scheme for keeping people out of such employment. Law cannot reach every discrimination in practice. But doubtless unreasonable discriminations, if avowed in formal law, would not survive constitutional challenge. Surely, a government could not exclude from public employment members of a minority group merely because they are odious to the majority, nor restrict such employment, say, to native-born citizens. To describe public employment as a privilege does not meet the problem.

This line of reasoning gives the direction, I believe, for dealing with the issues before us. A municipality like Los Angeles ought to be allowed adequate scope in seeking to elicit information about its employees and from them. It would give to the Due Process Clause an unwarranted power of intrusion into local affairs to hold that a city may not require its employees to disclose whether they have been members of the Communist Party or the Communist Political Association. In the context of our time, such membership is sufficiently relevant to effective and dependable government, and to the confidence of the electorate in its government. I think the precise Madison would have been surprised even to hear it suggested that the requirement of this affidavit was an "Attainder" under Art. I, § 10, of the Constitution. For reasons outlined in the concurring opinion in *United*

States v. *Lovett*, 328 U. S. 303, 318, I cannot so regard it. This kind of inquiry into political affiliation may in the long run do more harm than good. But the two employees who were dismissed solely because they refused to file an affidavit stating whether or when they had been members of the Communist Party or the Communist Political Association cannot successfully appeal to the Constitution of the United States.

A very different issue is presented by the fifteen employees who were discharged because they refused to take this oath:

> "I . . . do solemnly swear (or affirm) . . . that I . . . have not, within said period [from December 6, 1943], been or become a member of or affiliated with any group, society, association, organization or party which advises, advocates or teaches, or has, within said period, advised, advocated or taught, the overthrow by force, violence or other unlawful means of the Government of the United States of America, or of the State of California."

The validity of an oath must be judged on the assumption that it will be taken conscientiously. This ordinance does not ask the employee to swear that he "knowingly" or "to the best of his knowledge" had no proscribed affiliation. Certainty is implied in the disavowal exacted. The oath thus excludes from city employment all persons who are not certain that every organization to which they belonged or with which they were affiliated (with all the uncertainties of the meaning of "affiliated") at any time since 1943 has not since that date advocated the overthrow by "unlawful means" of the Government of the United States or of the State of California.

The vice in this oath is that it is not limited to affiliation with organizations known at the time to have advocated overthrow of government. We have here a very different

situation from that recently before us in *Gerende* v. *Board of Supervisors,* 341 U. S. 56. There the Attorney General of Maryland assured this Court that he would advise the appropriate authorities to accept as the oath required by State law from a candidate for office, an affirmation that he is not engaged in the attempt to overthrow the Government by force or violence and that he is not knowingly a member of an organization engaged in such an attempt. The Attorney General did not give this assurance as a matter of personal relaxation of a legal requirement. He was able to give it on the basis of the interpretation that the Court of Appeals of Maryland, the highest court of that State, had placed upon the legislation. No such assurance was remotely suggested on behalf of Los Angeles. Naturally not. Nothing in the decisions under review would warrant such restricted interpretation of the assailed ordinance.* To find *scienter* implied in a criminal statute is the obvious way of reading such a statute, for guilty knowledge is the normal ingredient of criminal responsibility. The ordinance before us exacts an oath as a condition of employment; it does not define a crime. It is certainly not open to this Court to rewrite the oath required by Los Angeles of its employees, after the oath as written has been sustained by the California courts.

If this ordinance is sustained, sanction is given to like oaths for every governmental unit in the United States. Not only does the oath make an irrational demand. It is

*Nothing in the decision or opinion of the Supreme Court of California in *People* v. *Steelik,* 187 Cal. 361, 203 P. 78, indicates that the courts of California would at their own instance read into the Los Angeles oath a limitation which is not there expressed. In the *Steelik* case the court was considering a statute which provided that "Any person who . . . [o]rganizes or assists in organizing, or is or knowingly becomes a member of, any organization" teaching criminal syndicalism is guilty of a felony. Cal. Stat. 1919, c. 188, § 2. The court held only that the word "knowingly" qualified the word "is" in addition to the word "becomes."

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bound to operate as a real deterrent to people contemplating even innocent associations. How can anyone be sure that an organization with which he affiliates will not at some time in the future be found by a State or National official to advocate overthrow of government by "unlawful means"? All but the hardiest may well hesitate to join organizations if they know that by such a proscription they will be permanently disqualified from public employment. These are considerations that cut deep into the traditions of our people. Gregariousness and friendliness are among the most characteristic of American attitudes. Throughout our history they have been manifested in "joining." See Arthur M. Schlesinger, Sr., Biography of a Nation of Joiners, published in 50 American Historical Review 1, reprinted in Schlesinger, Paths to the Present, 23.

Giving full scope to the selective processes open to our municipalities and States in securing competent and reliable functionaries free from allegiance to any alien political authority, I do not think that it is consonant with the Due Process Clause for men to be asked, on pain of giving up public employment, to swear to something they cannot be expected to know. Such a demand is at war with individual integrity; it can no more be justified than the inquiry into belief which MR. JUSTICE BLACK, MR. JUSTICE JACKSON and I deemed invalid in *American Communications Assn.* v. *Douds,* 339 U. S. 382.

The needs of security do not require such curbs on what may well be innocuous feelings and associations. Such curbs are indeed self-defeating. They are not merely unjustifiable restraints on individuals. They are not merely productive of an atmosphere of repression uncongenial to the spiritual vitality of a democratic society. The inhibitions which they engender are hostile to the best conditions for securing a high-minded and high-spirited public service.

It is not for us to write the oath that Los Angeles may exact. And so as to the fifteen employees I think the case should go back to the State court, with instructions that these petitioners be reinstated unless they refuse to take an oath or affirmation within the scope indicated in this opinion.

MR. JUSTICE BURTON, dissenting in part and concurring in part.

I.

I cannot agree that under our decisions the oath is valid. *United States* v. *Lovett,* 328 U. S. 303; *Ex parte Garland,* 4 Wall. 333; *Cummings* v. *Missouri,* 4 Wall. 277. The oath is so framed as to operate retrospectively as a perpetual bar to those employees who held certain views at any time since a date five years preceding *the effective date of the ordinance.* It leaves no room for a change of heart. It calls for more than a profession of present loyalty or promise of future attachment. It is not limited in retrospect to any period measured by reasonable relation to the present. In time this ordinance will amount to the requirement of an oath that the affiant has *never* done any of the proscribed acts. Cf. *Gerende* v. *Board of Supervisors,* 341 U. S. 56; *American Communications Assn.* v. *Douds,* 339 U. S. 382, 413–414.

The oath is not saved by the fact that it reaches back only to December 6, 1943, and that city employees have been forbidden since April 28, 1941, under § 432 of the Los Angeles Charter, to advise, teach or advocate the violent overthrow of the Government. See the *Lovett, Garland* and *Cummings* cases, *supra.*

II.

I agree with the Court that the judgment should be affirmed as to petitioners Pacifico and Schwartz. They

executed the oath but refused to sign an affidavit calling for information as to their past or present membership in the Communist Party or the Communist Political Association. Such refusal does not now present the question of whether the Constitution permits the City to discharge them from municipal employment on the basis of information in their affidavits. We have before us only the question of whether municipal employees may be required to give to their employer factual information which is relevant to a determination of their present loyalty and suitability for public service. Such loyalty and suitability is no less material in candidates for appointment as municipal employees than in candidates for elective office, *Gerende* v. *Board of Supervisors, supra,* or union officers, *American Communications Assn.* v. *Douds, supra.*

MR. JUSTICE BLACK, dissenting.

I agree with the dissenting opinion of MR. JUSTICE DOUGLAS but wish to emphasize two objections to the opinion of the Court:

1. Our *per curiam* opinion in *Gerende* v. *Board of Supervisors,* 341 U. S. 56, in no way stands for the principle for which the Court cites it today. In *Gerende,* we upheld a Maryland law that had been interpreted by the highest court of that state to require only an oath that a candidate "is not a person who is engaged 'in one way or another in the attempt to overthrow the government *by force or violence,*' and that he is not knowingly a member of an organization engaged in such an attempt." The oath and affidavit in the present case are obviously not so limited.

2. The opinion of the Court creates considerable doubt as to the continued vitality of three of our past decisions: *Cummings* v. *Missouri,* 4 Wall. 277; *Ex parte Garland,* 4 Wall. 333; *United States* v. *Lovett,* 328 U. S. 303. To

this extent it weakens one more of the Constitution's great guarantees of individual liberty. See, *e. g., Dennis* v. *United States, ante,* p. 494, and *Breard* v. *Alexandria, ante,* p. 622, decided this day.

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

Petitioners are citizens of the United States and civil service employees of the City of Los Angeles. In 1948 the City of Los Angeles passed Ordinance No. 94,004 which requires each of its employees to subscribe to an oath of loyalty which included, *inter alia,* an affirmation that he does not advise, advocate, or teach, and has not within the five years prior to the effective date of the ordinance "advised, advocated or taught, the overthrow by force, violence or other unlawful means, of the Government of the United States of America or of the State of California," and that he is not and has not within that period been "a member of or affiliated with any group, society, association, organization or party which advises, advocates or teaches, or has, within said period, advised, advocated or taught, the overthrow by force, violence or other unlawful means of the Government of the United States of America, or of the State of California."

The ordinance also requires each employee to execute an affidavit stating "whether or not he is or ever was a member of the Communist Party of the United States of America or of the Communist Political Association, and if he is or was such a member, stating the dates when he became, and the periods during which he was, such a member."

The ordinance was passed to effectuate the provisions of § 432 of the Charter of Los Angeles (Cal. Stat. 1941, c. 67, p. 3409) which provides, *inter alia,* that no person who has within five years prior to the adoption of § 432 ad-

vised, advocated or taught the overthrow by force or violence of the government of the United States or of California, or who during that time has been a member of or affiliated with any group or party which has advised, advocated, or taught that doctrine, shall hold or retain or be eligible for any employment in the service of the city. Thus the ordinance and § 432 of the Charter read together make plain that prior advocacy or membership is without more a disqualification for employment. Both the oath and the affidavit are methods for enforcement of that policy.

Fifteen of the petitioners refused to sign either the oath or the affidavit. Two took the oath but refused to sign the affidavit. All seventeen were discharged—the sole ground being their refusal to sign the affidavit or to sign and to take the oath, as the case may be. They had an administrative review, which afforded them no relief. This suit was thereupon instituted in the California court, claiming reinstatement and unpaid salaries. Relief was denied by the District Court of Appeal, 98 Cal. App. 2d 493, 220 P. 2d 958; and a hearing was denied by the Supreme Court, three justices dissenting. The case is here on certiorari.

The case is governed by *Cummings* v. *Missouri*, 4 Wall. 277, and *Ex parte Garland*, 4 Wall. 333, which struck down test oaths adopted at the close of the Civil War. The *Cummings* case involved provisions of the Missouri Constitution requiring public officials and certain classes of professional people, including clergymen, to take an oath that, *inter alia*, they had never been "in armed hostility" to the United States; that they had never "by act or word" manifested their "adherence to the cause" of enemies of the country or their "desire" for the triumph of its enemies; that they had never "knowingly and willingly harbored, aided, or countenanced" an enemy; that they

had never been a "member of, or connected with, any order, society, or organization inimical to the government of the United States" or engaged "in guerilla warfare" against its inhabitants; that they had never left Missouri "for the purpose of avoiding enrolment for or draft into the military service of the United States" or become enrolled as a southern sympathizer.

The *Garland* case involved certain Acts of Congress requiring public officials and attorneys practicing before the federal courts to take an oath that they had "voluntarily given no aid, countenance, counsel, or encouragement to persons engaged in armed hostility" against the United States and that they had "neither sought nor accepted, nor attempted to exercise the functions of any office whatever, under any authority or pretended authority in hostility to the United States." The Court amended its rules of admission to require this oath.

Cummings, a Catholic priest, was indicted and convicted for teaching and preaching without having first taken the oath.

Garland, a member of the Bar of the Court, had served in the Confederate Government, for which he had received a pardon from the President conditioned on his taking the customary oath of loyalty. He applied for permission to practice before the Court without taking the new oath.

Article I, § 10 of the Constitution forbids any state to "pass any Bill of Attainder" or any "ex post facto Law." Article I, § 9 curtails the power of Congress by providing that "No Bill of Attainder or ex post facto Law shall be passed." The Court ruled that the test oaths in the *Cummings* and *Garland* cases were bills of attainder and *ex post facto* laws within the meaning of the Constitution. "A bill of attainder," wrote Mr. Justice Field for the Court, "is a legislative act which inflicts punishment

without a judicial trial." [1] *Cummings* v. *Missouri, supra*, p. 323; and see *United States* v. *Lovett*, 328 U. S. 303, 317, 318. The Court held that deprivation of the right to follow one's profession is punishment. A bill of attainder, though generally directed against named individuals, may be directed against a whole class. Bills of attainder usually declared the guilt; here they assumed the guilt and adjudged the punishment conditionally, *i. e.*, they deprived the parties of their right to preach and to practice law unless the presumption were removed by the expurgatory oath. That was held to be as much a bill of

[1] Mr. Justice Field continued: "If the punishment be less than death, the act is termed a bill of pains and penalties. Within the meaning of the Constitution, bills of attainder include bills of pains and penalties. In these cases the legislative body, in addition to its legitimate functions, exercises the powers and office of judge; it assumes, in the language of the text-books, judicial magistracy; it pronounces upon the guilt of the party, without any of the forms or safeguards of trial; it determines the sufficiency of the proofs produced, whether conformable to the rules of evidence or otherwise; and it fixes the degree of punishment in accordance with its own notions of the enormity of the offence." 4 Wall. p. 323.

In addition to the history of bills of attainder in England, the draftsmen of the Constitution had before them recent examples of such legislation by the Revolutionary governments of the states. Legislative action against persons of known or suspected Loyalist sympathies included outright attaint of treason or subversion (*e. g.*, Georgia, Act of March 1, 1778; Pennsylvania Laws 1778, c. 49; New York Laws 1779, Third Session, c. 25); proscription and banishment (*e. g.*, Massachusetts, Act of Sept. 1778, Charters and Gen. Laws, c. 48; New Hampshire Laws 1778, Fourth Session, c. 9); confiscation (*e. g.*, Delaware Laws 1778, c. 29b; New Jersey, Act of Dec. 11, 1778, Laws, p. 40); as well as numerous test oaths involving, among other penalties, disqualification from holding office or practicing certain professions. See laws collected in Van Tyne, The Loyalists in the American Revolution, App. B, C; and generally, Thompson, Anti-Loyalist Legislation During the American Revolution, 3 Ill. L. Rev. 81, 147.

attainder as if the guilt had been irrevocably pronounced. The laws were also held to be *ex post facto* since they imposed a penalty for an act not so punishable at the time it was committed.

There are, of course, differences between the present case and the *Cummings* and *Garland* cases. Those condemned by the Los Angeles ordinance are municipal employees; those condemned in the others were professional people. Here the past conduct for which punishment is exacted is single—advocacy within the past five years of the overthrow of the Government by force and violence. In the other cases the acts for which Cummings and Garland stood condemned covered a wider range and involved some conduct which might be vague and uncertain. But those differences, seized on here in hostility to the constitutional provisions, are wholly irrelevant. Deprivation of a man's means of livelihood by reason of past conduct, not subject to this penalty when committed, is punishment whether he is a professional man, a day laborer who works for private industry, or a government employee. The deprivation is nonetheless unconstitutional whether it be for one single past act or a series of past acts. The degree of particularity with which the past act is defined is not the criterion. We are not dealing here with the problem of vagueness in criminal statutes. No amount of certainty would have cured the laws in the *Cummings* and *Garland* cases. They were stricken down because of the mode in which punishment was inflicted.

Petitioners were disqualified from office not for what they are today, not because of any program they currently espouse (cf. *Gerende* v. *Board of Supervisors,* 341 U. S. 56), not because of standards related to fitness for the office (cf. *Dent* v. *West Virginia,* 129 U. S. 114; *Hawker* v. *New York,* 170 U. S. 189), but for what they once

advocated. They are deprived of their livelihood by legislative act, not by judicial processes. We put the case in the aspect most invidious to petitioners. Whether they actually advocated the violent overthrow of Government does not appear. But here, as in the *Cummings* case, the vice is in the presumption of guilt which can only be removed by the expurgatory oath. That punishment, albeit conditional, violates here as it did in the *Cummings* case the constitutional prohibition against bills of attainder. Whether the ordinance also amounts to an *ex post facto* law is a question we do not reach.

LAND ET AL. *v.* DOLLAR ET AL.*

Decided June 4, 1951.

In these related proceedings, this Court (1) grants certiorari in Nos. 697 and 702; (2) denies a motion to vacate an order staying the Court of Appeals' contempt order; (3) continues on the docket a motion for reconsideration of the denial of certiorari in No. 353; and (4) rejects the suggestion that the Court defer adjournment and hear argument within a matter of weeks. Pp. 737–740.

Attorney General McGrath and *Solicitor General Perlman* for Land et al.

Arthur B. Dunne for petitioner in No. 702.

Herman Phleger, Gregory A. Harrison, Moses Lasky, Edmund L. Jones and *Howard Boyd* for Dollar et al.

PER CURIAM.

(1) Nos. 697 and 702 are before the Court on petitions for certiorari to review, first, an order of the District Court for the District of Columbia requiring that Charles Sawyer endorse certain stock certificates as "United States Maritime Commission, by Charles Sawyer, Secretary of Commerce," and, second, a Restraining Order issued by the Court of Appeals for the District of Columbia Circuit enjoining named petitioners from:

> "proposing, seeking or advocating any step in any proceeding, whether in said suit entitled *United States* v. *R. Stanley Dollar, et al.*, or in any other

*No. 353, *Land et al.* v. *Dollar et al.*, on motion for leave to file a motion for reconsideration of denial of certiorari; No. 697, *Land et al.* v. *Dollar et al.*, and No. 702, *In re Killion*, on petitions for writs of certiorari to the United States Court of Appeals for the District of Columbia Circuit; No. —, *Sawyer et al.* v. *Dollar et al.*, and No. —, *In re Killion*, on motion to vacate stay of contempt order.

proceeding, inconsistent with strict compliance with and obedience to the orders heretofore entered by this Court in this cause.

"AND IT IS FURTHER ORDERED that said persons are and each of them is enjoined and restrained until further order of this Court from complying with, taking advantage of, or utilizing, or seeking to comply with, utilize or take advantage of said temporary injunction issued by the United States District Court for the Northern District of California, Southern Division, in said cause entitled *United States* v. *R. Stanley Dollar, et al.*, or any order of similar tenor which may hereafter be entered by said court or any other court."

The two orders are before the Court for the first time in Nos. 697 and 702. Certiorari is granted in these cases.

(2) Subsequent to the issuance of the above Restraining Order, the Court of Appeals for the District of Columbia Circuit found named petitioners to be in civil contempt of its prior decrees by reason of, *inter alia*, their activities in connection with obtaining the temporary injunction on behalf of the United States in its suit in the Northern District of California, referred to in the Restraining Order. The order of contempt has been stayed pending disposition of Nos. 697 and 702 as well as the forthcoming petitions for certiorari directed to the contempt order. Motion of respondents to vacate the stay is denied.

(3) No action is taken at this time on petitioners' motion for leave to file a motion for reconsideration of our denial of certiorari in No. 353. The motion is continued on the docket so that there may be no question as to this Court's control over No. 353 for whatever action may be deemed appropriate.

(4) It has been suggested that this Court delay the normal ending of the October Term, 1950, and hear argument within a matter of weeks. No motion for advancement has been filed.

We agree that expeditious disposition of the important issues in this lengthy proceeding is highly desirable. But our desire for expedition must be weighed against the danger to orderly presentation of important issues inherent in hasty briefing and argument. And this is particularly so when it is suggested that we hear argument not only in Nos. 697 and 702 now before us, but also in the cases to come to us from the order of civil contempt in which petitions for certiorari are to be filed.

There is a further consideration militating against premature disposition of the issues presented. There is now pending in the United States District Court for the Northern District of California an action brought by the United States for adjudication of its claim of title in the same shares of stock as those involved in the instant cases. We have heretofore held that judgments entered in the instant cases would not be *res judicata* against the United States. *Land* v. *Dollar,* 330 U. S. 731, 736, 737, 739 (1947). Appeals have been taken from the temporary injunction issued in that suit on behalf of the United States and with which much of the present phase of this litigation is concerned. We are advised that on May 31, 1951, the Court of Appeals for the Ninth Circuit heard argument on a motion to stay the temporary injunction pending appeal from the order granting the temporary injunction and has taken that motion under advisement. On June 1, 1951, the District Court for the Northern District of California began its hearing on defendants' (respondents in this Court) motion to dismiss the complaint and for summary judgment.

For the foregoing reasons, we do not accept the suggestion that hearing argument in a matter of weeks is compatible with the orderly administration of justice.

MR. JUSTICE BLACK and MR. JUSTICE CLARK took no part in the consideration or decision of these applications.

MR. JUSTICE FRANKFURTER does not join in this opinion.

Separate memorandum of MR. JUSTICE FRANKFURTER.

It is not practicable, as a rule, for reasons indicated in my memorandum in *Maryland* v. *Baltimore Radio Show,* 338 U. S. 912, to set forth the considerations that move the Court in granting or denying a petition for certiorari. And since an unexplained announcement of an individual vote on such action is too often apt to be equivocal, it has been my unbroken practice not to note my vote on the disposition of such petitions. However, the petition now before the Court is the latest stage in a long process. In different phases it has been here three times. Because our action may be misleading, unless viewed in its setting, a plain narrative of the course of this litigation in its bearing on this petition is, I believe, desirable.

1. What is ultimately in issue is the ownership of the Dollar Steamship Lines. As a result of transactions between the Lines and the United States Maritime Commission, which we need not here relate, 92% of the stock of the corporation was in 1945 listed in the name of the Maritime Commission and voted by the members of that body. On November 6 of that year, the former Dollar stockholders (hereafter called the Dollars) brought suit against the members of the Commission, alleging that the stock was unlawfully withheld and demanding its return. The action was brought in the District Court for the District of Columbia, and for four and one-half

years wound its way through the Court of Appeals to this Court, back to the District Court, and once again to the Court of Appeals. 81 U. S. App. D. C. 28, 154 F. 2d 307; 330 U. S. 731; 82 F. Supp. 919; 87 U. S. App. D. C. 214, 184 F. 2d 245. At every stage, the Commissioners were represented by attorneys from the Department of Justice, who asserted as ground for dismissal that the action was a suit against the United States to which consent had not been given. Our decision, 330 U. S. 731, held that, if the allegations of the complaint were true, the action was not against the United States, but rather against the Commissioners in their individual capacities. The District Court decided on the merits that the facts were not as they had been alleged. 82 F. Supp. 919. But on July 17, 1950, the Court of Appeals reversed. It held that the stock of the corporation was unlawfully withheld by the members of the Commission, and that, since title to it had never vested in the United States, the suit was not against the sovereign. 87 U. S. App. D. C. 214, 184 F. 2d 245. We refused to review this decision. 340 U. S. 884. Later, we refused to reconsider our refusal. 340 U. S. 948.

2. The upshot of the litigation at this point was that the Dollars had obtained a final judgment that the members of the United States Maritime Commission were unlawfully withholding the stock of the corporation, and that, as against the Commissioners, the Dollars were entitled to it. To carry out the judgment, the District Court entered an order on mandate on December 11, 1950. That order stated in part that

> "title to the shares in question is in the plaintiffs [Dollars], since they were never legally divested of the same, and the asserted title of all others arising out of the same transaction to the contrary [is] null and void . . . ." 97 F. Supp. 59.

3. The members of the Maritime Commission took an appeal from this order. They urged that it was too broad, in that it purported to bind, not only the individual members of the Commission, but also the United States. The Court of Appeals remanded the cause with instructions to enter a narrower order, the terms of which it prescribed. The substance of those terms is as follows:

> "[P]laintiffs [Dollars] are entitled to possession of the shares as against defendants, and the defendants are ordered and directed to deliver forthwith to the plaintiffs the said shares. The possession to which plaintiffs are entitled is an effective possession of the shares. In so far as such right requires action on the part of defendants in addition to physical delivery of the certificates, such action is hereby directed to be taken. Plaintiffs are entitled under this judgment to all rights belonging to possessors of the shares." 88 U. S. App. D. C. —, —, 188 F. 2d 629, 631.

In further explanation of its order the Court stated:

> "The District Court is directed to enforce obedience to its order, as herein modified, whether effective process is against the present named defendants or is against another official, or other officials, against whom the order might be lawfully enforced if he or they were a party or parties to the suit.
>
> . . . . .
>
> "If the Secretary of Commerce now has custody or possession of the shares, he obviously acquired such custody or possession since the beginning of this action, indeed since the order of June 11, 1947 [prohibiting transfer of the stock *pendente lite*]. Obedience to the order about to be entered pursuant to this opinion is, therefore, enforceable against him, and he is liable under Rule 71, supra, to the same

process for enforcing obedience to that order as if he were a party." 88 U. S. App. D. C. —, —, 188 F. 2d 629, 632.

4. We were asked to grant certiorari to review this order for enforcement. On March 12, 1951, we refused. 340 U. S. 948. It was at this point that we refused to reconsider our refusal to review the decision on the merits.

5. Accordingly, the case went back to the District Court. That court entered two orders on March 16. The first was in the terms prescribed by the Court of Appeals. The second was designed to enforce the judgment against the Secretary of Commerce, who, under a Presidential Reorganization Plan, had succeeded the Maritime Commission as custodian of the stock shortly before the Court of Appeals entered its decision on the merits. This order directed the Secretary to endorse the stock certificates in his possession in blank, by writing on them the words, "United States Maritime Commission, by Charles Sawyer, Secretary of Commerce." It required further that he deliver the stock to a representative of the Dollars, and that he instruct the corporation to make the transfers of record. In the event that the Secretary failed to endorse the stock before delivery or to issue the instructions prior to March 17, the Clerk of the District Court was directed to perform these acts in his place. 97 F. Supp. 60.

6. Meanwhile, a new proceeding got under way. On March 12, the day we denied certiorari to the decision of the Court of Appeals modifying the order on mandate, the Government filed a complaint in the District Court for the Northern District of California, Southern Division. In this action, the United States was named as plaintiff, and sought relief by injunction, declaratory judgment, and damages against the Dollar shareholders, the corporation, and the transfer agents responsible for the stock. The claim urged was substantially the same as that which Government counsel for members of the Maritime Com-

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mission had unsuccessfully advanced in the litigation in the District of Columbia which culminated in the judgment against the individual defendants.

7. On March 19, the Government moved for a preliminary injunction in this California litigation. It requested that the Dollars be restrained from "exercising or attempting to exercise any rights or privileges as the owners" of the stock, from making demands upon the corporation that new certificates be issued in their name, and from transferring the stock certificates in their possession. The Government supported its motion by an affidavit of the present Chairman of the Federal Maritime Board. On the basis of a report of the Maritime Commission to the Congress on April 10, 1939, which referred to the Dollar management as "shockingly incompetent" and charged it with drawing excessive salaries from the corporation and with "[f]ailure to maintain adequate service from the West Coast to the Orient," the Chairman stated that "[s]hould inefficient management replace the existing management" of the corporation, "grave danger exists that this important unit of the American Merchant Marine may deteriorate as it did before when under the control of plaintiffs in the case of *R. Stanley Dollar et al.* v. *Emory S. Land et al.*" On April 6 the District Judge announced that he would issue a temporary restraining order. See 97 F. Supp. 50.

8. That order, dated April 11, is in pertinent part as follows:

> "Now, therefore, it is hereby ordered by this Court that, in order to preserve the status quo pending the determination by this Court as to whether plaintiff on the one hand, or the [Dollars] . . . on the other hand, are the lawful owners of said stock, the [Dollars] . . . be and they hereby are, enjoined pending the entry official judgment in this action, from

exercising or attempting to exercise any rights or privileges as owners of stock certificates . . . , and from making any demands upon [the corporation or its agents] . . . that new certificates representing said shares of stock . . . be issued to [the Dollars] . . . , or that said [Dollars] be registered as the owners of the shares of stock represented by said certificates . . . , and from pledging, selling, transferring, or otherwise disposing of said stock certificates and the shares of stock represented thereby, and

"It is further ordered by this Court that [the corporation and its agents] . . . be, and they hereby are, restrained, pending the entry of final judgment in this action, from issuing any new certificates of stock of [the corporation] representing said shares to [the Dollars] . . . , from registering or recording [the Dollars] . . . as owners of any of the shares of stock . . . , and from in any way recognizing said [Dollars] . . . , as the lawful owners of said shares of stock or said certificates."

9. While these proceedings were taking place in California, appeals were taken to the Court of Appeals for the District of Columbia Circuit from the two orders entered by the District Court for the District of Columbia on March 16. The Secretary of Commerce and the members of the Maritime Commission urged as grounds for reversal that the lower court had misconstrued the mandate of the Court of Appeals, and had jeopardized the United States' claim of title by giving the Dollars power to transfer the stock to a bona fide purchaser for value. They did not assert as grounds for reversing the orders that the Dollars were likely so to mismanage the corporation that assets to which the United States might ultimately be entitled would be wasted. On April 4 the

Court dismissed the appeals, without opinion. At the same time it took under advisement a motion to impose sanctions on the representatives of the Government.

10. The Court of Appeals acted on the motion to impose sanctions by orders dated April 10, for reasons indicated in a statement read in open court on April 6 and an opinion filed on April 11, 1951. 88 U. S. App. D. C. —, 190 F. 2d 366.

(a) It issued an order requiring the Secretary of Commerce, the Solicitor General, and other officials of the Department of Justice and of the corporation to show cause why they should not be held in contempt for disobedience to the orders of the courts of the District of Columbia. It based this order in part on allegations that the respondents "refused to endorse the certificates and refused to instruct the transfer agent to transfer the shares" as directed by the Court. Instead, respondents "executed proxies in their own names after the decree of this court was known to them," and "warned, in writing, the transfer agent of the corporation not to transfer the shares of stock." In part, the order was based on the allegation that respondents "sought and obtained from the District Court in Northern California an injunction against the Dollar interests, restraining them from attempting to secure compliance with the decree of this court." 88 U. S. App. D. C. at —, 190 F. 2d at 374. The proceedings to which this order has led are not before us on this petition.

(b) The Court of Appeals issued a restraining order also directed to the Secretary of Commerce, the Solicitor General, and officers of the Department of Justice and the corporation. It recited that these respondents "caused to be instituted" the California suit, and that "in said action said respondents have sought in the name of the United States relief which is contrary to, inconsistent

with, and in nullification of this Court's decisions and orders" in the case. It stated at the hearing on the order that it was not deciding "whether the United States might seek ancillary injunctive relief in any other respect; that is, in any respect save only the defeat and nullification of a judgment already finally entered by a court of competent jurisdiction." It ordered that the respondents, their agents, attorneys, and all persons in active concert with any of them

> "be and they hereby are enjoined and restrained until further order of this Court from proposing, seeking or advocating any step in any proceeding, whether in said suit entitled *United States* v. *R. Stanley Dollar, et al.*, or in any other proceeding, inconsistent with strict compliance with and obedience to the orders heretofore entered by this Court in this cause.
>
> "AND IT IS FURTHER ORDERED that said persons are and each of them is enjoined and restrained until further order of this Court from complying with, taking advantage of, or utilizing, or seeking to comply with, utilize or take advantage of said temporary injunction issued by the United States District Court for the Northern District of California, Southern Division, in said cause entitled *United States* v. *R. Stanley Dollar, et al.*, or any order of similar tenor which may hereafter be entered by said court or any other court."

We have before us for review on this petition (1) the order of the Court of Appeals for the District of Columbia Circuit dismissing appeals from the orders entered by the District Court on March 16 directing that the stock be delivered to the Dollars; (2) the restraining order issued by the Court of Appeals for the District of Columbia Circuit on April 10.

Three other matters concerning this litigation are also now before the Court. They are referred to in a *per curiam* opinion. This memorandum does not address itself to them.

By MR. JUSTICE JACKSON.

Respondents ask the full Court to vacate a stay of proceedings granted by THE CHIEF JUSTICE. I regret that I cannot acquiesce in summary disposition of the motion, for I think the circumstances require the Court to set it down for prompt argument and act only after hearing both sides.

This Court examined the decision of the Court of Appeals that the Dollar interests were entitled to the stock in question and decided that it did not merit further review. 87 U. S. App. D. C. 214, 184 F. 2d 245. Certiorari denied, 340 U. S. 884. The courts below properly understood that we then regarded that litigation as ended and the District Court entered its mandate. When complete compliance was withheld, the mandate was modified to order officials to deliver up "effective possession" of the stock. Certiorari was sought from this enforcement order and we were also again asked to review the merits. We denied both. 340 U. S. 948. To date, "effective possession" has not been delivered.

We may have been right or we may have been wrong in these repeated denials of review. But what the Court of Appeals has now done is try to effectuate a judgment that we, by refusal to review, in effect have confirmed.

Denial by the full Court of this motion fixes it as the Court's policy to suspend enforcement indefinitely, certainly so long as any phase of this matter is pending here. Successive stays will issue as of course until we decide this and perhaps also the case recently commenced in California. No one knows for how long this will con-

tinue. My prediction would be in terms of years rather than months.

Certainly both the appearance and substance of justice require that the parties be heard before the Court denies respondents, for an indefinite period, the benefits of the judgment they have won. We should not overlook the fact that management of this shipping concern is kept out of the hands of those whom years of litigation have adjudged to be its owners, and no protection by bond, condition of the order, or otherwise is provided for them during such time as it is kept in the hands adjudged to have it illegally.

This Court, now asked to vacate the stay order, denies the motion without hearing either of the parties. This matter has become one of considerable delicacy and I should not, in effect, approve an indefinite stay of proceedings without hearing all the argument and information that either party can offer. I do not think denial without hearing is prudent judicial action. No legitimate interest could suffer from a hearing and we would surely be better informed as a result of it.

Even if the parties themselves are not strictly entitled to or do not want to argue this motion, I should require them to do so, for hearings are more important here for the benefit of the Court, as a protection against unwise decision, than for benefit of the parties. It is the Court that is now on trial. When the shoe of contempt was on the other foot, we strongly supported the Government's demand for complete submission to court decrees, even before they were sustained by this Court and though their validity was reasonably in doubt. On this basis a heavy fine was levied against the United Mine Workers. *United States* v. *United Mine Workers,* 330 U. S. 258. See also *McComb* v. *Jacksonville Paper Co.,* 336 U. S. 187.

The spectacle of this Court stalling the enforcement efforts of lower courts while there is outstanding a judg-

ment that some of the Nation's high officials are guilty of contempt of court is not wholesome. The evil influence of such an example will be increased by delay. This Court should exercise utmost care lest it appear to be indifferent to a claim of official disobedience.

Moreover, we owe something in this matter to the Court of Appeals. That court held several hearings, considered every phase of this case in careful and exhaustive opinions, and made detailed findings of fact. It embarked on this effort at enforcement only after this Court had refused to review the basic orders. They were clearly justified in believing that we expected the order to be enforced. Surely we do not want to confirm Mr. Dooley's observation to the effect that an appeal is an occasion for one court to show its contempt for another.

Being outvoted as to the stay, however, I think it is owing to the Court itself, to the courts below, and to both litigants, to hear and decide the controversial orders without delay. Any denial of this motion or continuance of the stay should be conditioned upon a shortening of the time of all parties and an argument of the cases on the merits within two weeks, deferring the Court's adjournment until the controversy is finally cleared up. If the Court of Appeals is wrong, we should promptly vindicate the officials involved. If that court is right, we should not waver in upholding its hand.

I withhold my assent from the *per curiam* opinion of today.

REPORTER'S NOTE.

The next page is purposely numbered 901. The numbers from 750 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.

DECISIONS PER CURIAM AND ORDERS FROM APRIL 9 THROUGH JUNE 4, 1951.

APRIL 9, 1951.

Per Curiam Decisions. (*See also No. 420, ante, p. 50.*)

No. 567. EASTERN AIR LINES, INC. *v.* CIVIL AERONAUTICS BOARD ET AL. 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 proceeding upon the ground that the cause is moot. *E. Smythe Gambrell* and *W. Glen Harlan* for petitioner. *Solicitor General Perlman, Assistant Attorney General Morison, Emory T. Nunneley, Jr.* and *Warren L. Sharfman* for the Civil Aeronautics Board, and *Charles H. Murchison* for Capital Airlines, Inc., respondents. Reported below: 87 U. S. App. D. C. 331, 185 F. 2d 426.

No. 571. STITH ET AL. *v.* PINKERT ET AL. Appeal from the Supreme Court of Arkansas. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *J. R. Booker* and *Tilghman E. Dixon* for appellants. *Leffel Gentry* for appellees. Reported below: 217 Ark. 871, 234 S. W. 2d 45.

No. 588. REILING *v.* TAWES, COMPTROLLER OF MARYLAND. Appeal from the United States District Court for the District of Maryland. *Per Curiam:* The appeal is dismissed. Reported below: 93 F. Supp. 462.

No. 376. WILSON *v.* LOUISIANA. Certiorari, 340 U. S. 864, to the Supreme Court of Louisiana. Argued March 6–7, 1951. Decided April 9, 1951. *Per Curiam:* The

judgment is affirmed. Dissenting: MR. JUSTICE BLACK, MR. JUSTICE FRANKFURTER, and MR. JUSTICE DOUGLAS. *Lubin F. Laurent* argued the cause for petitioner. With him on the brief was *Henry P. Viering*. *Michael E. Culligan*, Assistant Attorney General of Louisiana, and *Frank H. Langridge* argued the cause for respondent. With them on the brief was *Bolivar E. Kemp, Jr.*, Attorney General. Reported below: 217 La. 470, 46 So. 2d 738.

Miscellaneous Orders.

No. 409, Misc. TATE *v.* CALIFORNIA ET AL. Application denied.

No. 413, Misc. EX PARTE MCCARLEY, ADMINISTRATOR; and

No. 415, Misc. CITY OF PADUCAH ET AL. *v.* SHELBOURNE, U. S. DISTRICT JUDGE. Motions for leave to file petitions for writs of mandamus denied. *C. Ray Robinson* and *James A. Cobey* for McCarley. *James G. Wheeler* for petitioners in No. 415, Misc.

Certiorari Granted. (*See also No. 567, supra.*)

No. 564. UNITED STATES EX REL. GIESE *v.* CHAMBERLIN, COMMANDING GENERAL, ET AL. C. A. 7th Cir. Certiorari granted. *Albert E. Hallett* for petitioner. *Solicitor General Perlman, Assistant Attorney General McInerney, Robert S. Erdahl* and *J. F. Bishop* for respondents. Reported below: 184 F. 2d 404.

Certiorari Denied.

No. 282. UNITED STATES *v.* ROGUE RIVER TRIBE OF INDIANS ET AL. Court of Claims. Certiorari denied. MR. JUSTICE BLACK is of the opinion certiorari should be granted. *Solicitor General Perlman* for the United

States. *L. A. Gravelle, Edward F. Howrey, Douglas Whitlock* and *John G. Mullen* for respondents. Reported below: 116 Ct. Cl. 454, 89 F. Supp. 798.

No. 358. THOR CORPORATION *v.* MAYFLOWER INDUSTRIES. C. A. 3d Cir. Certiorari denied. *Walter C. Lundgren* and *Franklin B. Lincoln, Jr.* for petitioner. *Bernard G. Segal* and *James J. Leyden* for respondent. Reported below: 184 F. 2d 537.

No. 546. HEIRS OF FERNANDEZ-GARCIA *v.* FERNANDEZ-ANTONETTI. C. A. 1st Cir. Certiorari denied. *Milton K. Eckert* for petitioners. *J. Guillermo Vivas* for respondent. Reported below: 184 F. 2d 1015.

No. 547. MAY *v.* ILLINOIS (BOYLE, STATE'S ATTORNEY). Criminal Court of Cook County, Illinois. Certiorari denied. *C. Vernon Thompson* for petitioner. *Ivan A. Elliott,* Attorney General of Illinois, and *John S. Boyle* for respondent.

No. 550. GENEVA METAL WHEEL CO. *v.* O'DONNELL ET AL. C. A. 6th Cir. Certiorari denied. *James A. Butler* and *Kenneth D. Carter* for petitioner. *Meyer A. Cook* and *Rees H. Davis* for respondents. Reported below: 190 F. 2d 59.

No. 558. FIRST NATIONAL BANK OF CHICAGO, EXECUTOR, *v.* UNITED AIR LINES, INC. C. A. 7th Cir. Certiorari denied. *William C. Wines* and *John H. Bishop* for petitioner. *Howard Ellis* for respondent. Reported below: 190 F. 2d 493.

No. 561. WILLIAMS *v.* HUGHES TOOL CO. C. A. 10th Cir. Certiorari denied. *Charles M. McKnight* and *Robert F. Davis* for petitioner. *George I. Haight* and

Robert F. Campbell for respondent. *Solicitor General Perlman* filed a memorandum for the United States, as *amicus curiae,* supporting the petition. Reported below: 186 F. 2d 278.

No. 568. TAUNAH ET AL. *v.* JONES, COLLECTOR OF INTERNAL REVENUE. C. A. 10th Cir. Certiorari denied. *William E. Leahy* and *William J. Hughes, Jr.* for petitioners. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack* and *Helen Goodner* for respondent. Reported below: 186 F. 2d 445.

No. 573. ESTATE OF RAINGER ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. *George T. Altman* for petitioners. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack, A. F. Prescott, Carlton Fox* and *John R. Benney* for respondent. Reported below: 183 F. 2d 587.

No. 575. NETHERLANDS MINISTRY OF TRAFFIC, DIRECTORATE GENERAL OF SHIOOING, *v.* STRIKA. C. A. 2d Cir. Certiorari denied. *George A. Garvey* for petitioner. *Chester A. Hahn* for respondent. Reported below: 185 F. 2d 555.

No. 579. SOUTHERN PACIFIC CO. *v.* GUTHRIE. C. A. 9th Cir. Certiorari denied. *Arthur B. Dunne* for petitioner. *Thomas C. Ryan* and *Daniel V. Ryan* for respondent. Reported below: 186 F. 2d 926.

No. 583. WHEATON BRASS WORKS *v.* SOUTHERN PACIFIC CO. Supreme Court of New Jersey. Certiorari denied. *Roy C. Collins* for petitioner. *Jeremiah C. Waterman* for respondent. Reported below: 5 N. J. 594, 76 A. 2d 890.

No. 559. KORTHINOS ET AL. *v.* NIARCHOS ET AL. C. A. 4th Cir. Certiorari denied. *J. L. Morewitz* for petitioners. *Hugh S. Meredith* and *Barron F. Black* for respondents. Reported below: 184 F. 2d 716.

No. 560. MALEURIS ET AL. *v.* PAPADAKIS ET AL. C. A. 4th Cir. Certiorari denied. *J. L. Morewitz* for petitioners. *Leon T. Seawell* and *Thos. M. Johnston* for respondents. Reported below: 184 F. 2d 716.

No. 578. ALLEN *v.* LITSINGER ET AL. Supreme Court of Appeals of Virginia. Certiorari denied. *Charles Orlando Pratt* for petitioner. *R. O. Norris* and *Gordon Lewis* for respondents. Reported below: 191 Va. lxv.

No. 308, Misc. WHITING *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 323, Misc. HURLEY *v.* REID, SUPERINTENDENT, ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied.

No. 365, Misc. PRITCHETT *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *James J. Laughlin* for petitioner. *Solicitor General Perlman, Assistant Attorney General McInerney* and *Robert S. Erdahl* for the United States. Reported below: 87 U. S. App. D. C. 374, 185 F. 2d 438.

No. 386, Misc. WATKINS *v.* DUFFY, WARDEN, ET AL. Supreme Court of California. Certiorari denied.

No. 403, Misc. RANDALL *v.* CRANOR, SUPERINTENDENT. Supreme Court of Washington. Certiorari denied.

No. 410, Misc. WYBACK *v.* CRANOR, SUPERINTENDENT. Supreme Court of Washington. Certiorari denied.

No. 411, Misc. KEMMERER *v.* WARDEN, MICHIGAN STATE PENITENTIARY. C. A. 6th Cir. Certiorari denied.

No. 412, Misc. GASTMAN *v.* NEW YORK. Appellate Division of the Supreme Court of New York, First Judicial Department. Certiorari denied.

Rehearing Denied.

No. 157, October Term, 1939. WEBER *v.* UNITED STATES, 308 U. S. 590;

No. 268, October Term, 1948. WEBER *v.* UNITED STATES, 335 U. S. 872;

No. 25. UNITED STATES ET AL. *v.* ROCK ISLAND MOTOR TRANSIT CO. ET AL., 340 U. S. 419;

No. 38. UNITED STATES ET AL. *v.* TEXAS & PACIFIC MOTOR TRANSPORT CO., 340 U. S. 450;

No. 39. REGULAR COMMON CARRIER CONFERENCE OF AMERICAN TRUCKING ASSOCIATIONS, INC. *v.* TEXAS & PACIFIC MOTOR TRANSPORT CO., 340 U. S. 450;

No. 462. HERWIG *v.* SCHOENEMAN, COMMISSIONER OF INTERNAL REVENUE, ET AL., 340 U. S. 935;

No. 508. CONSUMER MAIL ORDER ASSOCIATION OF AMERICA ET AL. *v.* MCGRATH, ATTORNEY GENERAL, 340 U. S. 925; and

No. 525. ALLEN ET AL. *v.* BROTHERHOOD OF RAILROAD TRAINMEN, 340 U. S. 934. Petitions for rehearing in these cases are severally denied.

No. 209. EMICH MOTORS CORP. ET AL. *v.* GENERAL MOTORS CORP. ET AL., 340 U. S. 558. Rehearing denied. MR. JUSTICE MINTON took no part in the consideration or decision of this application.

No. 161, Misc. BEST *v.* UNITED STATES, 340 U. S. 939. Rehearing denied. MR. JUSTICE CLARK took no part in the consideration or decision of this application.

No. 333, Misc. PRYOR *v.* CALIFORNIA ET AL., 340 U. S. 938. Rehearing denied.

APRIL 16, 1951.

Per Curiam Decisions.

No. 479. RISS & CO., INC. *v.* UNITED STATES ET AL. Appeal from the United States District Court for the Western District of Missouri. Argued April 11–12, 1951. Decided April 16, 1951. *Per Curiam:* The judgment is reversed. *Wong Yang Sung* v. *McGrath,* 339 U. S. 33. *A. Alvis Layne, Jr.* argued the cause for appellant. With him on the brief were *John B. Gage* and *Wendell Berge. Daniel W. Knowlton* argued the cause and filed a brief for the Interstate Commerce Commission, appellee. Reported below: 96 F. Supp. 452.

No. 640. FRIEDMAN ET AL. *v.* NEW YORK. Appeal from the Court of Appeals of New York. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of a substantial federal question. *Leo Pfeffer* for appellants. *Frank Hogan* for appellee. Reported below: 302 N. Y. 75, 96 N. E. 2d 184.

No. 641. WARNER ET AL., DOING BUSINESS AS WARNER & TAMBLE TRANSPORTATION CO., *v.* UNITED STATES ET AL. Appeal from the United States District Court for the Western District of Tennessee. *Per Curiam:* The motions to affirm are granted and the judgment is affirmed. *James W. Wrape* and *Glenn M. Elliott* for appellants. *Solicitor General Perlman* and *Daniel W. Knowlton* for the United States and the Interstate Commerce Commission; and *Harry C. Ames* for the American Barge Line Co. et al., appellees. Reported below: 97 F. Supp. 580.

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Miscellaneous Orders.

No. 421, Misc. STERN ET AL. *v.* THORNBURG, TRUSTEE IN BANKRUPTCY, ET AL.;

No. 422, Misc. PATTEN *v.* U. S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA ET AL.; and

No. 423, Misc. HOLLAND *v.* CIRCUIT COURT OF PETTIS COUNTY, MISSOURI, ET AL. Applications in these cases denied.

No. 425, Misc. ADAMS *v.* ALVIS, WARDEN;

No. 430, Misc. SCOTT *v.* MARTIN, WARDEN;

No. 433, Misc. HART *v.* HUNTER, WARDEN;

No. 435, Misc. BRADSHAW *v.* RAYMOND, SUPERINTENDENT; and

No. 436, Misc. CAVE *v.* RAYMOND, SUPERINTENDENT. The motions for leave to file petitions for writs of habeas corpus in these cases are severally denied.

Certiorari Granted.

No. 536. BRANNAN, SECRETARY OF AGRICULTURE, *v.* STARK ET AL.; and

No. 537. DAIRYMEN'S LEAGUE COOPERATIVE ASSOCIATION, INC. *v.* STARK ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. *Solicitor General Perlman, W. Carroll Hunter* and *Neil Brooks* for petitioner in No. 536. *Seward A. Miller, William E. Leahy* and *William J. Hughes, Jr.* for petitioner in No. 537. *Edward B. Hanify, Edgar J. Goodrich* and *Lipman Redman* for respondents. Reported below: 87 U. S. App. D. C. 388, 185 F. 2d 871.

Certiorari Denied.

No. 431. SCHLEIF *v.* DEFNET ET AL. Supreme Court of Wisconsin. Certiorari denied. *Arthur W. Richter* for petitioner. *Oliver L. O'Boyle* and *Van B. Wake* for respondents. Reported below: 257 Wis. 170, 42 N. W. 2d 926.

No. 535. ARKANSAS POWER & LIGHT CO. ET AL. *v.* FEDERAL POWER COMMISSION; and

No. 596. ARKANSAS PUBLIC SERVICE COMMISSION *v.* FEDERAL POWER COMMISSION. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *P. A. Lasley, A. J. G. Priest, Sidman I. Barber, Harry A. Poth, Jr.* and *Gordon E. Young* for petitioner in No. 535. *Ike Murry,* Attorney General of Arkansas, *H. Cecil Kilpatrick* and *Cecil A. Beasley, Jr.* for petitioner in No. 596. *Solicitor General Perlman, Acting Assistant Attorney General Clapp, Paul A. Sweeney, Melvin Richter, Bradford Ross, Howard E. Wahrenbrock* and *Reuben Goldberg* for respondent. Reported below: 87 U. S. App. D. C. 385, 185 F. 2d 751.

No. 562. TOWNSEND *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. *Maurice J. Nicoson* and *Frederick A. Potruch* for petitioner. *Solicitor General Perlman, David P. Findling, Mozart G. Ratner, Frederick U. Reel* and *Abraham H. Maller* for respondent. Reported below: 185 F. 2d 378.

No. 616. CLEM, TRUSTEE IN BANKRUPTCY, ET AL. *v.* JOHNSON. C. A. 8th Cir. Certiorari denied. *Matthew J. Levitt* for petitioner. Reported below: 185 F. 2d 1011.

No. 574. WESTINGHOUSE RADIO STATIONS, INC. ET AL. *v.* FELIX. C. A. 3d Cir. Certiorari denied. MR. JUSTICE BLACK is of the opinion certiorari should be granted. *Allen S. Olmsted, 2nd, Walter Biddle Saul* and *Robert F. Irwin, Jr.* for petitioners. *Thomas D. McBride* for respondent. Reported below: 186 F. 2d 1.

No. 594. BERLINSKY *v.* EISENBERG ET AL., TRUSTEES. Court of Appeals of Maryland. Certiorari denied. Petitioner *pro se. John Henry Lewin* for respondents. Reported below: —— Md. ——, 76 A. 2d 353.

No. 601. ADAMSON ET AL. *v.* CANADA STEAMSHIP LINES, LTD. C. A. 6th Cir. Motion to join Harold H. Timanus, Administrator, et al., as parties petitioner, denied. Certiorari denied. *Elmer H. Groefsema* for petitioners. *Lucian Y. Ray* and *Lee C. Hinslea* for respondent. Reported below: 185 F. 2d 1019.

No. 304, Misc. JAMES ET AL. *v.* STATE OF WASHINGTON. Supreme Court of Washington. Certiorari denied. *Joseph Forer* and *Ravid Rein* for petitioners. *George E. Flood* for respondent. Reported below: 36 Wash. 2d 918, 221 P. 2d 502.

No. 362, Misc. SPEARS *v.* KANE, U. S. ATTORNEY, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 185 F. 2d 456.

No. 367, Misc. CURTIS *v.* FORMAN, U. S. DISTRICT JUDGE. C. A. 3d Cir. Certiorari denied.

No. 406, Misc. PAYNE *v.* ASHE, WARDEN, ET AL. Supreme Court of Pennsylvania. Certiorari denied.

No. 414, Misc. NORVELL *v.* RAGEN, WARDEN. Supreme Court of Illinois. Certiorari denied.

No. 420, Misc. CLARK *v.* SMYTH, SUPERINTENDENT. Supreme Court of Appeals of Virginia. Certiorari denied.

No. 428, Misc. SLADE *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 429, Misc. GILLIS *v.* RAGEN, WARDEN. Circuit Court of Vermilion County, Illinois. Certiorari denied.

No. 431, Misc. BAKER *v.* ELLIS, GENERAL MANAGER, TEXAS PRISON SYSTEM, ET AL. Criminal Court of Appeals of Texas. Certiorari denied.

No. 432, Misc. LIETO *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied.

No. 434, Misc. EPHRAIM *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 437, Misc. WHALEN *v.* FRISBIE, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 185 F. 2d 607.

No. 440, Misc. CHRISTINA *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 441, Misc. PAUGH *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 303, Misc. JAMES *v.* STATE OF WASHINGTON. Supreme Court of Washington. Certiorari denied. MR. JUSTICE BLACK, MR. JUSTICE REED, and MR. JUSTICE DOUGLAS are of the opinion certiorari should be granted. *Joseph Forer* and *David Rein* for petitioners. *George E. Flood* for respondent. Reported below: 36 Wash. 2d 882, 221 P. 2d 482.

No. 334, Misc. PENNSYLVANIA EX REL. JOHNSON *v.* DYE, WARDEN. Supreme Court of Pennsylvania. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion certiorari should be granted. *Valera Grapp* for petitioner.

No. 341, Misc. MARELIA *v.* BURKE, WARDEN. Supreme Court of Pennsylvania. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion certiorari should be granted. Petitioner *pro se*. *James W. Tracey, Jr.* and *John H. Maurer* for respondent. Reported below: 366 Pa. 124, 75 A. 2d 593.

No. 349, Misc. BOYDEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 185 F. 2d 402.

Rehearing Denied.

No. 20. ROGERS *v.* UNITED STATES, 340 U. S. 367. Rehearing denied. MR. JUSTICE CLARK took no part in the consideration or decision of this application.

No. 427. HEALY, ADMINISTRATRIX, *v.* PENNSYLVANIA RAILROAD CO., 340 U. S. 935;

No. 509. SUCKOW BORAX MINES CONSOLIDATED, INC. ET AL. *v.* BORAX CONSOLIDATED, LTD. ET AL., 340 U. S. 943;

No. 518. MONTANA POWER CO. *v.* FEDERAL POWER COMMISSION, 340 U. S. 947;

No. 532. OTTLEY *v.* ST. LOUIS-SAN FRANCISCO RAILWAY CO., 340 U. S. 948; and

No. 330, Misc. ALLOWAY *v.* SIMPSON, SUPERINTENDENT, 340 U. S. 944. Petitions for rehearing in these cases are severally denied.

APRIL 21, 1951.

Miscellaneous Order.

No. ——. LAND ET AL. *v.* DOLLAR ET AL. The application for a stay of the order of the United States Court of Appeals for the District of Columbia Circuit requiring Charles Sawyer and others to show cause why they should not be adjudged in civil and criminal contempt, referred to the Court by THE CHIEF JUSTICE, is denied. MR. JUSTICE BLACK and MR. JUSTICE CLARK took no part in the consideration or decision of this application. *Attorney General McGrath* for petitioners. *Gregory A. Harrison* and *Moses Lasky* for respondents.

APRIL 23, 1951.

Per Curiam Decisions.

No. 446. CREST SPECIALTY, A LIMITED PARTNERSHIP, *v.* TRAGER, DOING BUSINESS AS TOPIC TOYS, ET AL. Certiorari, 340 U. S. 928, to the United States Court of Appeals for the Seventh Circuit. Argued April 10, 1951. Decided

April 23, 1951. *Per Curiam:* The judgment is reversed. *Great Atlantic & Pacific Tea Co.* v. *Supermarket Equipment Corp.*, 340 U. S. 147. *Clarence E. Threedy* argued the cause and filed a brief for petitioner. *Max R. Kraus* argued the cause for respondents. With him on the brief was *Sidney Neuman.* Reported below: 184 F. 2d 577.

No. 627. LYON ET AL. *v.* COMPTON UNION HIGH SCHOOL AND JUNIOR COLLEGE DISTRICT ET AL.; and

No. 628. HALVAJIAN ET AL. *v.* BOARD OF EDUCATION OF THE CITY OF INGLEWOOD ET AL. Appeals from the District Court of Appeal of California, Second Appellate District. *Per Curiam:* The motions to dismiss are granted and the appeals are dismissed for the want of a substantial federal question. MR. JUSTICE REED and MR. JUSTICE BURTON are of the opinion that probable jurisdiction should be noted. *Hayden C. Covington* for appellants. *Harold W. Kennedy* for appellees.

No. 649. MCKNIGHT ET AL. *v.* BOARD OF PUBLIC EDUCATION ET AL. Appeal from the Supreme Court of Pennsylvania. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of a substantial federal question. *Hayden C. Covington* for appellants. *J. Roy Dickie* for appellees. Reported below: 365 Pa. 422, 76 A. 2d 207.

No. 493. CHICAGO *v.* WILLETT COMPANY. On petition for writ of certiorari to the Supreme Court of Illinois. *Per Curiam:* The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the Supreme Court of Illinois for clarification by that court to show, in the light of *Minnesota* v. *National Tea Co.*, 309 U. S. 551; *State Tax Comm'n* v. *Van Cott,* 306 U. S. 511, whether the judgment herein rests on an adequate and independent state ground or whether decision of a federal question was necessary to the judgment ren-

dered. *J. Louis Karton* and *Arthur Magid* for petitioner. *Charles Dana Snewind* for respondent. Reported below: 406 Ill. 286, 94 N. E. 2d 195.

Miscellaneous Order.

No. 446, Misc. IN RE LA SALLE. Motion for leave to file petition for writ of certiorari denied.

Certiorari Granted. (*See also No. 493, supra.*)

No. 373, Misc. COOK *v.* COOK. Supreme Court of Vermont. Certiorari granted. *Henry Lincoln Johnson, Jr.* for petitioner. *H. Mason Welch* for respondent. Reported below: 116 Vt. 374, 76 A. 2d 593.

Certiorari Denied. (*See also No. 446, Misc., supra.*)

No. 566. PIERCE ET AL., DIRECTORS AND TRUSTEES, ET AL. *v.* WARREN, GOVERNOR, ET AL. Supreme Court of Florida. Certiorari denied. *Charles R. Pierce* and *John M. Sutton* for petitioners. *Thos. McE. Johnston* for respondents. Reported below: 47 So. 2d 857.

No. 569. JOY SILK MILLS, INC. *v.* NATIONAL LABOR RELATIONS BOARD. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Henry J. Fox* for petitioner. *Solicitor General Perlman, David P. Findling, Mozart G. Ratner* and *Bernard Dunau* for respondent. Reported below: 87 U. S. App. D. C. 360, 185 F. 2d 732.

No. 576. LION OIL CO. *v.* ALTENBAUMER ET AL. C. A. 5th Cir. Certiorari denied. *O. O. Touchstone* for petitioner. Reported below: 186 F. 2d 35.

No. 598. STUEBER ET AL. *v.* ADMIRAL CORPORATION. C. A. 7th Cir. Certiorari denied. *John Wattawa* for petitioners. *Francis H. Uriell* and *W. McNeil Kennedy* for respondent. Reported below: 185 F. 2d 10.

No. 604. HENRY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *O. P. Soares* and *Samuel Landau* for petitioner. *Solicitor General Perlman, Assistant Attorney General McInerney, Robert S. Erdahl* and *Felicia H. Dubrovsky* for the United States. Reported below: 186 F. 2d 521.

No. 607. ATLANTIC MARITIME CO. ET AL. *v.* RANKIN, ADMINISTRATOR. C. A. 2d Cir. Certiorari denied. *Cletus Keating* and *Vernon S. Jones* for petitioners. *Silas Blake Axtell* and *Arnold W. Knauth* for respondent. *James S. Hemingway* filed a brief for the Union Des Armateurs Belges et al., as *amici curiae,* supporting the petition. Briefs of *amici curiae* supporting respondent were filed by *Charles A. Ellis* for the Friends of Andrew Furuseth Legislative Assn.; and *Jacob Rassner* for the Danish Sailor's & Firemen's Union. Reported below: 179 F. 2d 597.

No. 608. LEVINSON ET AL. *v.* DEUPREE, ANCILLARY ADMINISTRATOR. C. A. 6th Cir. Certiorari denied. *Charles E. Lester, Jr.* and *Stephens L. Blakely* for petitioners. *Harry M. Hoffheimer* and *Robert S. Marx* for respondent. Reported below: 186 F. 2d 297.

No. 618. MARRA BROS., INC. *v.* SLATTERY ET AL. C. A. 2d Cir. Certiorari denied. *Edmund F. Lamb* for petitioner. *Abraham M. Fisch* for Slattery; and *Charles Landesman* for Wm. Spencer & Son Corp., respondents. Reported below: 186 F. 2d 134.

No. 625. OHIO EX REL. DUNHAM *v.* BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF CINCINNATI. Supreme Court of Ohio. Certiorari denied. *George J. Weller* for petitioner. *Ed F. Alexander* for respondent. Reported below: 154 Ohio St. 469, 96 N. E. 2d 413.

No. 632. TUCKER ET AL. *v.* BAKER ET AL. C. A. 5th Cir. Certiorari denied. *Dexter Hamilton* for petitioners. *J. Hart Willis* for respondents. Reported below: 185 F. 2d 863.

No. 589. NATIONAL CITY LINES, INC. ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. MR. JUSTICE CLARK took no part in the consideration or decision of this application. *Edward R. Johnston* and *H. Templeton Brown* for petitioners. *Solicitor General Perlman, Assistant Attorney General Morison* and *J. Roger Wollenberg* for the United States. Reported below: 186 F. 2d 562.

No. 597. GOO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE BLACK is of the opinion certiorari should be granted. *J. Garner Anthony* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, Robert L. Stern, Ellis N. Slack* and *Arthur F. Callahan* for the United States. Reported below: 187 F. 2d 62.

No. 643. POHL ET AL. *v.* ACHESON, SECRETARY OF STATE, ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion certiorari should be granted. MR. JUSTICE JACKSON took no part in the consideration or decision of this application. *Warren E. Magee* for petitioners. *Solicitor General Perlman* and *Robert W. Ginnane* for respondents.

No. 360, Misc. WEARS *v.* KANSAS. Supreme Court of Kansas. Certiorari denied. Petitioner *pro se*. *Harold R. Fatzer,* Attorney General of Kansas, and *Willis H. McQueary,* Assistant Attorney General, for respondent.

No. 374, Misc. ROEDEL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 448, Misc. WILLIAMS *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 449, Misc. WYATT *v.* SMYTH, SUPERINTENDENT. Supreme Court of Appeals of Virginia. Certiorari denied.

Rehearing Denied.

No. 149. OHIO EX REL. GREISIGER ET AL. *v.* GRAND RAPIDS BOARD OF EDUCATION ET AL., 340 U. S. 820. Motion for leave to file petition for rehearing denied.

No. 450. GARRETT ET AL. *v.* FAUST ET AL., 340 U. S. 931. Rehearing denied.

No. 481. MACARTHUR MINING CO., INC. *v.* RECONSTRUCTION FINANCE CORPORATION, 340 U. S. 943. Motion for oral argument on the petition for rehearing denied. Rehearing denied. MR. JUSTICE CLARK took no part in the consideration or decision of these applications.

No. 572. DELTA DRILLING CO. ET AL. *v.* ARNETT, 340 U. S. 954. Rehearing denied.

APRIL 25, 1951.

Miscellaneous Order.

No. 643. POHL ET AL. *v.* ACHESON, SECRETARY OF STATE, ET AL., *ante*, p. 916. Order denying certiorari withheld on motion of counsel for petitioners. MR. JUSTICE JACKSON took no part in the consideration or decision of this motion. *Warren E. Magee* for petitioners. *Solicitor General Perlman* for respondents.

APRIL 30, 1951.

Per Curiam Decisions.

No. 49. BAILEY *v.* RICHARDSON ET AL. Certiorari, 339 U. S. 977, to the United States Court of Appeals for the District of Columbia Circuit. Argued October 11–12, 1950. Decided April 30, 1951. *Per Curiam:* The judgment is affirmed by an equally divided Court. MR. JUSTICE CLARK took no part in the consideration or decision of this case. *Thurman Arnold* and *Paul A. Porter* argued the cause for petitioner. With them on the brief were *Abe Fortas* and *Milton V. Freeman*. *Solicitor General Perlman* argued the cause for respondents. With him on the brief were *Assistant Attorney General Morison, James L. Morrisson* and *Samuel D. Slade*. Reported below: 86 U. S. App. D. C. 248, 182 F. 2d 46.

No. 600. ROSS *v.* TEXAS. Certiorari, 340 U. S. 946, to the Court of Criminal Appeals of Texas. Argued April 23, 1951. Decided April 30, 1951. *Per Curiam:* The judgment is reversed, *Cassell* v. *Texas,* 339 U. S. 282. *Thos. H. Dent* and *W. J. Durham* filed a brief for petitioner. *Raymond E. Magee* argued the cause for respondent. With him on the brief were *Price Daniel,* Attorney General of Texas, *David B. Irons,* Administrative Assistant Attorney General, and *E. Jacobson,* Assistant Attorney General. Reported below: 154 Tex. Cr. R. —, 233 S. W. 2d 126.

Miscellaneous Orders.

No. 703. CARLSON ET AL. *v.* LANDON, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION SERVICE. Upon consideration of the application of counsel for the admission of the above-named petitioners to bail pending the disposition of the petition for writ of certiorari herein, it is ordered that the petitioners, Frank Carlson, Miriam Christine Stevenson, David Hyun, and Harry Carlisle, be

released from the custody of Herman R. Landon, District Director of Immigration and Naturalization Service, upon the furnishing of bonds, each in the amount of Five Thousand ($5,000) Dollars; the form of the bonds and sureties thereon to be approved by the United States District Court for the Southern District of California or a judge thereof, and, when approved, to be filed with the clerk of said court.

This order is to continue in effect pending the disposition of the petition for writ of certiorari and in the event certiorari is granted pending the issuance of the mandate of this Court.

John W. Porter, Carol Weiss King and *A. L. Wirin* for petitioners.

No. 463, Misc. BAKER *v.* MAYO, CUSTODIAN OF FLORIDA STATE PENITENTIARY. Motion for leave to file petition for writ of habeas corpus denied.

No. 471, Misc. MACNAMARA *v.* SOLOMON, U. S. DISTRICT JUDGE. Motion for leave to file petition for writ of mandamus denied. *Dean H. Dickinson* for petitioner.

Certiorari Granted.

No. 612. BINDCZYCK *v.* FINUCANE, CHAIRMAN OF THE BOARD OF IMMIGRATION APPEALS, ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. MR. JUSTICE CLARK took no part in the consideration or decision of this application. *Joseph A. Fanelli* for petitioner. *Solicitor General Perlman, Assistant Attorney General McInerney* and *Robert S. Erdahl* for respondents. Reported below: 87 U. S. App. D. C. 137, 184 F. 2d 225.

No. 273, Misc. PALMER *v.* ASHE, WARDEN. Supreme Court of Pennsylvania. Certiorari granted. Petitioner *pro se*. *William S. Rahauser* for respondent.

Certiorari Denied.

No. 580. GRAHAM *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *T. Emmett McKenzie* for petitioner. *Solicitor General Perlman, Assistant Attorney General McInerney* and *Robert S. Erdahl* for the United States. Reported below: 88 U. S. App. D. C. —, 187 F. 2d 87.

No. 592. CHICAGO, ROCK ISLAND & PACIFIC RAILROAD CO. *v.* ACME BRICK CO. C. A. 5th Cir. Certiorari denied. *F. B. Walker* for petitioner. *R. K. Hanger* for respondent. Reported below: 186 F. 2d 125.

No. 609. CLAUGHTON *v.* GRATZ ET AL. C. A. 2d Cir. Certiorari denied. *Henry Ward Beer* for petitioner. *Solicitor General Perlman* and *Roger S. Foster* for the United States; *Milton Pollack* and *Richard F. Wolfson* for Gratz; and *Orison S. Marden* and *David Hartfield, Jr.* for the Missouri-Kansas-Texas Railroad Co., respondents. Reported below: 187 F. 2d 46.

No. 610. PETTIFORD *v.* SOUTH CAROLINA STATE BOARD OF EDUCATION. Supreme Court of South Carolina. Certiorari denied. *C. T. Graydon* and *John Grimball* for petitioner. Reported below: 218 S. C. 322, 62 S. E. 2d 780.

No. 620. PAUDLER *v.* PAUDLER. C. A. 5th Cir. Certiorari denied. *E. L. Klett* for petitioner. *Chas. C. Crenshaw* for respondent. Reported below: 185 F. 2d 901.

No. 622. RECTANGLE RANCHE CO. *v.* BOARD OF COMMISSIONERS FOR THE BURAS LEVEE DISTRICT ET AL. C. A. 5th Cir. Certiorari denied. *John E. Jackson, Louis C. Guidry* and *Henry P. Dart, Jr.* for petitioner. *Leander H. Perez, A. Giffen Levy, Cullen R. Liskow* and *Harry F. Stiles, Jr.* for respondents. Reported below: 187 F. 2d 8.

No. 623. LOUGHLIN ET AL. *v.* FIREMEN'S INSURANCE Co. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Jacob N. Halper* for petitioners. *Lucien H. Mercier* and *N. Meyer Baker* for respondent. Reported below: 88 U. S. App. D. C. —, 186 F. 2d 357.

No. 624. O'KEEFE ET AL. *v.* WABASH RAILWAY Co. C. A. 7th Cir. Certiorari denied. *Milton W. King, Bernard I. Nordlinger* and *Ellis B. Miller* for petitioners. *Elmer W. Freytag* for respondent. Reported below: 185 F. 2d 241.

No. 637. CHESTER H. ROTH Co., INC. *v.* ESQUIRE, INC. C. A. 2d Cir. Certiorari denied. *Asher Blum* for petitioner. *William D. Whitney* for respondent. Reported below: 186 F. 2d 11.

No. 595. PAPAGIANAKIS ET AL. *v.* THE SAMOS ET AL. C. A. 4th Cir. Certiorari denied. *J. L. Morewitz* for petitioners. *Solicitor General Perlman, Assistant Attorney General Baldridge* and *Paul A. Sweeney* for Lamoreaux et al.; and *Hugh S. Meredith* and *Braden Vandeventer, Jr.* for The Samos et al., respondents. Reported below: 186 F. 2d 257.

No. 635. WILLIAMSON, TRUSTEE, *v.* COLUMBIA GAS & ELECTRIC CORP. C. A. 3d Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this application. *Arthur G. Logan* for petitioner. *Clarence A. Southerland* and *Edward S. Pinney* for respondent. Reported below: 186 F. 2d 464.

No. 339, Misc. NORTH DAKOTA EX REL. WRIGHT *v.* NYGAARD, WARDEN. Supreme Court of North Dakota. Certiorari denied. Petitioner *pro se*. *E. T. Christianson,* Attorney General of North Dakota, and *Helgi Johanneson,* Assistant Attorney General, for respondent.

No. 372, Misc. PAUL *v.* BURFORD, WARDEN. Criminal Court of Appeals of Oklahoma. Certiorari denied. Petitioner *pro se*. *Mac Q. Williamson,* Attorney General of Oklahoma, and *Owen J. Watts,* Assistant Attorney General, for respondent. Reported below: —— Okla. Cr. ——, 227 P. 2d 422.

No. 387, Misc. UNITED STATES EX REL. MAYO *v.* BURKE, WARDEN. C. A. 3d Cir. Certiorari denied. *Edwin P. Rome* and *Walter Stein* for petitioner. Reported below: 185 F. 2d 405.

No. 399, Misc. MOREHOUSE *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied. *Edward G. Howard* and *David W. Louisell* for petitioner. *Frank G. Millard,* Attorney General of Michigan, and *Edmund E. Shepherd,* Solicitor General, for respondent. Reported below: 328 Mich. 689, 44 N. W. 2d 830.

No. 444, Misc. FARRANT *v.* LAINSON, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 186 F. 2d 715.

No. 455, Misc. COLOHAN *v.* CRANOR, SUPERINTENDENT. Supreme Court of Washington. Certiorari denied.

No. 456, Misc. ALLEN *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 407 Ill. 596, 96 N. E. 2d 446.

No. 459, Misc. IN RE SPITALE. Court of Appeals of New York. Certiorari denied. Reported below: 302 N. Y. 616, 96 N. E. 2d 900.

No. 461, Misc. BALLES *v.* BURKE, WARDEN. Supreme Court of Pennsylvania, Eastern District. Certiorari denied.

No. 467, Misc. STENS *v.* CLAUDY, WARDEN. Supreme Court of Pennsylvania, Eastern District. Certiorari denied.

No. 468, Misc. JENNINGS *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 380, Misc. ROWLAND *v.* CHESAPEAKE & OHIO RAILWAY CO. The petition for writ of certiorari to the Supreme Court of Appeals of West Virginia is denied for the reason that it does not appear from the record or from the papers submitted that the judgment is final. MR. JUSTICE BLACK is of the opinion that certiorari should be granted. MR. JUSTICE REED took no part in the consideration or decision of this application. *W. Hayes Pettry* for petitioner. *C. W. Strickling* for respondent.

Rehearing Denied.

No. 344. UNITED STATES *v.* MOORE ET UX., 340 U. S. 616;

No. 347. UNITED STATES *v.* LEWIS, 340 U. S. 590; and

No. 577. GERENDE *v.* BOARD OF SUPERVISORS OF ELECTIONS OF BALTIMORE, *ante*, p. 56. The petitions for rehearing in these cases are severally denied.

MAY 7, 1951.

Per Curiam Decisions.

No. 229. WASHINGTON ET AL. *v.* MCGRATH ET AL. 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 and the judgment is affirmed by an equally divided Court. MR. JUSTICE CLARK took no part in the consideration or decision of this case. *O. John Rogge* for petitioners.

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Solicitor General Perlman filed a memorandum for the United States. Reported below: 86 U. S. App. D. C. 343, 182 F. 2d 375.

No. 670. DORITY ET AL. *v.* NEW MEXICO EX REL. BLISS, STATE ENGINEER. Appeal from the Supreme Court of New Mexico. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of a substantial federal question. *California Oregon Power Co.* v. *Beaver Portland Cement Co.*, 295 U. S. 142. MR. JUSTICE REED and MR. JUSTICE DOUGLAS are of the opinion probable jurisdiction should be noted. *Caswell S. Neal* for appellants. *Joe L. Martinez,* Attorney General of New Mexico, *Joseph O. Walton,* Special Assistant Attorney General, and *Charles S. Rhyne* for appellee. Reported below: 55 N. M. 12, 225 P. 2d 1007.

Miscellaneous Orders.

No. 457, Misc. WILLIAMS *v.* OVERHOLSER, SUPERINTENDENT;

No. 460, Misc. WILLIAMS *v.* LAINSON, WARDEN; and

No. 474, Misc. IN RE CHICK. The motions for leave to file petitions for writs of habeas corpus are severally denied.

No. 473, Misc. IN RE BRINK. Application denied.

No. 462, Misc. IN RE COSGROVE. Motion for leave to withdraw the petition for writ of habeas corpus granted.

Certiorari Granted. (*See also No. 621, ante, p. 321, and No. 229, supra.*)

No. 584. UNITED STATES *v.* WUNDERLICH ET AL. Court of Claims. Certiorari granted. *Solicitor General Perlman* for the United States. *Harry D. Ruddiman* and *John W. Gaskins* for respondents. Reported below: 117 Ct. Cl. 92.

No. 593. MORISSETTE *v.* UNITED STATES. C. A. 6th Cir. Certiorari granted. *Andrew J. Transue* for petitioner. *Solicitor General Perlman, Assistant Attorney General McInerney, Robert S. Erdahl* and *Robert G. Maysack* for the United States. Reported below: 187 F. 2d 427.

No. 602. UNITED STATES *v.* FORTIER ET AL. C. A. 1st Cir. Certiorari granted. *Solicitor General Perlman* for the United States. Reported below: 185 F. 2d 608.

Certiorari Denied.

No. 587. RAILWAY EXPRESS AGENCY, INC. *v.* COX. C. A. 5th Cir. Certiorari denied. *J. H. Mooers* and *George W. Gibson, Jr.* for petitioner. Reported below: 185 F. 2d 909.

No. 613. HALL ET AL. *v.* SCARLETT ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Camden R. McAtee* for petitioners. *Frederick M. Bradley* for respondents. Reported below: 88 U. S. App. D. C. —, 188 F. 2d 990.

No. 617. EMERY ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Daniel Ney Dougherty* for petitioners. *Solicitor General Perlman, John R. Benney, Ed Dupree, Leon J. Libeu* and *Nathan Siegel* for the United States. Reported below: 186 F. 2d 900.

No. 619. NUBAR *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 4th Cir. Certiorari denied. *Henry Mannix* and *Charles K. Rice* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack* and *Irving I. Axelrad* for respondent. Reported below: 185 F. 2d 584.

No. 626. NICK *v.* DUNLAP, ACTING COLLECTOR OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. *S. L. Mayo* and *J. Edwin Fleming* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack, A. F. Prescott* and *Maryhelen Wigle* for respondent. Reported below: 185 F. 2d 674.

No. 634. PARKER *v.* DELANEY, COLLECTOR OF INTERNAL REVENUE. C. A. 1st Cir. Certiorari denied. *Edward C. Thayer* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack* and *Lee A. Jackson* for respondent. Reported below: 186 F. 2d 455.

No. 636. ANGLIN *v.* UNITED STATES ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Mark P. Friedlander* for petitioner. *Solicitor General Perlman* filed a memorandum for the United States, respondent, stating that the Government in effect occupies the role of a stakeholder and takes no position as to whether the writ of certiorari should issue. *George A. Hospidor* and *Charles V. Imlay* for Barron, respondent. Reported below: 88 U. S. App. D. C. —, 185 F. 2d 755.

No. 639. LE ROY DYAL CO., INC. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Charles A. Horsky* and *Charles F. Barber* for petitioner. *Solicitor General Perlman, Assistant Attorney General Baldridge, Paul A. Sweeney* and *Morton Hollander* for the United States. Reported below: 186 F. 2d 460.

No. 646. LEAHY, EXECUTOR, *v.* KALIS. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *James F. Reilly* and *Eugene B. Sullivan* for petitioner. *Leo A. Rover* for respondent. Reported below: 88 U. S. App. D. C. —, 188 F. 2d 633.

No. 653. BALTIMORE & ANNAPOLIS RAILROAD CO. *v.* CONTINO ET AL. C. A. 4th Cir. Certiorari denied. *R. E. Lee Marshall* for petitioner. *J. Cookman Boyd, Jr.* for respondents. Reported below: 185 F. 2d 932.

No. 659. SANTANGELO *v.* SANTANGELO. Supreme Court of Errors of Connecticut. Certiorari denied. MR. JUSTICE BLACK is of the opinion certiorari should be granted. *William L. Hadden* for petitioner. *David Goldstein* for respondent. Reported below: 137 Conn. 404, 78 A. 2d 245.

No. 390, Misc. DAYTON *v.* MELLOTT. C. A. 10th Cir. Certiorari denied.

No. 393, Misc. SMITH *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Reported below: 88 U. S. App. D. C. —, 187 F. 2d 192.

No. 395, Misc. BOZELL *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Reported below: See 85 U. S. App. D. C. 420, 174 F. 2d 672.

No. 398, Misc. JOHNSON *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied.

No. 404, Misc. ADAMS *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied. Petitioner *pro se.* *Price Daniel,* Attorney General of Texas, and *E. Jacobson,* Assistant Attorney General, for respondent. Reported below: 155 Tex. Cr. R. —, 234 S. W. 2d 422.

No. 408, Misc. ALLEN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 453, Misc. SPROCH *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 409 Ill. 55, 97 N. E. 2d 833.

No. 470, Misc. CIHA *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 475, Misc. ST. JOHN *v.* ATTORNEY GENERAL OF ILLINOIS. Circuit Court of Randolph County, Illinois. Certiorari denied.

No. 476, Misc. SCHECTMAN *v.* MURPHY, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 479, Misc. MCGARTY *v.* O'BRIEN, WARDEN. C. A. 1st Cir. Certiorari denied. *William C. Crossley* for petitioner. *Francis E. Kelly,* Attorney General of Massachusetts, and *Henry P. Fielding,* Assistant Attorney General, for respondent. Reported below: 188 F. 2d 151.

No. 480, Misc. SOULIA *v.* O'BRIEN, WARDEN. C. A. 1st Cir. Certiorari denied. *Joseph J. McGovern* and *Margaret F. McGovern* for petitioner. *Francis E. Kelly,* Attorney General of Massachusetts, and *Henry P. Fielding,* Assistant Attorney General, for respondent. Reported below: 188 F. 2d 233.

No. 482, Misc. BURGE *v.* PENNSYLVANIA ET AL. Supreme Court of Pennsylvania, Western District. Certiorari denied.

Rehearing Denied.

No. 305. FARINA ET AL. *v.* UNITED STATES, 340 U. S. 875. Motion for leave to file petition for rehearing denied.

MAY 14, 1951.

Per Curiam Decision.

No. 648. WESTERVELT *v.* ISTOKPOGA CONSOLIDATED SUBDRAINAGE DISTRICT ET AL. Appeal from the Supreme Court of Florida. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of a substantial federal question. *D. C. Hull, Erskine W. Landis, John L. Graham* and *J. Compton French* for appellant. *O. K. Reaves, David E. Ward* and *Doyle E. Carlton* for appellees. Reported below: 49 So. 2d 341.

Miscellaneous Orders.

No. 464. PIONEER NEWS SERVICE, INC. *v.* SOUTHWESTERN BELL TELEPHONE CO. ET AL. Appeal from the United States District Court for the Eastern District of Missouri. Dismissed on motion of counsel for the appellant. *Morris A. Shenker* for appellant. *G. Wallace Bates* and *F. Mark Garlinghouse* for the Southwestern Bell Telephone Co.; and *J. E. Taylor,* Attorney General of Missouri, *Robert R. Welborn* and *Arthur M. O'Keefe,* Assistant Attorneys General, and *Tyre W. Burton* for the public Service Commission of Missouri, appellees.

No. 442, Misc. CHESSMAN *v.* CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied. Motion for leave to file petition for writ of habeas corpus also denied.

No. 11, Misc. CHAPMAN *v.* CALIFORNIA SUPREME COURT; and

No. 491, Misc. MCINTOSH *v.* U. S. COURT OF APPEALS FOR THE EIGHTH CIRCUIT ET AL. Motions for leave to file petitions for writs of mandamus denied.

No. 494, Misc. HARDIN *v.* HEINZE, WARDEN. Motion for leave to file petition for writ of habeas corpus denied.

Certiorari Granted.

No. 458. STEFANELLI ET AL. *v.* MINARD ET AL. C. A. 3d Cir. Certiorari granted. *Anthony A. Calandra* for petitioners. *Charles Handler* and *Vincent J. Casale* for respondents. Reported below: 184 F. 2d 575.

No. 606. MCMAHON *v.* UNITED STATES ET AL. C. A. 3d Cir. Certiorari granted. *Paul M. Goldstein* for petitioner. *Solicitor General Perlman, Assistant Attorney General Baldridge, Paul A. Sweeney, Leavenworth Colby, Herman Marcuse* and *Thomas E. Byrne, Jr.* for respondents. Reported below: 186 F. 2d 227.

No. 633. GEM MANUFACTURING CO. *v.* PACKARD MOTOR CAR CO. C. A. 7th Cir. Certiorari granted. *Charles B. Cannon* and *Geo. H. Wallace* for petitioner. Reported below: 187 F. 2d 65.

No. 642. UNITED STATES *v.* HAYMAN. C. A. 9th Cir. Certiorari granted. It is ordered that Paul A. Freund, Esquire, of Cambridge, Mass., a member of the Bar of this Court, be appointed to serve as counsel for the respondent in this case. *Solicitor General Perlman* for the United States. Respondent *pro se.* Reported below: 187 F. 2d 456.

Certiorari Denied. (*See also No. 442, Misc., supra.*)

No. 629. MASTRAPASQUA *v.* SHAUGHNESSY, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION. C. A. 2d Cir. Certiorari denied. *Jack Wasserman* for petitioner. *Solicitor General Perlman, Assistant Attorney General McInerney* and *Beatrice Rosenberg* for respondent. Reported below: 186 F. 2d 717.

No. 631. CONSUMER-FARMER MILK COOPERATIVE, INC. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. *Mark H. Johnson* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle* and *Ellis N. Slack* for respondent. Reported below: 186 F. 2d 68.

No. 644. GOGGIN, RECEIVER, *v.* BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION. C. A. 9th Cir. Certiorari denied. *George T. Goggin* and *Martin Gendel* for petitioner. *Hugo A. Steinmeyer* and *Samuel B. Stewart, Jr.* for respondent. Reported below: 186 F. 2d 158.

No. 647. GALT ET AL. *v.* DEPARTMENT OF PUBLIC WORKS & BUILDINGS OF ILLINOIS. Supreme Court of Illinois. Certiorari denied. *Owen Rall* for petitioners. *William C. Wines,* Assistant Attorney General of Illinois, for respondent. Reported below: 408 Ill. 41, 95 N. E. 2d 903.

No. 651. MITCHELL *v.* FLINTKOTE COMPANY. C. A. 2d Cir. Certiorari denied. *Saul J. Lance* for petitioner. *William Piel, Jr.* for respondent. Reported below: 185 F. 2d 1008.

No. 654. NEWARK SLIP CONTRACTING CO., INC. *v.* NEW YORK CREDIT MEN'S ADJUSTMENT BUREAU, INC. C. A. 2d Cir. Certiorari denied. *Samuel Rubin* for petitioner. *George Levin* for respondent. Reported below: 186 F. 2d 152.

No. 657. RICHMOND *v.* SHELBY MUTUAL CASUALTY CO. C. A. 2d Cir. Certiorari denied. *Cyril Coleman* for petitioner. *Hugh M. Alcorn* for respondent. Reported below: 185 F. 2d 803.

No. 614. MANN ET AL. *v.* CORNISH. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Marcus Borchardt* for petitioners. Reported below: 87 U. S. App. D. C. 110, 185 F. 2d 423.

No. 650. MARAGON *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Motion to withdraw the appearance of Irvin Goldstein, as counsel for the petitioner, granted. Certiorari denied. MR. JUSTICE CLARK took no part in the consideration or decision of this application. *Edward J. Hayes* and *William A. Kehoe, Jr.* for petitioner. *Solicitor General Perlman, Assistant Attorney General McInerney* and *Beatrice Rosenberg* for the United States. Reported below: 87 U. S. App. D. C. 349, 187 F. 2d 79.

No. 179, Misc. CHAPMAN *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 424, Misc. HINTON *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied.

No. 427, Misc. PETERSON *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied. *Margaret A. Brand* for petitioner. *Price Daniel,* Attorney General of Texas, *Charles D. Mathews,* First Assistant Attorney General, and *E. Jacobson* and *Mary K. Wall,* Assistant Attorneys General, for respondent. Reported below: 155 Tex. Cr. R. ——, 235 S. W. 2d 138.

No. 438, Misc. FOUQUETTE *v.* NEVADA. Supreme Court of Nevada. Certiorari denied. *Toy R. Gregory* for petitioner. *W. T. Mathews,* Attorney General of Nevada, and *Geo. P. Annand, Robert L. McDonald* and *Thomas A. Foley,* Deputy Attorneys General, and *Alan Bible* for respondent. Reported below: 67 Nev. ——, 221 P. 2d 404.

No. 439, Misc. MARES *v.* HILL, WARDEN. Supreme Court of Utah. Certiorari denied. Petitioner *pro se.* *Clinton D. Vernon,* Attorney General of Utah, and *Quentin L. R. Alston,* Assistant Attorney General, for respondent. Reported below: —— Utah ——, 222 P. 2d 811.

No. 478, Misc. DAVIS *v.* CRANOR, SUPERINTENDENT. Supreme Court of Washington. Certiorari denied.

No. 485, Misc. DE POE *v.* CLAUDY, WARDEN. Supreme Court of Pennsylvania. Certiorari denied.

No. 487, Misc. DANIELS *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 490, Misc. MAHURIN *v.* MORRIS ET AL. Supreme Court of Missouri. Certiorari denied.

No. 495, Misc. VOLKMANN *v.* RAGEN, WARDEN. Supreme Court of Illinois. Certiorari denied.

No. 496, Misc. MCGARRY *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 497, Misc. CHANDLER *v.* HEINZE, WARDEN, ET AL. Supreme Court of California. Certiorari denied.

Rehearing Denied.

No. 450. GARRETT ET AL. *v.* FAUST ET AL., 340 U. S. 931. Motion for leave to file a second petition for rehearing denied.

No. 643. POHL ET AL. *v.* ACHESON, SECRETARY OF STATE, ET AL., *ante,* p. 916. Rehearing denied. MR. JUSTICE JACKSON took no part in the consideration or decision of this application.

No. 376. WILSON *v.* LOUISIANA, *ante*, p. 901;

No. 561. WILLIAMS *v.* HUGHES TOOL CO., *ante*, p. 903;

No. 367, Misc. CURTIS *v.* FORMAN, U. S. DISTRICT JUDGE, *ante*, p. 910; and

No. 409, Misc. TATE *v.* CALIFORNIA ET AL., *ante*, p. 902. Petitions for rehearing in these cases denied.

MAY 21, 1951.

Miscellaneous Orders.

No. 499, Misc. PULLINS *v.* OHIO ET AL.;

No. 504, Misc. IN RE TIRKO;

No. 505, Misc. IN RE PAQUETTE; and

No. 507, Misc. HUBBARD *v.* JACQUES, WARDEN. Motions for leave to file petitions for writs of habeas corpus in these cases denied.

No. 500, Misc. DARRIN *v.* UNITED STATES ET AL. Petition for injunction denied.

Certiorari Granted.

No. 530. UNITED STATES *v.* CARIGNAN. C. A. 9th Cir. Certiorari granted. *Solicitor General Perlman* for the United States. *Harold J. Butcher* for respondent. Reported below: 185 F. 2d 954.

No. 638. GARDNER *v.* PANAMA RAILROAD CO. C. A. 5th Cir. Certiorari granted. Petitioner *pro se*. *Edwin Phillips Kohl* for respondent. Reported below: 185 F. 2d 730.

Certiorari Denied.

No. 645. HUMBLE OIL & REFINING CO. *v.* GRAY TOOL CO. C. A. 5th Cir. Certiorari denied. *Nelson Jones* and *Rex G. Baker* for petitioner. *Homer T. Bouldin*, *William M. Cushman* and *John W. Malley* for respondent. Reported below: 186 F. 2d 365.

No. 652. RING *v.* SPINA ET AL. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Arthur Garfield Hays* and *Osmond K. Fraenkel* for respondents. Reported below: 186 F. 2d 637.

No. 655. CALDERON ET AL. *v.* TOBIN, SECRETARY OF LABOR, ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *F. Trowbridge vom Baur* and *Ralph E. Becker* for petitioners. *Solicitor General Perlman, Assistant Attorney General Baldridge, Paul A. Sweeney* and *Morton Hollander* for respondents. Reported below: 88 U. S. App. D. C. —, 187 F. 2d 514.

No. 656. ANDERSON *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. *H. Maurice Fridlund, Robert E. Kline, Jr.* and *Earl Q. Kullman* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack, Robert N. Anderson* and *Louise Foster* for respondent. Reported below: 185 F. 2d 1021.

No. 658. MITCHELL *v.* MITCHELL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Dean Hill Stanley* for petitioner. *William F. Kelly* and *P. J. J. Nicolaides* for respondent. Reported below: 88 U. S. App. D. C. —, 188 F. 2d 42.

No. 664. MONEY *v.* WALLIN ET AL. C. A. 3d Cir. Certiorari denied. *Thomas D. McBride* for petitioner. *Solicitor General Perlman, Assistant Attorney General Baldridge* and *Samuel D. Slade* for respondents. Reported below: 186 F. 2d 411.

No. 672. JOSEPH *v.* OHIO. Supreme Court of Ohio. Certiorari denied. *Paul M. Herbert* for petitioner. *Ralph J. Bartlett* for respondent. Reported below: 154 Ohio St. 374, 96 N. E. 2d 3.

No. 677. MEREDITH *v.* JOHN DEERE PLOW CO. C. A. 8th Cir. Certiorari denied. *James Reginald Larson* for petitioner. *John LeRoy Peterson* for respondent. Reported below: 185 F. 2d 481.

No. 685. UNITED STATES CARTRIDGE CO. *v.* POWELL ET AL. C. A. 8th Cir. Certiorari denied. *Robert H. McRoberts* for petitioner. *Thomas Bond* for respondents. Reported below: 185 F. 2d 67, 186 F. 2d 611.

No. 729. CAULDWELL-WINGATE CO. ET AL. *v.* PERSON, ADMINISTRATRIX, ET AL. C. A. 2d Cir. Certiorari denied. *Warner Pyne* for petitioners. *Louis A. D'Agosto* for respondents. Reported below: 187 F. 2d 832.

No. 388. BRANDHOVE *v.* ROBINSON. C. A. 9th Cir. Certiorari denied. *George Olshausen* for petitioner. *H. J. McGuire* for respondent. Reported below: 183 F. 2d 121.

No. 464, Misc. EDGEMAN *v.* OHIO ET AL. Court of Appeals of Ohio, Second District. Certiorari denied.

No. 477, Misc. HOBBS *v.* WARDEN OF MARYLAND PENITENTIARY. Court of Appeals of Maryland. Certiorari denied.

No. 483, Misc. BEAM, ADMINISTRATRIX, *v.* PITTSBURGH RAILWAYS CO. ET AL. Supreme Court of Pennsylvania, Western District. Certiorari denied. *John D. Meyer* for petitioner. *J. Roy Dickie* for respondents. Reported below: 366 Pa. 360, 77 A. 2d 634.

No. 486, Misc. ROY *v.* LOUISIANA. Supreme Court of Louisiana. Certiorari denied. Reported below: 219 La. 97, 52 So. 2d 299.

No. 502, Misc. WORRELL *v.* MISSOURI. Supreme Court of Missouri. Certiorari denied.

No. 503, Misc. SHULENBERG *v.* JACKSON, WARDEN. C. A. 2d Cir. Certiorari denied.

Rehearing Denied.

No. 446. CREST SPECIALTY, A LIMITED PARTNERSHIP, *v.* TRAGER, DOING BUSINESS AS TOPIC TOYS, ET AL., *ante*, p. 912; and

No. 493. CHICAGO *v.* WILLETT COMPANY, *ante*, p. 913. Petitions for rehearing in these cases denied.

No. 545. CHARLES E. SMITH & SONS CO. ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE, 340 U. S. 953. Motion for leave to file petition for rehearing denied.

No. 303, Misc. JAMES *v.* STATE OF WASHINGTON, *ante*, p. 911;

No. 304, Misc. JAMES ET AL. *v.* STATE OF WASHINGTON, *ante*, p. 910; and

No. 423, Misc. HOLLAND *v.* CIRCUIT COURT OF PETTIS COUNTY, MISSOURI, ET AL., *ante*, p. 908. Petitions for rehearing in these cases denied.

MAY 28, 1951.

Per Curiam Decisions.

No. 713. BUTLER *v.* THOMPSON, CENTRAL REGISTRAR FOR THE COUNTY OF ARLINGTON, ET AL. Appeal from the United States District Court for the Eastern District of Virginia. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. MR. JUSTICE DOUGLAS dissents. *John Locke Green* for appellant. *J. Lindsay Almond, Jr.*, Attorney General of Virginia, *Walter E. Rogers* and *John W. Jackson* for appellees. Reported below: 97 F. Supp. 17.

No. 731. RED BALL MOTOR FREIGHT, INC. ET AL. *v.* UNITED STATES ET AL. Appeal from the United States District Court for the Northern District of Texas. *Per Curiam:* The motions to affirm are granted and the judgment is affirmed. *United States* v. *Detroit & Cleveland Navigation Co.*, 326 U. S. 236; *Interstate Commerce Commission* v. *Parker*, 326 U. S. 60. *Reagan Sayers* and *R. E. Kidwell* for appellants. *Solicitor General Perlman* and *Daniel W. Knowlton* for the United States and the Interstate Commerce Commission; and *Carl L. Phinney* for the Herrin Transportation Co., appellees. Reported below: 98 F. Supp. 248.

Miscellaneous Orders.

No. 707. PALMER *v.* ASHE, WARDEN. It is ordered that Louis B. Schwartz, Esquire, of Philadelphia, Pa., a member of the Bar of this Court, be appointed to serve as counsel for the petitioner in this case.

No. 331. GALLAGHER ET AL. *v.* MICHIGAN. Petition for writ of certiorari to the Supreme Court of Michigan dismissed per stipulation of counsel. *Paul B. Mayrand* for petitioners. *Stephen J. Roth,* Attorney General of Michigan, and *Edmund E. Shepherd,* Solicitor General, for respondent. Reported below: 328 Mich. 164, 166, 169, 171, 43 N. W. 2d 313, 314, 315.

No. 520, Misc. SNAP-ON DRAWER CO. *v.* DRUFFEL, U. S. DISTRICT JUDGE. Motion for leave to file petition for writ of mandamus denied. *Frank Zugelter, Gerald B. Tjoflat* and *Donald A. Gardiner* for petitioner. *Harry C. Alberts* for respondent.

Certiorari Granted.

No. 328, Misc. DIXON *v.* DUFFY, WARDEN. Supreme Court of California. Certiorari granted. Petitioner *pro*

se. Edmund G. Brown, Attorney General of California, and *Clarence A. Linn,* Deputy Attorney General, for respondent.

No. 450, Misc. ROCHIN *v.* CALIFORNIA. District Court of Appeal of California, Second Appellate District. Certiorari granted. *Dolly Lee Butler* for petitioner. *Edmund G. Brown,* Attorney General of California, and *Frank Richards* and *Howard S. Goldin,* Deputy Attorneys General, for respondent. Reported below: 101 Cal. App. 2d 140, 225 P. 2d 1.

No. 407, Misc. KEENAN *v.* BURKE, WARDEN;
No. 418, Misc. JANKOWSKI *v.* BURKE, WARDEN; and
No. 419, Misc. FOULKE *v.* BURKE, WARDEN. Supreme Court of Pennsylvania. Certiorari granted. Petitioners *pro se. John H. Maurer* for respondent.

Certiorari Denied.

No. 466. WEST TEXAS UTILITIES CO., INC. *v.* NATIONAL LABOR RELATIONS BOARD. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *M. R. Irion, Gerard D. Reilly* and *Frank Cain* for petitioner. *Solicitor General Perlman, James L. Morrisson, David P. Findling, Mozart G. Ratner* and *Frederick U. Reel* for the National Labor Relations Board; and *Louis Sherman* and *Philip R. Collins* for the International Brotherhood of Electrical Workers, respondents. Reported below: 87 U. S. App. D. C. 179, 184 F. 2d 233.

No. 511. SICKMAN, EXECUTRIX, ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *John F. Donelan* for Sickman et al., petitioners. *Solicitor General Perlman* for the United States. Reported below: 184 F. 2d 616.

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No. 581. ROYAL INDEMNITY CO. *v.* UNITED STATES. Court of Claims. Certiorari denied. *Cornelius W. Grafton* and *Charles I. Dawson* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack* and *Harry Baum* for the United States. Reported below: 117 Ct. Cl. 580, 92 F. Supp. 1003.

No. 661. CARLSON ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Kenneth C. West* and *Walter A. Raymond* for petitioners. *Solicitor General Perlman, Assistant Attorney General McInerney* and *Beatrice Rosenberg* for the United States. Reported below: 187 F. 2d 366.

No. 665. UNITED STATES *v.* STEWART ET AL. C. A. 7th Cir. Certiorari denied. *Solicitor General Perlman* for the United States. *John S. Burchmore, Nuel D. Belnap* and *Robert N. Burchmore* for respondents. Reported below: 186 F. 2d 627.

No. 671. SESLAR *v.* UNION LOCAL 901, INC. ET AL. C. A. 7th Cir. Certiorari denied. *Frank Donner* and *Arthur Kinoy* for petitioner. *Sol Rothberg* for respondents. Reported below: 186 F. 2d 403.

No. 673. CITY OF BIRMINGHAM ET AL. *v.* MONK ET AL. C. A. 5th Cir. Certiorari denied. *Horace C. Wilkinson* for petitioners. Reported below: 185 F. 2d 859.

No. 679. TURNER *v.* ALTON BANKING & TRUST CO., EXECUTOR. C. A. 8th Cir. Certiorari denied. *Lon Hocker* for petitioner. Reported below: 186 F. 2d 6.

No. 683. PAPALIOLIOS ET AL. *v.* DURNING, COLLECTOR OF CUSTOMS. C. A. 2d Cir. Certiorari denied. *Delbert*

M. Tibbetts for petitioners. *Solicitor General Perlman, Assistant Attorney General McInerney* and *Beatrice Rosenberg* for respondent. Reported below: 186 F. 2d 308.

No. 699. ATLANTIC COAST LINE RAILROAD CO. *v.* CHANCE. C. A. 4th Cir. Certiorari denied. *Collins Denny, Jr., J. M. Townsend* and *Charles Cook Howell* for petitioner. *Oliver W. Hill* and *Spottswood W. Robinson, III,* for respondent. Reported below: 186 F. 2d 879.

No. 708. MOBLEY ET AL. *v.* BETHLEHEM SUPPLY CO. C. A. 5th Cir. Certiorari denied. *Neth L. Leachman* for petitioners. *Harry D. Moreland* for respondent. Reported below: 186 F. 2d 23.

No. 676. HAYES *v.* HORNBUCKLE, SHERIFF. The petition for writ of certiorari to the Supreme Court of California is denied on the ground that the cause is moot, it appearing that petitioner is no longer in the respondent's custody. *I. B. Padway* and *Herbert S. Thatcher* for petitioner. *Edmund G. Brown,* Attorney General of California, and *Clarence A. Linn,* Deputy Attorney General, for respondent.

No. 159, Misc. LAPEAN *v.* BURKE, WARDEN. Supreme Court of Wisconsin. Certiorari denied. Petitioner *pro se. Thomas E. Fairchild,* Attorney General of Wisconsin, and *Harold H. Persons* and *William A. Platz,* Assistant Attorneys General, for respondent.

No. 388, Misc. DAVIS *v.* O'CONNELL, CHIEF OF POLICE, ET AL. C. A. 8th Cir. Certiorari denied. *Elisha Scott, Sr.* for petitioner. Reported below: 185 F. 2d 513.

No. 416, Misc. MARSH *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied. Petitioner *pro se.* *Frank G. Millard,* Attorney General of Michigan, *Edmund E. Shepherd,* Solicitor General, and *Daniel J. O'Hara,* Assistant Attorney General, for respondent.

No. 443, Misc. DE JORDAN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 187 F. 2d 263.

No. 466, Misc. DARANOWICH *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Roman Beck* for petitioner. *Solicitor General Perlman, Assistant Attorney General Baldridge* and *Samuel D. Slade* for the United States. Reported below: 186 F. 2d 386.

No. 469, Misc. IN RE PHYLE. Supreme Court of California. Certiorari denied. *Morris Lavine* for petitioner.

No. 493, Misc. CALVIN *v.* ANDERSON ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Robert H. McNeill* and *Thomas B. Fuller* for petitioner. *Austin F. Canfield* for respondents.

No. 498, Misc. DOCKERY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 188 F. 2d 451.

No. 508, Misc. HUDSPETH ET AL. *v.* HIATT, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 188 F. 2d 362.

No. 513, Misc. SIMMONS *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 515, Misc. HARDISON *v.* KING, SUPERINTENDENT. Supreme Court of California. Certiorari denied.

No. 488, Misc. BROWN *v.* NORTH CAROLINA. Supreme Court of North Carolina. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion certiorari should be granted. *Herman L. Taylor* for petitioner. *Harry McMullan,* Attorney General, and *Ralph Moody,* Assistant Attorney General, for respondent. Reported below: 233 N. C. 202, 63 S. E. 2d 99.

Rehearing Denied.

No. 594. BERLINSKY *v.* EISENBERG ET AL., TRUSTEES, *ante,* p. 909;

No. 641. WARNER ET AL., DOING BUSINESS AS WARNER & TAMBLE TRANSPORTATION CO., *v.* UNITED STATES ET AL., *ante,* p. 907; and

No. 387, Misc. UNITED STATES EX REL. MAYO *v.* BURKE, WARDEN, *ante,* p. 922. Petitions for rehearing in these cases denied.

No. 380, Misc. ROWLAND *v.* CHESAPEAKE & OHIO RAILWAY CO., *ante,* p. 923. Rehearing denied. MR. JUSTICE REED took no part in the consideration or decision of this application.

JUNE 4, 1951.

Per Curiam Decisions.

No. 483. ALABAMA PUBLIC SERVICE COMMISSION ET AL. *v.* ATLANTIC COAST LINE RAILROAD CO.; and

No. 660. ALABAMA PUBLIC SERVICE COMMISSION ET AL. *v.* LOUISVILLE & NASHVILLE RAILROAD CO. Appeals from the United States District Court for the Middle District of Alabama. *Per Curiam:* The motions to sub-

stitute parties appellant are granted. The judgments are reversed. *Alabama Public Service Commission* v. *Southern R. Co., ante,* p. 341. *Si Garrett,* Attorney General of Alabama, *A. A. Carmichael,* then Attorney General, and *Wallace L. Johnson,* Assistant Attorney General, for appellants. *W. A. Northcutt* and *Robert E. Steiner, Jr.* for appellee in No. 660. Reported below: No. 483, 92 F. Supp. 579; No. 660, 93 F. Supp. 544.

No. 538. SUNBEAM CORPORATION *v.* WENTLING. On petition for writ of certiorari to the United States Court of Appeals for the Third 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 for reconsideration in the light of *Schwegmann Brothers* v. *Calvert Distillers Corp., ante,* p. 384. *Herman T. Van Mell, Ira Jewell Williams, Jr., Thomas Raeburn White* and *Ira Jewell Williams* for petitioner. *Gilbert Nurick* for respondent. Briefs of *amici curiae* supporting the petition were filed by *Ivan A. Elliott,* Attorney General, and *William C. Wines, Robert J. Burdett* and *John T. Coburn,* Assistant Attorneys General, for the State of Illinois; and *Robert E. Woodside,* Attorney General, and *Harry F. Stambaugh* for the State of Pennsylvania. Reported below: 185 F. 2d 903.

No. 586. GREENBERG *v.* UNITED STATES. On petition for writ of certiorari to the United States Court of Appeals for the Third 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 for reconsideration in the light of *Hoffman* v. *United States, ante,* p. 479. *Frederick Bernays Wiener* and *Jacob Kossman* for petitioner. *Solicitor General Perlman, As-*

sistant Attorney General McInerney, John F. Davis and *Robert S. Erdahl* for the United States. Reported below: 187 F. 2d 35.

No. 734. BAKER *v.* LEENHOUTS ET AL.; and

No. 746. GENERAL MOTORS ACCEPTANCE CORP. *v.* COMMISSIONER OF BANKS OF WISCONSIN. Appeals from the Supreme Court of Wisconsin. *Per Curiam:* The appeals are dismissed for want of a substantial federal question. MR. JUSTICE JACKSON took no part in the consideration or decision of case No. 746. *Louis Quarles* for appellant in No. 734. *Jackson M. Bruce* and *Henry M. Hogan* for appellant in No. 746. *Vernon W. Thomson,* Attorney General of Wisconsin, and *Harold H. Persons,* Assistant Attorney General, for appellees in No. 734. *Mr. Thomson, Roy G. Tulane,* Assistant Attorney General, and *William E. Torkelson* for appellee in No. 746. Reported below: No. 734, 257 Wis. 584, 44 N. W. 2d 544; No. 746, 258 Wis. 56, 45 N. W. 2d 83.

No. 745. MINICH ET AL. *v.* CITY OF SHARON ET AL. Appeal from the Supreme Court of Pennsylvania. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of a substantial federal question. *M. L. McBride* for appellants. *Nathan Routman* and *William H. Eckert* for appellees. Reported below: 336 Pa. 267, 77 A. 2d 347.

No. 752. SIMMONS *v.* CITY OF BIRMINGHAM. Appeal from the Court of Appeals of Alabama. *Per Curiam:* The appeal is dismissed for the want of a properly presented federal question. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion probable jurisdiction should be noted. *George E. Trawick* for appellant. Reported below: 35 Ala. App. 712, 49 So. 2d 927.

No. 447, Misc. CHIARELLA *v.* UNITED STATES. On petition for writ of certiorari to the United States Court of Appeals for the Second Circuit. *Per Curiam:* The petition for writ of certiorari is granted. Upon consideration of the record and the confession of error by the Solicitor General, the judgment of the Court of Appeals is vacated and the case is remanded to the District Court for resentencing. *William Charles Brown* and *John M. Smith, Jr.* for petitioner. *Solicitor General Perlman, Assistant Attorney General McInerney* and *Beatrice Rosenberg* for the United States. Reported below: 187 F. 2d 12.

Miscellaneous Orders.

No. 11, Original. UNITED STATES *v.* CALIFORNIA. The report of the Special Master under the order of June 27, 1949, has been received and filed. Briefs of the parties in relation thereto may be filed on or before July 16, next, and reply briefs on or before August 6, next. MR. JUSTICE JACKSON and MR. JUSTICE CLARK took no part in the consideration or decision of this question.

No. 146. ALABAMA PUBLIC SERVICE COMMISSION ET AL. *v.* SOUTHERN RAILWAY CO.; and

No. 395. ALABAMA PUBLIC SERVICE COMMISSION ET AL. *v.* SOUTHERN RAILWAY CO. The motions of the appellee that the mandates in these cases provide for retention by the District Court of jurisdiction pending further proceedings are denied. The motions to stay the issuance of the mandates are also denied.

No. 524, Misc. THARP *v.* MISSOURI;

No. 525, Misc. COAKLEY *v.* ALVIS, WARDEN; and

No. 527, Misc. TAYLOR *v.* MCGRATH, ATTORNEY GENERAL, ET AL. Motions for leave to file petitions for writs of habeas corpus denied.

Certiorari Granted. (*See also Nos. 697, 702, ante, p. 737, Nos. 538, 586 and Misc. No. 447, supra.*)

No. 347, Misc. GALLEGOS *v.* NEBRASKA. Supreme Court of Nebraska. Certiorari granted. *James G. Mothersead, Floyd E. Wright* and *Robert G. Simmons, Jr.* for petitioner. *Clarence S. Beck,* Attorney General of Nebraska, *Walter E. Nolte,* Deputy Attorney General, and *Homer L. Kyle,* Assistant Attorney General, for respondent. Reported below: 152 Neb. 831, 43 N. W. 2d 1.

No. 452, Misc. JENNINGS *v.* ILLINOIS. Supreme Court of Illinois. Certiorari granted. Petitioner *pro se. Ivan A. Elliott,* Attorney General of Illinois, for respondent.

No. 481, Misc. LA FRANA *v.* ILLINOIS. Supreme Court of Illinois. Certiorari granted. Petitioner *pro se. Ivan A. Elliott,* Attorney General of Illinois, for respondent.

Certiorari Denied.

No. 387. UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, DISTRICT COUNCIL OF KANSAS CITY, MISSOURI, ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 10th Cir. Certiorari denied. *Clif Langsdale* for petitioners. *Solicitor General Perlman, David P. Findling, Mozart G. Ratner* and *Winthrop A. Johns* for respondent. Reported below: 184 F. 2d 60.

No. 611. MALOY *v.* FLORIDA. Supreme Court of Florida. Certiorari denied.

No. 662. CITIES SERVICE OIL CO. *v.* UNITED STATES. Court of Claims. Certiorari denied. *George H. Colin* for petitioner. *Solicitor General Perlman, Assistant Attorney General Baldridge* and *Samuel D. Slade* for the United States. Reported below: 118 Ct. Cl. 113.

No. 663. SKEELES, ADMINISTRATRIX, ET AL. *v.* UNITED STATES. Court of Claims. Certiorari denied. *Robert A. Littleton* for petitioners. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack, Lee A. Jackson* and *H. S. Fessenden* for the United States. Reported below: 118 Ct. Cl. 362, 95 F. Supp. 242.

No. 667. ORO FINO CONSOLIDATED MINES, INC. *v.* UNITED STATES. Court of Claims. Certiorari denied. *Prew Savoy* for petitioner. *Solicitor General Perlman, Assistant Attorney General Baldridge, Samuel D. Slade* and *Melvin Richter* for the United States. Reported below: 118 Ct. Cl. 18, 92 F. Supp. 1016.

No. 680. HOLMES *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Perlman, Assistant Attorney General McInerney, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 187 F. 2d 222.

No. 681. ICENHOUR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Franklin H. Pierce* for petitioner. *Solicitor General Perlman* for the United States. Reported below: 187 F. 2d 663.

No. 682. MARSHALL DRUG CO. *v.* UNITED STATES. Court of Claims. Certiorari denied. *J. S. Seidman* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle* and *Ellis N. Slack* for the United States. Reported below: 118 Ct. Cl. 532, 95 F. Supp. 820.

No. 684. ALLEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *James A. Murray, William E. Cullen* and *Therrett Towles* for petitioner. *Solicitor General Perlman, Assistant Attorney General McInerney* and *Beatrice Rosenberg* for the United States. Reported below: 186 F. 2d 439.

No. 686. FEDERAL LIQUIDATING CORP. *v.* SECURITIES & EXCHANGE COMMISSION; and

No. 687. EDELSTEIN ET AL. *v.* SECURITIES & EXCHANGE COMMISSION. C. A. 2d Cir. Certiorari denied. *Theodore N. Johnsen* for petitioner in No. 686. *Frank Weinstein* for petitioners in No. 687. *Solicitor General Perlman, John F. Davis, Roger S. Foster* and *Ellwood L. Englander* for respondent. Reported below: 187 F. 2d 804.

No. 689. DONADUCY *v.* PENNSYLVANIA. Supreme Court of Pennsylvania. Certiorari denied. *S. Y. Rossiter* for petitioner.

No. 690. MARACHOWSKY *v.* DEVINE, TRUSTEE. C. A. 7th Cir. Certiorari denied. *David A. Canel* for petitioner. *Ross Bennett* for respondent. Reported below: 187 F. 2d 387.

No. 691. SAUCIER *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied. *C. Ellis Ott* and *Eugene Sherrod, Jr.* for petitioner. *Price Daniel,* Attorney General of Texas, and *Calvin B. Garwood, Jr.,* Assistant Attorney General, for respondent. Reported below: 155 Tex. Cr. R. ——, 235 S. W. 2d 903.

No. 693. KANTZ, ADMINISTRATRIX, ET AL. *v.* FUGATE & GIRTON DRIVEWAY CO., INC. C. A. 6th Cir. Certiorari denied. *Jacob Rassner* for petitioners. *William H. Selva* for respondent.

No. 694. HENRY, TRUSTEE IN BANKRUPTCY, *v.* HOLLANDER ET AL. C. A. 2d Cir. Certiorari denied. *Allen Murray Myers* for petitioner. *Hyman N. Glickstein* for respondents. Reported below: 186 F. 2d 582.

No. 695. RED ROCK CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. *M. E. Kilpatrick* for petitioner. *Solicitor General Perlman, David P. Findling* and *Mozart G. Ratner* for respondent. Reported below: 187 F. 2d 76.

No. 696. PARK-IN THEATRES, INC. *v.* PARAMOUNT-RICHARDS THEATRES, INC. ET AL. C. A. 3d Cir. Certiorari denied. *Leonard L. Kalish* and *Arthur G. Connolly* for petitioner. *William S. Potter, James L. Latchum* and *Charles R. Fenwick* for respondents. Reported below: 185 F. 2d 407.

No. 698. SEIDEN ET AL. *v.* LARSON ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Norman Winer* and *Alfred B. Nathan* for petitioners. *Solicitor General Perlman, Assistant Attorney General Vanech* and *Roger P. Marquis* for respondents. Reported below: 88 U. S. App. D. C. —, 188 F. 2d 661.

No. 700. ELECTRIC BOND & SHARE CO. *v.* SECURITIES & EXCHANGE COMMISSION ET AL. C. A. 2d Cir. Certiorari denied. *John F. MacLane* for petitioner. *Solicitor General Perlman, John F. Davis, Roger S. Foster* and *Myer Feldman* for the Securities & Exchange Commission; and *Percival E. Jackson* and *A. Fairfield Dana* for Stuberfield et al., respondents.

No. 705. GABRIEL COMPANY *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. *Richard Inglis* and *L. H. Davis* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack* and *Harry Baum* for respondent. Reported below: 186 F. 2d 786.

No. 714. Eastern Air Lines, Inc. *v.* Civil Aeronautics Board. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *E. Smythe Gambrell, W. Glen Harlan* and *Harold L. Russell* for petitioner. *Solicitor General Perlman, Assistant Attorney General Morison, Emory T. Nunneley, Jr.* and *Warren L. Sharfman* for respondent.

No. 718. Fettig Canning Co. *v.* Steckler, U. S. District Judge. C. A. 7th Cir. Certiorari denied. *William C. Bachelder* for petitioner. *Solicitor General Perlman, Assistant Attorney General McInerney, Beatrice Rosenberg* and *John T. Grigsby* for respondent. Reported below: 188 F. 2d 715.

No. 732. Simons et al. *v.* Simons. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Donald S. Caruthers* for petitioners. *George L. Hart, Jr.* for respondent. Reported below: 88 U. S. App. D. C. —, 187 F. 2d 364.

No. 737. Cavness *v.* United States. C. A. 9th Cir. Certiorari denied. *Fred Patterson* for petitioner. *Solicitor General Perlman* for the United States. Reported below: 187 F. 2d 719.

No. 739. Transcontinental & Western Air, Inc. *v.* Pekelis, Administratrix. C. A. 2d Cir. Certiorari denied. *William J. Junkerman* for petitioner. *Samuel J. Silverman* for respondent. Reported below: 187 F. 2d 122.

No. 751. Carmichael, President of University of North Carolina, et al. *v.* McKissick et al. C. A. 4th Cir. Certiorari denied. *Harry McMullan,* Attorney

General of North Carolina, *Ralph Moody*, Assistant Attorney General, *J. C. B. Ehringhaus, Jr.* and *Kenneth C. Royall* for petitioners. *Robert L. Carter, Thurgood Marshall, Frank D. Reeves* and *Spottswood W. Robinson, III*, for respondents. Reported below: 187 F. 2d 949.

Nos. 753 and 754. CHASE ET AL. *v.* AUSTRIAN ET AL., TRUSTEES, ET AL. C. A. 4th Cir. Certiorari denied. *T. Roland Berner* and *George E. Allen, Sr.* for petitioners. *Solicitor General Perlman, John F. Davis, Roger S. Foster* and *Manuel F. Cohen* for the Securities & Exchange Commission; and *Saul J. Lance, Walter H. Brown, Jr., Lewis C. Williams, Thomas C. Egan, George Rosier, Victor Brudney* and *Francis E. Walter* for Austrian et al., respondents. Reported below: 189 F. 2d 555.

No. 756. KLEIN ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *George F. Callaghan* for petitioners. *Solicitor General Perlman* for the United States. Reported below: 187 F. 2d 873.

No. 201. SACHER ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion certiorari should be granted. MR. JUSTICE CLARK took no part in the consideration or decision of this application. *Paul L. Ross, Martin Popper, Earl B. Dickerson, Patrick H. O'Brien, Robert W. Kenny, Joseph Forer, Bernard Jaffe* and *Thomas D. McBride* for petitioners. *Solicitor General Perlman, Assistant Attorney General McInerney, Robert S. Erdahl* and *Irving S. Shapiro* for the United States. Reported below: 182 F. 2d 416.

No. 300. HALLINAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion certiorari should be granted.

MR. JUSTICE CLARK took no part in the consideration or decision of this application. *William F. Cleary, George Olshausen* and *Robert W. Kenny* for petitioner. *Solicitor General Perlman, Assistant Attorney General McInerney, Robert S. Erdahl* and *Philip R. Monahan* for the United States. Reported below: 182 F. 2d 880.

No. 590. UNITED STATES *v.* SAFEWAY STORES, INC; and No. 591. SAFEWAY STORES, INC. *v.* UNITED STATES. Court of Claims. Certiorari denied. MR. JUSTICE CLARK took no part in the consideration or decision of these applications. *Solicitor General Perlman* for the United States. *Elisha Hanson* and *Arthur B. Hanson* for Safeway Stores, Inc. Reported below: 118 Ct. Cl. 73, 93 F. Supp. 900.

No. 709. CHENERY CORPORATION ET AL. *v.* SECURITIES & EXCHANGE COMMISSION ET AL. C. A. 3d Cir. Certiorari denied. THE CHIEF JUSTICE and MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. *Charles A. Horsky, Daniel M. Gribbon* and *Wilbur R. Lester* for the Chenery Corporation et al.; and *Allen S. Hubbard* for the Federal Water & Gas Corporation, petitioners. *Solicitor General Perlman, Robert L. Stern, Roger S. Foster* and *Ellwood L. Englander* for the Securities & Exchange Commission; and *Percival E. Jackson* for the Federal Water & Gas Corporation Common Stockholders' Committee, respondents. Reported below: 188 F. 2d 100.

No. 357, Misc. ROSS *v.* STATE OF WASHINGTON. Supreme Court of Washington. Certiorari denied. Petitioner *pro se*. *Smith Troy,* Attorney General of Washington, and *Jennings P. Felix,* Assistant Attorney General, for respondent.

No. 426, Misc. KELLEY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 186 F. 2d 598.

No. 445, Misc. HOLLAND *v.* CAPITAL TRANSIT CO. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied.

No. 451, Misc. BABICH *v.* WISCONSIN. Supreme Court of Wisconsin. Certiorari denied. *A. W. Richter* for petitioner. *Vernon W. Thomson*, Attorney General of Wisconsin, *Harold H. Persons* and *William A. Platz*, Assistant Attorneys General, and *William J. McCauley* for respondent. Reported below: 258 Wis. 290, 45 N. W. 2d 660.

No. 454, Misc. SLEIGHTER *v.* BURKE, WARDEN. Supreme Court of Pennsylvania, Eastern District. Certiorari denied. *George E. C. Hayes* for petitioner.

No. 458, Misc. PORCH *v.* GEORGIA. Supreme Court of Georgia. Certiorari denied. *Joseph S. Crespi* for petitioner. Reported below: 207 Ga. 645, 63 S. E. 2d 902.

No. 472, Misc. UNITED STATES EX REL. RUSSO *v.* THOMPSON, WARDEN, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 188 F. 2d 244.

No. 484, Misc. HOLLINGSWORTH *v.* BIRD ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied.

No. 492, Misc. AARON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 188 F. 2d 446.

No. 501, Misc. BRYANT *v.* PENNSYLVANIA. Supreme Court of Pennsylvania, Eastern District. Certiorari de-

nied. *W. Bradley Ward* and *Edwin P. Rome* for petitioner. *Colbert C. McClain* for respondent. Reported below: 367 Pa. 135, 79 A. 2d 193.

No. 509, Misc. DIXON *v.* ILLINOIS. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 510, Misc. PETERSON *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied.

No. 511, Misc. JANIEC *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied. Reported below: 6 N. J. 608, 80 A. 2d 94.

No. 512, Misc. ALLEN *v.* CLAUDY, WARDEN, ET AL. Supreme Court of Pennsylvania, Western District. Certiorari denied.

No. 516, Misc. VAN PELT *v.* RAGEN, WARDEN. Supreme Court of Illinois. Certiorari denied.

No. 518, Misc. HARINCAR *v.* HEINZE, WARDEN. Supreme Court of California. Certiorari denied.

No. 521, Misc. GREEN *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Reported below: 88 U. S. App. D. C. —, 188 F. 2d 48.

No. 522, Misc. IN RE TAYLOR. C. A. 9th Cir. Certiorari denied. Reported below: 187 F. 2d 852.

No. 523, Misc. COSSENTINO *v.* JACKSON, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 528, Misc. LOWE *v.* EIDSON, WARDEN. Supreme Court of Missouri. Certiorari denied.

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No. 529, Misc. APPITITO ET AL. *v.* WARDEN, MARYLAND PENITENTIARY. Court of Appeals of Maryland. Certiorari denied.

No. 532, Misc. PIETRANIELLO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Vine H. Smith* for petitioner. Reported below: 187 F. 2d 870.

No. 531, Misc. STANCIN *v.* UNITED STATES. The petition for writ of certiorari to the United States Court of Appeals for the Second Circuit is denied without prejudice to an application to the District Court for resentencing. *William Charles Brown* for petitioner. Reported below: 184 F. 2d 903.

Rehearing Denied.

No. 348. JORDAN, DISTRICT DIRECTOR OF IMMIGRATION & NATURALIZATION, *v.* DE GEORGE, *ante*, p. 223;

No. 442. SCHWEGMANN BROTHERS ET AL. *v.* CALVERT DISTILLERS CORP., *ante*, p. 384;

No. 443. SCHWEGMANN BROTHERS ET AL. *v.* SEAGRAM DISTILLERS CORP., *ante*, p. 384; and

No. 645. HUMBLE OIL & REFINING CO. *v.* GRAY TOOL CO., *ante*, p. 934. The petitions for rehearing in these cases are denied.

No. 270. BLACKHAWK-PERRY CORPORATION *v.* COMMISSIONER OF INTERNAL REVENUE, 340 U. S. 875;

No. 473. BRANNAN, SECRETARY OF AGRICULTURE, *v.* ELDER ET AL.; and

No. 474. ELDER ET AL. *v.* BRANNAN, SECRETARY OF AGRICULTURE, *ante*, p. 277. The motions for leave to file petitions for rehearing in these cases are denied.

No. 561. WILLIAMS *v.* HUGHES TOOL CO., *ante*, p. 903. Second petition for rehearing denied.

No. 349, Misc. BOYDEN *v.* UNITED STATES, *ante*, p. 911;
No. 395, Misc. BOZELL *v.* UNITED STATES, *ante*, p. 927;
No. 444, Misc. FARRANT *v.* LAINSON, WARDEN, *ante*, p. 922;
No. 479, Misc. MCGARTY *v.* O'BRIEN, WARDEN, *ante*, p. 928;
No. 480, Misc. SOULIA *v.* O'BRIEN, WARDEN, *ante*, p. 928; and
No. 500, Misc. DARRIN *v.* UNITED STATES ET AL., *ante*, p. 934. The petitions for rehearing in these cases are severally denied.

AMENDMENTS TO
RULES OF CIVIL PROCEDURE
FOR THE
UNITED STATES DISTRICT COURTS

Effective August 1, 1951.

The following amendments to the Rules of Civil Procedure for the United States District Courts were prescribed by the Supreme Court of the United States on April 30, 1951, pursuant to 28 U. S. C. (1946 ed., Supp. III) § 2072, as amended by the Act of May 10, 1950, c. 174, § 2, 64 Stat. 158. They were reported to Congress by The Chief Justice on May 1, 1951, *post*, p. 961.

They became effective on August 1, 1951, as provided in paragraph 3 of the Court's order, *post*, p. 962.

For earlier publications of the Rules of Civil Procedure and the amendments thereto, see 308 U. S. 645, 308 U. S. 642, 329 U. S. 839, 335 U. S. 919.

LETTER OF TRANSMITTAL.

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

MAY 1, 1951.

To the Senate and House of Representatives of the United States of America in Congress assembled:

By direction of the Supreme Court, I have the honor to report to the Congress, under Section 2 of the Act of May 10, 1950 (P. L. 510, 81st Congress, 2d Session, Chapter 174), this 1st day of May 1951, the attached amendments to the Rules of Civil Procedure for the United States District Courts, which have been adopted by the Supreme Court, pursuant to the Act of June 25, 1948, Chapter 646 (62 Stat. 869, 961; U. S. C. Title 28, § 2072).

Accompanying these amendments is the Supplementary Report, which also contains the original report, of the Court's Advisory Committee on Rules for Civil Procedure submitted to the Court for its consideration of proposed amendments.

Respectfully,

(Signed) FRED M. VINSON,
Chief Justice.

ORDER.

ORDERED:

1. That paragraph (7) of Rule 81 (a) of the Rules of Civil Procedure be, and it hereby is, abrogated.

2. That the Rules of Civil Procedure be, and they hereby are, amended by including therein a rule to govern condemnation cases in the United States District Courts, numbered 71A, as follows:

[Rule 71A is set forth at pp. 963–969, *infra.*]

3. Effective date: That this Rule 71A and the amendment to Rule 81 (a) will take effect on August 1, 1951. Rule 71A governs all proceedings in actions brought after it takes effect and also all further proceedings in actions then pending, except to the extent that in the opinion of the court its application in a particular action pending when the rule takes effect would not be feasible or would work injustice, in which event the former procedure applies.

4. That Forms Nos. 28 and 29 be, and they hereby are, approved and added to the Appendix of Forms to the Rules of Civil Procedure. The forms read respectively as follows:

[Forms 28 and 29 are set forth at pp. 970–973, *infra.*]

5. That THE CHIEF JUSTICE be authorized to transmit these amendments to the Congress on or before May 1, 1951.

APRIL 30, 1951.

AMENDMENTS TO RULES OF CIVIL PROCEDURE
FOR THE
UNITED STATES DISTRICT COURTS

[By the foregoing order, paragraph (7) of Rule 81 (a) was abrogated and the following Rule 71A and Forms 28 and 29 were added.]

Rule 71A. Condemnation of Property.

(a) Applicability of Other Rules. The Rules of Civil Procedure for the United States District Courts govern the procedure for the condemnation of real and personal property under the power of eminent domain, except as otherwise provided in this rule.

(b) Joinder of Properties. The plaintiff may join in the same action one or more separate pieces of property, whether in the same or different ownership and whether or not sought for the same use.

(c) Complaint.

(1) *Caption.* The complaint shall contain a caption as provided in Rule 10 (a), except that the plaintiff shall name as defendants the property, designated generally by kind, quantity, and location, and at least one of the owners of some part of or interest in the property.

(2) *Contents.* The complaint shall contain a short and plain statement of the authority for the taking, the use for which the property is to be taken, a description of the property sufficient for its identification, the interests to be acquired, and as to each separate piece of property a designation of the defendants who have been joined as owners thereof or of some interest therein. Upon the commencement of the action, the plaintiff need join as defendants only the persons having or claiming an interest in the

property whose names are then known, but prior to any hearing involving the compensation to be paid for a piece of property, the plaintiff shall add as defendants all persons having or claiming an interest in that property whose names can be ascertained by a reasonably diligent search of the records, considering the character and value of the property involved and the interests to be acquired, and also those whose names have otherwise been learned. All others may be made defendants under the designation "Unknown Owners." Process shall be served as provided in subdivision (d) of this rule upon all defendants, whether named as defendants at the time of the commencement of the action or subsequently added, and a defendant may answer as provided in subdivision (e) of this rule. The court meanwhile may order such distribution of a deposit as the facts warrant.

(3) *Filing.* In addition to filing the complaint with the court, the plaintiff shall furnish to the clerk at least one copy thereof for the use of the defendants and additional copies at the request of the clerk or of a defendant.

(d) PROCESS.

(1) *Notice; Delivery.* Upon the filing of the complaint the plaintiff shall forthwith deliver to the clerk joint or several notices directed to the defendants named or designated in the complaint. Additional notices directed to defendants subsequently added shall be so delivered. The delivery of the notice and its service have the same effect as the delivery and service of the summons under Rule 4.

(2) *Same; Form.* Each notice shall state the court, the title of the action, the name of the defendant to whom it is directed, that the action is to condemn property, a description of his property sufficient for its identification, the interest to be taken, the authority for the taking, the uses for which the prop-

erty is to be taken, that the defendant may serve upon the plaintiff's attorney an answer within 20 days after service of the notice, and that the failure so to serve an answer constitutes a consent to the taking and to the authority of the court to proceed to hear the action and to fix the compensation. The notice shall conclude with the name of the plaintiff's attorney and an address within the district in which action is brought where he may be served. The notice need contain a description of no other property than that to be taken from the defendants to whom it is directed.

(3) *Service of Notice.*

(i) *Personal Service.* Personal service of the notice (but without copies of the complaint) shall be made in accordance with Rule 4 (c) and (d) upon a defendant who resides within the United States or its territories or insular possessions and whose residence is known. The provisions of Rule 4 (f) shall not be applicable.

(ii) *Service by Publication.* Upon the filing of a certificate of the plaintiff's attorney stating that he believes a defendant cannot be personally served, because after diligent inquiry within the state in which the complaint is filed his place of residence cannot be ascertained by the plaintiff or, if ascertained, that it is beyond the territorial limits of personal service as provided in this rule, service of the notice shall be made on this defendant by publication in a newspaper published in the county where the property is located, or if there is no such newspaper, then in a newspaper having a general circulation where the property is located, once a week for not less than three successive weeks. Prior to the last publication, a copy of the notice shall also be mailed to a defendant who cannot be personally

served as provided in this rule but whose place of residence is then known. Unknown owners may be served by publication in like manner by a notice addressed to "Unknown Owners."

Service by publication is complete upon the date of the last publication. Proof of publication and mailing shall be made by certificate of the plaintiff's attorney, to which shall be attached a printed copy of the published notice with the name and dates of the newspaper marked thereon.

(4) *Return; Amendment.* Proof of service of the notice shall be made and amendment of the notice or proof of its service allowed in the manner provided for the return and amendment of the summons under Rule 4 (g) and (h).

(e) Appearance or Answer. If a defendant has no objection or defense to the taking of his property, he may serve a notice of appearance designating the property in which he claims to be interested. Thereafter he shall receive notice of all proceedings affecting it. If a defendant has any objection or defense to the taking of his property, he shall serve his answer within 20 days after the service of notice upon him. The answer shall identify the property in which he claims to have an interest, state the nature and extent of the interest claimed, and state all his objections and defenses to the taking of his property. A defendant waives all defenses and objections not so presented, but at the trial of the issue of just compensation, whether or not he has previously appeared or answered, he may present evidence as to the amount of the compensation to be paid for his property, and he may share in the distribution of the award. No other pleading or motion asserting any additional defense or objection shall be allowed.

(f) Amendment of Pleadings. Without leave of court, the plaintiff may amend the complaint at any time

before the trial of the issue of compensation and as many times as desired, but no amendment shall be made which will result in a dismissal forbidden by subdivision (i) of this rule. The plaintiff need not serve a copy of an amendment, but shall serve notice of the filing, as provided in Rule 5 (b), upon any party affected thereby who has appeared and, in the manner provided in subdivision (d) of this rule, upon any party affected thereby who has not appeared. The plaintiff shall furnish to the clerk of the court for the use of the defendants at least one copy of each amendment, and he shall furnish additional copies on the request of the clerk or of a defendant. Within the time allowed by subdivision (e) of this rule a defendant may serve his answer to the amended pleading, in the form and manner and with the same effect as there provided.

(g) SUBSTITUTION OF PARTIES. If a defendant dies or becomes incompetent or transfers his interest after his joinder, the court may order substitution of the proper party upon motion and notice of hearing. If the motion and notice of hearing are to be served upon a person not already a party, service shall be made as provided in subdivision (d) (3) of this rule.

(h) TRIAL. If the action involves the exercise of the power of eminent domain under the law of the United States, any tribunal specially constituted by an Act of Congress governing the case for the trial of the issue of just compensation shall be the tribunal for the determination of that issue; but if there is no such specially constituted tribunal any party may have a trial by jury of the issue of just compensation by filing a demand therefor within the time allowed for answer or within such further time as the court may fix, unless the court in its discretion orders that, because of the character, location, or quantity of the property to be condemned, or for other reasons in the interest of justice, the issue of compensation shall be determined by a commission of three persons appointed by it. If a commission is appointed it shall have

the powers of a master provided in subdivision (c) of Rule 53 and proceedings before it shall be governed by the provisions of paragraphs (1) and (2) of subdivision (d) of Rule 53. Its action and report shall be determined by a majority and its findings and report shall have the effect, and be dealt with by the court in accordance with the practice, prescribed in paragraph (2) of subdivision (e) of Rule 53. Trial of all issues shall otherwise be by the court.

(i) DISMISSAL OF ACTION.

(1) *As of Right.* If no hearing has begun to determine the compensation to be paid for a piece of property and the plaintiff has not acquired the title or a lesser interest in or taken possession, the plaintiff may dismiss the action as to that property, without an order of the court, by filing a notice of dismissal setting forth a brief description of the property as to which the action is dismissed.

(2) *By Stipulation.* Before the entry of any judgment vesting the plaintiff with title or a lesser interest in or possession of property, the action may be dismissed in whole or in part, without an order of the court, as to any property by filing a stipulation of dismissal by the plaintiff and the defendant affected thereby; and, if the parties so stipulate, the court may vacate any judgment that has been entered.

(3) *By Order of the Court.* At any time before compensation for a piece of property has been determined and paid and after motion and hearing, the court may dismiss the action as to that property, except that it shall not dismiss the action as to any part of the property of which the plaintiff has taken possession or in which the plaintiff has taken title or a lesser interest, but shall award just compensation for the possession, title or lesser interest so taken.

The court at any time may drop a defendant unnecessarily or improperly joined.

(4) *Effect.* Except as otherwise provided in the notice, or stipulation of dismissal, or order of the court, any dismissal is without prejudice.

(j) DEPOSIT AND ITS DISTRIBUTION. The plaintiff shall deposit with the court any money required by law as a condition to the exercise of the power of eminent domain; and, although not so required, may make a deposit when permitted by statute. In such cases the court and attorneys shall expedite the proceedings for the distribution of the money so deposited and for the ascertainment and payment of just compensation. If the compensation finally awarded to any defendant exceeds the amount which has been paid to him on distribution of the deposit, the court shall enter judgment against the plaintiff and in favor of that defendant for the deficiency. If the compensation finally awarded to any defendant is less than the amount which has been paid to him, the court shall enter judgment against him and in favor of the plaintiff for the overpayment.

(k) CONDEMNATION UNDER A STATE'S POWER OF EMINENT DOMAIN. The practice as herein prescribed governs in actions involving the exercise of the power of eminent domain under the law of a state, provided that if the state law makes provision for trial of any issue by jury, or for trial of the issue of compensation by jury or commission or both, that provision shall be followed.

(l) COSTS. Costs are not subject to Rule 54 (d).

FORM 28. NOTICE; CONDEMNATION.

United States District Court for the Southern District of New York

CIVIL ACTION, FILE NUMBER .....

UNITED STATES OF AMERICA, PLAINTIFF *v.* 1,000 ACRES OF LAND IN [here insert a general location as "City of ...." or "County of....."], JOHN DOE ET AL., AND UNKNOWN OWNERS, DEFENDANTS	*Notice.*

To (here insert the names of the defendants to whom the notice is directed):

You are hereby notified that a complaint in condemnation has heretofore been filed in the office of the clerk of the United States District Court for the Southern District of New York, in the United States Court House in New York City, New York, for the taking (here state the interest to be acquired, as "an estate in fee simple") for use (here state briefly the use, "as a site for a post-office building") of the following described property in which you have or claim an interest.

(Here insert brief description of the property in which the defendants, to whom the notice is directed, have or claim an interest.)

The authority for the taking is (here state briefly, as "the Act of ....., ... Stat. ....., U. S. C., Title ....., § ....."). [1]

You are further notified that if you desire to present any objection or defense to the taking of your property you are required to serve your answer on the plaintiff's attorney at the address herein designated within twenty days after .... [2]

Your answer shall identify the property in which you claim to have an interest, state the nature and extent of the interest you claim, and state all of your objections and defenses to the taking of your

[1] And where appropriate add a citation to any applicable Executive Order.

[2] Here insert the words "personal service of this notice upon you," if personal service is to be made pursuant to subdivision (d) (3) (i) of this rule; or, insert the date of the last publication of notice, if service by publication is to be made pursuant to subdivision (d) (3) (ii) of this rule.

property. All defenses and objections not so presented are waived. And in case of your failure so to answer the complaint, judgment of condemnation of that part of the above-described property in which you have or claim an interest will be rendered.

But without answering, you may serve on the plaintiff's attorney a notice of appearance designating the property in which you claim to be interested. Thereafter you will receive notice of all proceedings affecting it. At the trial of the issue of just compensation, whether or not you have previously appeared or answered, you may present evidence as to the amount of the compensation to be paid for your property, and you may share in the distribution of the award.

.....

United States Attorney.

Address .....

(Here state an address within the district where the United States Attorney may be served as "United States Court House, New York, N. Y.")

Dated .....

940226 O—51——57

FORM 29. COMPLAINT; CONDEMNATION.

United States District Court for the Southern District of New York

CIVIL ACTION, FILE NUMBER .....

UNITED STATES OF AMERICA, PLAINTIFF *v.* 1,000 ACRES OF LAND IN [here insert a general location as "City of..... ....." or "County of....."], JOHN DOE ET AL., AND UNKNOWN OWNERS, DEFENDANTS	*Complaint.*

1. This is an action of a civil nature brought by the United States of America for the taking of property under the power of eminent domain and for the ascertainment and award of just compensation to the owners and parties in interest.[1]

2. The authority for the taking is (here state briefly, as "the Act of ....., ... Stat. ....., U. S. C., Title ....., § ....."). [2]

3. The use for which the property is to be taken is (here state briefly the use, "as a site for a post-office building").

4. The interest to be acquired in the property is (here state the interest as "an estate in fee simple").

5. The property so to be taken is (here set forth a description of the property sufficient for its identification) or (described in Exhibit A hereto attached and made a part hereof).

6. The persons known to the plaintiff to have or claim an interest in the property [3] are:

(Here set forth the names of such persons and the interests claimed.) [4]

---

[1] If the plaintiff is not the United States, but is, for example, a corporation invoking the power of eminent domain delegated to it by the state, then this paragraph 1 of the complaint should be appropriately modified and should be preceded by a paragraph appropriately alleging federal jurisdiction for the action, such as diversity. See Form 2.

[2] And where appropriate add a citation to any applicable Executive Order.

[3] At the commencement of the action the plaintiff need name as defendants only the persons having or claiming an interest in the property whose names are then known, but prior to any hearing involving the compensation to be paid for a particular piece of property the plaintiff must add as defendants all persons having or claiming an interest in that property whose names can be ascertained by an appropriate search of the records and also those whose names have otherwise been learned. See Rule 71A (c) (2).

[4] The plaintiff should designate, as to each separate piece of property, the defendants who have been joined as owners thereof or of some interest therein. See Rule 71A (c) (2).

7. In addition to the persons named, there are or may be others who have or may claim some interest in the property to be taken, whose names are unknown to the plaintiff and on diligent inquiry have not been ascertained. They are made parties to the action under the designation "Unknown Owners."

Wherefore the plaintiff demands judgment that the property be condemned and that just compensation for the taking be ascertained and awarded and for such other relief as may be lawful and proper.

.....

United States Attorney.

Address .....

(Here state an address within the district where the United States Attorney may be served, as "United States Court House, New York, N. Y.").

STATEMENT SHOWING THE NUMBER OF CASES FILED, DISPOSED OF, AND REMAINING ON DOCKETS, AT CONCLUSION OF OCTOBER TERMS—1948, 1949, AND 1950

	ORIGINAL			APPELLATE			MISCELLANEOUS			TOTALS		
Terms	1948	1949	1950	1948	1949	1950	1948	1949	1950	1948	1949	1950
Number of cases on dockets	14	13	13	889	867	783	702	568	539	1,605	1,448	1,335
Number disposed of during terms	1	0	5	747	757	687	686	551	524	1,434	1,308	1,216
Number remaining on dockets	13	13	8	142	110	96	16	17	15	171	140	119

	TERMS		
	1948	1949	1950
Distribution of cases disposed of during terms:			
Original cases	1	0	5
Appellate cases on merits	224	201	192
Petitions for certiorari	523	556	495
Miscellaneous docket applications	686	551	524

	TERMS		
	1948	1949	1950
Distribution of cases remaining on dockets:			
Original cases	13	13	8
Appellate cases on merits	76	52	40
Petitions for certiorari	66	58	56
Miscellaneous docket applications	16	17	15

JUNE 6, 1951.

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