# UNITED STATES REPORTS

## VOLUME 347

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## CASES ADJUDGED

IN

# THE SUPREME COURT

AT

## OCTOBER TERM, 1953

FEBRUARY 1 THROUGH JUNE 7, 1954

(END OF TERM)

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WALTER WYATT
REPORTER OF DECISIONS

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# JUSTICES

OF THE

# SUPREME COURT

DURING THE TIME OF THESE REPORTS.*

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EARL WARREN, Chief Justice.[1]
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.

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HERBERT BROWNELL, Jr., Attorney General.
SIMON E. SOBELOFF, Solicitor General.[2]
HAROLD B. WILLEY, Clerk.
WALTER WYATT, Reporter of Decisions.
T. PERRY LIPPITT, Marshal.
HELEN NEWMAN, Librarian.

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*Notes on p. iv.

## NOTES.

[1] MR. CHIEF JUSTICE WARREN served under a recess appointment from October 5, 1953 until March 2, 1954. (See 346 U. S. IV, VII.) His nomination was sent to the Senate by President Eisenhower on January 11, 1954; the nomination was confirmed on March 1, 1954; and a new commission was issued to him under date of March 2, 1954. See *post*, p. VII.

[2] Mr. Simon E. Sobeloff, of Maryland, was nominated to be Solicitor General by President Eisenhower on January 22, 1954; the nomination was confirmed by the Senate on February 9, 1954; he was commissioned on February 10, 1954; and he took the oath and entered on duty on February 25, 1954. During the vacancy which had existed since the resignation of Solicitor General Cummings effective March 1, 1953 (see 344 U. S. IV, n. 3), the duties of the office of Solicitor General were performed by Mr. Robert L. Stern, First Assistant to the Solicitor General, who signed government briefs and appeared as "Acting Solicitor General."

## SUPREME COURT OF THE UNITED STATES.

### ALLOTMENT OF JUSTICES.

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

For the District of Columbia Circuit, EARL WARREN, 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, EARL WARREN, 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 12, 1953.

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(For next previous allotment, see 345 U. S. p. IV.)

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*By order of April 26, 1954, the Court temporarily assigned MR. JUSTICE REED to the Second Circuit. See *post*, p. 950.

## COMMISSION OF MR. CHIEF JUSTICE WARREN.

SUPREME COURT OF THE UNITED STATES.

MONDAY, APRIL 5, 1954.

*It is ordered* that the Commission of THE CHIEF JUSTICE be recorded and that his oaths be filed.

The Commission of MR. CHIEF JUSTICE WARREN is in the words and figures following, viz:

DWIGHT D. EISENHOWER
PRESIDENT OF THE UNITED STATES OF AMERICA

*To all who shall see these Presents, Greeting:*

KNOW YE That reposing special trust and confidence in the Wisdom, Uprightness, and Learning of Earl Warren of California I have nominated, and, by and with the advice and consent of the Senate, do appoint him Chief Justice of the United States and do authorize and empower him to execute and fulfil the duties of that Office according to the Constitution and Laws of the said United States, and to Have and to Hold the said Office, with all the powers, privileges and emoluments to the same of right appertaining, unto Him, the said Earl Warren, during his good behavior.

IN TESTIMONY WHEREOF I have caused these Letters to be made patent and the seal of the Department of Justice to be hereunto affixed.

Done at the city of Washington this second day of March, in the year of our Lord one thousand nine hundred and fifty-four, and of the Independence of the United States of America the one hundred and seventy-eighth.

DWIGHT D. EISENHOWER

By the President:

HERBERT BROWNELL JR.

*Attorney General*

# TABLE OF CASES REPORTED

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# CASES ADJUDGED

IN THE

# SUPREME COURT OF THE UNITED STATES

AT

## OCTOBER TERM, 1953.

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## PEREIRA ET AL. *v.* UNITED STATES.

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

No. 50. Argued October 20, 1953.—Decided February 1, 1954.

Petitioners were convicted in a federal court of (1) violating the mail fraud statute, 18 U. S. C. § 1341, by causing a letter to be mailed by a bank pursuant to a scheme to defraud, (2) violating the National Stolen Property Act, 18 U. S. C. § 2314, by causing a check obtained by fraud to be transported by a bank in Texas to a bank in California for collection, and (3) a conspiracy to commit the two substantive offenses in violation of 18 U. S. C. § 371. The charges arose out of a scheme to defraud a wealthy widow of her property. Petitioner Pereira married her and absconded shortly thereafter. She divorced him before the trial and was permitted to testify against both petitioners over their objections. *Held:* The convictions are affirmed. Pp. 3–13.

1. There was no error in the admission of the victim's testimony over the objection that it violated the privilege for confidential marital communications; because it related primarily to statements made before the marriage or in the presence of third persons or acts which did not amount to confidential marital communications, and any residuum which may have been intended to be confidential was so slight as to be immaterial. Pp. 6–7.

2. Evidence that, pursuant to a scheme to defraud, Pereira delivered to a bank in one city for collection a check drawn on a bank in another city and that it was mailed to the drawee bank in the ordinary course of business was sufficient to sustain his

conviction of the substantive offense of using the mails to defraud, in violation of 18 U. S. C. § 1341. Pp. 7–9.

(a) In view of 18 U. S. C. § 2 (b), it was not necessary to show that petitioner actually mailed or transported anything himself; it was sufficient to show that he caused it to be done. P. 8.

(b) Where one does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended, then he "causes" the mails to be used. Pp. 8–9.

3. Evidence that Pereira delivered to a Texas bank for collection a check obtained by fraud and drawn on a bank in California and that it was sent to the drawee bank was sufficient to sustain his conviction of the substantive offense of causing property obtained by fraud to be transported in interstate commerce in violation of 18 U. S. C. § 2314. P. 9.

4. Sections 1341 and 2314 constitute two separate offenses, and a defendant may be convicted of both, even though the charges arise from a single act or series of acts, since each requires proof of a fact not essential to the other. P. 9.

5. In view of 18 U. S. C. § 2 (a) and the trial court's charge to the jury, the evidence presented by the Government that petitioner Brading was a participant in the fraud from beginning to end and actively aided and abetted Pereira in its perpetration was sufficient to sustain Brading's conviction of the substantive offenses. Pp. 9–11.

6. Petitioners' convictions on both the substantive counts and of a conspiracy to commit the crimes charged in the substantive counts did not constitute double jeopardy. Pp. 11–12.

7. The evidence was sufficient to sustain petitioners' convictions on the charge of conspiracy. Pp. 12–13.

202 F. 2d 830, affirmed.

*Charles L. Sylvester* argued the cause for petitioners. With him on the brief was *William H. Fryer.*

*John R. Wilkins* argued the cause for the United States. With him on the brief were *Acting Solicitor General Stern, Assistant Attorney General Olney* and *Beatrice Rosenberg.*

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

The petitioners, Pereira and Brading, were convicted in the District Court for the Western District of Texas under three counts of an indictment charging violation of the mail fraud statute, 18 U. S. C. (Supp. V) § 1341, violation of the National Stolen Property Act, 18 U. S. C. (Supp. V) § 2314, and a conspiracy to commit the aforesaid substantive offenses, 18 U. S. C. (Supp. V) § 371. The Court of Appeals for the Fifth Circuit affirmed. 202 F. 2d 830. This Court granted certiorari to consider questions which are important to the proper administration of criminal justice in the federal courts. 345 U. S. 990.

On April 19, 1951, Mrs. Gertrude Joyce, a wealthy widow, fifty-six years old, and her younger half-sister, Miss Katherine Joyner, were accosted by the petitioner Brading as they were about to enter a hotel in El Paso, Texas. Mrs. Joyce and her sister had just arrived from their home in Roswell, New Mexico, and were preparing to register at the hotel. Brading identified himself, assisted them in parking their car, and invited them into the hotel bar to meet a friend of his. They accepted. The friend was petitioner Pereira, thirty-three years of age. After a few drinks, the men suggested that they all go to Juarez for dinner. The women accepted, and after dinner visited some night clubs with the petitioners. Pereira devoted himself to Mrs. Joyce, telling her that their meeting was an "epoch" in his life. He mentioned that he was getting a divorce. This same performance was repeated the following night. When Pereira said that he would like to return to Roswell with the women, Mrs. Joyce invited the two men to be her house guests, and they accepted. Pereira commenced to make love to Mrs. Joyce, and she responded to his attentions. On May 3, Pereira exhibited a telegram to Mrs. Joyce, in the presence

of Brading and Miss Joyner, stating that his divorce would be granted on May 27, but that he would not receive his share of the property settlement, some $48,000, for a month.

Brading represented himself as a prosperous oil man, dealing in leases, and Pereira as the owner and operator of several profitable hotels. Brading then told Mrs. Joyce that Pereira was about to lose an opportunity to share in the profits of some excellent oil leases because of the delay in the divorce property settlement, and persuaded her to lend Pereira $5,000.

Pereira suggested that he and Mrs. Joyce take a trip together to "become better acquainted." He borrowed $1,000 from her to finance the trip. Brading joined them at Wichita Falls, and the three of them continued the trip together as far as Dallas. Pereira discussed his purported hotel business in Denver during this part of the trip. He stated that he was giving two hotels to his divorced wife, but intended to re-enter the hotel business in the fall. In the meantime, he was going to "play a little oil" with Brading. In Hot Springs, Arkansas, Pereira proposed marriage and was accepted. Brading reappeared on the scene, expressing great joy at the impending marriage. Pereira then told Brading, in the presence of Mrs. Joyce, that he would have to withdraw from further oil deals and get a hotel to assure himself of a steady income.

Pereira and Mrs. Joyce were married May 25, 1951, in Kansas City, Missouri. While there, Pereira persuaded Mrs. Joyce to procure funds to enable him to complete an arrangement to purchase a Cadillac through a friend. She secured a check for $6,956.55 from her Los Angeles broker, and drawn on a California bank, which she endorsed over to Pereira. The price of the car was $4,750, and she instructed Pereira to return the balance of the proceeds of the check to her. He kept the change.

From that time on, Pereira and Brading, in the presence of Mrs. Joyce, discussed a hotel which by words and conduct they represented that Pereira was to buy in Greenville, Texas. They took Mrs. Joyce—by this time Mrs. Pereira—to see it, and exhibited an option for its purchase for $78,000 through a supposed broker, "E. J. Wilson." Pereira asked his then wife if she would join him in the hotel venture and advance $35,000 toward the purchase price of $78,000. She agreed. It was then agreed, between her and Pereira, that she would sell some securities that she possessed in Los Angeles, and bank the money in a bank of his choosing in El Paso. On June 15, she received the check for $35,000 on the Citizens National Bank of Los Angeles from her brokers in Los Angeles, and gave it to Pereira, who endorsed it for collection to the State National Bank of El Paso. The check cleared, and on June 18, a cashier's check for $35,000 was drawn in favor of Pereira.

At five o'clock in the morning of June 19, Pereira and Brading, after telling their victim that they were driving the Cadillac to a neighboring town to sign some oil leases, left her at home in Roswell, New Mexico, promising to return by noon. Instead Pereira picked up the check for $35,000 at the El Paso Bank, cashed it there, and with Brading left with the money and the Cadillac.

That was the last Mrs. Joyce saw of either petitioner, or of her money, until the trial some seven months later. She divorced Pereira on November 16, 1951.

The record clearly shows that Brading was not an oil man; that Pereira was not a hotel owner; that there was no divorce or property settlement pending in Denver; that Pereira arranged to have the telegram concerning the divorce sent to him by a friend in Denver; that there were no oil leases; that the hotel deal was wholly fictitious; and that "E. J. Wilson" was the petitioner Brading. The only true statements which the petitioners

made concerned the purchase of the Cadillac, and they took that with them. Pereira and Brading contrived all of the papers used to lend an air of authenticity to their deals. In short, their activities followed the familiar pattern of the "confidence game."

The petitioners challenge the admissibility of Mrs. Joyce's testimony as being based on confidential communications between Mrs. Joyce and Pereira during the marriage. Petitioners do not now contend that Mrs. Joyce was not a competent witness against her ex-husband. They concede that the divorce removed any bar of incompetency. That is the generally accepted rule. Wigmore, Evidence, § 2237; 58 Am. Jur., Witnesses, § 204. Petitioners rely on the proposition that while divorce removes the bar of incompetency, it does not terminate the privilege for confidential marital communications. Wigmore, Evidence, § 2341 (2); 58 Am. Jur., Witnesses, § 379. This is a correct statement of the rule, but it is inapplicable to bar the communications involved in this case, since under the facts of the case, it cannot be said that these communications were confidential. Although marital communications are presumed to be confidential, that presumption may be overcome by proof of facts showing that they were not intended to be private. *Blau* v. *United States,* 340 U. S. 332; *Wolfle* v. *United States,* 291 U. S. 7. The presence of a third party negatives the presumption of privacy. Wigmore, Evidence, § 2336. So too, the intention that the information conveyed be transmitted to a third person. *Id.,* § 2336. The privilege, generally, extends only to utterances, and not to acts. *Id.,* § 2337. A review of Mrs. Joyce's testimony reveals that it involved primarily statements made in the presence of Brading or Miss Joyner, or both, acts of Pereira which did not amount to communications, trips taken with third parties, and her own acts. Much of her

testimony related to matters occurring prior to the marriage. Any residuum which may have been intended to be confidential was so slight as to be immaterial. Cf. *United States* v. *Mitchell,* 137 F. 2d 1006, 1009.

The court below was not in error in admitting Mrs. Joyce's testimony.

The petitioners challenge their conviction on the substantive counts on the ground that there was no evidence of any mailing or of transporting stolen property interstate, the gist of the respective offenses. These contentions are without merit.

The mail fraud statute provides:

> "§ 1341. Frauds and swindles.
>
> "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both." 18 U. S. C. (Supp. V) § 1341.

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The National Stolen Property Act provides:

> "§ 2314. Transportation of stolen goods, securities, monies, or articles used in counterfeiting.
>
> "Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud . . . .
>
> "Shall be fined not more than $10,000 or imprisoned not more than ten years, or both. . . ." 18 U. S. C. (Supp. V) § 2314.

To constitute a violation of these provisions, it is not necessary to show that petitioners actually mailed or transported anything themselves; it is sufficient if they caused it to be done. 18 U. S. C. (Supp. V) § 2 (b).

Petitioners do not deny that the proof offered establishes that they planned to defraud Mrs. Joyce. Collecting the proceeds of the check was an essential part of that scheme. For this purpose, Pereira delivered the check drawn on a Los Angeles bank to the El Paso bank. There was substantial evidence to show that the check was mailed from Texas to California, in the ordinary course of business.

The elements of the offense of mail fraud under 18 U. S. C. (Supp. V) § 1341 are (1) a scheme to defraud, and (2) the mailing of a letter, etc., for the purpose of executing the scheme. It is not necessary that the scheme contemplate the use of the mails as an essential element. *United States* v. *Young,* 232 U. S. 155. Here, the scheme to defraud is established, and the mailing of the check by the bank, incident to an essential part of the scheme, is established. There remains only the question whether Pereira "caused" the mailing. That question is easily answered. Where one does an act with

knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended, then he "causes" the mails to be used. *United States* v. *Kenofskey,* 243 U. S. 440. The conclusion that Pereira's conviction under this count was proper follows naturally from these factors.

As to the charge of causing stolen property to be transported in interstate commerce, the validity of Pereira's conviction is even more apparent. Sections 1341 and 2314 of Title 18 constitute two separate offenses, and a defendant may be convicted of both even though the charges arise from a single act or series of acts, so long as each requires the proof of a fact not essential to the other. *Gavieres* v. *United States,* 220 U. S. 338; *Blockburger* v. *United States,* 284 U. S. 299. 18 U. S. C. (Supp. V) § 2314 requires (1) knowledge that certain property has been stolen or obtained by fraud, and (2) transporting it, or causing it to be transported, in interstate commerce. It is obvious that the mail fraud offense requires different proof. The transporting charge does not require proof that any specific means of transporting were used, or that the acts were done pursuant to a scheme to defraud, as is required for the mail fraud charge. *United States* v. *Sheridan,* 329 U. S. 379. When Pereira delivered the check, drawn on an out-of-state bank, to the El Paso bank for collection, he "caused" it to be transported in interstate commerce. It is common knowledge that such checks must be sent to the drawee bank for collection, and it follows that Pereira intended the El Paso bank to send this check across state lines. *United States* v. *Sheridan, supra,* at 391. The trial court charged the jury that one who "aids, abets, counsels, commands, induces or procures" the commission of an act is as responsible for that act as if he had directly committed the act himself.

See 18 U. S. C. (Supp. V) § 2 (a). *Nye & Nissen* v. *United States,* 336 U. S. 613. The jury found Brading guilty in the light of this instruction. The Court of Appeals affirmed on the ground that the evidence supported conviction under this charge.*

The evidence is clear and convincing that Brading was a participant in the fraud from beginning to end. Brading made the initial contact with the victim. He persuaded her to part with $5,000, as a loan to Pereira for investment in some nonexistent oil leases. He was present and participated in conversations about buying the hotel lease. He engaged a telephone-answering service under the name of "E. J. Wilson," the name of Pereira's purported broker. The evidence established that he sent a telegram to Pereira authorizing an extension of the supposed option to purchase the hotel, signing it "E. J. Wilson." He supplied the false excuse for Pereira's departure from the victim, and went with Pereira to collect the proceeds of the check. He and Pereira fled together with the money.

The "aiding and abetting" instruction entitled the jury to draw inferences supplying any lack of evidence directly connecting the petitioner Brading with the specific acts charged in the indictment from the abundant circumstantial evidence offered. The jury was properly charged on this theory. There is ample evidence of the petitioners' collaboration and close cooperation in the fraud from

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*The Government argues that Brading's conviction on the substantive offenses can be affirmed on the basis of *Pinkerton* v. *United States,* 328 U. S. 640, since the record demonstrates that he conspired to defraud Mrs. Joyce and the acts charged in the substantive offenses were acts in furtherance of that design. The *Pinkerton* case, however, is inapplicable here since the jury was not instructed in terms of that theory. *Nye & Nissen* v. *United States,* 336 U. S. 613.

which the jury could conclude that Brading aided, abetted, or counseled Pereira in the commission of the specific acts charged. See *Nye & Nissen* v. *United States, supra,* at 619. The Court of Appeals has passed on the sufficiency of the evidence to sustain Brading's conviction on this theory. We see no reason to upset the findings of the courts below.

The petitioners allege that their conviction on both the substantive counts and a conspiracy to commit the crimes charged in the substantive counts constitutes double jeopardy. It is settled law in this country that the commission of a substantive offense and a conspiracy to commit it are separate and distinct crimes, and a plea of double jeopardy is no defense to a conviction for both. See *Pinkerton* v. *United States,* 328 U. S. 640, 643–644, and cases cited therein. Only if the substantive offense and the conspiracy are identical does a conviction for both constitute double jeopardy. Cf. *Gavieres* v. *United States,* 220 U. S. 338. The substantive offenses with which petitioners were charged do not require more than one person for their commission; either could be accomplished by a single individual. The essence of the conspiracy charge is an agreement to use the mails to defraud and/or to transport in interstate commerce property known to have been obtained by fraud. Pereira's conviction on the substantive counts does not depend on any agreement, he being the principal actor. Similarly, Brading's conviction does not turn on the agreement. Aiding, abetting, and counseling are not terms which presuppose the existence of an agreement. Those terms have a broader application, making the defendant a principal when he consciously shares in a criminal act, regardless of the existence of a conspiracy. *Nye & Nissen* v. *United States, supra,* at 620. Thus, the charge of conspiracy requires proof not essential to the convictions on

the substantive offenses—proof of an agreement to commit an offense against the United States—and it cannot be said that the substantive offenses and the conspiracy are identical, any more than that the two substantive offenses are identical.

Petitioners further contend that there was no evidence that they *agreed* to use the mails in furtherance of the scheme to defraud Mrs. Joyce or that they *agreed* to transport stolen property in interstate commerce. It is not necessary that an agreement to use the mails or transport stolen property exist from the inception of the scheme to defraud. If there was such an agreement at any time, it is sufficient. The existence of a conspiracy to defraud Mrs. Joyce is not denied. Pereira obtained a check from the victim for the purchase of an automobile. That check was drawn on a Los Angeles bank by Mrs. Joyce's brokers. When the subject of purchasing the hotel was broached, Mrs. Joyce told Pereira that she would have to have her California broker sell some stocks to obtain the funds for the purchase. When there was a delay in contacting the broker, Brading, as "E. J. Wilson," sent a telegram extending the spurious option for the purchase of the hotel. There is no doubt about Pereira's knowledge that a check on an out-of-state bank would be involved. From what we have said with regard to the substantive offenses, it is also clear that an intent to collect on the check would include an intent to use the mails or to transport the check in interstate commerce. It was certainly not improper to allow the jury to determine from the circumstances whether Brading shared Pereira's knowledge and agreed with him as to the use of the only appropriate means of collecting the money. It would be unreasonable to suppose that Brading would be so closely associated with Pereira in the scheme to defraud without knowing the details related to the realization of their common

goal. There is no reason for this Court to upset the jury's finding of conspiracy.

For the foregoing reasons, the judgment below is

*Affirmed.*

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

MR. JUSTICE MINTON, with whom MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS join, concurring in part and dissenting in part.

That a monumental fraud was perpetrated by the petitioners on Mrs. Joyce in the true fashion of a confidence game cannot be disputed. Such fraud could be punished by the States. For the United States to take cognizance of the offenses, the mails had to be used to carry out the fraud or the check fraudulently obtained must have been carried across state lines. That is what the Government charged. Count one charged that they caused a letter to be mailed from El Paso, Texas, to Los Angeles, California, on June 15, 1951. Count ten charged that on or about the same date they caused the check, in the amount of $35,286.78, to be transported in interstate commerce from El Paso to Los Angeles, knowing it was obtained by fraud. Count 11 charged a conspiracy to commit the substantive offenses.

I would affirm the convictions except as to Brading on the substantive counts. To convict on the substantive counts, the petitioners must have actually used the mails to transport the check from El Paso to Los Angeles. The use may be proved by direct or circumstantial evidence, but it must be proved. Brading must have used, or must have known or from the facts and circumstances be reasonably expected to have known, that Pereira actually

would use the mails. *United States* v. *Peoni,* 100 F. 2d 401, 402. To be guilty of the conspiracy, Brading had only to reasonably anticipate that Pereira might use the mails, and if he did subsequently use them, then Brading is bound.

The elements of the offense under the Mail Fraud statute are (1) a scheme to defraud which (2) reasonably contemplates the use of the mails, and (3) use of the mails in furtherance of the plan. The National Stolen Property Act is violated if (1) one transports securities or money of the value of $5,000 or more in interstate commerce and (2) does so knowing they have been taken by fraud.

Concededly, Brading did not participate directly in the use of the mails to transport the thirty-five thousand dollar check from El Paso to Los Angeles. He can be convicted, if at all, only as an aider and abettor. *Nye & Nissen* v. *United States,* 336 U. S. 613, 618. There is no evidence to establish that he could reasonably have expected that the mails would be used in carrying out the scheme.

Three financial transactions are mentioned by the Court in its opinion. First, the $5,000 transaction. That all took place in Roswell, New Mexico, where Mrs. Joyce cashed a check on a Roswell bank and gave the proceeds to Pereira. No federal offense there. The Cadillac transaction was liquidated by a check received from Los Angeles by Mrs. Joyce and turned over to Pereira, who cashed it in Kansas City, Missouri. Brading was not shown to have known where this money came from, and, more important, it was not proved that that check was mailed, as was done in the case of the third check, for $35,286.78.

Mrs. Joyce arranged for this check, the only transaction upon which the convictions are based, by selling securities in Los Angeles. She received the check and

turned it over to Pereira in Roswell, New Mexico, from whence he took it to El Paso, and there, on June 15, 1951, after securing Mrs. Joyce's endorsement, caused it to be sent through the mails for collection. The evidence does not show where Brading was at the time these events occurred. He next appeared at Mrs. Joyce's home in Roswell after the completion of the acts constituting the federal crimes, and on June 19, 1951, left with Pereira, ostensibly to see about some oil leases in Texas. The same day Pereira collected the money at the El Paso bank. There is no direct evidence that Brading actually knew or had reason to believe that a check would be received or that the check would be drawn on an out-of-town bank, necessitating its being placed in the mails for collection.

Lacking such proof, an important element of each crime charged, namely, that Brading had reason to foresee the use of the mails or interstate commerce, has not been established. It is true that the use of the mails need not have been originally intended as a part of the plan, but its use must have been a natural, reasonably foreseeable means of executing the plan. Brading might well have assumed that cash would be given to Pereira, or, if a check, one drawn on a local bank.

It may well be reasonable to infer that one receiving a check drawn on an out-of-town bank would know that it would be mailed in the process of collection, but to that inference must be added the inference that Brading had reason to know that a check would be received and also that the check would be on an out-of-town bank. This is piling inference upon inference, in the absence of direct proof. In short, this is simply guessing Brading into the federal penitentiary. It may be good guessing, but it is not proof.

Brading is clearly an aider and abettor of the scheme to defraud, which a State may punish, but is he an aider

and abettor of the federal offenses of using the mails to defraud and causing the fraudulent check to be carried across state lines? I think not, unless we are willing to say that aiding and abetting the scheme to defraud is aiding and abetting any means used for the consummation of the fraud. Brading must aid and abet the federal crimes, not just the fraudulent scheme. There is not a scintilla of evidence that Brading aided and abetted anything more than the scheme to get the money from Mrs. Joyce.

In *Bollenbach* v. *United States,* 326 U. S. 607, the defendant was charged with transporting securities in interstate commerce knowing them to have been stolen, and with conspiracy to commit the offense. He was convicted of conspiracy. The court had instructed the jury that possession of the securities by the defendant in New York soon after their theft in Minnesota was sufficient to warrant the jury in finding that the defendant knew the securities had been stolen, and this would support the further "presumption" that the defendant was the thief and transported the securities in interstate commerce. This Court set the conviction aside. The latter inference was said to be untenable.

In this case, I think it untenable to infer that Brading had reason to know that Pereira would get a foreign check that must be sent through the mails and in its handling must be carried across state lines, thereby making out the federal crimes. It is untenable because it is unreasonable to infer one or more facts from the inference of another fact. *Looney* v. *Metropolitan R. Co.,* 200 U. S. 480, 488; *United States* v. *Ross,* 92 U. S. 281.

Syllabus.

# RADIO OFFICERS' UNION OF THE COMMERCIAL TELEGRAPHERS UNION, AFL, *v.* NATIONAL LABOR RELATIONS BOARD.

NO. 5. CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.*

Argued January 8, 1953.—Reargued November 9, 1953.—Decided February 1, 1954.

1. A complaint filed with the National Labor Relations Board at the instance of a union truck driver charged his union with violating §§ 8 (b) (1) (A) and 8 (b) (2) of the National Labor Relations Act, as amended, by causing his employer to discriminate against him, because of his delinquency in paying union dues, by reducing his seniority standing and causing him to lose truck-driving assignments which he otherwise would have received. The Board found, *inter alia*, that the union's exclusive collective-bargaining agreement with the employer required establishment of a seniority system and gave the union authority to settle disputes over the seniority status of any employee; that its union-security provisions were not effective, due to lack of the authorization then required by § 8 (a) (3); that the union's reduction of the employee's seniority restrained and coerced him in the exercise of his right to refrain from assisting the union, in violation of § 8 (b) (1) (A); and that it had caused the employer to discriminate against the employee, thus tending to encourage membership in the union, in violation of § 8 (b) (2). The Board ordered the union to cease and desist from such violations, to reimburse the employee for loss of pay resulting from such discrimination, to request his employer to restore him to his former status, and to post appropriate notices. *Held:* The Board's order is sustained. Pp. 24–28, 39–42, 55.

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*Together with No. 6, *National Labor Relations Board* v. *International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America et al.*, on certiorari to the United States Court of Appeals for the Eighth Circuit, argued January 8–9, 1953, reargued November 9–10, 1953; and No. 7, *Gaynor News Co., Inc.* v. *National Labor Relations Board*, on certiorari to the United States Court of Appeals for the Second Circuit, argued April 27, 1953, reargued November 10, 1953.

2. A complaint filed with the Board at the instance of a radio officer charged his union with violating the same sections by causing a steamship company discriminatorily to refuse to employ him. The Board found that the union had a contract with the company requiring it to employ union members in good standing, when available; that it did not provide for a hiring hall giving the union complete control over the selection of radio officers; that the company offered the radio officer a job and he was willing to accept it; that the company was prevented from employing him by the wrongful refusal of a union officer to certify his good standing, because of his alleged violation of union rules; that this restrained and coerced him in his statutory right to refrain from observance of union rules, in violation of § 8 (b) (1) (A); that it caused the company to discriminate against him by denying him employment; and that the normal effect of such discrimination was to encourage membership in the union, in violation of § 8 (b) (2). The Board ordered the union to withdraw objection to his employment, to reimburse him for loss of pay and to take other corrective actions. *Held:* The Board's order is sustained. Pp. 28–33, 39–42, 55.
3. A complaint filed with the Board charged an employer with discrimination against nonunion employees in violation of § 8 (a) (1), (2) and (3), by granting retroactive pay increases and vacation payments to union employees and refusing such benefits to other employees solely because they were not union members. The Board found that this had been done; that the union was the exclusive bargaining agent of all employees in the employer's delivery department; that the union-security clause in the union's contract with the employer was invalid; that nothing in the contract with the union prohibited equal payment to nonunion employees; and that the natural and probable effect of the discrimination was to encourage membership in the union. The Board issued an order requiring the employer to cease and desist from such practices, to reimburse the nonunion employees for the losses sustained by reason of the discrimination against them, and to post appropriate notices. *Held:* The Board's order is sustained. Pp. 34–38, 46–48, 55.
4. The policy of the Act is to insulate employees' jobs from their organizational rights. P. 40.
5. Sections 8 (a) (3) and 8 (b) (2) were designed to allow employees to exercise freely their right to join or to abstain from joining unions, the only limitation being in the proviso to § 8 (a) (3) which

authorizes employers to enter into certain union-security contracts. P. 40.

6. Congress intended to prevent utilization of union-security agreements for any purpose other than to compel payment of union dues and fees. Pp. 40–41.

7. Under the Act, an employer may discharge an employee for nonmembership in a union if the employer has entered into a valid union-security contract and if the other requirements of the proviso are met; but no other discrimination aimed at encouraging employees to join, retain membership in, or stay in good standing in, a union is condoned. Pp. 41–42.

8. Although it is essential to a violation of § 8 (a)(3) that the employer's motive in discriminating against the employee be to encourage or discourage membership in a labor organization, specific evidence of intent to encourage or discourage is not an indispensable element of the proof. Pp. 42–48.

(a) The recognition that specific proof of intent is unnecessary where the conduct of the employer inherently encourages or discourages union membership is but an application of the common-law rule that a man is held to intend the foreseeable consequences of his conduct. Pp. 44–46.

(b) Discrimination by an employer solely on the basis of union membership status so foreseeably causes employee response as to obviate need for any other proof of intent. Pp. 45–46.

(c) Encouragement of union membership is a natural and foreseeable consequence of any employer discrimination at the request of a union. P. 52.

9. To establish a violation of § 8 (a)(3) it is not essential that there be evidence of actual encouragement of union membership; a tendency to encourage is sufficient, and such tendency is sufficiently established if its existence may reasonably be inferred from the nature of the discrimination. Pp. 48–52.

(a) Insofar as the power of the Board to draw reasonable inferences is concerned, the 1947 amendments of the Act did not alter the prior law. Pp. 49–51.

(b) Where an employer discriminated against an employee upon the instigation of a union, and the purpose of the union in causing such discrimination was clearly to encourage members to perform obligations or supposed obligations of membership, it was reasonable for the Board to infer encouragement of union membership. P. 52.

(c) The Act does not require, for the purposes of violations of § 8 (a) (3), that the employees discriminated against be the ones encouraged; nor that the change in the employees' "quantum of desire" to join a union have immediate manifestations. P. 51.

10. It was within the authority of the Board to proceed against a union for a violation of § 8 (b) (2) and to order the union to pay back-pay to an employee, without joining the employer, finding him guilty of a violation of § 8 (a) (3), or requiring reinstatement by the employer. Pp. 52–55.

11. The 6-month period of limitations prescribed in § 10 (b) of the Act did not bar the amendment of an individual employee's charge of discrimination so as to charge that the discriminatory treatment extended to all nonunion employees, since the employer had adequate notice and was not prejudiced by the amendment. P. 34, n. 30.

12. A question which was not presented in the petition for certiorari is not properly before the Court. P. 37, n. 35.

196 F. 2d 960, affirmed.

196 F. 2d 1, reversed.

197 F. 2d 719, affirmed.

No. 5. On a petition for enforcement of an order of the National Labor Relations Board, 93 N. L. R. B. 1523, the Court of Appeals granted enforcement. 196 F. 2d 960. This Court granted certiorari. 344 U. S. 852. *Affirmed,* p. 55.

No. 6. On a petition for enforcement of an order of the National Labor Relations Board, 94 N. L. R. B. 1494, the Court of Appeals denied enforcement. 196 F. 2d 1. This Court granted certiorari. 344 U. S. 853. *Reversed,* p. 55.

No. 7. On a petition for enforcement of an order of the National Labor Relations Board, 93 N. L. R. B. 299, the Court of Appeals granted enforcement. 197 F. 2d 719. This Court granted certiorari. 345 U. S. 902. *Affirmed,* p. 55.

*Abner H. Silverman* argued the cause for petitioner in No. 5 on the original argument, and *Emanuel Butter* on

the reargument. With them on the briefs was *Herbert S. Thatcher.*

*Bernard Dunau* argued the cause for the National Labor Relations Board. With him on the briefs on the original argument were *Walter J. Cummings, Jr.,* then Solicitor General, *George J. Bott, David P. Findling, Mozart G. Ratner, Elizabeth W. Weston* and *Louis Schwartz* in Nos. 5 and 6, and *Acting Solicitor General Stern, Mr. Bott, Mr. Findling, Dominick L. Manoli* and *Frederick U. Reel* in No. 7. With him on the briefs on the reargument were *Acting Solicitor General Stern, Mr. Bott, Mr. Findling* and *Mr. Manoli.*

*Julius Kass* argued the cause and filed the briefs for petitioner in No. 7.

*John J. Manning* argued the cause for respondents in No. 6. With him on the brief was *Clif Langsdale.*

*Stephen C. Vladeck* filed a brief for the Newspaper and Mail Deliverers' Union of New York and Vicinity, as *amicus curiae.*

Mr. Justice Reed delivered the opinion of the Court.

The necessity for resolution of conflicting interpretations by Courts of Appeals of § 8 (a)(3) of the National Labor Relations Act, as amended, 61 Stat. 136, 65 Stat. 601, 29 U. S. C. (Supp. V) § 158 (a)(3), impelled us to grant certiorari in these three cases. That section provides that "it shall be an unfair labor practice for an employer . . . by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: . . . ."[1] The Court of Appeals for

[1] "Sec. 8. (a) It shall be an unfair labor practice for an employer—

. . . . . .

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in

the Eighth Circuit in No. 6 (hereinafter referred to as *Teamsters*),[2] following a decision of the Third Cir-

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this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made [; and (ii) if, following the most recent election held as provided in section 9 (e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement:] *and has at the time the agreement was made or within the preceding twelve months received from the Board a notice of compliance with sections 9 (f), (g), (h), and (ii) unless following an election held as provided in section 9 (e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership; . . . ."

Section 8 (a) (3) was enacted as part of the Taft-Hartley Act, 61 Stat. 136, in 1947, and amended in 1951, 65 Stat. 601. Provisions added by the 1951 amendment are in italics; provisions eliminated in 1951 are in brackets. This section derived from § 8 (3) of the 1935 Wagner Act, 49 Stat. 452, 29 U. S. C. § 158 (3), with the proviso amended. See note 42, *infra*.

[2] *Labor Board* v. *International Brotherhood of Teamsters*, 196 F. 2d 1, certiorari granted, 344 U. S. 853. See also *Labor Board* v. *Del E. Webb Construction Co.*, 196 F. 2d 702.

cuit,[3] held that express proof that employer discrimination had the effect of encouraging or discouraging employees in their attitude toward union membership is an essential element to establish violation of this section. That holding conflicts with the holdings of the Second Circuit in No. 5 (hereinafter referred to as *Radio Officers*)[4] and No. 7 (hereinafter referred to as *Gaynor*),[5] with which decisions of the First[6] and Ninth Circuits[7] accord, that such employee encouragement or discouragement may be inferred from the nature of the discrimination. (See Part III, p. 48, *infra.*) In reaching its decision in *Gaynor,* the Second Circuit also rejected the contention, which contention is supported by many decisions of the Courts of Appeals,[8] that there can be no violation of § 8 (a)(3) unless it is shown by specific evidence that the employer intended his discriminatory action to encourage or discourage union membership. The Second Circuit determined that the employer intended the natural result of his discriminatory action. (See Part II, p. 42, *infra.*) Moreover, *Radio Officers* and *Teamsters* present conflicting views by Courts of Appeals as to the scope of the phrase "membership in any labor organization" in § 8 (a)(3). The Eighth Circuit restricts this phrase to "adhesion to membership," *i. e.,* joining or remaining on

[3] *Labor Board* v. *Reliable Newspaper Delivery, Inc.,* 187 F. 2d 547. See also *Western Cartridge Co.* v. *Labor Board,* 139 F. 2d 855.

[4] *Radio Officers' Union* v. *Labor Board,* 196 F. 2d 960, certiorari granted, 344 U. S. 852.

[5] *Labor Board* v. *Gaynor News Co., Inc.,* 197 F. 2d 719, certiorari granted, 345 U. S. 902. But cf. *Labor Board* v. *Air Associates, Inc.,* 121 F. 2d 586.

[6] *Labor Board* v. *Whitin Machine Works,* 204 F. 2d 883.

[7] *Labor Board* v. *Walt Disney Productions,* 146 F. 2d 44.

[8] See, *e. g., Labor Board* v. *Reliable Newspaper Delivery, Inc.,* 187 F. 2d 547; *Wells, Inc.* v. *Labor Board,* 162 F. 2d 457; *Labor Board* v. *Reynolds International P. Co.,* 162 F. 2d 680; *Labor Board* v. *Draper Corp.,* 145 F. 2d 199; *Labor Board* v. *Air Associates, Inc.,* 121 F. 2d 586.

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a union's membership roster; the Second Circuit, on the other hand, interprets it to include obligations of membership, *i. e.*, being a good union member.[9] (See Part I, p. 39, *infra*.) *Radio Officers* also raises subsidiary questions regarding the interrelationship of § 8 (a)(3) with § 8 (b)(2) of the Act which makes it an unfair labor practice for a labor organization or its agents "to cause or attempt to cause an employer to discriminate against an employee in violation of subsection [8] (a)(3) . . ."[10] (See Part IV, p. 52, *infra*.) These cases were argued last term, and, upon our order,[11] reargued this term. They reached us in the following manner.[12]

*Teamsters.* Upon the basis of a charge filed by Frank Boston, a truck driver employed by Byers Transportation Company and a member of Local Union No. 41, International Brotherhood of Teamsters, A. F. L., the General Counsel of the National Labor Relations Board issued a complaint against the union alleging violation

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[9] See also *Union Starch & Refining Co.* v. *Labor Board,* 186 F. 2d 1008; *Colonie Fibre Co.* v. *Labor Board,* 163 F. 2d 65; *Labor Board* v. *Walt Disney Productions,* 146 F. 2d 44; *Sperry Gyroscope Co., Inc.* v. *Labor Board,* 129 F. 2d 922; *Firestone Tire & Rubber Co.,* 93 N. L. R. B. 981.

[10] 29 U. S. C. (Supp. V) § 158 (b)(2):

"(b) It shall be an unfair labor practice for a labor organization or its agents—

. . . . . .

"(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership; . . . ."

[11] 345 U. S. 962.

[12] Requisite engagement in commerce for purposes of the National Labor Relations Act is admitted in all three cases.

of §§ 8 (b)(1)(A) [13] and 8 (b)(2) of the National Labor Relations Act by causing the company to discriminate against Boston by reducing his seniority standing because of Boston's delinquency in paying his union dues. A hearing was had before a trial examiner, whose intermediate report was largely adopted by the Board [14] with one member dissenting.

The Board found that the union, as exclusive bargaining representative of the teamsters in the company's employ, had in 1949 negotiated a collective-bargaining agreement with the company which governed working conditions on all over-the-road operations of the company.[15] This agreement established a seniority system under which the union was to furnish periodically to the company a seniority list and provided that "any controversy over the seniority standing of any employee on this list shall be referred to the Union for settlement." Union security provisions of the agreement were not effective due to lack of the authorization then required by § 8 (a)(3) of the Act.[16] The seniority list therefore included both union members and nonmembers. Each

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[13] 29 U. S. C. (Supp. V) § 158 (b)(1)(A). This section makes it an unfair labor practice for a union "to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title." Section 157 provides: "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 except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158 (a)(3)."

[14] 94 N. L. R. B. 1494.

[15] This agreement, known as the "Central States Area Over-the-Road Agreement," has been executed with employers by more than 300 locals of the Teamsters Union in 12 different states.

[16] See the bracketed language in note 1, *supra*.

new employee of the company, after a thirty-day trial period, was placed at the bottom of this list, and such employee would gradually advance in position as senior members were either removed from the list or reduced in their position on it. Position upon the seniority list governed the order of truck-driving assignments, the quality of such assignments, and the order of layoff.

The bylaws of Teamsters Local Union No. 41 provided that "any member, under contract, one month in arrears for dues shall forfeit all seniority rights. . . ." [17] A member's dues were payable on the first day of each month, and he was deemed "in arrears" for any month's dues on the second day of the following month. Boston did not pay his dues for June 1950 until July 5, 1950. When the union transmitted a new seniority list to the company on the following July 15, Boston, who had previously been eighteenth on the list, was reduced to fifty-fourth, the bottom position on the list. As a result of such reduction Boston was denied driving assignments he would otherwise have obtained and for which he would have received compensation.

Upon these facts a majority of the Board found that the union had violated §§ 8 (b)(1)(A) and 8 (b)(2) of the Act. As to the former, the Board held that the union's reduction of Boston's seniority restrained and coerced him in the exercise of his right to refrain from assisting a labor organization guaranteed by § 7.[18] The Board held that, "absent a valid contractual union-security provision, Boston had the absolute protected right under the Act to determine how he would handle his union affairs without risking any impairment of his em-

[17] "SEC. 45. Any member, under contract, one month in arrears for dues shall forfeit all seniority rights.

"(a) Clarification of the above paragraph: On the second day of the second month a member becomes in arrears with his dues."

[18] See note 13, *supra*.

ployment rights and that the Union had no right at any time whether Boston was a member or not a member to make his employment status to any degree conditional upon the payment of dues . . . ." As to the latter, the Board concluded that the union had caused the company to discriminate against Boston and adopted the Trial Examiner's finding that "the normal effect of the discrimination against Boston was to encourage nonmembers to join the Union, as well as members to retain their good standing in the Union, a potent organization whose assistance is to be sought and whose opposition is to be avoided. The Employer's conduct tended to encourage membership in the Union.[19] Its discrimination against Boston had the further effect of enforcing rules prescribed by the Union, thereby strengthening the Union in its control over its members and its dealings with their employers and was thus calculated to encourage all members to retain their membership and good standing either through fear of the consequences of losing membership or seniority privileges or through hope of advantage in staying in. . . ."

The Board entered an order requiring the union to cease and desist from the unfair labor practices found and from related conduct; to notify Boston and the company that the union withdraws its request for the reduction of Boston's seniority and that it requests the company to offer to restore Boston to his former status; to make Boston whole for any losses of pay resulting from the discrimination; and to post appropriate notices of compliance.

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[19] (Trial Examiner's Footnote.) "If, as Respondent appears to suggest, its conduct discouraged membership in a labor organization, it could be argued that from the plain meaning of Section 8 (a) (3), a union would equally violate the Act by causing an employer to discriminate against an employee in order to rid itself of slow-paying or otherwise recalcitrant members."

The Court of Appeals for the Eighth Circuit denied the Board's petition to enforce its order.[20] The court held that "the evidence here abundantly supports the finding of the Board that the respondent caused or attempted to cause the employer to discriminate against Boston in regard to 'tenure . . . or condition of employment,' " but "discrimination alone is not sufficient" and "we can find no substantial evidence to support the conclusion that the discrimination . . . did or would encourage or discourage membership in any labor organization." This conclusion was reached because "the testimony of Boston . . . shows clearly that this act neither encouraged nor discouraged his adhesion to membership in the respondent union" [21] and because, assuming the effect of the discrimination on other employees was relevant, the court found no evidence to support a conclusion that such employees were so encouraged or discouraged. We granted the Board's petition for certiorari.[22]

*Radio Officers.* Upon the basis of a charge filed by William Christian Fowler, a member of The Radio Officers' Union of the Commercial Telegraphers Union, A. F. L., the General Counsel of the National Labor Relations Board issued a complaint against the union alleging violation of §§ 8 (b)(1)(A) and 8 (b)(2) of the Act by causing the A. H. Bull Steamship Company to discriminatorily refuse on two occasions to employ Fowler. No complaint was issued against the company because

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[20] 196 F. 2d 1.

[21] In this connection, the court pointed out that Boston was a member of the union prior to the discrimination and retained his status as a member thereafter, and that Boston had testified that the discrimination neither encouraged nor discouraged him to remain in the union.

[22] 344 U. S. 853.

Fowler filed no charge against it. Following the usual proceedings under the Act, a hearing was had before a trial examiner, whose findings, conclusions, and recommendations with certain additions were adopted by the Board.[23]

The Board found that at the time the transactions giving rise to this case occurred the union had a collective-bargaining contract with a number of steamship concerns including the Bull Steamship Company covering the employment of radio officers on ships of the contracting companies. Pertinent provisions in this contract are:

> "Section 1. The Company agrees when vacancies occur necessitating the employment of Radio Officers, to select such Radio Officers who are members of the Union in good standing, when available, on vessels covered by this Agreement, provided such members are in the opinion of the Company qualified to fill such vacancies."
>
> "Section 6. The Company shall have the right of free selection of all its Radio Officers and when members of the Union are transferred, promoted, or hired the Company agrees to take appropriate measures to assure that such members are in good standing, and the Union agrees to grant all members of the Union in good standing the necessary 'clearance' for the position to which the Radio Officer has been assigned. If a member is not in good standing, the Union will so notify the Company in writing."

The union's contention that this contract provided for a hiring hall under which complete control over selection of radio officers to be hired by any company was given to the union was rejected by the Trial Examiner and by a majority of the Board. Such an agreement would have

[23] 93 N. L. R. B. 1523.

legalized the actions of the union in this case.[24] But the Board concluded, primarily from the last sentence of § 6 of the contract, that the contract "was clear on its face and did not provide for any hiring hall arrangement" and that it therefore was not improper for the Trial Examiner to exclude evidence that general, although not universal, practice had been for radio officers to be assigned to employers by the union.

The Board also found that: On February 24, 1948, the company telegraphed an offer of a job as radio officer on the company's ship S. S. *Frances* to Fowler, who had often previously been employed by the company; Fowler had notified the company that he would accept the job; the company then informed Kozel, the radio officer on the previous voyage of the ship, that he was being replaced by "a man with senior service in the company"; Fowler reported to the *Frances* without seeking clearance from the union and Kozel reported such action to the union; the union secretary wired Fowler that he had been suspended from membership for "bumping" another member and taking a job without clearance and notified the company that Fowler was not in good standing in the union; the union secretary had no authority to effect such a suspension, the suspension was void and Fowler was in good standing in the union at all times material in this case; [25] express requests to the union for clearance

[24] Such an agreement was permissible under § 8 (3) of the National Labor Relations Act, 49 Stat. 449, 29 U. S. C. § 158 (3). The agreement in this case was signed on January 11, 1947, and was extended for a period of one year on August 16, 1947. Under § 102 of the 1947 amendments to the National Labor Relations Act, 61 Stat. 152, acts performed under such agreement which would not have been unfair labor practices under § 8 (3) were not unfair practices under the amended Act.

[25] The Board found that the union secretary's "hasty attempt to suspend" Fowler was "in disregard of Fowler's rights under the union bylaws and constitution. . . . in no event could Howe's authority

of Fowler for employment on the *Frances* by the company and by Fowler were subsequently refused, the union secretary stating that he would never again clear Fowler for a position with that company although Fowler would be cleared for jobs with other employers; unable to obtain clearance for Fowler, the company gave the job to another man supplied by the union, and Fowler returned to his home in Florida; on April 22, 1948, Fowler returned to New York and again advised the company that he was available for work before reporting to the union; the union secretary told Fowler he was being made "a company stiff" and adhered to his position that he would not clear Fowler for work with that company; clearance sought by the company for Fowler for a job on the S. S. *Evelyn* was subsequently refused, and another man was dispatched to the job by the union.

Upon these facts a majority of the Board found that the union had violated §§ 8 (b)(1)(A) and 8 (b)(2). The Board rejected the union's defense that the union security provision of the contract, preferential hiring for members in good standing, immunized the union's action. They found that Fowler was in good standing at all times notwithstanding his suspension by the union secretary, and that conformity with the union's hiring-hall rules and procedures was not also required by the contract. Thus the Board concluded that the union, by refusing to clear Fowler in both February and April, restrained and coerced Fowler in his statutory right to refrain from observance of the union's rules, and caused the company to discriminate against Fowler by denying him employ-

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exceed that of the general chairman, who in all instances was required by specific provisions of the bylaws to advise Fowler of his offense and to afford him an opportunity to conform with union rules before suspending him. It is clear that Fowler was not given such opportunity; his purported suspension was therefore ineffectual. . . ."

The power of the Board to make this finding is not challenged here.

ment. The Board adopted the Trial Examiner's finding that "the normal effect of the discrimination against Fowler was to enforce not only his obedience as a member, of such rules as the Respondent might prescribe, but also the obedience of all his fellow members. It thereby strengthened the Respondent both in its control of its members for their general, mutual advantage, and in its dealings with their employers as their representative. It thus encouraged non-members to join it as a strong organization whose favor and help was to be sought and whose opposition was to be avoided. In its effect upon nonmembers alone, it must therefore be regarded as encouraging membership in the Respondent. Finally, by its demonstration of the Respondent's strength, the discrimination in the present case also had the normal effect of encouraging Fowler and other members to retain their membership in the Respondent either through fear of the consequences of dropping out of membership or through hope of advantage in staying in."

The Board entered an order requiring the union to cease and desist from the unfair labor practices found and from related conduct; to notify Fowler and the company that it withdraws objection to his employment and requests the company to offer him employment as a radio officer; to make Fowler whole for any losses of pay resulting from the discrimination, and to post appropriate notices of compliance.

The Court of Appeals for the Second Circuit affirmed the Board's findings and conclusions and granted the Board's petition for enforcement of its order.[26] The court agreed that the provisions of the contract "plainly give the company the right to select the man it desires to hire, and require the union to grant 'clearance' if the man

[26] 196 F. 2d 960.

the company wants is a member in good standing," that "such procedure is not a 'hiring hall' arrangement," [27] and that Fowler was in good standing at the time of refusal of clearance. It rejected the union's contention that its refusal to clear was merely a statement of views concerning breach of its rules and as such was within the protection of § 8 (c).[28] We agree that, viewing the record as a whole, each of these findings is supported by substantial evidence. *International Brotherhood of Electrical Workers* v. *Labor Board,* 341 U. S. 694; *Universal Camera Corp.* v. *Labor Board,* 340 U. S. 474. As to §§ 8 (b)(2) and 8 (a)(3), the court held that "refusal of clearance caused the company to discriminate against Fowler in regard to hire. Without the necessary clearance it could not accept him as an employee. The result was to encourage membership in the union. No threats or promises to the company were necessary. . . . Whether the union's motive was, as it argues, to enforce the contract provisions against discharging satisfactory radio officers such as Kozel, is immaterial . . . . Such conduct displayed to all non-members the union's power and the strong measure it was prepared to take to protect union members. . . ." The court also held that "a finding that the union has violated § 8 (b)(2) can be made without joining the employer and finding a § 8 (a)(3) violation," and that it was proper to enter a back-pay order against the union without ordering reinstatement by the employer. We granted the union's petition for certiorari.[29]

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[27] Judge Clark dissented as to this interpretation of the contract.

[28] Section 8 (c) provides: "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 subchapter, if such expression contains no threat of reprisal or force or promise of benefit." 29 U. S. C. (Supp. V) § 158 (c).

[29] 344 U. S. 852.

*Gaynor.* Upon the basis of charges filed by Sheldon Loner, a nonunion employee of Gaynor News Company, the General Counsel of the Board issued a complaint against the company alleging *inter alia* violation of §§ 8 (a)(1), (2) and (3) [30] of the Act by granting retroactive wage increases and vacation payments to employees who were members of the Newspaper and Mail Deliverers' Union of New York and Vicinity and refusing such benefits to other employees because they were not union members. The Board adopted the findings, conclusions and recommendations of the Trial Examiner with certain additions.[31]

The Board found that in 1946 the company, engaged in the wholesale distribution and delivery of newspapers

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[30] Section 8 (a)(1) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title" and § 8 (a)(2) makes it an unfair practice for an employer "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it . . . ."

The original charge filed on February 3, 1949, alleged violation only of §§ 8 (a)(1) and (3) by the above action relative to Loner between July and October 1948. This charge was amended on June 13, 1950, to allege violation of §§ 8 (a)(1) and (2) by executing the October 1948 contract with the illegal union security clause. The complaint issued by the General Counsel on the same day contained all of these allegations and alleged that the discriminatory treatment extended to all nonunion employees. The company contends that inclusion of such employees who did not file charges is prohibited by the six-month statute of limitations period provided in § 10 (b) of the Act. We agree with the Trial Examiner, the Board, and the court below that this charge relates back to the charges timely filed and thus the company was given adequate notice and was not prejudiced by the amendment. *Labor Board* v. *Kobritz*, 193 F. 2d 8, 14; *Labor Board* v. *Bradley Washfountain Co.*, 192 F. 2d 144, 149; *Labor Board* v. *Kingston Cake Co.*, 191 F. 2d 563, 567; cf. *Consolidated Edison Co.* v. *Labor Board*, 305 U. S. 197, 225, 238.

[31] 93 N. L. R. B. 299.

and periodicals, entered into a collective-bargaining agreement respecting delivery-department employees with the union. This agreement provided for specified wages and paid vacations, and also provided for a closed shop, *i. e.*, restricting employment by the company to members of the union. The agreement, however, permitted the employment by the company of nonunion employees pending such time as the union could supply union employees. This provision was necessary because the union was closed, ordinarily admitting to membership only first-born legitimate sons of members. The company at all pertinent times had nonunion as well as union employees in its delivery department. This original agreement was subsequently extended to 1948 and a supplementary agreement was executed by the parties in 1947 providing that in the event the parties negotiated a new contract, the wage rates set therein would be retroactive for three months. In October 1948 the company and the union entered into such a new contract which included an invalid union-security clause [32] and provided for increased wage and vacation benefits. In this agreement the company expressly recognized the union as exclusive bargaining agent of all employees in the delivery department. In compliance with the 1947 supplementary agreement, the company in November 1948 made lump-sum payments to its union employees of the differential between the old and new wage rates for the three months' retroactive period. Further payments were subsequently made to union members to compensate for differences in vacation benefits under the two contracts even though the supplementary agreement made no reference to such benefits. The company refused to make similar pay-

[32] This clause requiring all new employees to become union members within thirty days was not authorized as then required by § 8 (a)(3). See the bracketed language of note 1, *supra*.

ments to any of its nonunion employees on the grounds that it was not contractually bound to do so,[33] and, in its business judgment, did not choose to do so.

The Board concluded that, since nothing in the supplementary agreement prohibited equal payment to nonunion employees, "the contract affords no defense to the allegation that the Respondent unlawfully engaged in disparate treatment of employees on the basis of union membership or lack of it . . . ," [34] and held that the company had violated the Act as alleged. The company's arguments that its actions had not violated § 8 (a)(3) because "the record is barren of any evidence that the discriminatory treatment of non-union employes encouraged them to join the union" or had such purpose, and that there could be no such evidence because all the nonunion employees had previously sought membership in the union and been denied because of the union's closed policy, were rejected. The Board adopted the Trial Examiner's finding that "it is obvious that the discrimination with respect to retroactive wages and vacation benefits had

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[33] The 1946 contract stated that the union was contracting "for and in behalf of the Union and for and in behalf of the members thereof now employed and hereafter to be employed by the Employer." The president of the company testified before the Trial Examiner that he believed the 1946 contract and the supplementary agreement applied to union members only.

[34] The Board rejected the company's contention that since the closed-shop provision in the 1946 contract was valid under § 8 (3), see note 24, *supra*, and it thus could have legally discharged the nonunion employees during the life of that contract, it could legally retain such employees and contract to discriminate as to their wages.

The Board found, however, that the "evidence indicates that the Respondent had contracted to make retroactive wage payments to the employees covered by the original contract . . . ." The Board also adopted the Trial Examiner's finding that, regardless of the status of the wage payment, the retroactive vacation payments were entirely voluntary.

the natural and probable effect not only of encouraging nonunion employees to join the Union, but also of encouraging union employees to retain their union membership." We assume this concedes that the employer acted from self-interest and not to encourage unionism. An order was entered requiring the company to cease and desist from the unfair labor practices found and from related conduct; to make whole Loner and all other nonunion employees similarly situated for any loss of pay they have suffered by reason of the company's discrimination against them; and to post appropriate notices of compliance.

The Court of Appeals for the Second Circuit, upon the Board's petition, granted enforcement of all parts of the order pertinent here.[35] On the issue of the legality of the discrimination, the court distinguished *Labor Board* v. *Reliable Newspaper Delivery, Inc.*, 187 F. 2d 547, involving actions closely paralleling the company's here by another company dealing with the same union, stating, "there discrimination resulted from what the court considered the entirely legal action of the minority union in asking special benefits for its members only. The union made no pretense of representing the majority of employees or of being the exclusive bargaining agent in the plant. The other non-union employees, reasoned the Court, were quite able to elect their own representative and ask for similar benefits. Not so here. The union here represented the majority of employees and was the exclusive bargaining agent for the plant. Accordingly, it could

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[35] 197 F. 2d 719. The court modified parts of the order concerning the illegality of the 1948 contract. Judge Chase dissented as to such modification.

In its brief the company seeks to raise the issue of the illegality of that contract. This question was not presented in the petition for certiorari and is, therefore, not properly before the Court. *General Talking Pictures Corp.* v. *Western Elec. Co.*, 304 U. S. 175.

not betray the trust of non-union members, by bargaining for special benefits to union-members only, thus leaving the non-union members with no means of equalizing the situation." 197 F. 2d, at 722. The court continued, in answer to the company's contention that its action "had neither the purpose nor the effect required by § 8 (a)(3)": "discriminatory conduct, such as that practiced here, is inherently conducive to increased union membership. In this respect, there can be little doubt that it 'encourages' union membership, by increasing the number of workers who would like to join and/or their quantum of desire. It may well be that the union, for reasons of its own, does not want new members at the time of the employer's violations and will reject all applicants. But the fact remains that these rejected applicants have been, and will continue to be, 'encouraged,' by the discriminatory benefits, in their desire for membership. This backlog of desire may well, as the Board argues, result in action by non-members to 'seek to break down membership barriers by any one of a number of steps, ranging from bribery to legal action.' A union's internal politics are by no means static; changes in union entrance rules may come at any time. If and when the barriers are let down, among the new and now successful applicants will almost surely be large groups of workers previously 'encouraged' by the employer's illegal discrimination. We do not believe that, if the union-encouraging effect of discriminatory treatment is not felt immediately, the employer must be allowed to escape altogether. If there is a reasonable likelihood that the effects may be felt years later, then a reasonable interpretation of the Act demands that the employer be deemed a violator." 197 F. 2d, at 722–723. We granted the company's petition for certiorari.[36]

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[36] 345 U. S. 902.

## I. Meaning of "Membership."

The language employed by Congress in enacting the heart of § 8 (a)(3) is identical with that of the predecessor section in the Wagner Act, § 8 (3): "By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . ." 49 Stat. 452. These are the first cases to reach us involving application of this section or its predecessor to the problem of encouragement of union membership by employers. We have on many occasions considered aspects of the application of these sections to actions by employers aimed at discouragement of union membership.[37] The principles invoked in those cases are, of course, equally applicable to both aspects of employer discrimination, but most of the issues of statutory construction raised here have not previously been considered by this Court.

In past cases we have been called upon to clarify the terms "discrimination" and "membership in any labor organization." Discrimination is not contested in these cases: involuntary reduction of seniority, refusal to hire for an available job, and disparate wage treatment are clearly discriminatory. But the scope of the phrase "membership in any labor organization" is in issue here. Subject to limitations,[38] we have held that phrase to in-

[37] See, *e. g.*, *Labor Board* v. *Gullett Gin Co., Inc.*, 340 U. S. 361; *Universal Camera Corp.* v. *Labor Board*, 340 U. S. 474; *Phelps Dodge Corp.* v. *Labor Board*, 313 U. S. 177; *Republic Steel Corp.* v. *Labor Board*, 311 U. S. 7; *Labor Board* v. *Sands Mfg. Co.*, 306 U. S. 332; *Labor Board* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240; *Labor Board* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333; *Labor Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1.

[38] *Labor Board* v. *Fansteel Metallurgical Corp., supra; Labor Board* v. *Sands Mfg. Co., supra; Southern Steamship Co.* v. *Labor Board*, 316 U. S. 31. Cf. *Labor Board* v. *Electrical Workers*, 346 U. S. 464.

clude discrimination to discourage participation in union activities as well as to discourage adhesion to union membership.[39]

Similar principles govern the interpretation of union membership where encouragement is alleged. The policy of the Act is to insulate employees' jobs from their organizational rights.[40] Thus §§ 8 (a)(3) and 8 (b)(2) were designed to allow employees to freely exercise their right to join unions, be good, bad, or indifferent members, or abstain from joining any union without imperiling their livelihood. The only limitation Congress has chosen to impose on this right is specified in the proviso to § 8 (a)(3) which authorizes employers to enter into certain union security contracts, but prohibits discharge under such contracts if membership "was not available to the employee on the same terms and conditions generally applicable to other members" or if "membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership." [41] Lengthy legislative debate preceded the 1947 amendment to the Act which thus limited

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[39] *Associated Press* v. *Labor Board*, 301 U. S. 103. Cf. *Labor Board* v. *Kennametal, Inc.*, 182 F. 2d 817; *Labor Board* v. *Peter Cailler Kohler Swiss Chocolates Co.*, 130 F. 2d 503.

[40] See § 7, 29 U. S. C. (Supp. V) § 157, note 13, *supra*.

[41] The full text of the proviso to § 8 (a)(3) is set out in note 1, *supra*. That Congress intended § 8 (a)(3) to proscribe all discrimination to encourage union membership not excepted by the proviso, see H. Conf. Rep. No. 510, 80th Cong., 1st Sess. 44, where it is stated that § 8 (a)(3) "prohibits an employer from discriminating against an employee by reason of his membership or nonmembership in a labor organization, except to the extent that he obligates himself to do so under the terms of a permitted union shop or maintenance of membership contract."

permissible employer discrimination.[42] This legislative history clearly indicates that Congress intended to prevent utilization of union security agreements for any purpose other than to compel payment of union dues and fees. Thus Congress recognized the validity of unions' concern about "free riders," *i. e.*, employees who receive the benefits of union representation but are unwilling to contribute their share of financial support to such union, and gave unions the power to contract to meet that problem while withholding from unions the power to cause the discharge of employees for any other reason.[43] Thus an employer can discharge an employee for nonmembership in a union if the employer has entered a union security contract valid under the Act with such union, and if the other requirements of the proviso are met. No other

[42] Under the Wagner Act the proviso read: "*Provided,* That nothing in sections 151–166 of this title or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in said sections as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 159 (a) of this title, in the appropriate collective bargaining unit covered by such agreement when made." 29 U. S. C. (1946 ed.) § 158 (3). See *Colgate-Palmolive-Peet Co.* v. *Labor Board,* 338 U. S. 355.

[43] For example, Senator Taft said: "It is contended that the employer should be obliged to discharge the man because the union does not like him. That is what we are trying to prevent. I do not see why a union should have such power over a man in that situation." 93 Cong. Rec. 4191.

In H. R. Rep. No. 245, 80th Cong., 1st Sess., p. 33, it was stated that "The bill prohibits what is commonly known as the closed shop, or any form of compulsory unionism that requires a person to be a member of a union in good standing when the employer hires him."

See also 93 Cong. Rec. 4135, 4193, 4272, 4275, 4432; S. Rep. No. 105, 80th Cong., 1st Sess. 6 *et seq.;* H. R. 3020, 80th Cong., 1st Sess. 27–28; H. Conf. Rep. No. 510, 80th Cong., 1st Sess. 41.

discrimination aimed at encouraging employees to join, retain membership, or stay in good standing in a union is condoned.[44]

From the foregoing it is clear that the Eighth Circuit too restrictively interpreted the term "membership" in *Teamsters*. Boston was discriminated against by his employer because he was delinquent in a union obligation. Thus he was denied employment to which he was otherwise entitled, for no reason other than his tardy payment of union dues. The union caused this discrimination by applying a rule apparently aimed at encouraging prompt payment of dues. The union's action was not sanctioned by a valid union security contract, and, in any event, the union did not choose to terminate Boston's membership for his delinquency. Thus the union by requesting such discrimination, and the employer by submitting to such an illegal request, deprived Boston of the right guaranteed by the Act to join in or abstain from union activities without thereby affecting his job. *A fortiori* the Second Circuit correctly concluded in *Radio Officers* that such encouragement to remain in good standing in a union is proscribed. Thus that union in causing the employer to discriminate against Fowler by denying him employment in order to coerce Fowler into following the union's desired hiring practices deprived Fowler of a protected right.

II. A.—Necessity for Proving Employer's Motive.

The language of § 8 (a)(3) is not ambiguous. The unfair labor practice is for an employer to encourage or discourage membership by means of discrimination. Thus this section does not outlaw all encouragement or discouragement of membership in labor organizations; only

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[44] See *Labor Board* v. *Eclipse Lumber Co.*, 199 F. 2d 684; *Union Starch & Refining Co.* v. *Labor Board*, 186 F. 2d 1008.

such as is accomplished by discrimination is prohibited. Nor does this section outlaw discrimination in employment as such; only such discrimination as encourages or discourages membership in a labor organization is proscribed.

The relevance of the motivation of the employer in such discrimination has been consistently recognized under both § 8 (a)(3) and its predecessor. In the first case to reach the Court under the National Labor Relations Act, *Labor Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, in which we upheld the constitutionality of § 8 (3), we said with respect to limitations placed upon employers' right to discharge by that section that "the [employer's] true purpose is the subject of investigation with full opportunity to show the facts." *Id.*, at 46. In another case the same day we found the employer's "real motive" to be decisive and stated that "the act permits a discharge for any reason other than union activity or agitation for collective bargaining with employees." [45] Courts of Appeals have uniformly applied this criteria,[46] and writers in the field of labor law emphasize the importance of the employer's motivation to a finding of violation of this section.[47] Moreover, the National Labor Relations Board in its annual reports regularly reiterates this requirement in its discussion of § 8 (a)(3). For example, a recent report states that "upon scrutiny of all the facts in a particular case, the Board must determine whether or not the employer's treatment of the employee was

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[45] *Associated Press* v. *Labor Board*, 301 U. S. 103, 132.

[46] See cases cited, note 8, *supra*.

[47] *E. g.*, Manoff, Labor Relations Law, 82; CCH, Guidebook to Labor Relations Law, 142; Wollett, Labor Relations and Federal Law, 62; Millis & Brown, From the Wagner Act to Taft-Hartley, 428; Cox, Some Aspects of the Labor Management Relations Act, 1947, 61 Harv. L. Rev. 1, 20; Ward, "Discrimination" Under the National Labor Relations Act, 48 Yale L. J. 1152, 1158.

motivated by a desire to encourage or discourage union membership or other activities protected by the statute." [48]

That Congress intended the employer's purpose in discriminating to be controlling is clear. The Senate Report on the Wagner Act said: "Of course nothing in the bill prevents an employer from discharging a man for incompetence; from advancing him for special aptitude; or from demoting him for failure to perform." [49] Senator Wagner spoke of § 8 (3) as reaching "those very cases where the employer is strong enough to impress his will without the aid of the law." [50] With this consistent interpretation of that section before it, Congress, as noted above, chose to retain the identical language in its 1947 amendments. No suggestion is found in either the reports or hearings on those amendments that the section had been too narrowly construed, and the House Conference Report states that § 8 (a)(3) "prohibits an employer from discriminating against an employee by reason of his membership or nonmembership in a labor organization, except to the extent that he obligates himself to do so under the terms of a permitted union shop or maintenance of membership contract." [51]

### B.—Proof of Motive.

But it is also clear that specific evidence of intent to encourage or discourage is not an indispensable element of proof of violation of § 8 (a)(3). This fact was recognized in the House Report on the Wagner Act when it was stated that under § 8 (3) "agreements more favorable to the majority than to the minority are impossi-

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[48] N. L. R. B., 16th Annual Report 162.

[49] S. Rep. No. 573, 74th Cong., 1st Sess. 11.

[50] Hearings before the Senate Committee on Education and Labor on S. 1958, 74th Cong., 1st Sess. 38.

[51] H. Conf. Rep. No. 510, 80th Cong., 1st Sess. 44.

ble . . . ." [52] Both the Board and the courts have recognized that proof of certain types of discrimination satisfies the intent requirement.[53] This recognition that specific proof of intent is unnecessary where employer conduct inherently encourages or discourages union membership is but an application of the common-law rule that a man is held to intend the foreseeable consequences of his conduct. *Cramer* v. *United States,* 325 U. S. 1, 31; *Nash* v. *United States,* 229 U. S. 373, 376; *United States* v. *Patten,* 226 U. S. 525, 539; *Agnew* v. *United States,* 165 U. S. 36, 50. Thus an employer's protestation that he did not intend to encourage or discourage must be unavailing where a natural consequence of his action was such encouragement or discouragement. Concluding that encouragement or discouragement will result, it is presumed that he intended such consequence. In such circumstances intent to encourage is sufficiently established. Our decision in *Republic Aviation Corp.* v. *Labor Board,* 324 U. S. 793, relied upon by the Board to support its contention that employers' motives are irrelevant under § 8 (a)(3), applied this principle. That decision dealt primarily with the right of the Board to infer discouragement from facts proven for purposes of proof of violation of § 8 (3). In holding that discharges and suspensions of employees under company "no solicitation" rules for soliciting union membership, in the circumstances disclosed, violated § 8 (3), we noted that such employer action was not "motivated by opposition to the particular union or, we deduce, to unionism" and that "there was no union bias or discrimination by the company in enforcing the rule."

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[52] H. R. Rep. No. 1147, 74th Cong., 1st Sess. 21; see also Ward, note 47, *supra,* at 1166.

[53] See, *e. g., Labor Board* v. *Industrial Cotton Mills,* 208 F. 2d 87; *Cusano* v. *Labor Board,* 190 F. 2d 898; *Allis-Chalmers Mfg. Co.,* 70 N. L. R. B. 348, enforced, 162 F. 2d 435; *Labor Board* v. *Gluek Brewing Co.,* 144 F. 2d 847.

But we affirmed the Board's holding that the rules involved were invalid when applied to union solicitation since they interfered with the employees' right to organize. Since the rules were no defense and the employers intended to discriminate solely on the ground of such protected union activity, it did not matter that they did not intend to discourage membership since such was a foreseeable result.

In *Gaynor,* the Second Circuit also properly applied this principle. The court there held that disparate wage treatment of employees based solely on union membership status is "inherently conducive to increased union membership." In holding that a natural consequence of discrimination, based solely on union membership or lack thereof, is discouragement or encouragement of membership in such union, the court merely recognized a fact of common experience—that the desire of employees to unionize is directly proportional to the advantages thought to be obtained from such action. No more striking example of discrimination so foreseeably causing employee response as to obviate the need for any other proof of intent is apparent than the payment of different wages to union employees doing a job than to nonunion employees doing the same job. As noted above, the House Report on § 8 (3) of the Wagner Act emphasized that such disparate treatment was impossible under the Act.

In *Gaynor* it was conceded that the sole criterion for extra payments was union membership, and the vacation payments were admittedly gratuitous. The wage differential payments, on the other hand, were based upon the 1947 supplementary agreement which the company below contended was negotiated solely in behalf of union members. However, the court below held that the union was exclusive bargaining agent for both union and nonunion employees. The company has not challenged this

holding, asserting only that, even though the union represented all employees, the company's only liability to the nonunion employees can be for breach of contract.

The union's representative status obviously does not effect the legality of the gratuitous payment. According to the reasoning of the Second Circuit, however, disparate payments based on contract are illegal only when the union, as bargaining agent for both union and nonunion employees, betrays its trust and obtains special benefits for the union members. That court considered such action unfair because such employees are not in a position to protect their own interests. Thus, it reasoned, if a union bargains only for its own members, it is legal for such union to cause an employer to give, and for such employer to give, special benefits to the members of the union for if nonmembers are aggrieved they are free to bargain for similar benefits for themselves.

We express no opinion as to the legality of disparate payments where the union is not exclusive bargaining agent, since that case is not before us. We do hold that in the circumstances of this case, the union being exclusive bargaining agent for both member and nonmember employees, the employer could not, without violating § 8 (a)(3), discriminate in wages solely on the basis of such membership even though it had executed a contract with the union prescribing such action. Statements throughout the legislative history of the National Labor Relations Act emphasize that exclusive bargaining agents are powerless "to make agreements more favorable to the majority than to the minority." [54] Such discriminatory contracts are illegal and provide no defense to an action

[54] S. Rep. No. 573, 74th Cong., 1st Sess. 13. During a debate on the Act, Senator Wagner stated: "Under this proposed legislation, assuming an agreement has been consummated by the agency elected by the majority of the employees, there will be no advantage which a majority can have under an agreement to which the minority is

under § 8 (a)(3). See *Steele* v. *Louisville & Nashville R. Co.*, 323 U. S. 192; *Wallace Corp.* v. *Labor Board*, 323 U. S. 248; *J. I. Case Co.* v. *Labor Board*, 321 U. S. 332; *Order of Railroad Telegraphers* v. *Railway Express Agency*, 321 U. S. 342. Cf. *Ford Motor Co.* v. *Huffman*, 345 U. S. 330.

### III. Power of Board to Draw Inferences.

Petitioners in *Gaynor* and *Radio Officers* contend that the Board's orders in these cases should not have been enforced by the Second Circuit because the records do not include "independent proof that encouragement of Union membership actually occurred." The Eighth Circuit subscribed to this view that such independent proof is required in *Teamsters* when it denied enforcement of the Board's order in that proceeding on the ground that it was not supported by substantial evidence of encouragement. The Board argues that actual encouragement need not be proved but that a tendency to encourage is sufficient, and "such tendency is sufficiently established if its existence may reasonably be inferred from the character of the discrimination."

We considered this problem in the *Republic Aviation* case. To the contention that "there must be evidence before the Board to show that the rules and orders of the employers interfered with and discouraged union organization in the circumstances and situation of each company," we replied that the statutory plan for an adversary proceeding "does not go beyond the necessity for the production of evidential facts, however, and compel evidence as to the results which may flow from such facts. . . . An administrative agency with power after hearings to

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not also entitled, and in order to have that advantage the minority need not join any organization. It can join or not join, either way. It cannot be discriminated against under any other provision of the law." 79 Cong. Rec. 7673. See also note 52, *supra*.

determine on the evidence in adversary proceedings whether violations of statutory commands have occurred may infer within the limits of the inquiry from the proven facts such conclusions as reasonably may be based upon the facts proven. One of the purposes which lead to the creation of such boards is to have decisions based upon evidential facts under the particular statute made by experienced officials with an adequate appreciation of the complexities of the subject which is entrusted to their administration. . . ." 324 U. S., at 798, 800. See also *Labor Board* v. *Nevada Consolidated Copper Corp.*, 316 U. S. 105; *Labor Board* v. *Link-Belt Co.*, 311 U. S. 584. In these cases we but restated a rule familiar to the law and followed by all fact-finding tribunals—that it is permissible to draw on experience in factual inquiries.

It is argued, however, that these cases ceased to be good law under the Taft-Hartley amendments. The House Report on their version of § 10 of the amendments, in discussing "shocking injustices" resulting from limited court review of Board rulings, stated that "requiring the Board to rest its rulings upon facts, not interferences [*sic*], conjectures, background, imponderables, and presumed expertness will correct abuses under the act." [55] We do not read that statement nor statements in the House Conference Report, upon which petitioners rely to support their contention, to hold that the Board may not draw reasonable inferences from proven facts. The House Conference Report stated that, under the Wagner Act standard of review, courts had "abdicated" to the Board and "in many instances deference on the part of the courts to specialized knowledge that is supposed to inhere in administrative agencies has led the courts to acquiesce in decisions of the Board, even when the findings concerned mixed issues of law and of fact [citing

[55] H. R. Rep. No. 245, 80th Cong., 1st Sess. 41.

cases], or when they rested only on inferences that were not, in turn, supported by facts in the record [citing the *Republic Aviation* case]." [56] The report concluded that the amendment to § 10 (e), requiring Board findings to be "supported by substantial evidence on the record considered as a whole," "will be adequate to preclude such decisions as those in" *inter alia* the *Nevada Copper Corp.* and *Republic Aviation* cases.

In *Universal Camera Corp.* v. *Labor Board,* 340 U. S. 474, we carefully considered this legislative history and interpreted it to express dissatisfaction with too restricted application of the "substantial evidence" test of the Wagner Act. We noted, however, that sufficiency of evidence to support findings of fact was not involved in the *Republic Aviation* case, and stated that the amendment was not "intended to negative the function of the Labor Board as one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect." There is nothing in the language of the amendment itself that suggests denial to the Board of power to draw reasonable inferences. It is inconceivable that the authors of the reports intended such a result, for a fact-finding body must have some power to decide which inferences to draw and which to reject. We therefore conclude that insofar as the power to draw reasonable inferences is concerned, Taft-Hartley did not alter prior law.

The Board relies heavily upon the House Report on § 8 (3), which stated that the section outlawed discrimination "which tends to 'encourage or discourage membership in any labor organization,' " [57] for its conclusion

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[56] H. Conf. Rep. No. 510, 80th Cong., 1st Sess. 55. See Cox, *op. cit. supra,* note 47, at 39 *et seq.*

[57] H. R. Rep. No. 1147, 74th Cong., 1st Sess. 21.

that only a tendency to encourage or discourage membership is required by § 8 (a)(3). We read this language to mean that subjective evidence of employee response was not contemplated by the drafters, and to accord with our holding that such proof is not required where encouragement or discouragement can be reasonably inferred from the nature of the discrimination.

Encouragement and discouragement are "subtle things" requiring "a high degree of introspective perception." Cf. *Labor Board* v. *Donnelly Garment Co.*, 330 U. S. 219, 231. But, as noted above, it is common experience that the desire of employees to unionize is raised or lowered by the advantages thought to be attained by such action. Moreover, the Act does not require that the employees discriminated against be the ones encouraged for purposes of violations of § 8 (a)(3). Nor does the Act require that this change in employees' "quantum of desire" to join a union have immediate manifestations.

Obviously, it would be gross inconsistency to hold that an inherent effect of certain discrimination is encouragement of union membership, but that the Board may not reasonably infer such encouragement. We have held that a natural result of the disparate wage treatment in *Gaynor* was encouragement of union membership; thus it would be unreasonable to draw any inference other than that encouragement would result from such action. The company complains that it could have disproved this natural result if allowed to prove that Loner, the employee who filed the charges against it, had previously applied for and been denied membership in the union. But it is clear that such evidence would not have rebutted the inference: not only would it have failed to disprove an increase in desire on the part of other employees, union members or nonmembers, to join or retain good standing in the union, but it would not have shown lack of encouragement of Loner. In rejecting this argument the

Second Circuit noted that union admission policies are not necessarily static and that employees may be encouraged to join when conditions change. This proved to be an accurate prophecy regarding the Newspaper and Mail Deliverers' Union, involved in this case, for in 1952 it altered its admission policy to allow membership of "all steady situation holders," thus admitting many employees not previously eligible.

The circumstances in *Radio Officers* and *Teamsters* are nearly identical. In each case the employer discriminated upon the instigation of the union. The purposes of the unions in causing such discrimination clearly were to encourage members to perform obligations or supposed obligations of membership. Obviously, the unions would not have invoked such a sanction had they not considered it an effective method of coercing compliance with union obligations or practices. Both Boston and Fowler were denied jobs by employers solely because of the unions' actions. Since encouragement of union membership is obviously a natural and foreseeable consequence of any employer discrimination at the request of a union, those employers must be presumed to have intended such encouragement. It follows that it was eminently reasonable for the Board to infer encouragement of union membership, and the Eighth Circuit erred in holding encouragement not proved.

## IV. Sanction Against Union Under § 8 (b)(2).

Section 8 (b)(2) was added to the National Labor Relations Act by the Taft-Hartley amendments in 1947. It provides that "it shall be an unfair labor practice for a labor organization or its agents . . . to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or

terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership." 61 Stat. 141. Petitioner in *Radio Officers* contends that it was fatal error for the Board to proceed against it, a union, without joining the employer, and that absent a finding of violation of § 8 (a)(3) by and a reinstatement order against such employer, the Board could not order the union to pay back-pay under § 8 (b)(2).

We find no support for these arguments in the Act. No such limitation is contained in the language of § 8 (b)(2). That section makes it clear that there are circumstances under which charges against a union for violating the section must be brought without joining a charge against the employer under § 8 (a)(3), for attempts to cause employers to discriminate are proscribed. Thus a literal reading of the section requires only a showing that the union caused or attempted to cause the employer to engage in conduct which, if committed, would violate § 8 (a)(3).[58] No charge was filed against the company by Fowler when he filed his charge against the union. The General Counsel is entrusted with "final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints," [59] but without a charge he has no authority to issue a complaint.[60] Even when a charge is filed, many factors must influence exercise by the General Counsel of this discretion relative to prosecution of unfair labor practices. Abuse of discretion has not been shown, and, when a complaint is prosecuted, the Board is empowered by § 10 (a) "to prevent any person from engaging in any

[58] See *Labor Board* v. *Newspaper & Mail Deliverers' Union*, 192 F. 2d 654. Cf. *Katz* v. *Labor Board*, 196 F. 2d 411.

[59] 29 U. S. C. (Supp. V) § 153 (d).

[60] *Id.*, § 160 (b). But see *Labor Board* v. *Indiana & Michigan Electric Co.*, 318 U. S. 9, 17.

unfair labor practice. . . ." It, therefore, had the power to find that the union had violated § 8 (b)(2).

Nor does the absence of joinder of the employer preclude entry of a back-pay order against the union. The union cites in support of its position the language of § 10 (c) [61] which empowers the Board to issue orders requiring "such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: *Provided,* That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: . . . ." 61 Stat. 147. In *Phelps Dodge Corp.* v. *Labor Board,* 313 U. S. 177, 189, we interpreted the phrase giving the Board power to order "reinstatement of employees with or without back pay" not to limit, but merely to illustrate, the general grant of power to award affirmative relief. Thus we held that the Board could order back pay without ordering reinstatement. The proviso in § 10 (c) was added by the 1947 amendments. The purpose of Congress in enacting this provision was not to limit the power of the Board to order back pay without ordering reinstatement but to give the Board power to remedy union unfair labor practices comparable to the power it possessed to remedy unfair labor practices by employers.[62] Petitioner argues, however, that it will not "effectuate the policies of this Act" to require it to reimburse back pay if the employer is not made to share this burden, but, on the contrary, will frustrate the Act's purposes. We do not agree. It does not follow that because one form of remedy is not available or appropriate in a case, as here, that no remedy should be granted. It is

[61] 29 U. S. C. (Supp. V) § 160 (c).

[62] See *Labor Board* v. *J. I. Case Co.,* 198 F. 2d 919, 924; *H. N. Newman,* 85 N. L. R. B. 725, enforced, 187 F. 2d 488; *Union Starch & Refining Co.* v. *Labor Board,* 186 F. 2d 1008, 1014.

clear that petitioner committed an unfair labor practice and the policy of the Act is to make whole employees thus discriminated against. We therefore hold that the Board properly exercised its power in ordering petitioner to pay such back pay to Fowler.

From the foregoing it follows that:

The *Radio Officers' Union* v. *Labor Board* is affirmed.

*Labor Board* v. *International Brotherhood of Teamsters* is reversed.

*Gaynor News Co.* v. *Labor Board* is affirmed.

*No. 5, affirmed.*
*No. 6, reversed.*
*No. 7, affirmed.*

MR. JUSTICE FRANKFURTER, concurring.

In construing an ambiguous provision of a regulatory measure like the Taft-Hartley Act, a decision can seldom avoid leaving more or less discretion to the agency primarily charged with administering the statute. Since guidance in the exercise of this discretion by the Labor Board, and not merely guidance for litigants, thus becomes a function of the Court's opinion, it is doubly necessary to define the scope of our ruling as explicitly as possible.

The lower courts have given conflicting interpretations to the phrase, "by discrimination . . . to encourage or discourage membership in any labor organization," contained in § 8 (a)(3). We should settle this conflict without giving rise to avoidable new controversies.

The phrase in its relevant setting is susceptible of alternative constructions of decisively different scope:

> (a) On the basis of the employer's disparate treatment of his employees standing alone, or as supplemented by evidence of the particular circumstances under which the employer acted, it is open for

the Board to conclude that the conduct of the employer tends to encourage or discourage union membership, thereby establishing a violation of the statute.

(b) Even though the evidence of disparate treatment is sufficient to warrant the Board's conclusion set forth in (a), there must be a specific finding by the Board in all cases that the actual aim of the employer was to encourage or discourage union membership.

I think (a) is the correct interpretation. In many cases a conclusion by the Board that the employer's acts are likely to help or hurt a union will be so compelling that a further and separate finding characterizing the employer's state of mind would be an unnecessary and fictive formality. In such a case the employer may fairly be judged by his acts and the inferences to be drawn from them.

Of course, there will be cases in which the circumstances under which the employer acted serve to rebut any inference that might be drawn from his acts of alleged discrimination standing alone. For example, concededly a raise given only to union members is prima facie suspect; but the employer, by introducing other facts, may be able to show that the raise was so patently referable to other considerations, unrelated to his views on unions and within his allowable freedom of action, that the Board could not reasonably have concluded that his conduct would encourage or discourage union membership.

In sum, any inference that may be drawn from the employer's alleged discriminatory acts is just one element of evidence which may or may not be sufficient, without more, to show a violation. But that should not obscure the fact that this inference may be bolstered or rebutted by other evidence which may be adduced, and which the Board must take into consideration. The Board's task is

to weigh everything before it, including those inferences which, with its specialized experience, it believes can fairly be drawn. On the basis of this process, it must determine whether the alleged discriminatory acts of the employer were such that he should have reasonably anticipated that they would encourage or discourage union membership.

Since the issue which the Board thus has to decide involves pre-eminently an exercise of judgment on matters peculiarly within its special competence, little room will be left for judicial review. See *Universal Camera Corp.* v. *Labor Board,* 340 U. S. 474, 488.

What I have written and the Court's opinion, as I read it, are not in disagreement. In any event, I concur in its judgment.

MR. JUSTICE BURTON and MR. JUSTICE MINTON, having joined in the opinion of the Court, also join this opinion.

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

I.

*No. 7—The Gaynor Case.*—Eighteen years ago the language considered here became a part of what is now known as § 8 (a)(3) of the Labor Act. The Court today gives that language an entirely new interpretation. I dissent. The Section makes it an unfair labor practice for an employer "by discrimination in regard to . . . any term or condition of employment to encourage or discourage membership in any labor organization . . . ." Unquestionably payment of disparate wages to union and nonunion employees is "discrimination" as that term is used in § 8 (a)(3). But the Section does not forbid all "discrimination." It carefully limits the conditions under which "discrimination" is "unfair." The plain and long accepted meaning of § 8 (a)(3) is that it forbids an employer to discriminate only when he does so *in order to*

"encourage or discourage" union membership. *Labor Board* v. *Waterman S. S. Co.*, 309 U. S. 206, 219. Recently, however, the Labor Board has adopted the view that the Section outlaws discrimination merely having a "tendency to encourage . . ." or "the natural and probable effect" of which would be to encourage union membership. The Court apparently now accepts this interpretation, for here there is no finding that Gaynor acted in order to encourage union membership. Indeed, the Board concedes that Gaynor had no such purpose, and this concession is fully supported by the evidence. Gaynor had no desire to make retroactive payments to any employees. It yielded to the union not because it wanted to but because it was compelled to by a collective bargaining contract.

I think the Court's new interpretation of § 8 (a)(3) imputes guilt to an employer for conduct which Congress did not wish to outlaw. Behind the Labor Act was a long history of employer hostility to strong unions and affection for weak ones. Power over wages, hours and other working conditions permitted employers to help unions they liked and hurt unions they disliked. To enable workers to join or not join unions without fear of reprisal, Congress passed the Labor Act prohibiting such employer discrimination. But aside from this limitation on the employer's powers, Congress did not mean to invade his normal right to fix different wages, hours and other working conditions for different employees according to his best business judgment.[1] Section 8 (a)(3) is aptly phrased to accomplish both these purposes.

The Board has been careful in § 8 (a)(3) cases to make findings that employer discrimination was motivated by hostility or favoritism toward union mem-

[1] *Labor Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 45–46 (1937); *Phelps Dodge Corp.* v. *Labor Board*, 313 U. S. 177, 182–183 (1941).

bership.[2] Even now trial examiners and the Board continue to make findings as to the employer's purpose.[3] The courts have regularly held that § 8 (a)(3) requires such findings, and have been called on to determine if

[2] See, *e. g.*, *Fruehauf Trailer Co.*, 1 N. L. R. B. 68, 74–77 (1935), sustained, 301 U. S. 49, 55–57 (1937); *Union Pacific Stages, Inc.*, 2 N. L. R. B. 471, 486 (1936), enforced as modified, 99 F. 2d 153, 168, 176–177 (C. A. 9th Cir. 1938); *Kansas City Power & Light Co.*, 12 N. L. R. B. 1414, 1436–1453 (1939), enforced as modified, 111 F. 2d 340, 349–351 (C. A. 8th Cir. 1940); *Martel Mills Corp.*, 20 N. L. R. B. 712, 721, 724, 733 (1940), enforcement denied, 114 F. 2d 624, 630–633 (C. A. 4th Cir. 1940); *Air Associates, Inc.*, 20 N. L. R. B. 356 (1940), enforced as modified, 121 F. 2d 586, 591–592 (C. A. 2d Cir. 1941); *Stonewall Cotton Mills*, 36 N. L. R. B. 240 (1941), enforced as modified, 129 F. 2d 629, 632–633 (C. A. 5th Cir. 1942); *Western Cartridge Co.*, 48 N. L. R. B. 434 (1943), enforced as modified, 139 F. 2d 855, 858–860 (C. A. 7th Cir. 1943); *Robbins Tire and Rubber Co.*, 69 N. L. R. B. 440, 441 (1946), enforced, 161 F. 2d 798, 801 (C. A. 5th Cir. 1947); *Wells, Inc.*, 68 N. L. R. B. 545, 546–547 (1946), enforced as modified, 162 F. 2d 457, 459–460 (C. A. 9th Cir. 1947); *Victor Mfg. & Gasket Co.*, 79 N. L. R. B. 234, 235 (1948), enforced, 174 F. 2d 867, 868 (C. A. 7th Cir. 1949); *B & Z Hosiery Products Co.*, 85 N. L. R. B. 633 (1949), enforced, *Bochner* v. *Labor Board*, 180 F. 2d 1021 (C. A. 3d Cir. 1950). To support its position here that an employer's purpose is irrelevant under § 8 (a)(3) the Board relies on its decisions in *General Motors Corp.*, 59 N. L. R. B. 1143, 1145 (1944), enforced as modified, 150 F. 2d 201 (C. A. 3d Cir. 1945); *Allis-Chalmers Mfg. Co.*, 70 N. L. R. B. 348, 349–350 (1946), enforced, 162 F. 2d 435 (C. A. 7th Cir. 1947); and *Reliable Newspaper Delivery, Inc.*, 88 N. L. R. B. 659, 669–670 (1950), enforcement denied, 187 F. 2d 547 (C. A. 3d Cir. 1951). In the first two decisions specific findings of employer purpose were made, and in the latter the facts are substantially identical to the case here.

[3] *E. g.*, in *Marathon Electric Mfg. Corp.*, 106 N. L. R. B. No. 199 (September 29, 1953), the trial examiner found that numerous acts of an employer violated § 8 (a)(3) because the employer "discriminated . . . to discourage membership in UE. . . ." In sustaining the examiner as to some of the acts and overruling him as to others the Board's decision rested on such findings as: "the discharges were not only calculated to discourage concerted activities . . . but also to

they were supported by substantial evidence.[4] I think the Section should not at this late date be held to penalize an employer for using his judgment in fixing working conditions unless he discriminates among employees in order to strengthen or weaken a union for his own advantage. For this reason, I would not sustain the Board's holding that Gaynor violated § 8 (a)(3).

## II.

*Nos. 5 and 6—The Radio Officers and Teamsters Cases.*—In these cases the Board found that the Radio Officers and Teamsters unions had violated § 8 (b)(2) of the Taft-Hartley Act which makes it an "unfair labor practice" for a union "to cause or attempt to cause an employer to discriminate against an employee in viola-

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deter . . . from joining, or giving support in the future to, UE or any other labor organization"; the record did not show "that the failure to recall them [certain employees] was because of their actual or supposed connection with UE"; and there was "no evidence in the record to rebut the Respondent's [employer's] contention that its only reason for not recalling these employees was the cancellation of the contract." See also *New Mexico Transportation Co.*, 107 N. L. R. B. No. 8 (November 13, 1953); *Terri Lee, Inc.*, 107 N. L. R. B. No. 141 (December 28, 1953).

[4] See court decisions cited in note 2, *supra*. See also *Labor Board* v. *Waterman S. S. Co.*, 309 U. S. 206, 218, 220–226 (1940), where this Court reviewed the record and held that a finding of discrimination by an employer "because of" union membership was sustained by substantial evidence. *Republic Aviation Corp.* v. *Labor Board*, 324 U. S. 793 (1945), indicated no intent to repudiate the interpretation of § 8 (a)(3) accepted in the *Waterman* case, *supra*. The Board also relies on such cases as: *Labor Board* v. *Hudson Motor Car Co.*, 128 F. 2d 528, 532–533 (C. A. 6th Cir. 1942), enforcing 34 N. L. R. B. 815, 826–827 (1941); *Labor Board* v. *Gluek Brewing Co.*, 144 F. 2d 847, 853 (C. A. 8th Cir. 1944), modifying and enforcing 47 N. L. R. B. 1079, 1095 (1943); and *Labor Board* v. *Industrial Cotton Mills*, 208 F. 2d 87 (C. A. 4th Cir. 1953), modifying and enforcing 102 N. L. R. B. 1265 (1953). However, none of these cases is in point here, since in each the Board made findings of the employer's purpose.

tion" of § 8 (a)(3). The Board found on sufficient evidence that each of the two unions here "caused" an employer to treat an employee differently from the way it treated other employees, that is, the employer was caused "to discriminate" within the meaning of § 8 (a)(3). The Board also found that this "discrimination" had a tendency to encourage union membership. But there was no finding that either employer's discrimination occurred *in order* to encourage union membership. For the reasons set out in my discussion of § 8 (a)(3) in the *Gaynor* case, I think these findings fall short of showing an employer "violation of § 8 (a)(3)." A union does not violate § 8 (b)(2) by causing an employer to discriminate unless that employer discrimination is "in violation of § 8 (a)(3)." For this reason I would reverse No. 5 and affirm No. 6.

# WALDER *v.* UNITED STATES.

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

No. 121. Argued November 30, 1953.—Decided February 1, 1954.

Because heroin had been obtained from petitioner through unlawful search and seizure, its use in evidence was suppressed on petitioner's motion; and an indictment against him for its possession was dismissed on the Government's motion. In his subsequent trial for other illicit transactions in narcotics, petitioner testified on direct examination that he had never purchased, sold or possessed any narcotics. In order to impeach this testimony, the Government introduced the testimony of an officer who had participated in the unlawful search and seizure of the heroin involved in the earlier proceeding and the chemist who had analyzed it. *Held:* Petitioner's assertion on direct examination that he had never possessed any narcotics opened the door, solely for the purpose of attacking petitioner's credibility, to evidence of the heroin unlawfully seized in connection with the earlier proceeding. *Weeks* v. *United States,* 232 U. S. 383, and *Agnello* v. *United States,* 269 U. S. 20, distinguished. Pp. 62–66.

201 F. 2d 715, affirmed.

*Paul A. Porter,* acting under appointment by the Court, argued the cause and filed a brief for petitioner.

*Robert S. Erdahl* argued the cause for the United States. With him on the brief were *Acting Solicitor General Stern, Assistant Attorney General Olney* and *Edward S. Szukelewicz.*

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

In May 1950, petitioner was indicted in the United States District Court for the Western District of Missouri for purchasing and possessing one grain of heroin. Claiming that the heroin capsule had been obtained through an unlawful search and seizure, petitioner moved

to suppress it. The motion was granted, and shortly thereafter, on the Government's motion, the case against petitioner was dismissed.

In January of 1952, petitioner was again indicted, this time for four other illicit transactions in narcotics. The Government's case consisted principally of the testimony of two drug addicts who claimed to have procured the illicit stuff from petitioner under the direction of federal agents. The only witness for the defense was the defendant himself, petitioner here. He denied any narcotics dealings with the two Government informers and attributed the testimony against him to personal hostility.

Early on his direct examination petitioner testified as follows:

> "Q. Now, first, Mr. Walder, before we go further in your testimony, I want to you [*sic*] tell the Court and jury whether, not referring to these informers in this case, but whether you have ever sold any narcotics to anyone.
>
> "A. I have never sold any narcotics to anyone in my life.
>
> "Q. Have you ever had any narcotics in your possession, other than what may have been given to you by a physician for an ailment?
>
> "A. No.
>
> "Q. Now, I will ask you one more thing. Have you ever handed or given any narcotics to anyone as a gift or in any other manner without the receipt of any money or any other compensation?
>
> "A. I have not.
>
> "Q. Have you ever even acted as, say, have you acted as a conduit for the purpose of handling what you knew to be a narcotic from one person to another?
>
> "A. No, sir."

On cross-examination, in response to a question by Government counsel making reference to this direct testimony, petitioner reiterated his assertion that he had never purchased, sold or possessed any narcotics. Over the defendant's objection, the Government then questioned him about the heroin capsule unlawfully seized from his home in his presence back in February 1950. The defendant stoutly denied that any narcotics were taken from him at that time.[1] The Government then put on the stand one of the officers who had participated in the unlawful search and seizure and also the chemist who had analyzed the heroin capsule there seized. The trial judge admitted this evidence, but carefully charged the jury that it was not to be used to determine whether the defendant had committed the crimes here charged, but solely for the purpose of impeaching the defendant's credibility. The defendant was convicted, and the Court of Appeals for the Eighth Circuit affirmed, one judge dissenting. 201 F. 2d 715. The question which divided that court, and the sole issue here, is whether the defendant's assertion on direct examination that he had never possessed any narcotics opened the door, solely for the purpose of attacking the defendant's credibility, to evidence of the heroin unlawfully seized in connection with the earlier proceeding. Because this question presents a novel aspect of the scope of the doctrine of *Weeks* v. *United States,* 232 U. S. 383, we granted certiorari. 345 U. S. 992.

The Government cannot violate the Fourth Amendment [2]—in the only way in which the Government can do anything, namely through its agents—and use the fruits

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[1] This denial squarely contradicted the affidavit filed by the defendant in the earlier proceeding, in connection with his motion under Rule 41 (e) to suppress the evidence unlawfully seized.

[2] "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."

of such unlawful conduct to secure a conviction. *Weeks* v. *United States, supra.* Nor can the Government make indirect use of such evidence for its case, *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385, or support a conviction on evidence obtained through leads from the unlawfully obtained evidence, cf. *Nardone* v. *United States,* 308 U. S. 338. All these methods are outlawed, and convictions obtained by means of them are invalidated, because they encourage the kind of society that is obnoxious to free men.

It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths. Such an extension of the *Weeks* doctrine would be a perversion of the Fourth Amendment.

Take the present situation. Of his own accord, the defendant went beyond a mere denial of complicity in the crimes of which he was charged and made the sweeping claim that he had never dealt in or possessed any narcotics. Of course, the Constitution guarantees a defendant the fullest opportunity to meet the accusation against him. He must be free to deny all the elements of the case against him without thereby giving leave to the Government to introduce by way of rebuttal evidence illegally secured by it, and therefore not available for its case in chief. Beyond that, however, there is hardly justification for letting the defendant affirmatively resort to perjurious testimony in reliance on the Government's disability to challenge his credibility.[3]

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[3] Cf. *Michelson* v. *United States,* 335 U. S. 469, 479: "The price a defendant must pay for attempting to prove his good name is to throw open the entire subject which the law has kept closed for his

The situation here involved is to be sharply contrasted with that presented by *Agnello* v. *United States*, 269 U. S. 20. There the Government, after having failed in its efforts to introduce the tainted evidence in its case in chief, tried to smuggle it in on cross-examination by asking the accused the broad question "Did you ever see narcotics before?" [4] After eliciting the expected denial, it sought to introduce evidence of narcotics located in the defendant's home by means of an unlawful search and seizure, in order to discredit the defendant. In holding that the Government could no more work in this evidence on cross-examination than it could in its case in chief, the Court foreshadowed, perhaps unwittingly, the result we reach today:

> "And the contention that the evidence of the search and seizure was admissible in rebuttal is without merit. In his direct examination, Agnello was not asked and did not testify concerning the can of cocaine. In cross-examination, in answer to a question permitted over his objection, he said he had never seen it. He did nothing to waive his constitutional protection or to justify cross-examination in respect of the evidence claimed to have been obtained by the search. . . ." 269 U. S., at 35.

The judgment is

*Affirmed.*

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS dissent.

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benefit and to make himself vulnerable where the law otherwise shields him."

The underlying rationale of the *Michelson* case also disposes of the evidentiary question raised by petitioner, to wit, "whether defendant's actual guilt under a former indictment which was dismissed may be proved by extrinsic evidence introduced to impeach him in a prosecution for a subsequent offense."

[4] Transcript of Record, p. 476, *Agnello* v. *United States*, 269 U. S. 20.

Syllabus.

## WESTERN AIR LINES, INC. *v.* CIVIL AERONAUTICS BOARD ET AL.

NO. 225. CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.*

Argued December 9–10, 1953.—Decided February 1, 1954.

Section 406 (b) of the Civil Aeronautics Act, as amended, requires the Civil Aeronautics Board, in fixing mail-pay subsidy for air carriers, to "take into consideration . . . the need of each such air carrier for compensation . . . sufficient . . . together with all other revenue of the air carrier, to enable such air carrier . . . to maintain and continue the development" of a national air-transportation system. *Held:* In fixing mail-pay subsidy for the air carrier in this case, the Board was required to take into consideration the carrier's profits derived from (1) the operation of restaurants and other concessions at airports, (2) the sale of tangible assets to another air carrier, and (3) the sale of a route to another air carrier. Pp. 68–73.

(a) The "need" of the carrier which the Board is required to consider in fixing a subsidy rate is "the need" of the carrier as a whole. P. 71.

(b) The "all other revenue" which the Board is required to consider includes nonflight income from incidental carrier activities, not transportation revenue alone. P. 71.

(c) The profit derived by a carrier from the sale of a route to another carrier is also "other revenue" within the meaning of § 406 (b). Pp. 71–72.

(d) The standard prescribed by Congress to guide the Board in fixing mail-pay subsidy is "the need" of the carrier; and the Board was not justified, on the record in this case, in disregarding profits derived from the sale of a route to another carrier, in order "to safeguard the incentive for voluntary route transfers." Pp. 72–73.

92 U. S. App. D. C. 248, 207 F. 2d 200, affirmed.

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*Together with No. 224, *Civil Aeronautics Board* v. *Summerfield, Postmaster General, et al.*, also on certiorari to the same court.

The Civil Aeronautics Board issued an order fixing mail-pay subsidy for an air carrier. 14 C. A. B. 201. Both the Postmaster General and the carrier sought review of the Board's order in the Court of Appeals, which sustained the order in part and reversed it in part. 92 U. S. App. D. C. 248, 207 F. 2d 200. This Court granted certiorari. 346 U. S. 811. *Affirmed,* p. 73.

*Emory T. Nunneley, Jr.* argued the cause for the Civil Aeronautics Board. With him on the brief was *O. D. Ozment.*

*Hugh W. Darling* argued the cause for Western Air Lines, Inc., petitioner in No. 225 and respondent in No. 224. With him on the brief were *Edward S. Shattuck* and *D. P. Renda.*

*Daniel M. Friedman* argued the cause for the United States and the Postmaster General, respondents. With him on the brief were *Acting Solicitor General Stern, Assistant Attorney General Barnes, Murray L. Schwartz* and *Eugene J. Brahm.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

These cases, here on writs of certiorari to the Court of Appeals for the District of Columbia, present an important question in the construction of § 406 (b) of the Civil Aeronautics Act of 1938, 52 Stat. 973, as amended, 49 U. S. C. § 401 *et seq.* Section 406 (a) authorizes the Civil Aeronautics Board to fix "fair and reasonable rates of compensation for the transportation of mail by aircraft." [1] Section 406 (b) requires the Board to take into

[1] "The [Board] is empowered and directed, upon its own initiative or upon petition of the Postmaster General or an air carrier, (1) to fix and determine from time to time, after notice and hearing, the fair and reasonable rates of compensation for the transportation of mail by aircraft, the facilities used and useful therefor, and the services connected therewith (including the transportation of mail

consideration, *inter alia,* "the need of each such air carrier for compensation for the transportation of mail sufficient to insure the performance of such service, and, together with all other revenue of the air carrier, to enable such air carrier under honest, economical, and efficient management, to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense." [2] The con-

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by an air carrier by other means than aircraft whenever such transportation is incidental to the transportation of mail by aircraft or is made necessary by conditions of emergency arising from aircraft operation), by each holder of a certificate authorizing the transportation of mail by aircraft, and to make such rates effective from such date as it shall determine to be proper; (2) to prescribe the method or methods, by aircraft-mile, pound-mile, weight, space, or any combination thereof, or otherwise, for ascertaining such rates of compensation for each air carrier or class of air carriers; and (3) to publish the same; and the rates so fixed and determined shall be paid by the Postmaster General from appropriations for the transportation of mail by aircraft."

[2] "In fixing and determining fair and reasonable rates of compensation under this section, the [Board], considering the conditions peculiar to transportation by aircraft and to the particular air carrier or class of air carriers, may fix different rates for different air carriers or classes of air carriers, and different classes of service. In determining the rate in each case, the [Board] shall take into consideration, among other factors, the condition that such air carriers may hold and operate under certificates authorizing the carriage of mail only by providing necessary and adequate facilities and service for the transportation of mail; such standards respecting the character and quality of service to be rendered by air carriers as may be prescribed by or pursuant to law; and the need of each such air carrier for compensation for the transportation of mail sufficient to insure the performance of such service, and, together with all other revenue of the air carrier, to enable such air carrier under honest, economical, and efficient management, to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense."

troversy in the present cases turns on the meaning of the words "the need of each such air carrier" and "all other revenue of the air carrier."

Western Air Lines filed a petition for a rate order April 26, 1944. In 1951 the Board finally determined the rate applicable between May 1, 1944, and December 31, 1948. During this open-rate period Western realized some $88,000 in profits from the operation of restaurants and other concessions at airport terminals. The Board determined that this income was "other revenue" available to reduce mail pay. During the open-rate period Western with approval of the Board [3] sold to United Air Lines its certificate and properties for air operations (Route 68) between Los Angeles and Denver, at a profit in excess of $1,000,000. The Board treated the profit derived from the sale of the tangible assets (approximately $650,000) as "other revenue" and reduced the mail compensation by that amount. But it declined to reduce the mail-pay allowance by the profit realized from the sale of the "intangible value" of the route. The Board concluded that that amount should not be used in offset because it wanted "to encourage improvement of the air route pattern through voluntary route transfers by other air carriers." 14 C. A. B., at 246.

On review, Western challenged the inclusion in "other revenue" of the amounts received from the concessions and the profit from the sale of the tangible assets. The Postmaster General [4] challenged the exclusion from the

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[3] *United-Western, Acquisition of Air Carrier Property,* 8 C. A. B. 298 (1947).

[4] The Postmaster General has not only the duty to pay the mail rates from appropriations for the transportation of mail by aircraft but also is given standing by § 406 (a) to petition the Board to fix and determine the rates. A change in the function of the Postmaster General was made by Reorganization Plan No. 10 of 1953, effective October 1, 1953, 67 Stat. 644.

offsets of the profit Western made on the sale of the intangibles. The Court of Appeals sustained the Board in Western's petition and reversed it in the other petition and remanded the case to the Board for the fixing of a new rate after deducting the entire profit from the sale of Western's Route 68. 92 U. S. App. D. C. 248, 207 F. 2d 200.

Some air-mail rates are service rates, based on mail-miles flown; [5] others are subsidy rates based on "need." We are here concerned with a subsidy rate which in Western's case was fixed so as to produce a 7-percent return on investment after taxes for the period in question. In other words, the end problem concerns not the amount of money provided for operation and development but the amount of profit over and above all such sums.

We read the Act as meaning that "the need" of the carrier which Congress has directed the Board to consider in fixing a subsidy rate is "the need" of the carrier as a whole. The need specified in § 406 (b) is measured by "compensation for the transportation of mail sufficient to insure the performance of such service, and, together with all other revenue of the air carrier, to enable" it to develop air transportation, etc. The "compensation for the transportation of mail" is flight income. It seems too clear for argument that "all other revenue" would include nonflight income from incidental air-carrier activities. We have found nothing persuasive as indicating that "all other revenue" means transportation revenue. The inclusive nature of the category precludes a narrow reading. If the carrier's treasury is lush, "the need" for subsidy decreases whether the opulence is due to transportation activities or to activities incidental thereto.

By the same reasoning the profit made by Western on the sale of Route 68 is also "other revenue" within the

[5] See, for example, *Eastern Air Lines, Mail Rates,* 3 C. A. B. 733 (1942).

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meaning of § 406 (b). The Board agrees; but it goes on to say that that is not the end of the matter, since the reduction of the subsidy by the entire amount of the profit is not mandatory. The Act, it is true, merely says that the Board in determining the rate "shall take into consideration" various factors, including "the need" of the carrier (§ 406 (b)); and the "need," as we have noted, is not merely for compensation to insure the transportation of mail but compensation for "the development of air transportation" under the prescribed standards. By that standard the "need" in a given case may be so great that profits from other transactions should be allowed in addition to the normal rate. Or, on the other hand, the total revenues of the carrier as against its operating costs and developmental program may be so great that "the need" for subsidy disappears and the carrier is transferred to the service rate for mail pay. The difficulty here is that the Board, in concluding that a part of the profits from the sale to United should not be used as an offset, forsook the standard of "need" and adopted a different one. The Board wanted "to safeguard the incentive for voluntary route transfers." It thought it could not keep this incentive alive in the industry unless the profit were allowed in addition to the subsidy. The Board thought it important to keep that incentive alive in order to promote route transfers and mergers which the Board could not compel. The Board therefore argues that allowance of the profit over and above a subsidy enables Western "to maintain and continue the development of air transportation" within the meaning of § 406 (b), since the sale of Route 68 was consistent with the development program which the Board deemed desirable.

The Act, however, speaks of "the need" of the carrier for the subsidy, not the effect of a policy on carriers in general. This is not a case of recapture of earnings. Western keeps the entire amount of the profit. The issue

is how much additional money Western is to receive in the form of a subsidy. Western's "need" is the measure of the amount authorized by Congress. No finding was made that there was "need" for the additional subsidy, in the sense that otherwise Western would not have been willing or able to make the transfer of Route 68 in accordance with the development program which the Board deems advisable. Whether such a finding would have satisfied the statutory requirement is a question we do not reach, since the opinion of the Board makes plain that other considerations were controlling:

> ". . . our decision not to include the net profit from the sale of intangibles was reached solely because we are thus seeking to encourage improvement of the air route pattern through voluntary route transfers by other air carriers." 14 C. A. B., at 246.

The standard prescribed by Congress, however, is "the need" of the air carrier whose subsidy rates are being fixed.

*Affirmed.*

# DELTA AIR LINES, INC. *v.* SUMMERFIELD, POSTMASTER GENERAL, ET AL.

NO. 223. CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.*

Argued December 9–10, 1953.—Decided February 1, 1954.

Section 406 (b) of the Civil Aeronautics Act, as amended, requires the Civil Aeronautics Board, in fixing mail-pay subsidy for air carriers, to "take into consideration . . . the need of each such air carrier for compensation . . . sufficient . . . together with all other revenue of the air carrier, to enable such air carrier . . . to maintain and continue the development" of a national air-transportation system. *Held:* In fixing the mail-pay subsidy for the foreign operations of the carrier here involved during a past period, the Board erred in refusing to offset against the carrier's need for foreign operations excess earnings during the same period on its domestic operations. Pp. 75–80.

(a) An air-mail subsidy may not exceed the carrier's "need," which is to be measured by the entirety of the carrier's operations, not by the losses of one division or department, even when a rate is fixed for a class of service, as authorized by § 406 (b). Pp. 78–79.

(b) Arguments of policy against this conclusion are for Congress, not the courts. Pp. 79–80.

92 U. S. App. D. C. 256, 207 F. 2d 207, affirmed.

The Civil Aeronautics Board issued an order fixing mail-pay subsidy for an air carrier. 14 C. A. B. 681. On the Postmaster General's petition for review, the Court of Appeals reversed. 92 U. S. App. D. C. 256, 207 F. 2d 207. This Court granted certiorari. 346 U. S. 811. *Affirmed,* p. 80.

*Emory T. Nunneley, Jr.* argued the cause for the Civil Aeronautics Board. With him on the brief was *O. D. Ozment.*

*Together with No. 222, *Civil Aeronautics Board* v. *Summerfield, Postmaster General, et al.,* also on certiorari to the same court.

*L. Welch Pogue* argued the cause and filed a brief for petitioner in No. 223.

*Daniel M. Friedman* argued the cause for the United States and the Postmaster General, respondents. With him on the brief were *Acting Solicitor General Stern, Assistant Attorney General Barnes, Murray L. Schwartz* and *Eugene J. Brahm.*

*Hubert A. Schneider,* on behalf of Braniff Airways, Inc., *C. Edward Leasure,* on behalf of Northwest Airlines, Inc., and *Gerald B. Brophy,* on behalf of Trans World Airlines, Inc., filed a brief, as *amici curiae,* urging reversal.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Delta Air Lines, petitioner in No. 223, is the successor by merger to Chicago and Southern Air Lines (C & S). C & S was an air carrier which conducted both domestic and foreign operations prior to the merger. The present case involves subsidy mail pay for its foreign operations from 1946 through 1950.

In 1948 the Board, on applications made by C & S in 1944 and 1945, fixed a prospective annual subsidy for its domestic operations beginning January 1, 1948, which the Board estimated would yield a net return after taxes of 7.4 percent on that part of its investment allocable to those operations. 9 C. A. B. 786. The following three years—1948, 1949, and 1950—the rates in operation produced a subsidy of more than $654,000 in excess of a 7.4-percent return.

In 1946 C & S applied for subsidy mail pay on its Latin-American routes. On October 18, 1951, the Board issued its opinion and order. Rates were fixed retroactively from November 1, 1946, to December 15, 1950, and prospectively from December 16, 1950. The subsidy awarded was designed to give the carrier a 7-percent re-

turn, on the property allocable to foreign operations, after taxes for the past period, and 10 percent for the future. 14 C. A. B. 681.

In fixing the subsidy for the past period, the Board refused to offset against the carrier's need for foreign operations the excess earnings on its domestic flights. It gave two "considerations of economic policy" for that position.[1] First, the Board said it would put

[1] The Board said:

"If an offset policy were adopted, the almost invariable result would be that, as in the instant case, the profits from a carrier's domestic operation would be used to sustain any international operations it might have. Recognizing this likelihood, we hesitate to burden the more robust segment of the industry with the obligations of the economically weaker part. For if the domestic air transport system can be kept financially sound, the public must ultimately benefit, putting aside any consideration of the obvious advantage of reduced rates of mail compensation. Thus, we anticipate that if the carriers' earning position continues strong, reductions in the domestic fare level will be possible, thereby giving impetus to the further development of the industry. In addition, with improved earnings, the domestic operators should be able to benefit the public and themselves with more modern aircraft, and with improved methods affording safer and more efficient operations. We cannot escape the thought that if we allow international operations to be carried on the back of domestic operations, we shall be subjecting the latter to an unjustifiable strain. Many of the domestic operators are well along the road to self-sufficiency. It is our duty to speed them on their way, not thwart them.

"It also appears desirable to maintain the comparative status between those domestic operators which have foreign routes as against those which do not have foreign routes. Since carriers fall into fairly well-defined classes, the Board is enabled to fix uniform domestic mail rates for groups of carriers provided, of course, that their comparative status is preserved by excluding consideration of any international operations. A carrier operating under a class rate has every incentive to operate efficiently because it may retain any profits it earns in excess of the estimated return to be afforded by the uniform rate. It is also administratively desirable to preserve a comparative status between carriers because the Board has been

an "unjustifiable strain" on domestic operations if the latter were required to carry the international operations. Second, it concluded that regulatory ends would be better served by maintaining "the comparative status between those domestic operators which have foreign routes as against those which do not have foreign routes."

On the Postmaster General's petition for review the Court of Appeals reversed the Board. 92 U. S. App. D. C. 256, 207 F. 2d 207. The cases are here on certiorari, 346 U. S. 811, and were argued with Nos. 224 and 225, decided this day, *ante,* p. 67.

As we have already noted in the companion cases, § 406 (a) of the Civil Aeronautics Act, 52 Stat. 998, 49 U. S. C. § 486 (a), directs the Board to fix "fair and reasonable rates of compensation for the transportation of mail by aircraft." Section 406 (b) provides that the Board in determining those rates

> "shall take into consideration, among other factors, . . . the need of each such air carrier for compensation for the transportation of mail sufficient to insure the performance of such service, and, together with all other revenue of the air carrier, to enable such air carrier under honest, economical, and efficient management, to maintain and continue the development

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able to analyze the operations of each carrier within a class in the light of the results achieved by others within the same class. The comparison technique of rate-making has proved to be the most satisfactory and practicable available to the Board. If we were required to fix rates for both domestic and international operations at the same time, it would be difficult, if not impossible, to find a suitable basis for a comparison technique of analysis.

"In view of the foregoing, we find that the earnings from C&S' domestic routes should not be used to offset the 'need' resulting from the carrier's international routes. This conclusion stems from considerations of economic policy; we are not deciding the question of our legal power to make such an offset." 14 C. A. B., at 683.

of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense."

The mandate is that the Board "shall take into consideration" what "the need" of the carrier is. The Act thus poses as the initial question for the Board whether the financial condition of the carrier is such that it needs a subsidy or has no need for one. The Board did not find that Delta had a "need" for an additional $654,000. It merely concluded that those excess domestic profits should not "as a matter of economic policy" be taken into account in computing a subsidy for international operations. In that posture the decision of the Board seems not in conformity with the law.

The Board answers to the effect that under § 406 (b) it "may fix different rates for different air carriers or classes of air carriers, and different classes of service." It may, therefore, fix a rate for international service. Since it may do that, it may, consistently with rate-making decisions (see, *e. g., American Toll Bridge Co.* v. *Railroad Commission,* 307 U. S. 486, 494), fix the rate at a level which will sustain the particular unit. Therefore the Board need do no more under § 406 (b) when it fixes a rate for international service than offset revenue attributable to the class of service for which the rate is made. That is the argument.

There are aspects of traditional rate-making that are carried over into the Act. Thus we held in *T. W. A.* v. *Civil Aeronautics Board,* 336 U. S. 601, that rates under the Act are made retroactive only to the date of the application. We also noted in that case that the "need" clause in § 406 (b) is not wholly at war with traditional rate-making functions. *Id.,* p. 604. But the application of the "need" clause which the Board has made in this case is at war with the language of § 406 (b). The stand-

ard is "the need of each such air carrier." The "need" of the carrier is measured by the entirety of its operations, not by the losses of one division or department. The measure of "the need" is an amount of compensation necessary to carry the mail and "together with all other revenue of the air carrier" adequate for maintenance and development. And the Act defines "air carrier" as "any citizen of the United States who undertakes . . . to engage in air transportation . . . ." § 1 (2). Thus the wording of the Act precludes measuring "the need" of the carrier by any other unit than the carrier as an entity.

As we read the Act, Congress has established a special formula for the fixing of a subsidy rate. While the rate may be for a class of service, the return in form of a subsidy must be computed with reference to the entire operations of the carrier. The requirement is that the Board offset all of a carrier's revenues in determining the subsidy; there is no discretion in the Board to disregard any portion of the revenue because of economic or other policy considerations. In other words, an air carrier's subsidy need is an amount which, "together with all other revenue" of the carrier, will enable it to meet and maintain the objectives of the Act. The carrier's "need" is therefore a limiting factor in the sense that the subsidy may not exceed it. Since the Board did not construe and apply the Act in that manner, the Court of Appeals was correct in reversing the rate order.

The Board makes an extended argument of policy against that position in elaboration of the reasons it advanced for not offsetting the excess earnings from domestic operations against the international subsidy rate.[2] It maintains that maximum operating efficiency on the part of air carriers and the development of air transpor-

[2] See note 1, *supra*.

tation—prominent objectives of the Act [3]—will be better served by setting subsidy rates on a divisional rather than on a system basis. This may be so. But that is a matter of policy for Congress to decide. As we read § 406 (b), Congress adopted in the present Act a rate formula based on "the need" of the carrier as measured by its entire operations, even when a rate was being fixed for a class of service.

*Affirmed.*

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[3] Section 2 of the Act provides:

"In the exercise and performance of its powers and duties under this Act, the [Board] shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity—

"(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

"(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

"(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

"(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

"(e) The regulation of air commerce in such manner as to best promote its development and safety; and

"(f) The encouragement and development of civil aeronautics."

# UNITED STATES *v.* CITY OF NEW BRITAIN ET AL.

CERTIORARI TO THE SUPREME COURT OF ERRORS OF CONNECTICUT.

No. 92. Argued December 1, 1953.—Decided February 1, 1954.

Foreclosure sales under two mortgages on real estate of a delinquent taxpayer in Connecticut produced less than enough to satisfy all claims, which included a federal lien created by § 3670 of the Internal Revenue Code for unpaid withholding and unemployment taxes and insurance contributions and a City's liens for delinquent real-estate taxes and water rent. Connecticut laws provide that real-estate tax liens "shall take precedence of all transfers and incumbrances" in any manner affecting the property subject to the lien and that water-rent liens take "precedence over all other liens or incumbrances except taxes" on the property subject to the liens. The record did not establish that the taxpayer was insolvent. *Held:* Since § 3670 of the Internal Revenue Code does not in terms confer priority upon the lien created thereby and no other federal statute does so in the circumstances of this case, the priority of each statutory lien here involved must depend on the time it attached to the property in question and became choate. Pp. 82–88.

(a) The City gains no priority by the fact that its liens are specific while the federal liens are general. P. 84.

(b) *United States* v. *Security Trust & Savings Bank,* 340 U. S. 47, and *United States* v. *Gilbert Associates,* 345 U. S. 361, distinguished. Pp. 86–87.

(c) That § 3672 of the Internal Revenue Code makes the federal lien invalid as to the prior recorded mortgages and the judgment in this case, and that the mortgagee could have paid the delinquent real-estate taxes and water rent with the amount so paid becoming part of the mortgage debt covered by the mortgage lien, does not require a different result. Pp. 87–88.

139 Conn. 363, 94 A. 2d 10, judgment vacated and cause remanded.

A Connecticut state court directed that, in the distribution of the proceeds of certain mortgage foreclosure sales of real estate, certain municipal tax and water-rent liens should take priority over certain federal tax liens.

The Supreme Court of Errors affirmed. 139 Conn. 363, 94 A. 2d 10. This Court granted certiorari. 346 U. S. 809. *Judgment vacated and cause remanded,* p. 88.

*Marvin E. Frankel* argued the cause for the United States. With him on the brief were *Acting Solicitor General Stern, Assistant Attorney General Holland, Ellis N. Slack, A. F. Prescott* and *Harry Baum.*

*Frank R. Kennedy* argued the cause for respondents. With him on the brief for the City of New Britain were *William S. Gordon, Jr.* and *Harold Koplowitz.*

MR. JUSTICE MINTON delivered the opinion of the Court.

The question presented by this writ involves the relative priority of statutory federal and municipal liens to the proceeds of a mortgage foreclosure sale of the property to which the liens attached.

Two mortgages on the real property of a corporation located in the City of New Britain, Connecticut, were foreclosed by judgment sale in the Superior Court of Hartford County, and a gross sum of $28,071.24 was realized. Against this fund, there were claims of some $31,000, including expenses of the sale, the two mortgages, a judgment of record, and various statutory liens asserted by the City and by the United States. The federal liens, securing unpaid withholding and unemployment taxes and insurance contributions totaling $8,475.13, were created by § 3670 of the Internal Revenue Code.[1]

[1] "SEC. 3670. PROPERTY SUBJECT TO LIEN.

"If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person." I. R. C., § 3670, 26 U. S. C. (1946 ed.) § 3670.

They arose at the times the assessment lists were received in the office of the Collector of Internal Revenue for Connecticut [2] on various dates between April 26, 1948, and September 21, 1950. The City's liens, which attached to the specific real estate sold in the total sum of $3,587.71, are for delinquent real-estate taxes and water rent. The real-estate taxes became due on various dates in 1947 through 1951, the liens attaching in each case as of October 1 or other assessment date of the prior year; [3] the water-rent liens arose upon failure to pay [4] and date from December 1, 1947, to June 1, 1951.

A Connecticut statute provides that real-estate tax liens "shall take precedence of all transfers and incumbrances" in any manner affecting the property subject to the lien.[5] Another state law gives the water-rent liens "precedence over all other liens or incumbrances except taxes" on the property subject to the liens.[6] The funds available for distribution being insufficient to pay all claimants in full, the Superior Court directed that the expenses, the City's liens, the mortgages, the judgment lien, and the United States' liens be paid in that order. The United States appealed from the judgment insofar as the statutory liens of the City were given priority over those of the United States. The Supreme Court of Errors of Connecticut affirmed, 139 Conn. 363, 94 A. 2d 10, and we granted certiorari, 346 U. S. 809.

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[2] I. R. C., § 3671, 26 U. S. C. (1946 ed.) § 3671.

[3] Conn. Gen. Stat., 1949, c. 88, § 1853.

[4] Conn. Gen. Stat., 1949, c. 34, § 758.

[5] Conn. Gen. Stat., 1949, c. 88, § 1853.

[6] Conn. Gen. Stat., 1949, c. 34, § 758. As construed by the Supreme Court of Errors of Connecticut in this case, the term "taxes" in § 758 includes "only those taxes which may be assessed in favor of the state or some subdivision thereof and which, under the law, are secured by specific liens upon real property." 139 Conn. 363, 367, 94 A. 2d 10, 12.

We are here dealing with several statutory liens, some owned by the City and some by the Federal Government, on real estate. The Supreme Court of Errors stated that the City's liens were specific and perfected. Such characterization of a lien by the State is not, of course, conclusive against the Federal Government. *United States* v. *Security Trust & Savings Bank,* 340 U. S. 47, 49; *Illinois* v. *Campbell,* 329 U. S. 362, 371. However, we accept the holding as to the specificity of the City's liens since they attached to specific pieces of real property for the taxes assessed and water rent due. The liens may also be perfected in the sense that there is nothing more to be done to have a choate lien—when the identity of the lienor, the property subject to the lien, and the amount of the lien are established. The federal tax liens are general and, in the sense above indicated, perfected. But the fact that one group of liens is specific and the other general in and of itself is of no significance in these cases involving statutory liens on real estate only. *United States* v. *City of Greenville,* 118 F. 2d 963, 964. A mortgage is a specific lien, yet "[a] statutory lien is as binding as a mortgage, and has the same capacity to hold the land so long as the statute preserves it in force." *Rankin* v. *Scott,* 12 Wheat. 177, 179.

Thus, the general statutory liens of the United States are as binding as the specific statutory liens of the City. The City gains no priority by the fact that its liens are specific while the United States' liens are general. Obviously, the State cannot on behalf of the City impair the standing of the federal liens, without the consent of Congress. *Michigan* v. *United States,* 317 U. S. 338, 340; *United States* v. *Oklahoma,* 261 U. S. 253, 260; *United States* v. *Snyder,* 149 U. S. 210, 214. On the other hand, the federal statutes do not attempt to give priority in all cases to liens created under the paramount authority of the United States. The statute creating the federal liens

here involved, I. R. C., § 3670, does not in terms confer priority upon them.

When the debtor is insolvent, Congress has expressly given priority to the payment of indebtedness owing the United States, whether secured by liens or otherwise, by § 3466 of the Revised Statutes, 31 U. S. C. (1946 ed.) § 191. In that circumstance, where all the property of the debtor is involved, Congress has protected the federal revenues by imposing an absolute priority.[7] Where the debtor is not insolvent, Congress has failed to expressly provide for federal priority, with certain exceptions not relevant here,[8] although the United States is free to pursue the whole of the debtor's property wherever situated. The State, having a lien only upon property within its boundaries, may not reach beyond the state line to fasten its lien upon other property. The record does not establish that the taxpayer in this case was insolvent.

It does not follow, however, that the City's liens must receive priority as a whole. We believe that priority of these statutory liens is determined by another principle of law, namely, "the first in time is the first in right." As stated by Chief Justice Marshall in *Rankin* v. *Scott, supra:*

> "The principle is believed to be universal, that a prior lien gives a prior claim, which is entitled to prior satisfaction, out of the subject it binds, unless the lien be intrinsically defective, or be displaced by some act of the party holding it, which shall postpone him in a Court of law or equity to a subsequent claimant." 12 Wheat., at 179.

This principle is widely accepted and applied, in the absence of legislation to the contrary. 33 Am. Jur., Liens,

[7] *United States* v. *Gilbert Associates,* 345 U. S. 361; *United States* v. *Waddill, Holland & Flinn,* 323 U. S. 353.

[8] *E. g.,* I. R. C., § 2800 (e), 26 U. S. C. (1946 ed.) § 2800 (e) (distilled spirits tax lien).

§ 33; 53 C. J. S., Liens, § 10b. We think that Congress had this cardinal rule in mind when it enacted § 3670, a schedule of priority not being set forth therein. Thus, the priority of each statutory lien contested here must depend on the time it attached to the property in question and became choate.

The United States in claiming priority for all its liens relies heavily on two recent cases from this Court, *United States* v. *Security Trust & Savings Bank, supra,* and *United States* v. *Gilbert Associates,* 345 U. S. 361. We do not think they are inconsistent with our decision in this case.

The *Security Trust* case involved an *inchoate* attachment lien that had not ripened into a judgment at the time the federal tax liens attached. We noted that "[n]umerous contingencies might arise that would prevent the attachment lien from ever becoming perfected by a judgment awarded and recorded." 340 U. S., at 50. Thus, the attachment lien was "merely a *lis pendens* notice that a right to perfect a lien exists." *Ibid.* Such inchoate liens may become certain as to amount, identity of the lienor, or the property subject thereto only at some time subsequent to the date the federal liens attach and cannot then be permitted to displace such federal liens. Otherwise, a State could affect the standing of federal liens, contrary to the established doctrine, simply by causing an inchoate lien to attach at some arbitrary time even before the amount of the tax, assessment, etc., is determined.[9] Accordingly, we concluded in *Security Trust* "that the tax liens of the United States are superior to the inchoate attachment lien . . . ." *Id.,* at 51. In the instant case, certain of the City's tax and water-rent liens apparently attached to the specific property and

[9] See Sarner, Correlation of Priority and Lien Rights in the Collection of Federal Taxes, 95 U. of Pa. L. Rev. 739, 755–761.

became choate prior to the attachment of the federal tax liens.

The State and the United States were both holders of general statutory liens in the *Gilbert Associates* case. But the question we have here did not arise there because that was a case involving personal property and insolvency of the taxpayer. We said in that case:

> "Where the lien of the Town and that of the Federal Government are both general, and the taxpayer is insolvent, § 3466 [Revised Statutes] clearly awards priority to the United States." 345 U. S., at 366.

Here the contest is between two groups of statutory liens, one specific and one general, attached to the same real estate, with no question of insolvency involved; therefore, "the first in time is the first in right."

The State finds the rule of "first in time, first in right" not applicable because of § 3672 of the Internal Revenue Code,[10] which makes the lien of the United States invalid as to the prior recorded mortgages and the judgment in this case. It points out that the mortgagee could have paid the delinquent real-estate taxes and water rent, with the amount so paid becoming part of the mortgage debt covered by the mortgage lien,[11] and suggests that the federal tax lien would therefore be invalid as to such amount by virtue of § 3672.[12] From this and a belief that Congress did not intend, by giving mortgages and

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[10] "SEC. 3672. VALIDITY AGAINST MORTGAGEES, PLEDGEES, PURCHASERS, AND JUDGMENT CREDITORS.

"(a) INVALIDITY OF LIEN WITHOUT NOTICE.—Such lien shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the collector . . . ." I. R. C., § 3672, as amended, 53 Stat. 882, 26 U. S. C. (1946 ed.) § 3672.

[11] Conn. Gen. Stat., 1949, c. 361, § 7192.

[12] We need not now pass upon the merits of this suggestion since the situation is not presented by the record in this case.

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judgments priority over federal tax liens, to supersede state laws making certain interests superior to mortgages and judgments, the Supreme Court of Errors concluded that by enacting § 3672 Congress "expressed the intention that federal liens should be subordinated to such mortgages and judgment liens as are described therein and, consequently, subordinated to such other incumbrances as have priority over those mortgages and judgment liens." [13]

We do not agree. The United States is not interested in whether the State receives its taxes and water rents prior to mortgagees and judgment creditors. That is a matter of state law. But as to any funds in excess of the amount necessary to pay the mortgage and judgment creditors, Congress intended to assert the federal lien. There is nothing in the language of § 3672 to show that Congress intended antecedent federal tax liens to rank behind any but the specific categories of interests set out therein, and the legislative history lends support to this impression.[14]

Under the circumstances, we vacate the judgment of the Supreme Court of Errors of Connecticut and remand the case to that court to have determined the order of priority of the various liens asserted, in accordance with this opinion.

*Judgment vacated.*

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[13] 139 Conn. 363, 373, 94 A. 2d 10, 15.

[14] See *United States* v. *Gilbert Associates,* 345 U. S. 361, 364; *United States* v. *Security Trust & Savings Bank,* 340 U. S. 47, 51 (concurring opinion).

# PARTMAR CORPORATION ET AL. *v.* PARAMOUNT PICTURES THEATRES CORP. ET AL.

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

No. 17. Argued October 13, 1953.—Decided February 8, 1954.

Paramount leased a theatre and granted a franchise to Partmar to exhibit first-run films of Paramount pictures, both for terms of ten years. The lease provided that it was terminable at Paramount's option if the franchise agreement "be cancelled or terminated for any reason whatsoever." In an antitrust suit by the Government against Paramount and others, a Federal District Court held that such franchise agreements were the product of an illegal conspiracy and enjoined their enforcement. Paramount then notified Partmar that it was terminating the franchise agreement because of the injunction and that it was terminating the lease because of termination of the franchise agreement. Partmar refused to vacate the theatre, and Paramount sued in a Federal District Court to obtain possession and for a declaratory judgment that the lease had been properly terminated. Partmar answered, setting up various defenses, and filed counterclaims seeking treble damages resulting from a conspiracy respecting the franchise agreement in violation of the Sherman Act. Paramount's suit and the counterclaims were separated for trial. After this Court had overruled the District Court's finding that such franchise agreements violated the Sherman Act, the eviction suit was tried and the District Court found no substantial evidence of a conspiracy respecting the franchise agreement and entered judgment for Partmar; but it also dismissed Partmar's treble-damage counterclaims, with prejudice and without trial. Partmar took no appeal from the District Court's judgment in the eviction suit; but it appealed from the judgment dismissing the treble-damage counterclaims. *Held:* Collateral estoppel bars further litigation by the parties of the issue of conspiracy in violation of the Sherman Act, and the judgment dismissing the counterclaims with prejudice is sustained. Pp. 90–103.

(a) A prior judgment between parties operates as an estoppel in a suit on a cause of action different from that forming the basis for the original suit only as to those matters in issue or points

controverted, upon the determination of which the finding or verdict was rendered. P. 91.

(b) The District Court did not err in dismissing Partmar's counterclaims with prejudice and without a separate trial as to their merits, and such dismissal did not deprive Partmar of due process of law. Pp. 100–103.

(c) The power remained in the trial court until entry of its final judgment to set aside, for appropriate reasons, the former order for the separate trial of the counterclaims. P. 100.

(d) A separate trial on the counterclaims would have been an improper procedure, as the judgment entered in Paramount's suit was a final disposition of the determinative issue on the counterclaims—whether or not the terms of the lease were the product of an illegal conspiracy. Pp. 100–101.

(e) Partmar was not prejudiced by the failure of the District Court to consider either the judgment or the decree in the Government's antitrust suit as evidence of the conspiracy alleged in the counterclaims. Pp. 102–103.

200 F. 2d 561, affirmed.

In a suit by respondents to declare a lease properly terminated and to regain possession of a theatre, the District Court decided that issue in favor of petitioners but dismissed petitioners' counterclaims for treble damages under the antitrust laws. 97 F. Supp. 552. The Court of Appeals affirmed. 200 F. 2d 561. This Court granted certiorari. 345 U. S. 963. *Affirmed*, p. 103.

*Russell Hardy* argued the cause for petitioners. With him on the brief were *Henry Schaefer, Jr.* and *James Wallace Kemp.*

*Jackson W. Chance* argued the cause for respondents. With him on the brief was *Rodney K. Potter.*

MR. JUSTICE REED delivered the opinion of the Court.

This case presents a matter of federal practice involving inconsistent positions by litigants in court proceedings. We have often held that under the doctrine of *res judicata* a judgment entered in an action conclusively

settles that action as to all matters that were or might have been litigated or adjudged therein.[1] But a prior judgment between the parties has been held to operate as an estoppel in a suit on a cause of action different from that forming the basis for the original suit "only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered."[2] This latter aspect of *res judicata* is the doctrine of collateral estoppel by judgment, established as a procedure for carrying out the public policy of avoiding repetitious litigation.

Petitioners entered counterclaims in a suit against them by respondent. These counterclaims were dismissed by the trial court upon determination of the original suit for petitioners and against respondents. The cause of action stated in petitioners' counterclaims is based upon a controverted personal right that had not been adjudged and therefore *res judicata* is no bar to the claimed right of recovery. Respondent, however, in its original suit had raised an issue, determinative of its cause of action, which had been therein successfully controverted by petitioners to final judgment on the merits. Collateral estoppel stands as a bar to further litigation by the parties of this issue, and this issue was held by the trial court to be determinative of petitioners' counterclaims. Petitioners' argument that the dismissal denied a hearing of issues that might have been but were not determined by the judgment on the merits of the original action

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[1] *Cromwell* v. *County of Sac,* 94 U. S. 351, 352; *Fayerweather* v. *Ritch,* 195 U. S. 276, 300, 308; *Gunter* v. *Atlantic Coast Line R. Co.,* 200 U. S. 273, 290; *Stoll* v. *Gottlieb,* 305 U. S. 165.

[2] *Cromwell* v. *County of Sac, supra,* at 353; *United States* v. *Moser,* 266 U. S. 236, 241; *Treinies* v. *Sunshine Mining Co.,* 308 U. S. 66, 74; *Commissioner* v. *Sunnen,* 333 U. S. 591, 597–601. Cf. *Federal Trade Commission* v. *Cement Institute,* 333 U. S. 683, 706, where the rule is recognized but its application denied because the issues differed.

moved us to grant certiorari, limited to the issue of the counterclaims. 345 U. S. 963.

Although federal jurisdiction was sought only on the ground of diversity, the complaint relied upon a breach of the Sherman Act, and the counterclaims were similarly bottomed on that federal law. Therefore our conclusion is reached on a consideration of federal law and procedure. It will depend upon whether or not any issue of fact or law remained for decision after the primary action was decided.[3] The issue reaches us under the following circumstances.

Paramount Pictures Theatres Corp., a subsidiary of Paramount Productions, Inc., and successor to Paramount Pictures, Inc., is a New York corporation engaged in the business of operating motion picture theatres throughout the United States. These three corporations will hereinafter be referred to jointly as "Paramount." On August 31, 1939, Paramount leased the Paramount Downtown Theatre in Los Angeles, California, for ten years to Partmar Corp., a California corporation, petitioner here, wholly owned by Fanchon & Marco, Inc. This lease was subsequently amended in 1942 and extended to March 18, 1952. A "film franchise agreement" was executed in conjunction with, and for the same period as, the lease. It licensed Partmar to exhibit Paramount pictures at the theatre as first "runs" of the films, required Partmar to exhibit such pictures not less than forty-six weeks each year, and set a scale of license fees. The lease expressly provided that it was terminable at the option of Paramount if the franchise agreement "be cancelled or terminated for any reason whatsoever." Other provisions of the lease and agreement are not germane to the issue before this Court.

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[3] See Scott, Collateral Estoppel by Judgment, 56 Harv. L. Rev. 1; Note, Collateral Estoppel by Judgment, 52 Col. L. Rev. 647.

On December 31, 1946, a decree was entered in the District Court for the Southern District of New York in an equity action brought by the United States against Paramount and other major companies of the motion picture industry alleging a conspiracy to violate the Sherman Act, 26 Stat. 209, 15 U. S. C. §§ 1–2. *United States* v. *Paramount Pictures, Inc.*, 70 F. Supp. 53. One provision of that decree defined a "franchise" to be a licensing agreement "in effect for more than one motion picture season and covering the exhibition of pictures released by one distributor during the entire period of agreement" and enjoined each of the defendants in that action "from further performing any existing franchise to which it is a party and from making any franchises in the future." *Id.*, at 73, Decree, § II, 5.

On March 26, 1947, Paramount notified Partmar that it was cancelling and terminating the franchise agreement because of the injunction, and on April 2, 1947, notified Partmar that it was terminating the lease by reason of the termination of the franchise agreement. Partmar refused to vacate the theatre upon demand, and Paramount instituted this action on May 1, 1947, in the District Court for the Southern District of California, alleging diversity and unlawful detainer of the theatre. The complaint sought, so far as is material here, restitution of possession based on illegality of the franchise under the Sherman Act as construed in the decree in the Southern District of New York, *supra,* and a declaratory judgment that the lease had been properly terminated.

Partmar and Fanchon & Marco, Inc., answered setting up various defenses and filed three counterclaims seeking treble damages under 38 Stat. 731, 15 U. S. C. § 15, resulting from a conspiracy between Paramount and other motion picture companies in violation of the Sherman Act. The conspiracy was alleged to have resulted in the

imposition of excessive terms and conditions on Partmar by the lease and franchise agreement.[4]

By order dated April 26, 1948, the District Court, upon Paramount's motion, ordered Paramount's causes of ac-

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[4] Petitioner's first counterclaim alleged:

"27. Paramount Pictures Theatres Corporation, Paramount Pictures, Inc., Paramount Film Distributing Corporation, . . . and the defendants in United States of America v. Paramount Pictures, Inc., et al., Equity No. 87–273, in the United States District Court for the Southern District of New York, and other persons to the defendants unknown, were, at the time of the acts and transactions stated in the complaint herein, and they now are, engaged in a conspiracy in restraint of trade and commerce among the States, in the distribution and exhibition of motion pictures, in violation of the Act of July 2, 1890, that is to say, the same conspiracy stated in the complaint in that case.

. . . . . .

"32. This action has been brought by the plaintiff in pursuance of the aforesaid conspiracy, arrangements and agreements, and to evade and defeat the purpose to end the aforesaid conspiracy and restraint of trade for which United States of America v. Paramount Pictures, Inc., et al., Equity No. 87–273, was instituted.

"33. As part of the aforesaid conspiracy, the plaintiff and the third-party defendants arranged and agreed among themselves, to require Partmar Corporation to license for exhibition at the Paramount Theatre for 46 weeks of each year, only photoplays made and released by Paramount Pictures, Inc., and, for any failure upon the part of Partmar Corporation to obey that requirement, to evict it from Paramount Theatre. The plaintiff, and the third-party defendants have been able to impose, and they have in fact imposed, upon Partmar Corporation, excessive terms, conditions and charges for the photoplays made and released by them and exhibited at the Paramount Theatre, from March 2, 1933, to the present time."

In the second counterclaim, the third-party plaintiffs (petitioners) reiterated their allegations of conspiracy and based their claim for damages on an addition to the lease that required Partmar "to pay an additional sum; that is to say, fifty per cent of the net receipts of Partmar Corporation at the Paramount Theatre."

The other counterclaim is not in the record but the briefs indicate that it contained substantially the same allegation as numbers one and two.

tion for unlawful detainer and declaratory judgment tried separately from Partmar's counterclaims. Prior to trial on May 3, 1948, we handed down our decision on Paramount's and the other defendants' appeals from the decree of the Southern District of New York. *United States* v. *Paramount Pictures, Inc.,* 334 U. S. 131. We held *inter alia* that "we cannot say on this record that franchises are illegal *per se* when extended to any theatre or circuit no matter how small" and set aside the District Court's findings relative to such franchises. *Id.,* at 156. Relying on that decision Partmar and Fanchon & Marco, Inc., moved in the Southern District of California for dismissal of Paramount's action against them. Their motion was denied and the case went to trial without amendment of the pleadings in November 1950, on two issues: whether Paramount was justified in terminating the franchise agreement because of the decree in the New York *Paramount* case, *supra;* whether the lease and contract were illegal contracts under the federal antitrust statutes justifying repossession of the theatre by Paramount under California law. See, *e. g., Glos* v. *McBride,* 47 Cal. App. 688, 191 P. 67. Thus issue was joined as to the legality of the actions of Paramount and its alleged co-conspirators relative to the lease and franchise agreement, wholly apart from the New York injunction, and Paramount was in the anomalous position of attempting to prove that its agreements with Partmar violated the antitrust laws. Paramount did not limit its contention of illegality of the agreement to nonconspiratorial aspects of the antitrust laws, but argued that if the agreements were illegal in any way it had the right to possession. That Partmar recognized this position is clearly shown by its statement in its brief to the trial court that "after the reversal of that judgment [in the New York case], the plaintiff [Paramount] took the position that the question presented was whether the franchise was violative of the

Sherman Act, wholly apart from any judgment or the decisions of the District and Supreme Courts." Partmar vigorously contended in brief and in argument that the lease of the theatre and the franchise for "first-run" exhibitions did not in any way violate the Sherman Act. It clearly recognized that one way the franchise might be illegal would be if it were the result of a conspiracy, for it argued in its brief that:

> "There was no allegation or proof of conspiracy. There being no showing of interstate commerce, it is immaterial whether there was conspiracy, unreasonable clearance, fixed admission prices, block booking, or unreasonable restraint. In the absence of interstate commerce, all else was entirely beyond the purview of the Sherman Act. But, assuming that there had been no failure to prove interstate commerce, the absence of conspiracy is equally fatal. Probably the only evidence relative to conspiracy was the statement of Y. Frank Freeman, a witness for Paramount, that there were no conspiratorial arrangements between Paramount and Fox West Coast. . . . Even in a setting of conspiracy, it is doubtful that the franchise would be unlawful. . . . On the evidence in this case the Partmar franchise is neither one of a system, or made by one holding a dominant position, or pursuant to a conspiracy . . . ."

It thus insisted that the remunerative lease and franchise agreements were still valid and subsisting, and that Paramount had no right to possession.

After eighteen days of trial the District Judge on May 2, 1951, filed a memorandum opinion, 97 F. Supp. 552, in which he concluded that the termination "for any reason" clause in the lease meant for any "legal or substantial reason," and that the 1946 decree of the Southern District of New York "was not a legal cause or reason for terminat-

ing the franchise agreement." He continued, "there is no evidence to indicate that any third party conspired with either Paramount or Partmar to bring into existence the franchise agreement," that "a single contract between one film company and one exhibitor is not violative of the Sherman Act," and that, since the franchise agreement was "not in itself an illegal agreement," Paramount "had no right to cancel or terminate it because of illegality." The court went on to hold that "as we find no substantial evidence of a conspiracy in this case on the part of Partmar or Paramount, we are of the opinion that the counterclaimant cannot recover" on the counts seeking treble damages on the basis of an alleged conspiracy. The opinion directed Partmar to submit proposed findings of fact; both parties submitted such findings and proposed conclusions; and a hearing, upon notice, was held on June 18, 1951. Paramount thereupon submitted Finding No. 20 and conclusion No. 11, *infra,* thus formalizing its contention that the judgment denying plaintiff's petition estopped defendant from recovering on its counterclaims for violation of the Sherman Act. At this hearing Partmar appeared and expressly objected to the adoption of the proposed finding and conclusion which required the dismissal of its treble-damage counterclaims. Argument was heard on Partmar's objection, but the court adhered to its position and adopted among its findings No. 20 which provides:

> "Paramount, not in conjunction with any other major studio, entered into the franchise agreement which gave to Partmar the right to exhibit the first-run feature pictures of Paramount in the City of Los Angeles. Neither said franchise agreement, nor said lease, nor any amendment to either of them constituted any part of, nor were they or any of them entered into as a result of any agreement, combina-

tion or conspiracy of any kind whatsoever between Paramount and any other person or persons, nor between Partmar and any other person or persons."

And conclusion No. 11 which provides:

"Inasmuch as the said lease and said franchise agreement and all amendments to each of them were in all respects lawful and were not entered into nor performed as a result of any combination or conspiracy of any kind whatsoever on the part of either plaintiffs, defendants, third party plaintiff or third party defendants, with any person or persons; inasmuch as said lease, said agreement and amendments thereto have neither the purpose or effect of restraining or monopolizing trade or commerce among the several states in the production, distribution, transportation, sale or exhibition of motion pictures; and inasmuch as each was an agreement solely between plaintiff and defendants, or defendants and third party plaintiffs and third party defendants dealing solely with the Paramount Theatre Los Angeles alone and the exhibition of pictures thereat; third party plaintiffs, and each of them, cannot recover upon the first, second and fourth counterclaim, or any of them." [5]

The court simultaneously entered an order giving judgment for Partmar on Paramount's two counts of unlawful detainer, declaring the rights and duties of the parties under the franchise and the lease, and dismissing with prejudice Partmar's three treble-damage counterclaims.

Partmar, apparently not wishing to jeopardize its valuable lease and franchise, took no appeal from parts of

[5] Partmar had brought in other parties as third-party defendants under Fed. Rules Civ. Proc. 14. Their presence is not important in this phase of the controversy.

the District Court's judgment declaring the lease and franchise to be valid and subsisting and the theatre not to be unlawfully detained.[6] Therefore those parts of the judgment must be accepted as valid and binding on the parties. Partmar did, however, serve timely notice of appeal to the Court of Appeals for the Ninth Circuit from so much of the District Court judgment as dismissed with prejudice the treble-damage counterclaims. The Court of Appeals for the Ninth Circuit, in a *per*

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[6] While Partmar did not appeal, it might have. The finding and conclusion of law just quoted were essential to the determination of Paramount's claim for possession of the theatre. Paramount's position after this Court's reversal of the franchise portion of the New York decree, was that the agreements were invalid under the federal antitrust statutes as the product of an illegal conspiracy. It is only when a finding of law or fact is not necessary for a decree that the prevailing party may not appeal and the finding does not form the basis for collateral estoppel. This is shown by the case cited to support the statement as to appeal in *Lindheimer* v. *Illinois Bell Telephone Co.*, 292 U. S. 151, 176. See *New York Telephone Co.* v. *Maltbie,* 291 U. S. 645, and cases cited. *Electrical Fittings Corp.* v. *Thomas & Betts Co.*, 307 U. S. 241, stated the practice negatively. "A party may not appeal . . . findings . . . not necessary to support the decree." Professor Scott, note 3, *supra,* at 12, concurs in this view. Restatement, Judgments, § 68 reads: "(1) Where a question of fact essential to the judgment is actually litigated and determined by a valid and final judgment, the determination is conclusive between the parties in a subsequent action on a different cause of action, except as stated in §§ 69, 71 and 72." Section 69 (2) ["Where a party to a judgment cannot obtain the decision of an appellate court because the matter determined against him is immaterial or moot, the judgment is not conclusive against him in a subsequent action on a different cause of action."] is immaterial because the conspiracy determination was essential for Partmar's defense to Paramount's claim. See *Galloway* v. *General Motors Acceptance Corp.*, 106 F. 2d 466. The paucity of cases in this field is explainable by the infrequent happening of a need of a prevailing party to set aside a determination necessary to a judgment in his favor.

*curiam* opinion on December 16, 1952, 200 F. 2d 561, noted agreement with the opinion of the District Court and affirmed the District Court judgment. As heretofore indicated, our consideration is "limited to the issue of the counterclaims."

Partmar contends that the District Court erred in dismissing its counterclaims with prejudice without a separate trial as to their merits, which the trial court had previously ordered, and that such dismissal deprived it of due process of law. In particular, it argues that it was denied the valuable property right of having admitted in evidence during a trial the judgment in the case of *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, which, it argues, would provide, under § 5 of the Clayton Act, 38 Stat. 731, 15 U. S. C. § 16, prima facie evidence of the conspiracy on which the counterclaims were based. We think these contentions are without merit. The power remained in the trial court until the entry of his final judgment to set aside, for appropriate reasons, the former order for separate trial of the counterclaims.

Each of Partmar's counterclaims for treble damages was predicated upon allegations that Paramount and its alleged co-conspirators engaged in a conspiracy in restraint of trade and commerce, and that the allegedly "excessive terms, conditions and charges for the photoplays made and released by them" and the exaction of fifty percent of the net receipts, imposed by the lease and franchise agreement, were part of such conspiracy. The District Court found in the principal action, which decision was not appealed and is not before us, that neither the lease nor the franchise was the result "of any agreement, combination or conspiracy of any kind whatsoever." Of course, if this finding were not material to the principal action, the doctrine of collateral estoppel would not apply. But this finding was ob-

viously necessary to the court's judgment that the agreements were not illegal. Partmar had ample opportunity upon trial to present evidence and to contest the conspiracy finding, and argument was heard prior to adoption of the findings. This finding, binding all of the parties, determined the key ingredient of Partmar's counterclaims contrary to its allegations and thus precluded recovery upon such claims. A separate trial on the counterclaims would have been improper procedure, as the judgment entered on the complaint was a final disposition of the determinative issue on the counterclaims—whether or not the terms of the lease were a product of an illegal conspiracy.[7]

The allegations of the counterclaims charge that as a result of "the same conspiracy stated in the complaint" in *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, Partmar was damaged in the terms of its lease from Paramount. Yet this very lease was sustained by the judgment in this case on the ground that it was not violative of the Sherman Act. Partmar moved to dismiss the complaint in this case after this Court's decision in the *Paramount Pictures* case on the ground that it "had become moot by the demonstrated nonexistence of the basic fact," *i. e.*, the illegality of the lease. In its brief in the trial court, petitioner stated its position clearly:

> "The effect of the opinion seems to be that franchises are not unlawful per se, that is, apart from con-

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[7] *Southern Pacific R. Co.* v. *United States*, 168 U. S. 1, 48–49:

"The general principle announced in numerous cases is that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified."

spiracy, and that on the record in that case they were not shown to have been parts of the conspiracy.

. . . . . .

"The Supreme Court seems at least to have clearly indicated that a franchise with one exhibitor for one theatre, like that with Partmar, was not involved in the case. It said in effect that only franchises with defendants and franchises for theatres in a circuit were involved."

Nor would unlimited admission in evidence of the final decree in *United States* v. *Paramount Pictures, Inc., supra,* have aided Partmar. We had reversed the only finding in that case pertaining to the illegality under the Sherman Act of franchise agreements between exhibitors and producers, and the final consent decree as to Paramount entered on March 4, 1949, contains no findings on such subject. Cf. *United States* v. *Paramount Pictures, Inc.,* 85 F. Supp. 881, 897. Since final judgments or decrees in Government antitrust actions are admissible under § 5 of the Clayton Act as prima facie evidence only of issues actually determined in the prior adjudication,[8] the Government judgments provide no proof of the indispensable element to Partmar's counterclaims, that the lease and

[8] *Emich Motors Corp.* v. *General Motors Corp.,* 340 U. S. 558, 568–569:

"We think that Congress intended to confer, subject only to a defendant's enjoyment of its day in court against a new party, as large an advantage as the estoppel doctrine would afford had the Government brought suit.

"The evidentiary use which may be made under § 5 of the prior conviction of respondents is thus to be determined by reference to the general doctrine of estoppel. . . . Accordingly, we think plaintiffs are entitled to introduce the prior judgment to establish prima facie all matters of fact and law necessarily decided by the conviction and the verdict on which it was based."

See *Theatre Enterprises* v. *Paramount Corp.,* 346 U. S. 537; *Monticello Tobacco Co., Inc.* v. *American Tobacco Co.,* 197 F. 2d 629.

franchise were part of or the result of a conspiracy. From the decree there would have been prima facie evidence of a conspiracy but no evidence that the Partmar lease was a result of that conspiracy so as to overturn the trial court's finding in this very proceeding that no illegality tainted the lease. Partmar, therefore, was not prejudiced by the fact that the District Court did not consider either the judgment or the decree as evidence of the conspiracy alleged in the counterclaims. As we have pointed out, the conclusion of the trial court went beyond the lawfulness of the "franchise," as distinguished from the lease of which it was a part, and held that the lease was not secured by conspiracy. See p. 96, *supra*. This was *res judicata* of that fact, if it be considered a fact, and nonetheless *res judicata* if it is a decision on the law, binding in another cause of action arising from the same controversy or claim.[9]

*Affirmed.*

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

[For dissenting opinion of MR. CHIEF JUSTICE WARREN, joined by MR. JUSTICE BLACK, see p. 104.]

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[9] *United States* v. *Moser*, 266 U. S. 236, 242:

"The contention of the Government seems to be that the doctrine of *res judicata* does not apply to questions of law; and, in a sense, that is true. It does not apply to unmixed questions of law. Where, for example, a court in deciding a case has enunciated a rule of law, the parties in a subsequent action upon a different demand are not estopped from insisting that the law is otherwise, merely because the parties are the same in both cases. But a *fact, question* or *right* distinctly adjudged in the original action cannot be disputed in a subsequent action, even though the determination was reached upon an erroneous view or by an erroneous application of the law."

*Emich Motors Corp.* v. *General Motors Corp.*, 340 U. S. 558, 569; Cf. *United States* v. *Stone & Downer Co.*, 274 U. S. 225, 230.

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MR. CHIEF JUSTICE WARREN, whom MR. JUSTICE BLACK joins, dissenting.

I cannot join in the Court's decision. Relying on the doctrine of collateral estoppel, it affirms the trial judge's dismissal of petitioner's treble-damage counterclaims without a trial. The doctrine, I believe, is inapplicable to the facts of this case.

The Court correctly states the well-settled rule that a prior judgment on a different cause of action is not conclusive as to questions which might have been but were not actually litigated in the original action.[1] The inquiry, therefore, must be whether the conspiracy issue was actually litigated in the eviction suit; if it was not so litigated, the District Court's finding as to the absence of evidence of conspiracy cannot preclude petitioner on its counterclaims. The Court rests its decision on the assumptions (1) that the conspiracy issue was litigated in the eviction suit and (2) that in any event petitioner had a full opportunity to litigate the issue. Neither assumption, it seems to me, is warranted by the facts. To those facts I now turn.

The respondent, Paramount, sought to take advantage of its own violation of the federal antitrust laws by bringing an eviction suit to cancel a valuable lease held by its tenant, the petitioner, on a Los Angeles theatre. The lease provided that it was terminable if, "for any reason whatsoever," petitioner's franchise for the showing of Paramount's pictures should be "cancelled or terminated."

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[1] *Cromwell* v. *County of Sac*, 94 U. S. 351, 353. See also Restatement, Judgments, § 68; Scott, Collateral Estoppel by Judgment, 56 Harv. L. Rev. 1, 2–3, 5–6; Note, Collateral Estoppel, 52 Col. L. Rev. 647, 652–657; Developments in the Law, Res Judicata, 65 Harv. L. Rev. 818, 840–841; Von Moschzisker, Res Judicata, 38 Yale L. J. 299, 311–312; Cleary, Res Judicata Reexamined, 57 Yale L. J. 339, 342–343; Freeman, Judgments (5th ed.), §§ 674–676.

Paramount, in its complaint charging unlawful detainer, did not allege in any respect that the franchise was invalid because part of a conspiracy; rather, the crux of the complaint was that the franchise had been terminated by the District Court decree in the Government antitrust action against Paramount and others. *United States* v. *Paramount Pictures, Inc.*, 66 F. Supp. 323, 70 F. Supp. 53. After the eviction complaint had been filed, the decree in the Government action was reviewed here; the Court sustained the decree as to the existence of a nationwide conspiracy among the defendants, but reversed that portion of the decree which held that franchises were illegal *per se*. 334 U. S. 131, 155–156. Petitioner moved to dismiss, contending that the basis of the eviction complaint had been swept away by this Court's decision. In opposing the motion to dismiss, Paramount made an about-face and urged the illegality of the franchise on other grounds: its minimum price requirements, block booking, and restrictions on runs and clearances. Paramount alleged that these provisions of the franchise agreement, apart from any conspiracy and independent of the decree in the Government action, rendered the agreement an illegal "contract . . . in restraint of trade" under the Sherman Act. This new theory of the case was accepted by the trial court without any change in the pleadings, and the motion was denied.

In its answer, petitioner set up as a defense that Paramount was seeking to evict petitioner in pursuance of the conspiracy enjoined in *United States* v. *Paramount Pictures, Inc., supra,* and that the effect of an eviction would be to drive petitioner out of business and thus enable Paramount to extend an unlawful monopoly over motion picture theatres. On Paramount's motion, the defense was stricken as an improper collateral attack on the right of the lessor to recover possession of the theatre.

The answer also contained petitioner's counterclaims, alleging that Paramount and others named as cross-defendants had engaged in the conspiracy enjoined in *United States* v. *Paramount Pictures, Inc., supra,* and that by reason of this market control Paramount had been able to exact from petitioner monopoly profits in the form of overcharges for theatre and film rentals. Treble damages and injunctive relief were sought. On Paramount's motion to dismiss the counterclaims, they were sustained as valid actions under the antitrust laws.[2]

Both actions—the eviction suit and the counterclaims—were then ready for trial. Paramount moved that the two actions be tried separately. Petitioner consented and the court so ordered, the eviction suit to be tried first.

Throughout the lengthy trial of the eviction suit, the trial judge repeatedly complained of the total absence of any evidence showing that the franchise was part of a conspiracy. His complaint went unheeded. Paramount, which had the burden of proof in the eviction suit, not only failed to introduce such evidence but never even alleged such a conspiracy. Petitioner, on the other hand, never denied the existence of the conspiracy, but argued that the franchise in itself was not invalid.[3] And both

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[2] 38 Stat. 731, 15 U. S. C. § 15.

[3] The Court's opinion, apparently for the purpose of showing that the conspiracy issue was actually litigated, points to statements in petitioner's trial brief to the effect that Paramount had failed to establish a conspiracy in restraint of interstate commerce. It is difficult to understand how petitioner's argument at the trial that the conspiracy issue was *not* litigated can now be converted into proof that the issue *was* litigated. Petitioner's statements in its brief amounted to nothing more than a wholly justifiable contention that Paramount had failed in its burden of proof in the eviction suit; the statements merely pointed out that the franchise was valid in the absence of evidence of conspiracy and that Paramount had not even alleged a conspiracy—by pleadings, evidence, or oral argument.

times that petitioner sought to inject the conspiracy issue into the case, it was prevented from doing so. As I have already noted, petitioner's answer alleged that the eviction suit was brought in pursuance of the conspiracy; on Paramount's motion, the defense was stricken. Later when Paramount offered into evidence the decree in the Government action for the limited purpose of showing Paramount as being subject to the injunctive features of the decree, petitioner objected on the ground that the decree "should go in as a document in toto—no part of it but the whole thing." In support of the objection, petitioner argued that § 5 of the Clayton Act [4] made the decree prima facie evidence of the conspiracy established in the Government action. Again petitioner was overruled.

At the conclusion of the eviction trial, the court gave judgment for petitioner because of Paramount's failure to show the illegality of the franchise by evidence of conspiracy. As to the counterclaims, the court stated: [5]

> "At the time of trial it was agreed that action on the counter-claims should be postponed until after the trial of the main issue involved, and no evidence was offered by either plaintiff or defendant on the counter-claims."

Nevertheless, the court dismissed the counterclaims without trial on the ground that there was ". . . no substantial evidence of a conspiracy in this case on the part of Partmar or Paramount . . . ." [6] The court thus disposed of both the eviction suit and the counterclaims on the same ground—the absence of any evidence of conspiracy.

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[4] 38 Stat. 731, 15 U. S. C. § 16.

[5] 97 F. Supp. 552, 561.

[6] *Ibid.*

I submit that on these facts the Court's two assumptions are unwarranted. The issue of conspiracy was not litigated; nor did petitioner have a fair opportunity to litigate the issue. Indeed, whether petitioner had an opportunity to do so is immaterial under the doctrine of collateral estoppel. If the counterclaims had been based on the same cause of action as the eviction suit, such an opportunity might have barred petitioner under the more sweeping doctrine of *res judicata*. But here, where the second suit is based on a different cause of action, a neglected opportunity in the first action to litigate an issue is without legal significance.[7]

Under these circumstances, should the doctrine of collateral estoppel be invoked against petitioner to bar a trial on its counterclaims? I believe not. The doctrine presupposes, and the Constitution requires, that the party who is estopped had his day in court in a prior action and that he then had a fair hearing in which to prove his point but failed. Surely the doctrine was never intended to estop a party who in the prior action was denied such a hearing.

That, as I see it, is precisely the situation here. The eviction suit and counterclaims had been severed for trial purposes. During the trial of the eviction suit, Paramount was the only party with any reason or justification for proving that the franchise was part of a conspiracy. Because of Paramount's failure to present such proof, the court held the lease to be valid, but at the same time gave judgment against petitioner on its counterclaims because of the same shortcoming of Paramount's proof. This Court now affirms. The anomalous result is to penalize petitioner for refusing to help Paramount win the eviction suit.

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[7] See note 1, *supra*.

I believe that petitioner has been denied its day in court, and that the case should be reversed with instructions to the trial court to hear the counterclaims.[8]

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[8] There is yet an additional reason for not applying the doctrine of collateral estoppel here. Petitioner, as the successful party in the eviction suit, could not appeal the District Court's finding that there was no evidence of conspiracy. *Lindheimer* v. *Illinois Bell Telephone Co.*, 292 U. S. 151, 176; *New York Telephone Co.* v. *Maltbie,* 291 U. S. 645. The adverse finding was not included in the Court's decree, as in *Electrical Fittings Corp.* v. *Thomas & Betts Co.*, 307 U. S. 241. Because of this inability to appeal, the finding cannot bind petitioner in a subsequent action between the parties based upon a different cause of action. See Restatement, Judgments, § 69 (2); Scott, Collateral Estoppel by Judgment, 56 Harv. L. Rev. 1, 15–18.

The Court's opinion (footnote 6) concedes that inability to appeal precludes a subsequent application of collateral estoppel, but contends that petitioner could have appealed here because the trial court's finding in the eviction suit (as to the absence of proof of conspiracy) was material to the decree in the eviction suit. The Court's opinion cites no case, in this Court or any other, holding that a successful party can appeal findings which are not inserted as part of the decree. Indeed, the opinion overlooks the very holdings of this Court on which it relies for support. In both *Lindheimer* v. *Illinois Bell Telephone Co., supra,* and *New York Telephone Co.* v. *Maltbie, supra,* the findings which the public utility sought to appeal related to the value of its property for rate-making purposes; in each case, the trial court had held that the rates fixed by a state commission were confiscatory *on the basis of those findings.* Yet this Court held that the public utility, as the successful party, could not appeal those findings. Surely in this case the trial judge's finding as to conspiracy was no more "material" than the findings which this Court refused to review in *Lindheimer* and *Maltbie.*

# KERN-LIMERICK, INC. ET AL. *v.* SCURLOCK, COMMISSIONER OF REVENUES FOR ARKANSAS.

APPEAL FROM THE SUPREME COURT OF ARKANSAS.

No. 115. Argued January 4, 1954.—Decided February 8, 1954.

The Arkansas Gross Receipts Tax Law of 1941, which levies on sellers an excise tax of 2% on the gross receipts from all sales in the State, *held* unconstitutional as applied to the transactions here involved, whereby private contractors procured in Arkansas two tractors for use in constructing a naval ammunition depot for the United States under a cost-plus-fixed-fee contract entered into with the Navy Department under §§ 2 (c) (10) and 4 (b) of the Armed Services Procurement Act of 1947 and providing that, in procuring articles required for accomplishment of the work, the contractor should act as purchasing agent for the Government, title to the articles purchased should pass directly from the vendor to the Government and the Government should be directly liable to the vendor for payment of the purchase price. Pp. 111–123.

(a) The Procurement Act authorized the purchase of this machinery by the Navy for the construction of an ammunition depot. P. 114.

(b) Under the Procurement Act, the Navy Department has power to negotiate contracts which provide for private purchasing agents for supplies and materials. Pp. 114–116.

(c) The restrictions in § 7 (b) on delegations of authority are not applicable to actions under § 2 (c) (10). Pp. 115–116.

(d) Under the contract here involved, the United States was the real purchaser; the naming of the Government as purchaser was not merely colorable and did not leave the contractor the real purchaser. *Alabama* v. *King & Boozer,* 314 U. S. 1, distinguished. Pp. 116–122.

(e) The drafting of the contract by the Navy Department to conserve Government funds, if that was the purpose, does not change the character of the transaction. Pp. 122–123.

221 Ark. 439, 254 S. W. 2d 454, reversed.

The Supreme Court of Arkansas held the Arkansas Gross Receipts Tax Law of 1941, Ark. Stat., 1947, § 84–1901 *et seq.*, applicable to the sale of certain ma-

chinery in Arkansas for use in the construction of a naval ammunition depot for the United States. 221 Ark. 439, 254 S. W. 2d 454. On appeal to this Court, *reversed,* p. 123.

*Assistant Attorney General Holland* argued the cause for appellants. On the brief were *Acting Solicitor General Stern, Mr. Holland, Ellis N. Slack* and *Lee A. Jackson* for the United States, and *A. F. House* and *William Nash* for Kern-Limerick, Inc., appellants.

*O. T. Ward* argued the cause and filed a brief for appellee.

MR. JUSTICE REED delivered the opinion of the Court.

This appeal brings here the legality of the application of the Arkansas Gross Receipts Tax Law of 1941, Ark. Stat., 1947, § 84–1901 *et seq.,* to a transaction by which certain private contractors engaged in a joint venture, abbreviated WHMS, procured in Arkansas two diesel tractors costing $17,146, for use in the construction there for the United States of a naval ammunition depot estimated to cost over thirty million dollars. The tractors were procured from Kern-Limerick, Inc., a local dealer. The circumstances of the transaction would concededly make Kern-Limerick liable for the tax if the real purchaser were not the United States.

The applicable sections of the Gross Receipts Tax Law levy an "excise tax of two [2%] per centum upon the gross proceeds or gross receipts derived from all sales to any person." § 84–1903. This is a sales tax, not a use tax.[1] It is to be paid to the Tax Commissioner by the seller, § 84–1908. He is the taxpayer, § 84–1902 (e), and "shall collect the tax levied hereby from the purchaser."

[1] *Cook* v. *Southeast Arkansas Transportation Co.,* 211 Ark. 831, 202 S. W. 2d 772.

§ 84–1908. Gross receipts derived from sales to the United States Government are exempt. § 84–1904.

The construction contract had, so far as pertinent here, the provisions as to "Materials—Purchases" which are set out in the margin.[2] It was entered into by the Department of the Navy "under authority of Sections 2 (c)(10) and 4 (b)" of the Armed Services Procurement

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[2] Materials—Purchases. Article 8—(a) "Except where provision is otherwise made by the Officer-in-Charge, all materials, articles, supplies, and equipment required for the accomplishment of the work under this contract shall be furnished by the Contractor. The Contractor shall act as the purchasing agent of the Government in effecting such procurement and the Government shall be directly liable to the vendors for the purchase price. The exercise of this agency is subject to the obtaining of approval in the instances and in the manner required by subparagraph (c) of this article. The Contractor shall negotiate and administer all such purchases and shall advance all payments therefor unless the Officer-in-Charge shall otherwise direct.

"(b) Title to all such materials, articles, supplies and equipment, the cost of which is reimbursable to the Contractor hereunder, shall pass directly from the vendor to the Government without vesting in the Contractor, and such title (except as to property to which the Government has obtained title at an earlier date) shall vest in the Government at the time payment is made therefor by the Government or by the Contractor or upon delivery thereof to the Government or the Contractor, whichever of said events shall first occur. This provision for passage of title shall not relieve the Contractor of any of its duties or obligations under this contract or constitute any waiver of the Government's right to absolute fulfillment of all of the terms hereof.

"(c) No purchase in excess of $500 shall be made hereunder without the prior written approval of the Officer-in-Charge, except that the Officer-in-Charge may, in his discretion, either reduce the limitation on the amount of any purchase which may be made without such prior approval or authorize the Contractor to make purchases in amounts not in excess of $2500 for any one purchase without obtaining such prior approval."

These provisions were also applicable to subcontractors.

Act of 1947. 62 Stat. 21, 41 U. S. C. (Supp. V) § 157 *et seq.* These sections authorized this cost-plus-a-fixed-fee contract by negotiation without advertising.[3]

Kern-Limerick, Inc., the seller, upon demand by the Commissioner paid under protest the amount of the sales tax and brought this action for a refund in accordance with state law. The United States intervened, as under the contract any state taxes the contractor was required to pay were reimbursable to it by the Government. The Supreme Court of Arkansas held WHMS was the purchaser and the claimed tax payable by Kern-Limerick as the "seller." It denied the contention of the United States that the Government was the purchaser. It held that the Armed Services Procurement Act authorized the Navy Department "to purchase . . . supplies or services for its own *use*," but did not authorize the Department "to buy nails, lumber, cement, tractors, etc., which were not to be *used* by the Navy but by WHMS [in this instance] to construct, as independent contractors, the Ammunition Dump." The state court further held that, even if the Department had the authority to buy the tractors, it could not, under the Procurement Act of 1947, delegate this power to WHMS. 221 Ark. 439, 254 S. W. 2d 454.

Appellants seek reversal of the decision on the grounds that the Procurement Act authorizes this contract and

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[3] Section 2 (c) provides:

"All purchases and contracts for supplies and services shall be made by advertising, as provided in section 3, except that such purchases and contracts may be negotiated by the agency head without advertising if—

. . . . . .

"(10) for supplies or services for which it is impracticable to secure competition; . . . ."

Section 4 (b) prohibits use of cost-plus-a-percentage-of-cost contracts and prescribes other operative limitations not pertinent here. All provisions required by those sections were included in the contract.

that the Arkansas tax cannot by statute or constitutionally be applied to a purchase by the United States.

The state court's interpretation of the Procurement Act to deny the Navy authority to buy supplies or equipment for the construction of an ammunition dump is, we think, too restrictive. The Act gives broad powers to the Armed Services for obtaining as cheaply and promptly as possible "purchases and contracts for supplies or services . . . for the use of any such agency or otherwise," § 2 (a), and provides:

> SEC. 9. "(b) The term 'supplies' shall mean all property except land, and shall include, by way of description and without limitation, public works, buildings, facilities, ships, floating equipment, and vessels of every character, type and description, aircraft, parts, accessories, equipment, machine tools and alteration or installation thereof." [4]

We hold that the Act allows the purchase of this machinery.

It seems to us, also, that under the Procurement Act the Armed Services may use agents, other than its own official personnel, to handle for it the detail of purchase. The contention of Arkansas which was accepted by its

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[4] S. Rep. No. 571, 80th Cong., 1st Sess., p. 21, had this to say of this language:

"To make it clear that the bill relates to all procurement by the services, except purchases with nonappropriated funds, subsection (b) of this section defines 'supplies' to include all property except land, and shall include, but without limitation, public works, buildings, facilities, ships, floating equipment, and vessels of every character, type and description, aircraft, parts, accessories, equipment, machine tools, and alteration or installation thereof. These are really examples and this section is to be construed in the broadest manner possible."

The corresponding House Report, No. 109, p. 23, omitted only the last sentence.

Supreme Court is, as we understand it, that the Procurement Act does not permit a delegation to private contractors of any authority to purchase for or pledge the credit of the United States even though these contractors have contracts for construction or supplies on a cost-plus basis. Further, it follows from the Arkansas contention, that without such statutory authority the purchase by the contractor was not for the United States but for itself. This contention is based on the language of the Procurement Act, §§ 7 (a) and (b).[5] Pursuant to § 7 (a), the Secretary of the Navy, somewhat obscurely, appears to have delegated his authority to determine the necessity for a negotiated contract to a Navy Contracting Officer asserted in the contract, without exception, to be the Chief of the Bureau of Yards and Docks. See 32 CFR §§ 400.201–5 and 402.101. That official negotiated the contract, as it stated and as is admitted by stipulation, under the authority of § 2 (c)(10) of the Procurement Act—"for supplies or services for which it is impracticable to secure competition."

Arkansas calls attention to the restrictions on delegation in § 7 (b) upon which the state court commented. But the provisions of § 7 (b), as the words show, do not

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[5] "SEC. 7. (a) . . . Except as provided in subsection (b) of this section, the agency head is authorized to delegate his powers provided by this Act, including the making of such determinations and decisions, in his discretion and subject to his direction, to any other officer or officers or officials of the agency.

"(b) The power of the agency head to make the determinations or decisions specified in paragraphs (12), (13), (14), (15), and (16) of section 2 (c) and in section 5 (a) shall not be delegable, and the power to make the determinations or decisions specified in paragraph (11) of section 2 (c) shall be delegable only to a chief officer responsible for procurement and only with respect to contracts which will not require the expenditure of more than $25,000."

Appellee also refers to § 10. As that provides only for interservice procurement, we do not think it pertinent.

cover actions under § 2 (c)(10), and the section's prohibition of delegation in certain instances is inapplicable. We find nothing in the Procurement Act that bars a contract for purchase for the United States of supplies or services by private persons.

The Government asserts that §§ 4 (a) and (b) authorize this contract. Under them, negotiated contracts such as this "may be of any type which . . . will promote the best interests of the Government." Under such a provision, it seems that the determination to use purchasing agents is permissible. Where there is no prohibition of a particular type of contract and no direction to use a particular type, the contracting officers are free to follow business practices.[6] We conclude that the Navy Department has power to negotiate contracts which provide for private purchasing agents for supplies and materials.

With this determination that the provisions of the contract are within the authority of the Procurement Act, we turn to examine the validity of the argument that the naming of the Government as purchaser was only colorable and left the contractor the real purchaser and the transaction subject to the Arkansas tax. *Alabama* v. *King & Boozer,* 314 U. S. 1, is relied upon primarily. We consider this argument under the assumption, made by the Supreme Court of Arkansas, that the contract was designed to avoid the necessity in this cost-plus contract of the ultimate payment of a state tax by the United States.

We are mindful, too, of the careful attention Congress has given in recent years to a proper adjustment of tax liabilities between the federal and the state sovereignties. Congress has been solicitous to see that states and their subdivisions are not unduly burdened by federal acquisi-

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[6] *United States* v. *Linn,* 15 Pet. 290, 316; *Muschany* v. *United States,* 324 U. S. 49, 63.

tion of property taxable by the states when otherwise held. It understands the burdens on local public agencies from the new federal installations and their accompanying personnel. Provisions deemed suitable have been made.[7] These include recent legislation designed to make independent contractors carrying on activities of the Atomic Energy Commission subject to state sales taxes.[8] But in recommending the legislation the Joint Committee on Atomic Energy, while providing for voluntary contributions, did not propose to subject Government property and purchases to state taxes. The enactment left them free.[9] This recognition of the constitutional immunity of the Federal Government from state exactions rests, of course, upon unquestioned authority. From *McCulloch* v. *Maryland,* 4 Wheat. 316, through *Gillespie* v. *Oklahoma,* 257 U. S. 501, and *New York ex rel. Rogers* v. *Graves,* 299 U. S. 401, a host of cases upheld freedom from state taxation not only for Government activities but also for the agencies and

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[7] *E. g.,* T. V. A., 16 U. S. C. § 831*l*; R. F. C., 15 U. S. C. § 607. Cf. *Dameron* v. *Brodhead,* 345 U. S. 322.

[8] 67 Stat. 575. See S. Rep. No. 694, 83d Cong., 1st Sess.

[9] Section 9 of the Atomic Energy Act of 1946, 60 Stat. 765, 42 U. S. C. § 1809 (b), as amended, provides: "In order to render financial assistance to those States and localities in which the activities of the Commission are carried on and in which the Commission has acquired property previously subject to State and local taxation, the Commission is authorized to make payments to State and local governments in lieu of property taxes. Such payments may be in the amounts, at the times, and upon the terms the Commission deems appropriate, but the Commission shall be guided by the policy of not making payments in excess of the taxes which would have been payable for such property in the condition in which it was acquired, except in cases where special burdens have been cast upon the State or local government by activities of the Commission, the Manhattan Engineer District or their agents. In any such case, any benefit accruing to the State or local government by reason of such activities shall be considered in determining the amount of the payment."

salaries of persons that carried on the work. *James* v. *Dravo Contracting Co.*, 302 U. S. 134, reviewed this judicial history, adopted for federal contractors and state taxation the reasoning that subjected a state contractor's earnings to federal income tax and upheld the state's gross receipts tax upon a federal contractor's earnings on the ground that it did not interfere "in any substantial way with the performance of federal functions." *Id.*, at 161. The question of the immunity of Government in relation to its purchases of commodities was left open. *Id.*, at 153. *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466, overruled *New York ex rel. Rogers* v. *Graves*, *supra*, and *Gillespie*, *supra*, fell in *Oklahoma Tax Comm'n* v. *Texas Co.*, 336 U. S. 342, 365.

A phase of the question reserved in the *Dravo* case came up in *Alabama* v. *King & Boozer*, 314 U. S. 1. We declared that federal sovereignty "does not spell immunity from paying the added costs, attributable to the taxation of those who furnish supplies to the Government and who have been granted no tax immunity." *Id.*, at 9. That case involved the usual type sales tax on the seller, collectible by him from the buyer. There was there, too, a cost-plus-a-fixed-fee contract with the United States. We held the state tax collectible from the sellers, notwithstanding the Government bore the economic burden. A few excerpts will make clear the purport of the ruling:

> "As the sale of the lumber by King and Boozer was not for cash, the precise question is whether the Government became obligated to pay for the lumber and so was the purchaser whom the statute taxes, but for the claimed immunity. . . . The contract provided that the title to all materials and supplies for which the contractors were 'entitled to be reimbursed' should vest in the Government 'upon delivery at the site of the work or at an approved

storage site and upon inspection and acceptance in writing by the Contracting Officer.'" *Id.*, at 10.

". . . we think all the provisions which we have mentioned, read together, plainly contemplate that the contractors were to purchase in their own names and on their own credit all the materials required, unless the Government should elect to furnish them; that the Government was not to be bound by their purchase contracts, but was obligated only to reimburse the contractors when the materials purchased should be delivered, inspected and accepted at the site." *Id.*, at 11.

"But however extensively the Government may have reserved the right to restrict or control the action of the contractors in other respects, neither the reservation nor the exercise of that power gave to the contractors the status of agents of the Government to enter into contracts or to pledge its credit." *Id.*, at 13.

The contract here in issue differs in form but not in economic effect on the United States. The Nation bears the burden of the Arkansas tax as it did that of Alabama. The significant difference lies in this. Both the request for bids and the purchase order, in accordance with the contract arrangements making the contractors purchasing agents for the Government, note 2, *supra,* contain this identical, specific provision:

"3. This purchase is made by the Government. The Government shall be obligated to the Vendor for the purchase price, but the Contractor shall handle all payments hereunder on behalf of the Government. The vendor agrees to make demand or claim for payment of the purchase price from the Government by submitting an invoice to the Con-

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tractor. Title to all materials and supplies purchased hereunder shall vest in the Government directly from the Vendor. The Contractor shall not acquire title to any thereof."

The purchase order is headed Navy Department Bureau of Yards and Docks, is signed by the contractor as purchasing agent, and requires the seller to make this certification on the claim for payment:

"'I certify that the above bill is correct and just; that payment therefor has not been received; that all statutory requirements as to American production and labor standards, and all conditions of purchase applicable to the transactions have been complied with; and that the State or local sales taxes are not included in the amounts billed.'

. . . . .

"In the event the Contractor is required to pay and does pay State or local sales taxes, the words 'and that State or local sales taxes are not included in the amounts billed' should be struck from the certification and the following additional certification added:

"'The amount of State or local sales, use, occupational, gross receipts, or other similar taxes or license fees imposed on the Vendor or Vendee by reason of this transaction is $————. The Vendor, or Vendee, as the case may be, agrees upon direction of the United States to make appropriate claim for refund and in the event of any refund, to pay the amount thereof to the United States.'"

The stipulation of facts shows in detail the course of business under this contract in the purchase of supplies and the form of this purchase. Both conform to the language of the contract in requiring specific Government approval to the purchasing agent for each request for bid and each purchase. Under these circumstances, it is clear

that the Government is the disclosed purchaser and that no liability of the purchasing agent to the seller arises from the transaction.[10]

A comment should be made about another excerpt from *King & Boozer*. It was referred to in the Arkansas opinion as though it were effective for the determination of this case. The quotation is this:

> "The soundness of this conclusion turns on the terms of the contract and the rights and obligations of the parties under it. The taxing statute, as the Alabama courts have held, makes the 'purchaser' liable for the tax to the seller, who is required 'to add to the sales price' the amount of the tax and collect it when the sales price is collected, whether the sale is for cash or on credit. Who, in any particular transaction like the present, is a 'purchaser' within the meaning of the statute, is a question of state law on which only the Supreme Court of Alabama can speak with final authority." *Id.*, at 9–10.

Read literally, one might conclude this Court was saying that a state court might interpret its tax statute so as to throw tax liability where it chose, even though it arbitrarily eliminated an exempt sovereign. Such a conclusion as to the meaning of the quoted words would deny the long course of judicial construction which establishes as a principle that the duty rests on this Court to decide for itself facts or constructions upon which federal constitutional issues rest.[11] The quotation refers, we think, only to the power of the state court to determine who is responsible under its law for payment to the state of the

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[10] See *Hodgson* v. *Dexter*, 1 Cranch 345, 362; *Larson* v. *Domestic & Foreign Corp.*, 337 U. S. 682, 703; Restatement, Agency, § 320; Williston, Contracts, § 281. Cf. *Merchant Fleet Corp.* v. *Harwood*, 281 U. S. 519, 525.

[11] *New Jersey Ins. Co.* v. *Division of Tax Appeals*, 338 U. S. 665, 674; *Richfield Oil Corp.* v. *State Board*, 329 U. S. 69, 83; *United*

exaction. The formulation of the "precise question" at the first of the quotation from *King & Boozer,* p. 118, *supra,* indicates this.

We find that the purchaser under this contract was the United States. Thus, *King & Boozer* is not controlling for, though the Government also bore the economic burden of the state tax in that case, the legal incidence of that tax was held to fall on the independent contractor and not upon the United States.[12] The doctrine of sovereign immunity is so embedded in constitutional history and practice that this Court cannot subject the Government or its official agencies to state taxation without a clear congressional mandate. No instance of such submission is shown.

Nor do we think that the drafting of the contract by the Navy Department to conserve Government funds, if that was the purpose, changes the character of the transaction. As we have indicated, the intergovernmental submission to taxation is primarily a problem of finance and legislation. But since purchases by independent contractors of supplies for Government construction or other activities do not have federal immunity from taxation, the form of contracts, when governmental

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*States* v. *Allegheny County,* 322 U. S. 174, 182; *Union Pacific R. Co.* v. *Public Service Comm'n,* 248 U. S. 67, 69. Cf. *Dyer* v. *Sims,* 341 U. S. 22, 29.

This principle covers the question of who is the "purchaser." *S. R. A., Inc.* v. *Minnesota,* 327 U. S. 558, 564; *Metropolitan Bank* v. *United States,* 323 U. S. 454, 456; *Standard Oil Co.* v. *Johnson,* 316 U. S. 481, 483.

[12] See *Oklahoma Tax Comm'n* v. *Texas Co.,* 336 U. S. 342, 365: "True intergovernmental immunity remains for the most part. But, so far as concerns private persons claiming immunity for their ordinary business operations (even though in connection with governmental activities), no implied constitutional immunity can rest on the merely hypothetical interferences with governmental functions here asserted to sustain exemption."

immunity is not waived by Congress, may determine the effect of state taxation on federal agencies,[13] for decisions consistently prohibit taxes levied on the property or purchases of the Government itself.[14]

*Reversed.*

MR. JUSTICE BLACK, with whom THE CHIEF JUSTICE and MR. JUSTICE DOUGLAS concur, dissenting.

The Court holds that Government purchasing agents can delegate to their subordinates authority to delegate to private persons power to buy goods for the Government and pledge its credit to pay for them. *Alabama* v. *King & Boozer,* 314 U. S. 1, 13, rejected a similar contention. The Court points to no statute which either expressly or by fair implication grants any such broad delegation authority to Government agents.

Experiences through the years have caused Congress to hedge in Government purchases by many detailed safeguards such as competitive bidding after public advertising.* Due to a supposed necessity for haste, chosen Government officials have sometimes been granted temporary powers to buy supplies at their discretion. But these occasions, perhaps fortunately, have been rare, and have usually been limited to items costing little. The Court here, however, without any clear statutory author-

[13] *Alabama* v. *King & Boozer,* 314 U. S. 1; *Carson* v. *Roane-Anderson Co.,* 342 U. S. 232; *Esso Standard Oil Co.* v. *Evans,* 345 U. S. 495.

[14] *United States* v. *Allegheny County,* 322 U. S. 174; *Mayo* v. *United States,* 319 U. S. 441; *Pittman* v. *Home Owners' Corp.,* 308 U. S. 21, 31.

*For illustrations of experience with abuse of wartime Government contracting and purchasing, see Hearings Before House Committee on Military Affairs, 74th Cong., 1st Sess., on H. R. 3 and H. R. 5293, pp. 590–616, discussing profiteering during the Revolution, the Civil War, the War with Spain, and World War I. The hearings were held on a bill to end profiteering in wartime.

ity, makes a tremendous break with long established buying practices which embodied safeguards wisely adopted to prevent needless waste of Government money. Maybe Congress has power, though I am not sure it has, to delegate Government spending to private contractors. Even so, a purpose to have Government business handled in such a loose manner should not be attributed to Congress in the absence of much more explicit statutory language than the Court is able to cite here.

I think the Supreme Court of Arkansas was right in sustaining the State's tax on authority of *Alabama* v. *King & Boozer, supra.* The Court in effect overrules that case. In doing so it moves back in the direction of discredited tax immunities like that sustained in the case of *Gillespie* v. *Oklahoma,* 257 U. S. 501, later disapproved. I would not do that, but would sustain application of this Arkansas tax to purchases of the cost-plus-a-fixed-fee contractor and affirm the State Supreme Court's judgment.

MR. JUSTICE DOUGLAS, with whom THE CHIEF JUSTICE and MR. JUSTICE BLACK join, dissenting.

The Arkansas Gross Receipts Tax is laid, as the majority opinion points out, on the gross receipts from all sales to any person. Ark. Stat., 1947, § 84–1903. The Act, however, spells out the incidence of the tax in detail. "Sales of service and tangible personal property including materials, supplies and equipment made to contractors who use same in the performance of any contract are hereby declared to be sales to consumers or users and not sales for resale." § 84–1903 (e). "The term 'consumer' or 'user' means the person to whom the taxable sale is made . . . . All contractors are deemed to be consumers or users of all tangible personal property including materials, supplies and equipment used or consumed by them in performing any contract and the sales

of all such property to contractors are taxable sales within the meaning of this act." § 84–1902 (i).

On the basis of this statutory language the Supreme Court of Arkansas held that the contractor was the "purchaser" of the tractors and that the sale involved was taxable. It seems clear that, as a matter of state law, the contractor was the "consumer" and "user" of these tractors, whether or not the contractor would have been a purchaser in the common-law view. Of course Arkansas could not impose its tax on the contractor in such a way as to discriminate against the United States. But that has not been attempted here.

What Arkansas has done is to define an independent contractor as the "consumer" or "purchaser" of tractors which the contractor uses. Obviously the contractor could be made liable for the tax, if its contract were with a private corporation rather than with the Federal Government. Arkansas has not tried to collect the tax from the United States, and it clearly could not do so. See *Mayo* v. *United States,* 319 U. S. 441. Arkansas has collected the tax from the "purchaser" as that word is defined by the taxing statute. That is where the *legal incidence* of the tax falls. If the *economic burden* of the tax falls on the Federal Government, it falls there because the Government assumed it by contract, not because Arkansas placed it there. See *Curry* v. *United States,* 314 U. S. 14, 18.

The constitutional problem, of course, is to determine whether the *legal incidence* of a tax will be disregarded because the *economic burden* of the tax is on the United States. When Congress has not spoken, that determination must be made by the Court.

In *Alabama* v. *King & Boozer,* 314 U. S. 1, we allowed a sales tax to be exacted from an independent contractor acting for the Government on a cost-plus-a-fixed-fee basis. That tax was measured by the value of lumber

used by the contractor in performing its contract. The Government exercised much the same sort of detailed control over that transaction as it did over the present one. The Court was careful to point out, in rejecting the claim of immunity, that "Who, in any particular transaction like the present, is a 'purchaser' within the meaning of the statute, is a question of state law on which only the Supreme Court of [the State] can speak with final authority." 314 U. S., at 9–10.

In that case, however, the Supreme Court of Alabama had held the transaction immune from the tax. There was no authoritative state determination of the *legal incidence* of the tax. The Court therefore assumed, 314 U. S., at 10, that the tax fell on the "purchaser" of the lumber in the common-law sense. The Court then went on to show, in answer to the same arguments which the Government has made in this case, that the United States was not a purchaser of the lumber even under common-law rules. It is this segment of the opinion which the Court now uses practically to overrule the decision itself. No doubt the United States was, under some of the language used in *King & Boozer,* the "purchaser" of these two tractors. But the United States is not the "purchaser" under the language used in the Arkansas statute, and it is the Arkansas statute that controls this case. What was important in *King & Boozer* was the substance of the transaction and the nature of the economic burden on the United States. On these two paramount issues it is impossible to distinguish the present case.

The concepts "title," "agency," and "obligation to pay" are no basis for this constitutional adjudication. Today they are used to permit any government functionary to draw the constitutional line by changing a few words in a contract. When the Congress deliberates over this

problem, as it often has,[1] it does not worry about the passing of title or other legal technicalities. The Congress debates whether as a matter of policy, including the need of the States for revenue, the holder of a cost-plus government contract should be immune from state taxation.

*Alabama* v. *King & Boozer* and the cases it followed [2] were a long step forward from the time when a State's power to tax was nullified whenever the federal treasury was even remotely affected. We should not take this equally long step backwards. We should hold that, until the Congress says differently, the States are free to tax all sales to cost-plus government contractors. We should dispense with fruitless talk of agency, titles, and obligations to pay. The *legal incidence* of a tax is a matter for the States to determine. We should decide today, as we did more than a decade ago, that a tax on a contractor for goods he uses is constitutional, even though the *economic burden* falls on the Federal Government.

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[1] See, for example, 86 Cong. Rec. 7528, 7532–7535; 88 Cong. Rec. 2835, 3464–3466, 4814; Hearings Before House Committee on Ways and Means on H. R. 6617, 77th Cong., 2d Sess. (1942).

[2] *James* v. *Dravo Contracting Co.*, 302 U. S. 134; *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466.

# IRVINE *v.* CALIFORNIA.

CERTIORARI TO THE DISTRICT COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT.

No. 12. Argued November 30, 1953.—Decided February 8, 1954.

After admission of evidence obtained by illegal entries into his home, petitioner was convicted in a California state court on charges of horse-race bookmaking and related offenses under the state anti-gambling laws. Prior to petitioner's arrest, and while he and his wife were absent from their home, a police officer arranged with a locksmith to go there and make a key to the door. On three different occasions, without a search warrant or other process, officers and a technician entered the home by means of this key and installed a concealed microphone in the hall and later moved it to petitioner's bedroom and thence to a closet. At petitioner's trial, officers were allowed to testify, over objection, to incriminating conversations heard through the listening apparatus. Also admitted in evidence were a federal wagering tax stamp, which petitioner had on his person when arrested, and documents from the office of the United States Collector of Internal Revenue showing his application for the stamp and his return to the Collector. *Held:* The conviction is sustained as not violative of the Fourteenth Amendment or of federal law. Pp. 129–139.

113 Cal. App. 2d 460, 248 P. 2d 502, affirmed.



Petitioner's conviction in a California state court of offenses under the state antigambling laws was affirmed on appeal. 113 Cal. App. 2d 460, 248 P. 2d 502. The

State Supreme Court denied a petition for hearing. This Court granted certiorari. 345 U. S. 903. *Affirmed,* p. 138.

*Morris Lavine* argued the cause and filed a brief for petitioner.

*Elizabeth Miller,* Deputy Attorney General of California, and *Clarence A. Linn,* Assistant Attorney General, argued the cause for respondent. With them on the brief were *Edmund G. Brown,* Attorney General, and *William V. O'Connor,* Chief Deputy Attorney General.

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

This case involves constitutional questions growing out of methods employed to convict petitioner on charges of horse-race bookmaking and related offenses [1] against the antigambling laws of California.[2] Petitioner exhausted all avenues to relief under state procedures and then sought review here of duly raised federal issues.

We granted certiorari [3] on a petition which tendered four questions. However, petitioner's counsel has now presented two additional questions, one concerning the application of an immunity statute of California and another attacking certain instructions given to the jury by the trial court. Neither of these was mentioned in the petition. We disapprove the practice of smuggling additional questions into a case after we grant certiorari. The issues here are fixed by the petition unless we limit the grant, as frequently we do to avoid settled, frivolous

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[1] Keeping premises with paraphernalia for the purpose of recording and registering bets on horse racing, receiving money and the equivalent thereof which had been or was to be wagered on horse races, and recording and registering bets on horse races.

[2] Deering's Cal. Penal Code, 1949, §§ 337a (1), (2), (3), and (4).

[3] 345 U. S. 903.

or state law questions. We do not take up the questions numbered 3 and 6 of petitioner's brief because they are improperly presented.

Upon his arrest, petitioner had on his person a federal wagering tax stamp bearing his name, home address and the date, November 5, 1951. Against objection, it and other documentary evidence from the office of the United States Collector of Internal Revenue was received to show petitioner's application for the wagering tax stamp and his return to the Collector under the federal law. These documents were made pursuant to the Federal Act imposing wagering taxes, 65 Stat. 529, 26 U. S. C. (Supp. V) § 3285 *et seq.*, held constitutional by this Court in *United States* v. *Kahriger*, 345 U. S. 22. The claim is made that it was error as a matter of federal law to admit this evidence and also that payment of the federal tax resulted in a federal license to conduct the wagering business. This statute does not make such records or stamps confidential or privileged but, on the contrary, expressly requires the name and place of business of each such taxpayer to be made public. 53 Stat. 395, 26 U. S. C. § 3275. Petitioner's contentions are without substance or merit in view of the express provision of the statute that payment of the tax does not exempt any person from penalty or punishment by state law and does not authorize commencement or continuance of such business. 53 Stat. 395, 26 U. S. C. § 3276; 65 Stat. 531, 26 U. S. C. (Supp. V) § 3292.[4]

But the questions raised by the officers' conduct while investigating this case are serious. The police strongly suspected petitioner of illegal bookmaking but were without proof of it. On December 1, 1951, while Irvine and his wife were absent from their home, an officer ar-

[4] Petitioner's question number 2, which challenges the State's use of "compelled evidence" obtained under the federal wagering statute, is answered in *United States* v. *Kahriger*, *supra*, at 32.

ranged to have a locksmith go there and make a door key. Two days later, again in the absence of occupants, officers and a technician made entry into the home by the use of this key and installed a concealed microphone in the hall. A hole was bored in the roof of the house and wires were strung to transmit to a neighboring garage whatever sounds the microphone might pick up. Officers were posted in the garage to listen. On December 8, police again made surreptitious entry and moved the microphone, this time hiding it in the bedroom. Twenty days later, they again entered and placed the microphone in a closet, where the device remained until its purpose of enabling the officers to overhear incriminating statements was accomplished.

We should note that this is not a conventional instance of "wire tapping." Here the apparatus of the officers was not in any way connected with the telephone facilities, there was no interference with the communications system, there was no interception of any message. All that was heard through the microphone was what an eavesdropper, hidden in the hall, the bedroom, or the closet, might have heard. We do not suppose it is illegal to testify to what another person is heard to say merely because he is saying it into a telephone. We cannot sustain the contention that the conduct or reception of the evidence violated the Federal Communications Act. 48 Stat. 1103, 47 U. S. C. § 605. Cf. *Nardone* v. *United States,* 308 U. S. 338; *Goldman* v. *United States,* 316 U. S. 129; *Schwartz* v. *Texas,* 344 U. S. 199.

At the trial, officers were allowed to testify to conversations heard through their listening installations. The snatches of conversation which the prosecution thought useful were received in evidence. They were in the lingo of the race track and need not be recited, but the jury might well have regarded them as incriminating. The testimony was received under objection, properly

raising the question that it was constitutionally inadmissible since obtained by methods which violate the Fourteenth Amendment.

Each of these repeated entries of petitioner's home without a search warrant or other process was a trespass, and probably a burglary, for which any unofficial person should be, and probably would be, severely punished. Science has perfected amplifying and recording devices to become frightening instruments of surveillance and invasion of privacy, whether by the policeman, the blackmailer, or the busybody. That officers of the law would break and enter a home, secrete such a device, even in a bedroom, and listen to the conversation of the occupants for over a month would be almost incredible if it were not admitted. Few police measures have come to our attention that more flagrantly, deliberately, and persistently violated the fundamental principle declared by the Fourth Amendment as a restriction on the Federal Government that "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." The decision in *Wolf* v. *Colorado,* 338 U. S. 25, 27, for the first time established that "[t]he security of one's privacy against arbitrary intrusion by the police" is embodied in the concept of due process found in the Fourteenth Amendment.

But *Wolf,* for reasons set forth therein, declined to make the subsidiary procedural and evidentiary doctrines developed by the federal courts limitations on the states. On the contrary, it declared, "We hold, therefore, that in a prosecution in a State court for a State crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure."

338 U. S. 25, 33. See *Stefanelli* v. *Minard,* 342 U. S. 117, 119, 122. That holding would seem to control here.

An effort is made, however, to bring this case under the sway of *Rochin* v. *California,* 342 U. S. 165. That case involved, among other things, an illegal search of the defendant's person. But it also presented an element totally lacking here—coercion (as the Court noted, p. 173), applied by a physical assault upon his person to compel submission to the use of a stomach pump. This was the feature which led to a result in *Rochin* contrary to that in *Wolf.* Although *Rochin* raised the search-and-seizure question, this Court studiously avoided it and never once mentioned the *Wolf* case. Obviously, it thought that illegal search and seizure alone did not call for reversal. However obnoxious are the facts in the case before us, they do not involve coercion, violence or brutality to the person, but rather a trespass to property, plus eavesdropping.

It is suggested, however, that although we affirmed the conviction in *Wolf,* we should reverse here because this invasion of privacy is more shocking, more offensive, than the one involved there. The opinions in *Wolf* were written entirely in the abstract and did not disclose the details of the constitutional violation. Actually, the search was offensive to the law in the same respect, if not the same degree, as here. A deputy sheriff and others went to a doctor's office without a warrant and seized his appointment book, searched through it to learn the names of all his patients, looked up and interrogated certain of them, and filed an information against the doctor on the information that the District Attorney had obtained from the books. The books also were introduced in evidence against the doctor at his trial.

We are urged to make inroads upon *Wolf* by holding that it applies only to searches and seizures which pro-

duce on our minds a mild shock, while if the shock is more serious, the states must exclude the evidence or we will reverse the conviction. We think that the *Wolf* decision should not be overruled, for the reasons so persuasively stated therein. We think, too, that a distinction of the kind urged would leave the rule so indefinite that no state court could know what it should rule in order to keep its processes on solid constitutional ground.

Even as to the substantive rule governing federal searches in violation of the Fourth Amendment, both the Court and individual Justices have wavered considerably. Compare *Harris* v. *United States,* 331 U. S. 145; *Trupiano* v. *United States,* 334 U. S. 699; *United States* v. *Rabinowitz,* 339 U. S. 56; *Brinegar* v. *United States,* 338 U. S. 160; *Goldman* v. *United States,* 316 U. S. 129; *On Lee* v. *United States,* 343 U. S. 747. Never until June of 1949 did this Court hold the basic search-and-seizure prohibition in any way applicable to the states under the Fourteenth Amendment. At that time, as we pointed out, thirty-one states were not following the federal rule excluding illegally obtained evidence, while sixteen were in agreement with it. Now that the *Wolf* doctrine is known to them, state courts may wish further to reconsider their evidentiary rules. But to upset state convictions even before the states have had adequate opportunity to adopt or reject the rule would be an unwarranted use of federal power. The chief burden of administering criminal justice rests upon state courts. To impose upon them the hazard of federal reversal for noncompliance with standards as to which this Court and its members have been so inconstant and inconsistent would not be justified. We adhere to *Wolf* as stating the law of search-and-seizure cases and decline to introduce vague and subjective distinctions.

Whether to exclude illegally obtained evidence in federal trials is left largely to our discretion, for admissibility

of evidence is governed "by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." Fed. Rules Crim. Proc., 26. As we have pointed out, reason has led state courts to differing conclusions, but about two-thirds of them to acceptance of the illegally obtained evidence. What actual experience teaches we really do not know. Our cases evidence the fact that the federal rule of exclusion and our reversal of conviction for its violation are not sanctions which put an end to illegal search and seizure by federal officers. The rule was announced in 1914 in *Weeks* v. *United States,* 232 U. S. 383. The extent to which the practice was curtailed, if at all, is doubtful. The lower federal courts, and even this Court,[5] have repeatedly been constrained to enforce

[5] *E. g., Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385; *Gouled* v. *United States,* 255 U. S. 298; *Amos* v. *United States,* 255 U. S. 313; *Agnello* v. *United States,* 269 U. S. 20; *Byars* v. *United States,* 273 U. S. 28; *Gambino* v. *United States,* 275 U. S. 310; *Go-Bart Importing Co.* v. *United States,* 282 U. S. 344; *United States* v. *Lefkowitz,* 285 U. S. 452; *Taylor* v. *United States,* 286 U. S. 1; *Grau* v. *United States,* 287 U. S. 124; *Nathanson* v. *United States,* 290 U. S. 41; *United States* v. *Di Re,* 332 U. S. 581; *Johnson* v. *United States,* 333 U. S. 10; *Trupiano* v. *United States,* 334 U. S. 699; *McDonald* v. *United States,* 335 U. S. 451; *Lustig* v. *United States,* 338 U. S. 74; *United States* v. *Jeffers,* 342 U. S. 48. The Court has also cited the doctrine with approval in many related cases. *E. g., Perlman* v. *United States,* 247 U. S. 7; *Burdeau* v. *McDowell,* 256 U. S. 465; *Carroll* v. *United States,* 267 U. S. 132; *McGuire* v. *United States,* 273 U. S. 95; *Marron* v. *United States,* 275 U. S. 192; *Olmstead* v. *United States,* 277 U. S. 438; *Palko* v. *Connecticut,* 302 U. S. 319; *Goldstein* v. *United States,* 316 U. S. 114; *McNabb* v. *United States,* 318 U. S. 332; *Feldman* v. *United States,* 322 U. S. 487; *Davis* v. *United States,* 328 U. S. 582; *Zap* v. *United States,* 328 U. S. 624; *Harris* v. *United States,* 331 U. S. 145; *United States* v. *Wallace & Tiernan Co.,* 336 U. S. 793; *United States* v. *Rabinowitz,* 339 U. S. 56; *On Lee* v. *United States,* 343 U. S. 747. See Appendix to dissenting opinion of MR. JUSTICE FRANKFURTER in *Harris* v. *United States, supra,* at 175.

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the rule after its violation. There is no reliable evidence known to us that inhabitants of those states which exclude the evidence suffer less from lawless searches and seizures than those of states that admit it. Even this Court has not seen fit to exclude illegally seized evidence in federal cases unless a federal officer perpretrated the wrong. Private detectives may use methods to obtain evidence not open to officers of the law. *Burdeau* v. *McDowell,* 256 U. S. 465; see *McGuire* v. *United States,* 273 U. S. 95, 99; cf. *Feldman* v. *United States,* 322 U. S. 487; *Lustig* v. *United States,* 338 U. S. 74. And the lower federal courts, treating the Fourth Amendment right as personal to the one asserting it, have held that he who objects must claim some proprietary or possessory interest in that which was unlawfully searched or seized. *E. g., Connolly* v. *Medalie,* 58 F. 2d 629; *Steeber* v. *United States,* 198 F. 2d 615, 617. See *Goldstein* v. *United States,* 316 U. S. 114, 121; *Wolf* v. *Colorado, supra,* at 30–31. Cf. *United States* v. *Jeffers,* 342 U. S. 48.

It must be remembered that petitioner is not invoking the Constitution to prevent or punish a violation of his federal right recognized in *Wolf* or to recover reparations for the violation. He is invoking it only to set aside his own conviction of crime. That the rule of exclusion and reversal results in the escape of guilty persons is more capable of demonstration than that it deters invasions of right by the police. The case is made, so far as the police are concerned, when they announce that they have arrested their man. Rejection of the evidence does nothing to punish the wrong-doing official, while it may, and likely will, release the wrong-doing defendant. It deprives society of its remedy against one lawbreaker because he has been pursued by another. It protects one against whom incriminating evidence is discovered, but does nothing to protect innocent persons who are the victims of illegal but fruitless searches. The disciplinary or educa-

tional effect of the court's releasing the defendant for police misbehavior is so indirect as to be no more than a mild deterrent at best. Some discretion is still left to the states in criminal cases, for which they are largely responsible, and we think it is for them to determine which rule best serves them.

But admission of the evidence does not exonerate the officers and their aides if they have violated defendant's constitutional rights. It was pointed out in *Wolf* v. *Colorado, supra,* that other remedies are available for official lawlessness, although too often those remedies are of no practical avail. The difficulty with them is in part due to the failure of interested parties to inform of the offense. No matter what an illegal raid turns up, police are unlikely to inform on themselves or each other. If it turns up nothing incriminating, the innocent victim usually does not care to take steps which will air the fact that he has been under suspicion. And the prospect that the guilty may capitalize on the official wrongdoing in his defense, or to obtain reversal from a higher court, removes any motive he might have to inform.

It appears to the writer, in which view he is supported by THE CHIEF JUSTICE, that there is no lack of remedy if an unconstitutional wrong has been done in this instance without upsetting a justifiable conviction of this common gambler. If the officials have willfully deprived a citizen of the United States of a right or privilege secured to him by the Fourteenth Amendment, that being the right to be secure in his home against unreasonable searches, as defined in *Wolf* v. *Colorado, supra,* their conduct may constitute a federal crime under 62 Stat. 696, 18 U. S. C. (Supp. III) § 242. This section provides that whoever, under color of any law, statute, ordinance, regulation or custom, willfully subjects any inhabitant of any state to the deprivation of any rights, privileges or immunities secured or protected by the Constitution of the United

States shall be fined or imprisoned. See *Williams* v. *United States,* 341 U. S. 97; *Screws* v. *United States,* 325 U. S. 91. It does not appear that the statute of limitations yet bars prosecutions. 45 Stat. 51, 18 U. S. C. § 582. We believe the Clerk of this Court should be directed to forward a copy of the record in this case, together with a copy of this opinion, for attention of the Attorney General of the United States. However, MR. JUSTICE REED and MR. JUSTICE MINTON do not join in this paragraph.

*Judgment affirmed.*

MR. JUSTICE CLARK, concurring.

Had I been here in 1949 when *Wolf* was decided, I would have applied the doctrine of *Weeks* v. *United States,* 232 U. S. 383 (1914), to the states. But the Court refused to do so then, and it still refuses today. Thus *Wolf* remains the law and, as such, is entitled to the respect of this Court's membership.

Of course, we could sterilize the rule announced in *Wolf* by adopting a case-by-case approach to due process, in which inchoate notions of propriety concerning local police conduct guide our decisions. But this makes for such uncertainty and unpredictability that it would be impossible to foretell—other than by guesswork—just how brazen the invasion of the intimate privacies of one's home must be in order to shock itself into the protective arms of the Constitution. In truth, the practical result of this *ad hoc* approach is simply that when five Justices are sufficiently revolted by local police action, a conviction is overturned and a guilty man may go free. *Rochin* bears witness to this. We may thus vindicate the abstract principle of due process, but we do not shape the conduct of local police one whit; unpredictable reversals on dissimilar fact situations are not likely to curb the zeal of those police and prosecutors who may be intent on racking up a high percentage of successful prosecu-

tions. I do not believe that the extension of such a vacillating course beyond the clear cases of physical coercion and brutality, such as *Rochin,* would serve a useful purpose.

In light of the "incredible" activity of the police here, it is with great reluctance that I follow *Wolf.* Perhaps strict adherence to the tenor of that decision may produce needed converts for its extinction. Thus I merely concur in the judgment of affirmance.

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

I would reverse this conviction because the petitioner Irvine was found guilty of a crime and sentenced to prison on evidence extorted from him by the Federal Government in violation of the Fifth Amendment.

Federal law makes it a crime punishable by fine, imprisonment, or both, for a person to run a gambling business without making a report to the Government and buying a federal wagering tax stamp, both of which reveal his gambling operations.[1] Petitioner made the necessary report of his gambling activities in California and bought the required tax stamp. The information he gave and the stamp he bought were used in this case to convict and sentence him to prison for violating California's antigambling law. For reasons given in my dissent in *United States* v. *Kahriger,* 345 U. S. 22, 36, I believe the federal law that extracted the disclosures and required the tax stamp violates the Fifth Amendment's command that a person shall not be compelled to be a witness against himself. But even though the law is valid, as the Court held, *use* of such forced confessions to convict the confessors still amounts to compelling a person to testify against himself in violation of the Fifth Amendment.

[1] 65 Stat. 529, 26 U. S. C. (Supp. V) §§ 3285, 3287.

I cannot agree that the Amendment's guarantee against self-incrimination testimony can be spirited away by the ingenious contrivance of using federally extorted confessions to convict of state crimes and vice versa.[2] Licensing such easy evasion of the Amendment has proven a heavy drain on its vitality although no such debilitating interpretation was given the Amendment by this Court until it decided *United States* v. *Murdock* in 1931, one hundred and forty years after the Bill of Rights was adopted.[3] That construction was rested on the premise that a state and the United States are so separate and foreign to one another that neither of them need protect witnesses against being forced to admit offenses against the laws of the other.[4] This treatment of the states and the Federal Government as though they were entirely foreign to each other is wholly conceptualistic and cannot justify such a narrow interpretation of the Fifth Amendment's language and the resulting frustration of its purpose.

I think the Fifth Amendment of itself forbids all federal agents, legislative, executive and judicial, to force a person to confess a crime; forbids the use of such a federally coerced confession in any court, state or federal; and forbids all federal courts to use a confession which a person has been compelled to make against his will.

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[2] See my dissent in *Feldman* v. *United States*, 322 U. S. 487, 494.

[3] 284 U. S. 141, and see *United States* v. *The Saline Bank of Virginia*, 1 Pet. 100; *Brown* v. *Walker*, 161 U. S. 591, 606, 608; *Ballmann* v. *Fagin*, 200 U. S. 186; *Vajtauer* v. *Commissioner of Immigration*, 273 U. S. 103; *United States* v. *Murdock*, 290 U. S. 389, 396.

[4] Reliance for this view was placed mainly on two English cases, *King of the Two Sicilies* v. *Willcox*, 7 State Trials (N. S.) 1049, and *Queen* v. *Boyes*, 1 B. & S. 311. 284 U. S., at 149. See discussion of these two cases as related to the Fifth Amendment privilege against self-incrimination in Grant, Immunity from Compulsory Self-Incrimination, 9 Temp. L. Q. 57–70 and 194–212, particularly 59–62 and 196–204.

The Fifth Amendment forbids the Federal Government and the agents through which it acts—courts, grand juries, prosecutors, marshals or other officers—to use physical torture, psychological pressure, threats of fines, imprisonment or prosecution, or other governmental pressure to force a person to testify against himself. And if the Federal Government does extract incriminating testimony, as the Court has held it may in compelling gamblers to confess, the immunity provided by the Amendment should at the very least prevent the use of such testimony in any court, federal or state.[5] The use of such testimony is barred, even though the Fifth Amendment may not of itself prohibit the states or their agents from extorting incriminating testimony.[6] The Amendment does plainly prohibit all federal agencies from using their power to force self-incriminatory statements. Consequently, since the Amendment is the supreme law of the land and is binding on all American judges, the use of federally coerced testimony to convict a person of crime in any court, state or federal, is forbidden.

The Fifth Amendment not only forbids agents of the *Federal Government* to compel a person to be a witness against himself; it forbids federal courts to convict persons on their own forced testimony, whatever "sovereign"—federal or state—may have compelled it. Otherwise, the constitutional mandate against self-incrimination is an illusory safeguard that collapses whenever a confession is extorted by anyone other than the Federal Government.

Though not essential to disposition of this case, it seems appropriate to add that I think the Fourteenth Amendment makes the Fifth Amendment applicable to states

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[5] *Counselman* v. *Hitchcock*, 142 U. S. 547.

[6] See *Barron* v. *Baltimore*, 7 Pet. 243.

and that state courts like federal courts are therefore barred from convicting a person for crime on testimony which either state or federal officers have compelled him to give against himself.[7] The construction I give to the Fifth and Fourteenth Amendments makes it possible for me to adhere to what we said in *Ashcraft* v. *Tennessee*, 322 U. S. 143, 155, that "The Constitution of the United States stands as a bar against the conviction of any individual in an American court by means of a coerced confession."

So far as this case is concerned it is enough for me that Irvine was convicted in a state court on a confession coerced by the Federal Government. I believe this frustrates a basic purpose of the Fifth Amendment—to free Americans from fear that federal power could be used to compel them to confess conduct or beliefs in order to take away their life, liberty or property. For this reason I would reverse Irvine's conviction.

It has been suggested that the Court should call on the Attorney General to investigate this record in order to start criminal prosecutions against certain California officers. I would strongly object to any such action by this Court. It is inconsistent with my own view of the judicial function in our government. Prosecution, or anything approaching it, should, I think, be left to government officers whose duty that is.

MR. JUSTICE FRANKFURTER, whom MR. JUSTICE BURTON joins, dissenting.

Mere failure to have an appropriate warrant for arrest or search, without aggravating circumstances of misconduct in obtaining evidence, invalidates a federal conviction helped by such an unreasonable search and seizure.

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[7] *Adamson* v. *California*, 332 U. S. 46, 68 (dissenting opinion); *Rochin* v. *California*, 342 U. S. 165, 174 (concurring opinion).

Such was the construction placed upon the Fourth Amendment by *Weeks* v. *United States,* 232 U. S. 383. But *Wolf* v. *Colorado,* 338 U. S. 25, held that the rule of the *Weeks* case was not to be deemed part of the Due Process Clause of the Fourteenth Amendment and hence was not binding upon the States. Still more recently, however, in *Rochin* v. *California,* 342 U. S. 165, the Court held that "stomach pumping" to obtain morphine capsules, later used as evidence in a trial, was offensive to prevailing notions of fairness in the conduct of a prosecution and therefore invalidated a resulting conviction as contrary to the Due Process Clause.

The comprehending principle of these two cases is at the heart of "due process." The judicial enforcement of the Due Process Clause is the very antithesis of a Procrustean rule. In its first full-dress discussion of the Due Process Clause of the Fourteenth Amendment, the Court defined the nature of the problem as a "gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded." *Davidson* v. *New Orleans,* 96 U. S. 97, 104. The series of cases whereby, in the light of this attitude, the scope of the Due Process Clause has been unfolded is the most striking, because the liveliest, manifestation of the wide and deep areas of law in which adjudication "depends upon differences of degree. The whole law does so as soon as it is civilized." Holmes, J., concurring in *LeRoy Fibre Co.* v. *Chicago, M. & St. P. R. Co.,* 232 U. S. 340, 354. It is especially true of the concept of due process that between the differences of degree which that inherently undefinable concept entails "and the simple universality of the rules in the Twelve Tables or the Leges Barbarorum, there lies the culture of two thousand years." *Ibid.*

In the *Wolf* case, the Court rejected one absolute. In *Rochin,* it rejected another.

In holding that not all conduct which by federal law is an unreasonable search and seizure vitiates a conviction in connection with which it transpires, *Wolf* did not and could not decide that as long as relevant evidence adequately supports a conviction, it is immaterial how such evidence was acquired. For the exact holding of that case is defined by the question to which the opinion addressed itself: "Does a conviction by a State court for a State offense deny the 'due process of law' required by the Fourteenth Amendment, solely because evidence that was admitted at the trial was obtained under circumstances which would have rendered it inadmissible in a prosecution for violation of a federal law in a court of the United States because there deemed to be an infraction of the Fourth Amendment as applied in *Weeks* v. *United States,* 232 U. S. 383?" Thus, *Wolf* did not change prior applications of the requirements of due process, whereby this Court considered the whole course of events by which a conviction was obtained and was not restricted to consideration of the trustworthiness of the evidence.

*Rochin* decided that the Due Process Clause of the Fourteenth Amendment does not leave States free in their prosecutions for crime. The Clause puts limits on the wide discretion of a State in the process of enforcing its criminal law. The holding of the case is that a State cannot resort to methods that offend civilized standards of decency and fairness. The conviction in the *Rochin* case was found to offend due process not because evidence had been obtained through an unauthorized search and seizure or was the fruit of compulsory self-incrimination. Neither of these concepts, relevant to federal prosecutions, was invoked by the Court in *Rochin,* so of course the *Wolf* case was not mentioned. While there is in the case before us, as there was in *Rochin,* an element of unreasonable search and seizure, what is

decisive here, as in *Rochin,* is additional aggravating conduct which the Court finds repulsive.

Thus, the basis on which this case should be adjudicated is laid down in *Rochin:* "Regard for the requirements of the Due Process Clause 'inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings [resulting in a conviction] in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses.'" 342 U. S., at 169, quoting from *Malinski* v. *New York,* 324 U. S. 401, at 416–417.

This brings us to the specific circumstances of this case. This is a summary of the conduct of the police:

(1) They secretly made a key to the Irvines' front door.

(2) By boring a hole in the roof of the house and using the key they had made to enter, they installed a secret microphone in the Irvine house with a listening post in a neighboring garage where officers listened in relays.

(3) Using their key, they entered the house twice again to move the microphone in order to cut out interference from a fluorescent lamp. The first time they moved it into Mr. and Mrs. Irvine's bedroom, and later into their bedroom closet.

(4) Using their key, they entered the house on the night of the arrest and in the course of the arrest made a search for which they had no warrant.

There was lacking here physical violence, even to the restricted extent employed in *Rochin.* We have here, however, a more powerful and offensive control over the Irvines' life than a single, limited physical trespass. Cer-

tainly the conduct of the police here went far beyond a bare search and seizure. The police devised means to hear every word that was said in the Irvine household for more than a month. Those affirming the conviction find that this conduct, in its entirety, is "almost incredible if it were not admitted." Surely the Court does not propose to announce a new absolute, namely, that even the most reprehensible means for securing a conviction will not taint a verdict so long as the body of the accused was not touched by State officials. Considering the progress that scientific devices are making in extracting evidence without violence or bodily harm, satisfaction of due process would depend on the astuteness and subtlety with which the police engage in offensive practices and drastically invade privacy without authority of law. In words that seem too prophetic of this case, it has been said that "[d]iscovery and invention have made it possible for the Government, by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet." Brandeis, J., dissenting in *Olmstead* v. *United States,* 277 U. S. 438, 473.

The underlying reasoning of *Rochin* rejected the notion that States may secure a conviction by any form of skulduggery so long as it does not involve physical violence. The cases in which coercive or physical infringements of the dignity and privacy of the individual were involved were not deemed "sports in our constitutional law but applications of a general principle. They are only instances of the general requirement that States in their prosecutions respect certain decencies of civilized conduct. Due process of law, as a historic and generative principle, precludes defining, and thereby confining, these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend 'a sense of justice.'" 342 U. S., at 173.

Since due process is not a mechanical yardstick, it does not afford mechanical answers. In applying the Due Process Clause judicial judgment is involved in an empiric process in the sense that results are not predetermined or mechanically ascertainable. But that is a very different thing from conceiving the results as *ad hoc* decisions in the opprobrious sense of *ad hoc*. Empiricism implies judgment upon variant situations by the wisdom of experience. *Ad hoc*ness in adjudication means treating a particular case by itself and not in relation to the meaning of a course of decisions and the guides they serve for the future. There is all the difference in the world between disposing of a case as though it were a discrete instance and recognizing it as part of the process of judgment, taking its place in relation to what went before and further cutting a channel for what is to come.

The effort to imprison due process within tidy categories misconceives its nature and is a futile endeavor to save the judicial function from the pains of judicial judgment. It is pertinent to recall how the Court dealt with this craving for unattainable certainty in the *Rochin* case:

> "The vague contours of the Due Process Clause do not leave judges at large. We may not draw on our merely personal and private notions and disregard the limits that bind judges in their judicial function. Even though the concept of due process of law is not final and fixed, these limits are derived from considerations that are fused in the whole nature of our judicial process. See Cardozo, The Nature of the Judicial Process; The Growth of the Law; The Paradoxes of Legal Science. These are considerations deeply rooted in reason and in the compelling traditions of the legal profession. The Due Process Clause places upon this Court the duty of exercising

> a judgment, within the narrow confines of judicial power in reviewing State convictions, upon interests of society pushing in opposite directions." 342 U. S., at 170–171.

Nor can we dispose of this case by satisfying ourselves that the defendant's guilt was proven by trustworthy evidence and then finding, or devising, other means whereby the police may be discouraged from using illegal methods to acquire such evidence.

This Court has rejected the notion that because a conviction is established on incontestable proof of guilt it may stand, no matter how the proof was secured. Observance of due process has to do not with questions of guilt or innocence but the mode by which guilt is ascertained. Mere errors of law in the conduct of State trials afford no basis for relief under the Fourteenth Amendment, and a wide swath of discretion must be left to the State Courts in such matters. But when a conviction is secured by methods which offend elementary standards of justice, the victim of such methods may invoke the protection of the Fourteenth Amendment because that Amendment guarantees him a trial fundamentally fair in the sense in which that idea is incorporated in due process. If, as in *Rochin,* "[o]n the facts of this case the conviction of the petitioner has been obtained by methods that offend the Due Process Clause," 342 U. S., at 174, it is no answer to say that the offending policemen and prosecutors who utilize outrageous methods should be punished for their misconduct.[1]

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[1] That the prosecution in this case, with the sanction of the courts, flouted a legislatively declared philosophy against such miscreant conduct and made it a policy merely on paper, does not make the conduct any the less a disregard of due process. Cf. *Rochin* v. *California, supra,* at 167.

Of course it is a loss to the community when a conviction is overturned because the indefensible means by which it was obtained cannot be squared with the commands of due process. A new trial is necessitated, and by reason of the exclusion of evidence derived from the unfair aspects of the prior prosecution a guilty defendant may escape. But the people can avoid such miscarriages of justice. A sturdy, self-respecting democratic community should not put up with lawless police and prosecutors. "Our people may tolerate many mistakes of both intent and performance, but, with unerring instinct, they know that when any person is intentionally deprived of his constitutional rights those responsible have committed no ordinary offense. A crime of this nature, if subtly encouraged by failure to condemn and punish, certainly leads down the road to totalitarianism." [2]

MR. JUSTICE DOUGLAS, dissenting.

The search and seizure conducted in this case smack of the police state, not the free America the Bill of Rights envisaged.

The police and their agents first made a key to the home of a suspect. Then they bored a hole in the roof of his house. Using the key they entered the house, installed a microphone, and attached it to a wire which ran through the hole in the roof to a nearby garage where officers listened in relays. Twice more they used the key to enter the house in order to adjust the microphone. First they moved it into the bedroom where the suspect and his wife slept. Next, they put the microphone into the bedroom closet. Then they used the key to enter the

[2] Statement by Director J. Edgar Hoover of the Federal Bureau of Investigation in FBI Law Enforcement Bulletin, September 1952, p. 1.

house to arrest the suspect. They had no search warrant; but they ransacked the house. Moreover, they examined the suspect's hands under an ultraviolet lamp to see if he had handled betting slips which they had earlier impregnated with fluorescent powder.

The evidence so obtained was used by California to send the suspect, petitioner here, to prison.

What transpired here was as revolting as the abuses arising out of the writs of assistance against which James Otis complained. Otis in his speech against the writs [1] had this to say:

> "Now one of the most essential branches of English liberty is the freedom of one's house. A man's house is his castle; and whilst he is quiet, he is as well guarded as a prince in his castle. This writ, if it should be declared legal, would totally annihilate this privilege. Custom-house officers may enter our houses when they please; we are commanded to permit their entry. Their menial servants may enter, may break locks, bars, and every thing in their way: and whether they break through malice or revenge, no man, no court, can inquire. Bare suspicion without oath is sufficient."

In those days courts put their sanction behind the unlawful invasion of privacy by issuing the general warrant that permitted unlimited searches. There is no essential difference between that and the action we take today. Today we throw the weight of the Government on the side of the lawless search by affirming a conviction based on evidence obtained by it. Today we compound the grievance against which Otis complained. Not only is privacy invaded. The lawless invasion is officially approved as the means of sending a man to prison.

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[1] Tudor, Life of James Otis (1823), pp. 66–67.

I protest against this use of *unconstitutional* evidence. It is no answer that the man is doubtless guilty. The Bill of Rights was designed to protect every accused against practices of the police which history showed were oppressive of liberty. The guarantee against unreasonable searches and seizures contained in the Fourth Amendment was one of those safeguards. In 1914 a unanimous Court decided that officers who obtained evidence in violation of that guarantee could not use it in prosecutions in the federal courts. *Weeks* v. *United States*, 232 U. S. 383. Lawless action of the federal police, it said, "should find no sanction in the judgments of the courts . . . ." *Id.*, p. 392.

The departure from that principle which the Court made in 1949 in *Wolf* v. *Colorado*, 338 U. S. 25, is part of the deterioration which civil liberties have suffered in recent years. In that case the Court held that evidence obtained in violation of the Fourth Amendment, though inadmissible in federal prosecutions, could be used in prosecutions in the state courts. Mr. Justice Murphy, dissenting, pointed out the peril of that step, *id.*, p. 44:

> "The conclusion is inescapable that but one remedy exists to deter violations of the search and seizure clause. That is the rule which excludes illegally obtained evidence. Only by exclusion can we impress upon the zealous prosecutor that violation of the Constitution will do him no good. And only when that point is driven home can the prosecutor be expected to emphasize the importance of observing constitutional demands in his instructions to the police."

Exclusion of evidence is indeed the only effective sanction. If the evidence can be used, no matter how lawless the search, the protection of the Fourth Amendment, to use the words of the Court in the *Weeks* case, "might as

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well be stricken from the Constitution." 232 U. S., at 393.

The suggestion that the remedy for lawless conduct by the local police is through federal prosecution under the civil rights laws relegates constitutional rights under the Fourth Amendment to a lowly status. An already overburdened Department of Justice, busily engaged in law enforcement, cannot be expected to devote its energies to supervising local police activities and prosecuting police officers, except in rare and occasional instances.[2] And the hostility which such prosecutions have received here (see *Screws* v. *United States,* 325 U. S. 91, especially pp. 138 *et seq.*) hardly encourages putting the federal prosecutor on the track of state officials who take *unconstitutional* short cuts in enforcing state laws.[3]

If unreasonable searches and seizures that violate the privacy which the Fourth Amendment protects are to be outlawed, this is the time and the occasion to do it. If police officers know that evidence obtained by their unlawful acts cannot be used in the courts, they will clean their own houses and put an end to this kind of action. But as long as courts will receive the evidence, the police will act lawlessly and the rights of the individual will suffer. We should throw our weight on the side of the citizen and against the lawless police. We should be alert to see that no *unconstitutional* evidence is used to convict any person in America.

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[2] For an analysis of the civil rights suits instituted by the Department of Justice, see the Appendix to this opinion.

[3] The current hostility towards federal actions—both criminal and civil—under the civil rights laws is further evidenced by *United States* v. *Williams,* 341 U. S. 70; *Tenney* v. *Brandhove,* 341 U. S. 367; *Collins* v. *Hardyman,* 341 U. S. 651; *Whittington* v. *Johnston,* 201 F. 2d 810, cert. denied, 346 U. S. 867; *Francis* v. *Crafts,* 203 F. 2d 809, cert. denied, 346 U. S. 835.

## APPENDIX TO OPINION OF MR. JUSTICE DOUGLAS.

Mr. Justice Murphy, when Attorney General, was responsible for the creation of the Civil Rights Section in the Department of Justice. That was on February 3, 1939. In 1947 Mr. Justice Clark, then Attorney General, reported that the Section had in the eight years of its existence investigated nearly 850 complaints, instituted prosecutions in 178 cases, and obtained the conviction of more than 130 defendants. Clark, A Federal Prosecutor Looks at the Civil Rights Statutes, 47 Col. L. Rev. 175, 181. See also Report of the President's Committee on Civil Rights: To Secure These Rights (1947), pp. 114 *et seq.*

A more recent account of the work of the Civil Rights Section will be found in Putzel, Federal Civil Rights Enforcement: A Current Appraisal, 99 U. of Pa. L. Rev. 439 (1951). It is there stated that on the average 20 civil rights cases are prosecuted a year, acquittals and convictions being about equally divided. *Id.,* p. 449, n. 43. These figures are confirmed by the Administrative Office of the United States Courts. Records available in that office show the following number of civil rights prosecutions filed in the district courts in the years since 1947:

| *Fiscal year* | *1947* | *1948* | *1949* | *1950* | *1951* | *1952* | *1953* |
|---|---|---|---|---|---|---|---|
| Total cases..... | 10 | 13 | 22 | 18 | 16 | 15 | 29 |
| Total defendants.. | 26 | 53 | 66 | 72 | 69 | 49 | 92 |

More detailed figures are available for the past three fiscal years. The following table shows the number of defendants who actually went to trial, the disposition of

their cases, and the sentences imposed on those who were convicted:

| *Fiscal year* | *1951* | *1952* | *1953* |
|---|---|---|---|
| Total defendants | 22 | 50 | 54 |
| Not convicted: Total | 11 | 20 | 45 |
| Dismissed | 4 | 2 | 18 |
| Acquitted by court | ..... | ..... | 1 |
| Acquitted by jury | 7 | 18 | 26 |
| Convicted: Total | 11 | 30 | 9 |
| Pleas of guilty or nolo contendere | 3 | 21 | 1 |
| Convicted by court | ..... | 5 | |
| Convicted by jury | 8 | 4 | 8 |
| Type of sentence: Imprisonment total | 7 | 4 | 8 |
| 1–6 months | ..... | ..... | 1 |
| 6 months to 1 year, 1 day | 7 | ..... | 7 |
| More than 1 year, 1 day | ..... | 4 | |
| Type of sentence: Probation and suspended sentence | 2 | 20 | |
| Type of sentence: Fine only | 2 | 6 | 1 |
| Average sentence of imprisonment (months) | 10.9 | 16.5 | 9.4 |

*Note:* These figures from the Administrative Office include all prosecutions filed and conducted under all of the Sections of the Criminal Code which are usually called Civil Rights Sections, that is, 18 U. S. C. §§ 241–244. Use of §§ 243 and 244, however, has been very rare, so that most of the figures quoted involve prosecutions under either § 241 or § 242. The figures set out in the second table do not take into account such appellate reversals as may have been entered, and they include only those post-judgment motions in the district court which were disposed of before the end of the fiscal year in question.

The Code provisions in question read as follows:

"§ 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.

"§ 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.

"§ 243. *Exclusion of jurors on account of race or color.*

"No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State on account of race, color, or previous condition of servitude; and whoever, being an officer or other person charged

with any duty in the selection or summoning of jurors, excludes or fails to summon any citizen for such cause, shall be fined not more than $5,000.

"§ 244. *Discrimination against person wearing uniform of armed forces.*

"Whoever, being a proprietor, manager, or employee of a theater or other public place of entertainment or amusement in the District of Columbia, or in any Territory, or Possession of the United States, causes any person wearing the uniform of any of the armed forces of the United States to be discriminated against because of that uniform, shall be fined not more than $500."

# MICHIGAN-WISCONSIN PIPE LINE CO. *v.* CALVERT, COMPTROLLER OF PUBLIC ACCOUNTS, ET AL.

NO. 198. APPEAL FROM THE COURT OF CIVIL APPEALS OF TEXAS, THIRD SUPREME JUDICIAL DISTRICT.*

Argued January 5–6, 1954.—Decided February 8, 1954.

1. A Texas tax on the occupation of "gathering gas," measured by the entire volume of gas "taken," as applied to an interstate natural gas pipeline company, where the taxable incidence is the taking of gas from the outlet of an independent gasoline plant within the State for the purpose of immediate interstate transmission, *held* invalid under the Commerce Clause of the Federal Constitution. Pp. 161–170.

(a) The validity of the tax under the Commerce Clause depends upon considerations of constitutional policy having reference to the substantial effects, actual or potential, of the tax in suppressing or unduly burdening interstate commerce. P. 164.

(b) A tax imposed on a local activity related to interstate commerce is valid only if the local activity is not such an integral part of the flow of interstate commerce that it cannot realistically be separated from it. P. 166.

(c) As here applied, the State has delayed the incidence of the tax beyond the step where production and processing have ceased and transmission in interstate commerce has begun; so that the tax here is not levied on the capture or production of the gas, but rather on its taking into interstate commerce *after* production, gathering and processing. *Utah Power & Light Co.* v. *Pfost*, 286 U. S. 165, distinguished. Pp. 166–169.

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*Together with No. 200, *Panhandle Eastern Pipe Line Co.* v. *Calvert, Comptroller of Public Accounts, et al.*, on appeal from the same court; and No. 199, *Michigan-Wisconsin Pipe Line Co.* v. *Calvert, Comptroller of Public Accounts, et al.*, and No. 201, *Panhandle Eastern Pipe Line Co.* v. *Calvert, Comptroller of Public Accounts, et al.*, both on appeal from the Supreme Court of Texas.

(d) Validation of this tax would permit a multiple burden upon interstate commerce, for if Texas may impose this "first taking" tax measured by the total volume of gas so taken, then the other recipient states would have at least equal right to tax the first taking or "unloading" from the pipeline of the same gas when it arrives for distribution; and thus in effect would be resurrected the customs barriers that the Commerce Clause was designed to eliminate. P. 170.

2. The Supreme Court of Texas "refused" applications for writs of error to review a decision of the Court of Civil Appeals which upheld the validity of a state statute challenged as violative of the Federal Constitution. By state statute and procedural rule, the refusal signified that the State Supreme Court deemed the judgment of the Court of Civil Appeals correct and that the principles of law had been correctly determined. *Held:* The Court of Civil Appeals was "the highest court of a State in which a decision could be had," within the meaning of 28 U. S. C. § 1257, and the appeals to this Court were properly from the Court of Civil Appeals and not from the Supreme Court of Texas. Pp. 159–160.

3. The issue of the validity of the tax was properly raised in this case. P. 165, n. 4.

255 S. W. 2d 535, reversed.

The Texas Court of Civil Appeals sustained the validity of a state statute challenged as violative of the Federal Constitution. 255 S. W. 2d 535. The State Supreme Court refused writs of error. The two appellants each took appeals from both the Court of Civil Appeals and the State Supreme Court. Here the appeals from the State Supreme Court are dismissed and the judgments of the Court of Civil Appeals are *reversed,* pp. 160, 170.

*D. H. Culton* and *S. A. L. Morgan* argued the cause for appellants. On the brief were *Arthur R. Seder, Jr., Everett L. Looney, R. Dean Moorhead, Mr. Culton* and *Mr. Morgan* for the Michigan-Wisconsin Pipe Line Company, and *E. H. Lange, Gene M. Woodfin, Chas. I. Francis, Mr. Looney, Mr. Moorhead* and *Mr. Culton* for the Panhandle Eastern Pipe Line Company, appellants.

*John S. L. Yost* entered an appearance for appellant in Nos. 200 and 201.

*W. V. Geppert,* Assistant Attorney General of Texas, and *John Ben Shepperd,* Attorney General, argued the cause for appellees. With them on the brief was *William W. Guild,* Assistant Attorney General.

MR. JUSTICE CLARK delivered the opinion of the Court.

The appellants, two natural gas pipeline companies, brought separate suits against Texas State officials, appellees here, in a state district court, seeking a determination that a Texas tax statute as applied to appellants violates the Commerce Clause of the Constitution of the United States, and seeking recovery of money paid under protest in compliance with the statute. The District Court sustained appellants' contentions and entered judgment in their favor. The Court of Civil Appeals reversed, holding that the tax statute as applied is constitutional. 255 S. W. 2d 535. The Supreme Court of Texas "refused" appellants' applications for writs of error.

By state statute and procedural rule, the docket notation "refused" in denying application for writ of error signifies that the State Supreme Court deems the judgment of the Court of Civil Appeals a correct one and the principles of law declared in the opinion correctly determined. Appellants were uncertain whether appeal to this Court was properly from the Court of Civil Appeals or the Supreme Court of Texas, as "the highest court of a State in which a decision could be had" within the meaning of 28 U. S. C. § 1257. Hence each appellant appealed from each of the courts.[1] We postponed to the hearing of the cases on the merits a determination of the jurisdictional question. 346 U. S. 805.

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[1] Cf. *Western Union Telegraph Co.* v. *Priester,* 276 U. S. 252 (1928).

We think that appeals in these cases were properly from the Court of Civil Appeals. In *American Railway Express Co.* v. *Levee,* 263 U. S. 19 (1923), the Supreme Court of Louisiana had refused a writ of certiorari to the State Court of Appeal "for the reason that the judgment is correct." Mr. Justice Holmes, speaking for a unanimous Court, said:

> ". . . [U]nder the Constitution of the State the jurisdiction of the Supreme Court is discretionary . . . and although it was necessary for the petitioner to invoke that jurisdiction in order to make it certain that the case could go no farther, . . . when the jurisdiction was declined the Court of Appeal was shown to be the highest Court of the State in which a decision could be had. Another section of the article cited required the Supreme Court to give its reasons for refusing the writ, and therefore the fact that the reason happened to be an opinion upon the merits rather than some more technical consideration, did not take from the refusal its ostensible character of declining jurisdiction. *Western Union Telegraph Co.* v. *Crovo,* 220 U. S. 364, 366. *Norfolk & Suburban Turnpike Co.* v. *Virginia,* 225 U. S. 264, 269. Of course the limit of time for applying to this Court was from the date when the writ of certiorari was refused." 263 U. S., at 20–21.

In *Lone Star Gas Co.* v. *Texas,* 304 U. S. 224 (1938), with the present Texas procedural provisions in effect, this Court's mandate issued to the Court of Civil Appeals in a case where the State Supreme Court had "refused" writ of error. See also *United Public Service Co.* v. *Texas,* 301 U. S. 667 (1937).

Accordingly the appeals in Nos. 199 and 201, from the Supreme Court of Texas, are dismissed. We proceed to consider Nos. 198 and 200.

The question presented is whether the Commerce Clause is infringed by a Texas tax on the occupation of "gathering gas," measured by the entire volume of gas "taken," as applied to an interstate natural gas pipeline company, where the taxable incidence is the taking of gas from the outlet of an independent gasoline plant within the State for the purpose of immediate interstate transmission. In relevant part the tax statute [2] provides that "In addition to all other licenses and taxes levied and assessed in the State of Texas, there is hereby levied upon every person engaged in gathering gas produced in this State, an occupation tax for the privilege of engaging in such business, at the rate of 9/20 of one cent per thousand (1,000) cubic feet of gas gathered." Using a beggared definition of the term "gathering gas," the Act further provides that "In the case of gas containing gasoline or liquid hydrocarbons that are removed or extracted at a plant within the State by scrubbing, absorption, compression or any other process, the term 'gathering gas' means the first taking or the first retaining of possession of such gas for other processing or transmission whether through a pipeline, either common carrier or private, or otherwise after such gas has passed through the outlet of such plant." It also prohibits the "gatherer" as therein defined from shifting the burden of the tax to the producer of the gas, and provides that the tax shall not be levied as to gas gathered for local consumption if declared unconstitutional as to that gathered for interstate transmission.

Michigan-Wisconsin Pipe Line Company and Panhandle Eastern Pipe Line Company, appellants, are Delaware corporations and are natural gas companies holding certificates of convenience and necessity under the Natural Gas Act of 1938 for the transportation and sale

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[2] Tex. Laws 1951, c. 402, § XXIII.

in interstate commerce of natural gas. The nature of their activities has been stipulated.

Michigan-Wisconsin has constructed a pipeline extending from Texas to Michigan and Wisconsin. At points in these two States and in Missouri and Iowa it sells gas to distribution companies which serve markets in those areas.[3] It sells no gas in Texas. The company produces no gas; it purchases its supply from Phillips Petroleum Company in Texas, under a long-term contract. Phillips collects the gas from the wells and pipes it to a gasoline plant, where certain liquefiable hydrocarbons, oxygen, sulphur, hydrogen sulphide, dust and foreign substances are removed preparatory to the transmission of the residue. As this residue gas leaves the absorbers, it flows through pipes owned by Phillips for a distance of 300 yards to the outlet of its gasoline plant, at the boundary between property of Phillips and property of Michigan-Wisconsin. Phillips has installed gas meters in its pipes at this point. The gas emerging from the outlet flows directly into two 26-inch pipelines of

[3] The two appellants, through the distribution companies, supply gas for consumer markets with a population of about 12,000,000 people. As noted by the court below, "Except for minor variations Panhandle conducts its activities in the same manner as Michigan-Wisconsin. Panhandle loads its interstate pipeline with gas from the outlets of three gasoline plants, rather than with gas from only one plant; it produces a portion of the gas which it takes at the outlet of one of such plants; and it makes sales in Texas to three small customers, rather than sending all of its gas outside the State." We agree with that court that for purposes of this decision Panhandle's operations are not significantly different from those of Michigan-Wisconsin. Only the interstate aspects of the enterprise are in question. The operations of Michigan-Wisconsin, which transmits all of its gas out of Texas, most clearly present the question to be decided and will be the basis of our discussion. This approach was utilized by the State court; and appellees do not suggest that the situations of the two appellants are different for purposes of decision here.

Michigan-Wisconsin. It is this "taking" that is made the taxable incidence of the statute. After the gas has been taken into the Michigan-Wisconsin pipes, it flows a distance of approximately 1,215 feet to a compressor station owned and operated by Michigan-Wisconsin, at which station the pressure of the gas is raised from about 200 pounds to some 975 pounds to facilitate movement to distant markets. In the course of its flow through this station the gas is compressed, cooled, scrubbed and dehydrated and then passes into a 24-inch pipeline which carries it 1.74 miles to the Oklahoma border and thence to markets outside Texas. Additional motive power is furnished by 15 other compressor stations in other states through which the gas is transported.

The entire movement of the gas, from producing wells through the Phillips gasoline plant and into the Michigan-Wisconsin pipeline to consumers outside Texas, is a steady and continuous flow. All of Michigan-Wisconsin's gas is purchased from Phillips for transportation to points outside Texas, and is in fact so transported.

Exclusive of the tax in question, Michigan-Wisconsin pays an ad valorem tax on the value of all its facilities and leases within the State. The State also levies on producers a tax of 5.72% of the value at the well of all gas produced in the State and a special tax to cover expenses in enforcing the conservation and proration laws.

The appellees place much emphasis upon the fact that Texas through these conservation and proration measures has afforded great benefits and protection to pipeline companies. It is beyond question that the enforcement of these laws has been not only in the public interest but to the commercial advantage of the industry. But, though this be an appealing truth, these benefits are relevant here only to show that essential requirements of due process have been met sufficiently to justify the

imposition of *any* tax on the interstate activity. No challenge is made of the validity of the tax under the Due Process Clause, the appellants basing their objections only on the Commerce Clause, and when we proceed to examine the tax under the latter its validity "depends upon other considerations of constitutional policy having reference to the substantial effects, actual or potential, of the particular tax in suppressing or burdening unduly the commerce." *Nippert* v. *Richmond,* 327 U. S. 416, 424 (1946). We proceed, therefore, to discuss only those relevant factors involved in the testing of the tax under the Commerce Clause.

The tax here assailed applies equally to gas moving in intrastate and interstate commerce. It is levied in addition to all other licenses and taxes and is denominated an occupation tax for the privilege of engaging in the "gathering of gas." Obviously appellants are not engaged in "gathering gas" within the meaning of that term in its ordinary usage; but the tax statute gives the term a transcendent scope; as to appellants' operations it is defined as "the first taking . . . of possession of such gas for other processing or transmission . . . after such gas has passed through the outlet" of a gasoline plant. The State Appellate Court realistically found "the taxable event described by the statute" to be "the taking or retaining of the gas at the gasoline plant outlet . . . ." It thought that since this local activity was not subject to repetition elsewhere, "the sole question is whether such local activities are so closely related to and such an integral part of the interstate business of [appellants] who transport gas in interstate commerce as to be within the scope of the Commerce Clause of the Constitution." The court concluded that such taking "is just as local in nature as the production itself is local," and held the tax valid principally on the authority of *Utah Power & Light Co.*

v. *Pfost,* 286 U. S. 165 (1932), and *Hope Natural Gas Co.* v. *Hall,* 274 U. S. 284 (1927).[4]

We accept the State court's determination of the operating incidence of the tax, and we think the court has correctly stated the essential question presented. But we are unable to agree with its answer thereto or with its conclusion of constitutionality.

Appellants' business is the interstate transportation and sale of natural gas. Under the Commerce Clause interstate commerce and its instrumentalities are not totally immune from state taxation, absent action by Congress. Frequently it has been said that interstate business must pay its way, *Postal Telegraph-Cable Co.* v. *Richmond,* 249 U. S. 252, 259 (1919); *Western Live Stock* v. *Bureau of*

[4] Appellees challenge at the outset of their argument this Court's jurisdiction to consider these appeals, on the ground that appellants present no question, federal or otherwise, for the Court's determination. The argument is in substance that appellants' grounds of protest in the State courts set forth a number of alleged operating incidences of the tax, none of which coincided with the operating incidence found by the Court of Civil Appeals; that the State court's finding on this subject is conclusive and binding on this Court; that appellants, in urging that the tax is a burden on and discriminatory against interstate commerce, are advancing new grounds not considered by the State courts and hence waived under the Texas protest statute; in short, that the issue of the validity of the tax was not properly raised. We think there is no substance to this contention. In their complaints and continuously thereafter appellants specifically challenged the validity of the tax statute under the Commerce Clause. The trial court held the tax invalid as violating the Commerce Clause. The Court of Civil Appeals expressly stated that the question for its decision was whether the statute as applied to appellants "violates the commerce clause of the Constitution of the United States. If so it is void, if not it is valid." Since the State courts have clearly treated the single issue here presented as properly raised and preserved, and since appellees first suggested the contrary in their brief on argument in this Court, we think the objections to jurisdiction are not well taken.

*Revenue,* 303 U. S. 250, 254 (1938); and the Court has done more than pay lip service to this idea. Numerous cases have upheld state levies where it is thought that the tax does not operate to discriminate against commerce or unduly burden it either directly or by the possibility of multiple taxation resulting from other taxes of the same sort being imposed by other states. The recurring problem is to resolve a conflict between the Constitution's mandate that trade between the states be permitted to flow freely without unnecessary obstruction from any source, and the state's rightful desire to require that interstate business bear its proper share of the costs of local government in return for benefits received. Some have thought that the wisest course would be for this Court to uphold all state taxes not patently discriminatory, and wait for Congress to adjust conflicts when and as it wished. But this view has not prevailed, and the Court has therefore been forced to decide in many varied factual situations whether the application of a given state tax to a given aspect of interstate activity violates the Commerce Clause. It is now well settled that a tax imposed on a local activity related to interstate commerce is valid if, and only if, the local activity is not such an integral part of the interstate process, the flow of commerce, that it cannot realistically be separated from it. *Memphis Natural Gas Co.* v. *Stone,* 335 U. S. 80, 87 (1948); *Western Live Stock* v. *Bureau of Revenue, supra,* at 258. And if a genuine separation of the taxed local activity from the interstate process is impossible, it is more likely that other states through which the commerce passes or into which it flows can with equal right impose a similar levy on the goods, with the net effect of prejudicing or unduly burdening commerce.

The problem in this case is not whether the State could tax the actual gathering of all gas whether transmitted in interstate commerce or not, cf. *Hope Natural Gas Co.* v.

*Hall, supra,* but whether here the State has delayed the incidence of the tax beyond the step where production and processing have ceased and transmission in interstate commerce has begun. Cf. *Utah Power & Light Co.* v. *Pfost, supra.* The incidence of the tax here at issue, as stated by the Texas appellate court, is appellants' "taking" of gas from Phillips' gasoline plant. This event, as stipulated, occurs after the gas has been produced, gathered and processed by others than appellants. The "taking" into appellants' pipelines is solely for interstate transmission and the gas at that time is not only actually committed to but is moving in interstate commerce. What Texas seeks to tax is, therefore, more than merely the loading of an interstate carrier, which was condemned in *Joseph* v. *Carter & Weekes Stevedoring Co.,* 330 U. S. 422, 427 (1947), for the gas here simultaneously enters the pipeline carrier and moves on continuously to its outside market. "There is no break, no period of deliberation, but a steady flow ending as contemplated from the beginning beyond the state line." *United Fuel Gas Co.* v. *Hallanan,* 257 U. S. 277, 281 (1921). As early as *Gloucester Ferry Co.* v. *Pennsylvania,* 114 U. S. 196, 213 (1885), this Court said, "Receiving and landing passengers and freight is incident to their transportation." But receipt of the gas in the pipeline is more than its "taking"; from a practical standpoint it is its "taking off" in appellants' carrier into commerce; in reality the tax is, therefore, on the exit of the gas from the State. This economic process is inherently unsusceptible of division into a distinct local activity capable of forming the basis for the tax here imposed, on the one hand, and a separate movement in commerce, on the other. It is difficult to conceive of a factual situation where the incidence of taking or loading for transmission is more closely related to the transmission itself. This Court has held that much less integrated activity is "so closely related to interstate

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transportation as to be practically a part of it." [5] We are therefore of the opinion that the taking of the gas here is essentially a part of interstate commerce itself.

The Court of Civil Appeals, as we have stated, relied largely on *Utah Power & Light Co.* v. *Pfost, supra.* But that case involved a license tax on the generation of electricity produced in a hydraulic power plant within the State of Idaho and transmitted to Utah. The question the Court was called upon to solve was whether "the generation of electrical energy, like manufacture or production generally, [is] a process essentially local in character and complete in itself; or is it so linked with the transmission as to make it an inseparable part of a transaction in interstate commerce?" The Court thought it inaccurate to say that the entire system was purely a transferring device. "On the contrary," it said, "the generator and the transmission lines perform different functions, with a result comparable, so far as the question here under consideration is concerned, to the manufacture of physical articles of trade and their subsequent shipment and transportation in commerce." [6] Cited to support this principle was *Oliver Iron Mining Co.* v. *Lord,* 262 U. S.

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[5] *Baltimore & Ohio S. W. R. Co.* v. *Burtch,* 263 U. S. 540, 544 (1924) ("loading or unloading of a shipment"); also see *Telegraph Co.* v. *Texas,* 105 U. S. 460, 466 (1882) (tax on "sending" of messages outside state is a regulation of interstate commerce); *Puget Sound Stevedoring Co.* v. *State Tax Commission,* 302 U. S. 90, 92 (1937) ("loading and discharge of cargoes" is interstate operation); *Richfield Oil Corp.* v. *State Board,* 329 U. S. 69, 83 (1946) (commerce begins "no later than the delivery of the oil into the vessel").

[6] 286 U. S., at 180–181. The Court found that in the operation there involved it was necessary to convert the mechanical energy into electrical energy before it could be transmitted and that this transformation was completed at the generator where the interstate movement began. This is analogous to the situation here where the gas is prepared by Phillips for transmission and is then fed into appellants' lines.

172 (1923), where a state tax levied on all "engaged in the business of mining or producing iron ore or other ores" was upheld since the "ore does not enter interstate commerce until after the mining is done, and the tax is imposed only in respect of the mining" (at 179); and *Hope Natural Gas Co.* v. *Hall, supra,* which upheld a tax on "producers of natural gas reckoned according to the value of that commodity at the well." But the tax here is not levied on the capture or production of the gas, but rather on its taking into interstate commerce *after* production, gathering and processing.

The State Appellate Court recognized that nothing was done to the gas at the point of "taking"; its form was not changed in any way; it merely continued its journey. However, the court thought that it would be unfair to base a decision on the fluid nature of natural gas, and that there was in fact a two-step process, taking and transmission, with interference in between found in title passing and processing. But the processing, on which this tax is *not* imposed, was done by Phillips and took place prior to the taxable event of "taking." As for the interference of title passing, appellees readily admit this levy was designed to avoid taxing the sale; and we think that, as a basis for finding a separate local activity, the incidence must be a more substantial economic factor than the movement of the gas from a local outlet of one owner into the connecting interstate pipeline of another. Such an aspect of interstate transportation cannot be "carve[d] out from what is an entire or integral economic process," *Nippert* v. *Richmond, supra,* at 423, by legislative whimsy and segregated as a basis for the tax. The separation must be realistic.[7]

[7] Appellees also rely on *Memphis Natural Gas Co.* v. *Stone, supra; Western Live Stock* v. *Bureau of Revenue, supra; Edelman* v. *Boeing Air Transport,* 289 U. S. 249 (1933); *Chassaniol* v. *Greenwood,* 291 U. S. 584 (1934); *Coverdale* v. *Arkansas-Louisiana Pipe Line Co.,* 303

Here it is perhaps sufficient that the privilege taxed, namely the taking of the gas, is not so separate and distinct from interstate transportation as to support the tax. But additional objection is present if the tax be upheld. It would "permit a multiple burden upon that commerce," *Joseph* v. *Carter & Weekes Stevedoring Co., supra,* at 429, for if Texas may impose this "first taking" tax measured by the total volume of gas so taken, then Michigan and the other recipient states have at least equal right to tax the first taking or "unloading" from the pipeline of the same gas when it arrives for distribution. Oklahoma might then seek to tax the first taking of the gas as it crossed into that State. The net effect would be substantially to resurrect the customs barriers which the Commerce Clause was designed to eliminate. "The very purpose of the Commerce Clause was to create an area of free trade among the several States. That clause vested the power of taxing a transaction forming an unbroken process of interstate commerce in the Congress, not in the States." *McLeod* v. *Dilworth Co.,* 322 U. S. 327, 330–331 (1944).

*Reversed.*

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U. S. 604 (1938). We think these cases are distinguishable from the present one in that in each of them the tax was imposed on a less integral part of the commerce process involved. Also distinguishable is *McGoldrick* v. *Berwind-White Coal Mining Co.,* 309 U. S. 33 (1940), involving a tax on the sale of goods for consumption, imposed by the city in which the goods had come to rest. The Court there found that commerce, as to the goods, had ended prior to the taxable event, and likened the tax to an ad valorem one on property.

Syllabus.

# UNITED STATES *v.* BINGHAMTON CONSTRUCTION CO., INC.

CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

No. 65. Argued December 1, 1953.—Decided March 8, 1954.

The schedule of minimum wage rates included in a government construction contract, as required by the Davis-Bacon Act, 40 U. S. C. (1946 ed.) § 276a, is not a representation or warranty by the Government to the contractor as to the wage rates prevailing in the contract area; and the Secretary of Labor's action in prescribing minimum wage rates lower than those actually prevailing in the area when bids were invited on a construction project does not give the contractor a valid claim against the Government. Pp. 172–178.

(a) The purpose of the Act was not to benefit contractors but to protect their employees from substandard earnings by fixing a floor under wages on government projects. Pp. 176–177.

(b) The requirement of the Act and the contract thereunder that the contractors pay wages at rates "not less than" those specified is no assurance that they will not have to pay more. Pp. 177–178.

(c) That the Act requires the minimum wage rates specified in government contracts to be "based upon . . . the wages . . . determined by the Secretary of Labor to be prevailing" in the area where the work is to be performed does not require a different result. Pp. 177–178.

123 Ct. Cl. 804, 107 F. Supp. 712, reversed in part.

The Court of Claims awarded respondent a recovery based on the difference between the minimum wage rates specified under 40 U. S. C. (1946 ed.) § 276a in respondent's contract with the Government and higher rates specified in a determination by the Secretary of Labor for the Federal Works Agency. 123 Ct. Cl. 804, 107 F. Supp. 712. This Court granted certiorari. 346 U. S. 809. *Reversed as to this point,* p. 178.

*Assistant Attorney General Burger* argued the cause for the United States. With him on the brief were *Acting Solicitor General Stern, Paul A. Sweeney* and *Hubert H. Margolies.*

*Jerome Beaudrias* argued the cause for respondent. With him on the brief was *Malcolm A. MacIntyre.*

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

This case is before us on writ of certiorari to the Court of Claims. The question presented is whether the schedule of minimum wage rates included in a Government construction contract, as required by the Davis-Bacon Act,[1] is a representation or warranty as to the prevailing wage rates in the contract area. We hold that it is not.

The Davis-Bacon Act requires that the wages of workmen on a Government construction project shall be "not less" than the "minimum wages" specified in a schedule furnished by the Secretary of Labor. The schedule "shall be based upon the wages that will be determined by the Secretary of Labor to be prevailing" for corresponding work on similar projects in the area.[2] The Act also pro-

[1] Act of March 3, 1931, c. 411, § 1, 46 Stat. 1494, as amended by the Act of August 30, 1935, c. 825, 49 Stat. 1011, 40 U. S. C. §§ 276a–276a–5.

[2] 49 Stat. 1011, 40 U. S. C. § 276a:

". . . That the advertised specifications for every contract in excess of $2,000, to which the United States or the District of Columbia is a party, for construction, . . . of public buildings or public works of the United States . . . which requires or involves the employment of mechanics and/or laborers shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics which shall be based upon the wages that will be determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the city, town, village, or other civil subdivision of

vides for penalties, including termination of the contract, if it is found that the contractor is paying less than the schedule rate.[3]

The respondent, a construction company, was the successful bidder for a Government flood control project on the Chemung River at Elmira, New York. On January 31, 1941, at the request of the Corps of Engineers, the Secretary of Labor submitted a schedule of minimum wages for the project. This schedule set the minimum hourly wage rate at $1.00 for carpenters and $.50 for laborers. On March 29, 1941, the Corps of Engineers issued an invitation for bids.[4] Pursuant to the Davis-Bacon Act, *supra,* the Secretary's wage schedule was included in the contract specifications furnished to respondent, prior to the computation of its bid.[5] On May 14,

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the State in which the work is to be performed . . . ; and every contract based upon these specifications shall contain a stipulation that the contractor or his subcontractor shall pay all mechanics and laborers employed directly upon the site of the work . . . the full amounts accrued at time of payment, computed at wage rates not less than those stated in the advertised specifications . . . ."

[3] 49 Stat. 1011, 40 U. S. C. § 276a–1.

[4] The invitation provided in part:

"*Investigation of Conditions.*—Bidders are expected to visit the locality of the work and to make their own estimates of the facilities needed, the difficulties attending the execution of the proposed contract, including local conditions, availability of labor, uncertainties of weather, and other contingencies. In no case will the Government assume any responsibility whatever for any interpretation, deduction, or conclusion drawn from the examination of the site. . . . Failure to acquaint himself with all available information concerning these conditions will not relieve the successful bidder of responsibility for estimating the difficulties and costs of successfully performing the complete work."

[5] The specifications contained the following provision:

"1–31. *Wage and Labor Provisions.* (a) The Secretary of Labor has determined the minimum wage rates applicable in the locality

1941, respondent's bid of $232,669.30 was accepted and a written contract was executed, incorporating the specifications and subject only to formal approval by the Government. The contract provided that respondent was to pay wages "not less than those stated in the specifications . . ."; for breach of this provision, the Government was authorized to terminate the contract.[6] On June 3, 1941, the contract was formally approved; and on June 5, 1941, respondent received notice to proceed with the work.

On October 22, 1940, the local carpenters' union had notified the contracting officer that the hourly wage scale for carpenters would be increased from $1.00 to $1.125 as of January 1, 1941. On March 4, 1941, some three

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for the labor classifications anticipated to be used on the work. In accordance with Article 17 of the contract, employees at the site shall be paid not less than these wages as listed below:

| *"Designation* | *Wage rate—hourly* |
|---|---|
| Carpenters, Journeymen | $1.00 |
| . . . . | . |
| Laborers, unskilled | 0.50 |
| Laborers, Concrete Puddlers | 0.50" |

[6] Article 17 of the contract reads in part as follows:

"(*a*) The contractor or his subcontractor shall pay all mechanics and laborers employed directly upon the site of the work . . . the full amounts accrued at time of payment, computed at wage rates not less than those stated in the specifications . . . .

"(*b*) In the event it is found by the contracting officer that any laborer or mechanic employed by the contractor or any subcontractor directly on the site of the work covered by the contract has been or is being paid a rate of wages less than the rate of wages required by the contract to be paid as aforesaid, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been a failure to pay said required wages and prosecute the work to completion by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess costs occasioned the Government thereby."

weeks prior to the invitation for bids on the project involved here, the Secretary of Labor had furnished another Government agency, the Federal Works Agency, a schedule of minimum wages for inclusion in the specifications for a federal housing project in Elmira. This schedule set the minimum hourly wage rate at $1.125 for carpenters and $.55 for laborers. On April 1, 1941, the union hourly rate for laborers was increased from $.55 to $.625.

In the performance of the contract, respondent paid the union rates then in effect—$1.125 for carpenters and $.625 for laborers. On June 16, 1941, respondent protested to the contracting officer that it was unable to obtain workmen at the rates specified in the contract schedule and demanded an adjustment of compensation, on the theory that the schedule was an affirmative representation as to the prevailing wage rates in the area and that respondent was entitled to rely on this representation in the computation of its bid. The contracting officer denied relief and the Chief of Engineers dismissed respondent's appeal.[7]

Respondent thereupon brought this action in the Court of Claims, seeking damages for the alleged misrepresentation as well as other relief. The court specifically found that an investigation by respondent would have revealed that the prevailing rates were higher than the rates speci-

[7] The Chief of Engineers advised respondent: "There is no authority in law for this office to question the correctness of any determination made by the Secretary of Labor pursuant to the provisions of the above cited act [the Davis-Bacon Act]." Later, in refusing to reconsider respondent's appeal, the Chief of Engineers stated: ". . . The contract by Article 17 and by paragraph 1–31 of the specifications provides that wages not less than those specified shall be paid. The contract makes no representation as to the availability of labor nor as to the actual wage scales that would be in effect. The alleged increased costs did not result from your contract obligation but from economic conditions which are ordinary contingencies contemplated under the terms of the contract."

fied in the schedule.[8] Nevertheless, it allowed respondent a recovery of $7,363.22, consisting of the difference between the rates specified in the contract schedule ($1.00 for carpenters and $.50 for laborers) and the rates specified in the Secretary of Labor's determination for the Federal Works Agency ($1.125 for carpenters and $.55 for laborers).[9] The court held that the contract schedule misrepresented—although inadvertently—the prevailing wage rate in the Elmira area, since, prior to the invitation to bid, the Secretary of Labor had made a higher determination and the contracting officer could have ascertained that fact. Respondent, the court held, was entitled to rely on the schedule "as the Secretary's *latest* determination—as a representation of the wages it would have to pay when the work was to be done." [10] We granted review [11] because of the obvious importance of the decision in the administration of the Davis-Bacon Act.

The Act itself confers no litigable rights on a bidder for a Government construction contract.[12] The language

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[8] 123 Ct. Cl. 804, 810–811, 107 F. Supp. 712, 716:

"If plaintiff's president had investigated wage rates, he could have ascertained that the prevailing rate for carpenters was $1.125 per hour, and that the prevailing rate for unskilled labor was $.55 per hour, with an advance to $.625 per hour, effective as of April 1, 1941. Also, before inviting bids on this project, the District Engineer could have ascertained that the Secretary of Labor had made a new determination of the prevailing wage rates for Elmira on March 4, 1941."

[9] On all other claims of respondent, the Court of Claims denied recovery. That part of the court's judgment is the subject of respondent's petition for writ of certiorari in No. 78, this Term. [Certiorari denied, *post*, p. 926.]

[10] 123 Ct. Cl. 804, 836–837, 107 F. Supp. 712, 731, relying on *Albert & Harrison, Inc.* v. *United States*, 107 Ct. Cl. 292, 308–309, 68 F. Supp. 732, 734, cert. denied, 331 U. S. 810.

[11] 346 U. S. 809.

[12] Compare 49 Stat. 1011, 40 U. S. C. § 276a–2 (b), conferring a right of action on employees to recover from the contractor the amount due the employees under the minimum wage schedule.

of the Act and its legislative history plainly show that it was not enacted to benefit contractors, but rather to protect their employees from substandard earnings by fixing a floor under wages on Government projects.[13] Congress sought to accomplish this result by directing the Secretary of Labor to determine, on the basis of prevailing rates in the locality, the appropriate minimum wages for each project. The correctness of the Secretary's determination is not open to attack on judicial review.[14]

The Court of Claims nevertheless awarded respondent damages on the ground that the Government, through the Corps of Engineers, had falsely represented the prevailing rates in the Elmira area. The short answer to this is that the Government made no such representation. Neither the contract nor the specifications refers to "prevailing" rates. The contract speaks only of "wage rates not less than those stated in the specifications." [15] The specifications in turn speak only of "minimum wage rates applicable in the locality." [16] The only reference to "prevailing" rates appears in the statute itself, which provides that the minimum wage rates are to be "based upon . . . the wages . . . determined by the Secretary of Labor to be prevailing." But this provision in the Act cannot convert

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[13] *United States* v. *Morley Const. Co.*, 98 F. 2d 781, 788, cert. denied, 305 U. S. 651; *Gillioz* v. *Webb*, 99 F. 2d 585; *Winn-Senter Const. Co.* v. *United States*, 110 Ct. Cl. 34, 61, 75 F. Supp. 255, 257–258; cf. *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, 128; *Endicott Johnson Corp.* v. *Perkins*, 317 U. S. 501, 507. See also H. R. Rep. No. 1756, 74th Cong., 1st Sess.; S. Rep. No. 1155, 74th Cong., 1st Sess.; S. Rep. No. 1445, 71st Cong., 3d Sess.

[14] *Alliance Const. Co.* v. *United States*, 79 Ct. Cl. 730. Cf., concerning the related Walsh-Healey Public Contracts Act, *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, and *Endicott Johnson Corp.* v. *Perkins*, 317 U. S. 501.

[15] See note 6, *supra*.

[16] See note 5, *supra*.

the contractor's obligation to pay not less than the minimum into a Government representation that the contractor will not have to pay more. On its face, the Act is a minimum wage law designed for the benefit of construction workers. The Act does not authorize or contemplate any assurance to a successful bidder that the specified minima will in fact be the prevailing rates. Indeed, its requirement that the contractor pay "not less" than the specified minima presupposes the possibility that the contractor may have to pay higher rates. Under these circumstances, even assuming a representation by the Government as to the prevailing rate, respondent's reliance on the representation in computing its bid cannot be said to have been justified.

The Government further contends that the Secretary of Labor was justified in fixing different minimum rates for the housing and flood control projects according to the degree of skill required by each project, and that respondent is estopped to claim misrepresentation because of its failure to make an investigation of labor costs before submitting its bid. Because of our disposition of the case, we find it unnecessary to reach these issues. The portion of the judgment on which the Government sought review is

*Reversed.*

# ADAMS *v.* MARYLAND.

CERTIORARI TO THE COURT OF APPEALS OF MARYLAND.

No. 271. Argued January 7, 1954.—Decided March 8, 1954.

1. In response to a summons, petitioner appeared before a Senate Committee investigating crime. Answering without objection questions asked on behalf of the Committee, he confessed to having run a gambling business in Maryland. *Held:* Under 18 U. S. C. § 3486, his testimony before the Committee was inadmissible in his trial in a state court for a gambling offense, and his conviction based on such evidence is reversed. Pp. 179–183.
   (a) Petitioner's failure to claim a constitutional privilege against self-incrimination did not deprive him of the statutory protection afforded by § 3486. Pp. 180–181.
   (b) Section 3486 applies to criminal proceedings in state courts as well as federal courts. Pp. 181–182.
   (c) *Counselman* v. *Hitchcock,* 142 U. S. 547, in no way impairs the protection afforded congressional witnesses by § 3486. Pp. 182–183.
2. As thus construed, § 3486 does not exceed the constitutional power of Congress. P. 183.

202 Md. 455, 97 A. 2d 281, reversed.

*J. Francis Ford* and *George E. C. Hayes* argued the cause for petitioner. With them on the brief were *James A. Cobb* and *Joseph H. A. Rogan.*

*W. Giles Parker,* Assistant Attorney General of Maryland, argued the cause for respondent. With him on the brief were *Edward D. E. Rollins,* Attorney General, and *J. Edgar Harvey,* Deputy Attorney General.

MR. JUSTICE BLACK delivered the opinion of the Court.

In response to a summons the petitioner Adams appeared to testify before a Senate Committee investigating crime. Answering questions he confessed to having run a gambling business in Maryland. That confession has been used in this case to convict Adams of conspiring

to violate Maryland's antilottery laws. The trial court sentenced Adams to pay a fine of $2,000 and serve seven years in the state penitentiary. The Court of Appeals of Maryland affirmed, rejecting Adams' contention that use of the committee testimony against him was forbidden by a provision in a federal statute. 202 Md. 455, 97 A. 2d 281. That provision, now 18 U. S. C. § 3486, set out in full below, provides that no testimony given by a witness in congressional inquiries "shall be used as evidence in any criminal proceeding against him in any court . . . ."[1] The Maryland Court of Appeals held that Adams had testified before the Committee "voluntarily" and was therefore not protected by § 3486. We granted certiorari because a proper understanding of the scope of this Section is of importance to the national government, to the states and to witnesses summoned before congressional committees. 346 U. S. 864. In this Court Maryland contends that the Section does not bar use of Adams' testimony because: (1) He waived the statutory "privilege" by testifying "voluntarily," meaning that Adams failed to object to each committee question on the ground of its tendency to incriminate him; (2) the Section should be construed so as to apply to United States courts only. If these two statutory contentions are rejected, we are urged to hold that Congress is without constitutional power to bar the use of congressional committee testimony in state courts.

(1) Circumstances may be conceivable under which statements made in the presence of a congressional com-

[1] "No testimony given by a witness before either House, or before any committee of either House, or before any joint committee established by a joint or concurrent resolution of the two Houses of Congress, shall be used as evidence in any criminal proceeding against him in any court, except in a prosecution for perjury committed in giving such testimony. But an official paper or record produced by him is not within the said privilege." 11 Stat. 156, 12 Stat. 333, 52 Stat. 943, 62 Stat. 833, 18 U. S. C. § 3486.

mittee might not be protected by § 3486. For example, a person might voluntarily appear and obtain permission to make a statement in a committee's presence, wholly for his own advantage, and without ever being questioned by the committee at all. But Adams did not testify before the Senate Committee under any such circumstances. He was not a volunteer. He was summoned. Had he not appeared he could have been fined and sent to jail. 2 U. S. C. § 192. Nor does the record show any spontaneous outpouring of testimony from him. The testimony Maryland used to convict him was brought out by repeated committee questions. It is true that Adams did not attempt to escape answering these questions by claiming a constitutional privilege to refuse to incriminate himself. But no language of the Act requires such a claim in order for a witness to feel secure that his testimony will not be used to convict him of crime. Indeed, a witness does not need any statute to protect him from the use of self-incriminating testimony he is compelled to give over his objection. The Fifth Amendment takes care of that without a statute. Consequently, the construction of § 3486 here urged would limit its protection to that already afforded by the Fifth Amendment, leaving the Section with no effect whatever. We reject the contention that Adams' failure to claim a constitutional privilege deprived him of the statutory protection of § 3486.

(2) Nor can we hold that the Act bars use of committee testimony in United States courts but not in state courts. The Act forbids use of such evidence "in any criminal proceeding . . . in any court." Language could be no plainer. Even if there could be legislative history sufficiently strong to make "any court" mean United States courts only, there is no such history. The few scraps of legislative history pointed out tend to indicate that Congress was well aware that an ordinary person

would read the phrase "in any court" to include state courts. To construe this phrase as having any other meaning would make the Act a trap for the unwary.

It is suggested, however, that regardless of the plain meaning of § 3486 as originally passed an event since its passage should cause us to give it an entirely different meaning. The Section stems from an 1857 Act of Congress designed to grant committee witnesses immunity from prosecution in order to compel them to give self-incriminating testimony despite the Fifth Amendment.[2] Thirty-five years later in *Counselman* v. *Hitchcock*, 142 U. S. 547, this Court held that an act not providing "complete" immunity from prosecution was not broad enough to permit a federal grand jury to compel witnesses to give incriminating testimony. Section 3486 does not provide "complete" immunity. The original purpose of Congress to compel incriminating testimony has thus been frustrated.[3] It is argued that Congress could not have intended to afford any immunity to criminals unless it was thereby enabled to compel them to testify about their crimes. Therefore, it is said, § 3486 should now be given the narrowest possible construction—made effective only when the Fifth Amendment privilege is claimed, and held applicable only to United States courts. Because Congress did not get all it hoped, we are urged to deny witnesses the protection the statute promises. But a court decision subsequent to an act's passage does not usually alter its original meaning. And we reject the implication that a general act of Congress is like a private contract which courts should nullify upon a showing of partial or total failure of consideration. Moreover, Congress has kept the statute in force more than sixty years since the *Counselman* decision. And in 1938 Congress

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[2] Act of Jan. 24, 1857, 11 Stat. 156.

[3] See *United States* v. *Bryan*, 339 U. S. 323, 335–337.

reenacted the statute making changes deemed desirable to insure its continued usefulness. 52 Stat. 943. Our holding is that *Counselman* v. *Hitchcock* in no way impairs the protection afforded congressional witnesses by § 3486.

(3) Little need be said about the contention that Congress lacks power to bar state courts from convicting a person for crime on the basis of evidence he has given to help the national legislative bodies carry on their governmental functions. Congress has power to summon witnesses before either House or before their committees. *McGrain* v. *Daugherty,* 273 U. S. 135. Article I of the Constitution permits Congress to pass laws "necessary and proper" to carry into effect its power to get testimony. We are unable to say that the means Congress has here adopted to induce witnesses to testify is not "appropriate" and "plainly adapted to that end." *McCulloch* v. *Maryland,* 4 Wheat. 316, 421. And, since Congress in the legitimate exercise of its powers enacts "the supreme Law of the Land," state courts are bound by § 3486, even though it affects their rules of practice. *Brown* v. *Walker,* 161 U. S. 591, 606–608. Cf. *Testa* v. *Katt,* 330 U. S. 386.

The judgment of the Maryland Court of Appeals affirming this conviction is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

*It is so ordered.*

MR. JUSTICE FRANKFURTER concurs in the result.

MR. JUSTICE JACKSON, concurring.

I am in substantial agreement with the Court's opinion but differ in emphasis.

The only controlling fact for me is that this Act is on the federal statute books. What someone intended almost a century ago when it was passed, or in the 1890's when *Counselman* v. *Hitchcock,* 142 U. S. 547, was de-

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cided, I do not know. Since the last event, some thirty Congresses have come and gone, something near 15,000 Congressmen have been elected, not allowing for re-election. How many of them knew of *Counselman* v. *Hitchcock,* how many felt frustrated by it, and how many would have vented their frustration by repeal, I do not know or care. Congress left the Act on the books, and it was there when this petitioner testified. The only question is what it would mean to a reasonably well-informed lawyer reading it.

I do not think it important whether petitioner was a "voluntary" or "involuntary" witness before the congressional Committee or whether he raised the question of his immunity under the Fifth Amendment. No such qualification appears in the Act. The whole object and usefulness of the statute is to relieve the witness of the risks which might induce him to withhold testimony from Congress. It is very customary for one who is asked for information to appear before a committee without requiring the formality of a subpoena. The Act does not strip one of its protection because he may be a cooperative, or even interested, witness; indeed, its purpose is to protect and thereby encourage cooperation instead of hesitation or resistance.

The statute seems as unambiguous as language can be. If words mean anything, the statute extends its protection to all witnesses, to all testimony, and in all courts. It is easy to see, as this case illustrates, the hazard a witness would run otherwise. A lawyer would be warranted from the face of this Act in advising the witness that he had nothing to fear from frank and complete disclosure to Congress. Thus the Act would have accomplished its obvious purpose of facilitating disclosure.

I cannot see the slightest doubt that Congress has power to enact the statute for that purpose. It does not take anything from Maryland. It does not say Mary-

land cannot prosecute petitioner; it just says she shall not put him to disadvantage on the trial by reason of his cooperation with Congress. It leaves Maryland with complete freedom to prosecute—she just has to work up her own evidence and cannot use that worked up by Congress. The protection to the witness does not extend beyond the testimony actually received. In this case, petitioner was convicted by the State on the admissions he made before the Senate Committee. Section 3486 was thereby violated, and the conviction should be reversed.

# UNITED STATES *v.* EMPLOYING PLASTERERS ASSOCIATION OF CHICAGO ET AL.

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

No. 440. Argued February 3, 1954.—Decided March 8, 1954.

The United States brought a civil action in a Federal District Court charging a violation of § 1 of the Sherman Act by a Chicago trade association of plastering contractors, a local labor union of plasterers, and the union's president. The complaint alleged a combination and conspiracy to restrain competition among Chicago plastering contractors, and charged that the effect was to restrain interstate commerce. *Held:* The complaint stated a cause of action on which relief could be granted on proper proof. Pp. 187–190.

(a) The contention that the Sherman Act was inapplicable here because the interstate buying, selling and movement of plastering materials had ended before the local restraints became effective, cannot be sustained. P. 189.

(b) Wholly local business restraints can produce effects condemned by the Sherman Act. P. 189.

(c) Where a complaint filed by the Government under the Sherman Act charges every element necessary to relief, a defendant who desires more evidential facts may call for them under Rule 12 (e) of the Federal Rules of Civil Procedure; and if the Government's claim is frivolous, a full-dress trial can be avoided by invoking the summary judgment procedure under Rule 56. P. 189.

(d) Section 20 of the Clayton Act does not render a labor union immune from prosecution for violation of the Sherman Act upon a charge that the union and its president have combined with business contractors to suppress competition among them. P. 190.

118 F. Supp. 387, reversed.

*Charles H. Weston* argued the cause for the United States. With him on the brief were *Acting Solicitor General Stern, Assistant Attorney General Barnes* and *Marvin E. Frankel.*

*Thomas M. Thomas* argued the cause for the Employing Plasterers Association of Chicago, appellee. With

him on the brief was *Howard Ellis*. *Perry S. Patterson* entered an appearance.

*Daniel D. Carmell* argued the cause and filed a brief for the Journeymen Plasterers' Protective and Benevolent Society, Local No. 5, et al., appellees.

MR. JUSTICE BLACK delivered the opinion of the Court.

The United States brought this civil action in a Federal District Court charging the defendants (appellees here) with having violated § 1 of the Sherman Act which forbids combinations or conspiracies in restraint of interstate trade or commerce.* Holding that the complaint failed to state a cause of action on which relief could be granted under the Act, the District Court dismissed. The case is before us on direct appeal, 15 U. S. C. § 29, and the only question we must decide is whether the District Court's dismissal was error. We hold it was.

In summary the Government's complaint alleges:

> Defendants are (1) a Chicago trade association of plastering contractors; (2) a local labor union of plasterers and their apprentices; (3) the union's president. These contractors and union members employed by them do approximately 60% of the plastering contracting business in the Chicago area of Illinois. Materials used in the plastering, such as gypsum, lath, cement, lime, etc., are furnished by the contractors. Substantial quantities of this material are produced in other states, bought by Illinois build-

*26 Stat. 209, as amended by 50 Stat. 693, 15 U. S. C. § 1, so far as here relevant reads:

"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 declared to be illegal . . . ." The complaint here also charged a violation of § 2 of the Sherman Act, but the Government has not pressed that claim here. Cf. *Standard Oil Co.* v. *United States*, 337 U. S. 293, 314.

ing materials dealers and shipped into Illinois, sometimes going directly to the place of business of the dealers and sometimes directly to job sites for use by the plastering contractors under arrangements with the dealers. The practical effect of all this is a continuous and almost uninterrupted flow of plastering materials from out-of-state origins to Illinois job sites for use there by plastering contractors. Restraint or disruption of plastering work in the Chicago area thus necessarily affects this interstate flow of plastering materials adversely. Since 1938 the Chicago defendants have acted in concert to suppress competition among local plastering contractors, to prevent out-of-state contractors from doing any business in the Chicago area and to bar entry of new local contractors without approval by a private examining board set up by the union. The effect of all this has been an unlawful and unreasonable restraint of the flow in interstate commerce of materials used in the Chicago plastering industry.

The District Court did not question that the foregoing and other factual allegations showed a combination to restrain competition among Chicago plastering contractors. But the court considered these allegations to be "wholly a charge of local restraint and monopoly," not reached by the Sherman Act. And the court held that there was no allegation of fact which showed that these powerful local restraints had a sufficiently adverse effect on the flow of plastering materials into Illinois. At this point we disagree. The complaint plainly charged several times that the effect of all these local restraints was to restrain interstate commerce. Whether these charges be called "allegations of fact" or "mere conclusions of the pleader," we hold that they must be taken into account in deciding whether the Government is entitled to have its case tried.

We are not impressed by the argument that the Sherman Act could not possibly apply here because the interstate buying, selling and movement of plastering materials had ended before the local restraints became effective. Where interstate commerce ends and local commerce begins is not always easy to decide and is not decisive in Sherman Act cases. See *Mandeville Island Farms* v. *American Crystal Sugar Co.*, 334 U. S. 219, 232. However this may be, the complaint alleged that continuously since 1938 a local group of people were to a large extent able to dictate who could and who could not buy plastering materials that had to reach Illinois through interstate trade if they reached there at all. Under such circumstances it goes too far to say that the Government could not possibly produce enough evidence to show that these local restraints caused unreasonable burdens on the free and uninterrupted flow of plastering materials into Illinois. That wholly local business restraints can produce the effects condemned by the Sherman Act is no longer open to question. See, *e. g.*, *United States* v. *Women's Sportswear Manufacturers Assn.*, 336 U. S. 460, 464.

The Government's complaint may be too long and too detailed in view of the modern practice looking to simplicity and reasonable brevity in pleading. It does not charge too little. It includes every essential to show a violation of the Sherman Act. And where a bona fide complaint is filed that charges every element necessary to recover, summary dismissal of a civil case for failure to set out evidential facts can seldom be justified. If a party needs more facts, it has a right to call for them under Rule 12 (e) of the Federal Rules of Civil Procedure. And any time a claim is frivolous an expensive full dress trial can be avoided by invoking the summary judgment procedure under Rule 56.

We hold it was error to dismiss the Government's complaint for failure to state a cause of action.

This leaves the separate contention of the union that it is immune from prosecution for violation of the Sherman Act because of § 20 of the Clayton Act. This contention has no merit under the allegations of the complaint here because they show, if true, that the union and its president have combined with business contractors to suppress competition among them. *Allen Bradley Co.* v. *Local Union No. 3,* 325 U. S. 797.

*Reversed.*

MR. JUSTICE MINTON, with whom MR. JUSTICE DOUGLAS joins, dissenting.*

That, accepting the pleadings as true, there are and were conspiracies to restrain is not open to question. The question is whether the Sherman Act applies, and that depends upon whether the conspiracies are to restrain interstate commerce. In my opinion, the activities here complained of are wholly intrastate, and the restraint upon interstate commerce, if any, is so indirect, remote and inconsequential as to be without effect and wholly foreign to an intent or purpose to conspire to restrain interstate commerce.

There is no interference with interstate commerce. That commerce ends when the plaster and lath reach the building site, whether they come first to material suppliers and at rest in their warehouses and afterwards on order delivered to the contractors on the job, as most of the transactions are alleged to be handled, or are delivered directly to the job. The construction of a building and the incorporation therein of plaster and lath are purely local transactions.

> "Nor is building commerce; and the fact that the materials to be used are shipped in from other states

*[This opinion applies also to No. 439, *United States* v. *Employing Lathers Assn. et al., post,* p. 198.]

> does not make building a part of such interstate commerce." *Anderson* v. *Shipowners Assn.*, 272 U. S. 359, 364.

The Government does not and could not contend that building is commerce. It contends that the appellees' acts affect commerce, relying upon such cases as *Labor Board* v. *Denver Building Council*, 341 U. S. 675, and *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564. But those cases arose under different statutes, the sweep of which is broader than that of § 1 of the Sherman Act, which declares illegal only those contracts, combinations and conspiracies "in restraint of trade or commerce among the several States." The *Denver Council* case arose under the Labor Management Relations Act, which provides:

> "SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. . . ." 61 Stat. 146, 29 U. S. C. § 160 (a).

Section 2 of that Act defines "affecting commerce" as follows:

> "(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. 138, 29 U. S. C. § 152 (7).

The *Jacksonville Paper* case arose under the Fair Labor Standards Act, which is applicable to "employees who [are] engaged in commerce or in the production of goods for commerce . . . ." 52 Stat. 1062, 29 U. S. C. § 206. Furthermore, that case dealt with transactions that took place in the stream of commerce. Compare *Higgins* v.

*Carr Bros. Co.*, 317 U. S. 572. In the instant cases, the stream of commerce stops at the building site.

Insofar as the factual allegations in these complaints are concerned, the appellees are essentially charged with conspiring to divide the plastering and lathing business in the Chicago area among themselves, limiting the number and classes of persons who may become contractors or union members and reducing competition among the contractors, primarily by means of union control over those who may engage in the business either as contractors or as union members. The acts of the appellees here complained of thus are all related to local building construction and those permitted to engage in such construction. The allegations do not establish any interference with the flow of commerce, at its beginning or end or in the course of its flow, or that anything is done to influence the place from whence or to which the materials come or go, or their price. To be sure, the complaints contain bald statements to the effect that the alleged conspiracies are in restraint of interstate commerce. However, these conclusional allegations add nothing and do not conceal the failure to set forth facts showing any direct or substantial restraint on interstate commerce or a purpose or intent to do so. What is charged in these cases may constitute a restraint under state jurisdiction and may remotely or indirectly affect interstate commerce. But that has been consistently held to be no violation of the Sherman Act. *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 495; *Levering & Garrigues Co.* v. *Morrin*, 289 U. S. 103, 107.

*Industrial Association of San Francisco* v. *United States*, 268 U. S. 64, was a case involving far more offensive action than the instant cases. In that case, contractors and suppliers, in order to force an "open shop," required builders to secure permits for certain materials

from a builders' exchange, refusing such permits to those who did not maintain an open shop. Some of the materials came from other States, and the permits were so handled as to control materials, such as plumbers' supplies, that came altogether from out-of-state sources. This Court, commenting on the "established general facts" of the plan, said:

> "Interference with interstate trade was neither desired nor intended. On the contrary, the desire and intention was to avoid any such interference, and, to this end, the selection of materials subject to the permit system was substantially confined to California productions. The thing aimed at and sought to be attained was not restraint of the interstate sale or shipment of commodities, but was a purely local matter, namely, regulation of building operations within a limited local area, so as to prevent their domination by the labor unions. Interstate commerce, indeed commerce of any description, was not the object of attack, 'for the sake of which the several specific acts and courses of conduct were done and adopted.' *Swift and Company* v. *United States,* 196 U. S. 375, 397. The facts and circumstances which led to and accompanied the creation of the combination and the concert of action complained of, which we have briefly set forth, apart from other and more direct evidence, are 'ample to supply a full local motive for the conspiracy.' *United Mine Workers* v. *Coronado Co.,* 259 U. S. 344, 411." 268 U. S., at 77.

In language prophetic, this Court further said:

> "But here, the delivery of the plaster to the local representative or dealer was the closing incident of the interstate movement and ended the authority

of the federal government under the commerce clause of the Constitution. What next was done with it, was the result of new and independent arrangements." 268 U. S., at 79.

Although the permits were used so as to interfere with the free movement of materials and supplies from other States, this Court said:

"It was, however, an interference not within the design of the appellants, but purely incidental to the accomplishment of a different purpose. The court below laid especial stress upon the point that plumbers' supplies, which for the most part were manufactured outside the state, though not included under the permit system, were prevented from entering the state by the process of refusing a permit to purchase other materials, which were under the system, to anyone who employed a plumber who was not observing the 'American plan.' This is to say, in effect, that the building contractor, being unable to purchase the permit materials, and consequently unable to go on with the job, would have no need for plumbing supplies, with the result that the trade in them, to that extent, would be diminished. But this ignores the all important fact that there was no interference with the freedom of the outside manufacturer to sell and ship or of the local contractor to buy. The process went no further than to take away the latter's opportunity to use, and, therefore, his incentive to purchase. . . ."

. . . . . .

"The alleged conspiracy and the acts here complained of, spent their intended and direct force upon a local situation,—for building is as essentially local as mining, manufacturing or growing crops,—and if, by

> a resulting diminution of the commercial demand, interstate trade was curtailed either generally or in specific instances, that was a fortuitous consequence so remote and indirect as plainly to cause it to fall outside the reach of the Sherman Act." 268 U. S., at 80, 82.

As I see it, that is all that happens here. Interstate commerce has ended. There is no intent or purpose to restrain interstate commerce. The effect upon commerce is incidental, remote and indirect. It is a restraint that spends itself on a purely local incident. If contractors of materials and supplies may combine to compel an open shop by far more drastic measures, as in the *Industrial Association* case, then surely the workers and contractors may combine to promote a closed system by an agreement local in its nature.

The case of *Levering & Garrigues Co.* v. *Morrin,* 289 U. S. 103, which followed the *Industrial Association* case, is in point here. In that case, the companies, engaged in the building of steel bridges, operated open shops. The unions by strike and other techniques sought to force closed shops. The companies sought an injunction under the Sherman Act. The complaint was dismissed for failure to state a cause of action. This Court said:

> "Accepting the allegations of the bill at their full value, it results that the sole aim of the conspiracy was to halt or suppress local building operations as a means of compelling the employment of union labor, not for the purpose of affecting the sale or transit of materials in interstate commerce. *Use* of the materials was purely a local matter, and the suppression thereof the result of the pursuit of a purely local aim. Restraint of interstate commerce was not an object of the conspiracy. Prevention of

> the local use was in no sense a means adopted to effect such a restraint. It is this exclusively local aim, and not the fortuitous and incidental effect upon interstate commerce, which gives character to the conspiracy. . . . If thereby the shipment of steel in interstate commerce was curtailed, that result was incidental, indirect and remote, and, therefore, not within the anti-trust acts, as this court, prior to the filing of the present bill, had already held. . . ." 268 U. S., at 107.

If a union may strike and obtain its objective of a closed shop without interfering with interstate commerce, as in the *Levering* case, the unions in the instant cases could certainly bargain and agree with the employers to reach the same result. See also *United Leather Workers* v. *Herkert & Meisel Trunk Co.*, 265 U. S. 457, and see *United States* v. *Frankfort Distilleries*, 324 U. S. 293, 297, where the cases discussed above are distinguished.

The Government has relied heavily upon *Mandeville Farms* v. *American Crystal Sugar Co.*, 334 U. S. 219. But that decision, as did the *Frankfort Distilleries* case, recognized the distinct line of cases I rely upon here as distinguishable from the holding therein. Page 234.

In No. 440, it is alleged that the appellees have prevented and discouraged out-of-state plastering contractors from doing business in the Chicago area by slowdowns, fines on union labor, intimidation, and other means. Assume that such tactics are effective to keep outstate contractors from seeking contracts in the Chicago area. Contracting to plaster a building in Chicago by an outstate contractor is not commerce, even if the contractor did intend to bring his men from outstate, any more than bringing men from one State into another to play baseball is commerce. *Toolson* v. *New York*

*Yankees,* 346 U. S. 356; *Federal Baseball Club of Baltimore* v. *National League of Professional Baseball Clubs,* 259 U. S. 200, 208. The materials to plaster the building flow without interruption to the building site. There a local labor situation arises that has nothing to do with commerce or any conspiracy to restrain it. That is all that is involved here, and therefore commerce in the sense of that term as used in the Sherman Act is not involved.

I would affirm.

# UNITED STATES *v.* EMPLOYING LATHERS ASSOCIATION OF CHICAGO AND VICINITY ET AL.

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

No. 439. Argued February 3, 1954.—Decided March 8, 1954.

The United States brought a civil action in the Federal District Court charging a violation of § 1 of the Sherman Act by a trade association of Chicago lathing contractors, two of its member contractors, and a local labor union composed of lathers. The complaint alleged a combination and conspiracy to restrain competition in the lathing business, and charged that an effect of the combination and conspiracy was that interstate trade and commerce in lathing and related building materials had been unlawfully restrained. *Held:* The complaint stated a cause of action on which relief can be granted on proper proof. *United States* v. *Employing Plasterers Assn., ante,* p. 186. Pp. 198–200.

118 F. Supp. 387, reversed.

*Charles H. Weston* argued the cause for the United States. With him on the brief were *Acting Solicitor General Stern, Assistant Attorney General Barnes* and *Marvin E. Frankel.*

*Leo F. Tierney* argued the cause for the Employing Lathers Association of Chicago and Vicinity et al., appellees. With him on the brief was *Charles L. Stewart, Jr.*

*Lester Asher, Nathan M. Cohen* and *Robert S. Fiffer* submitted on brief for Local No. 74 of the Wood, Wire and Metal Lathers International Union of Chicago, Illinois and Vicinity, appellee.

MR. JUSTICE BLACK delivered the opinion of the Court.

This civil action was brought by the Government in a Federal District Court of Illinois against appellees, a trade association of Chicago lathing contractors, two of

its member contractors, and a local labor union composed of lathers. The complaint charged a violation of § 1 of the Sherman Act which forbids combinations or conspiracies in restraint of trade or commerce among the states. 15 U. S. C. § 1.* The District Court dismissed the complaint on the ground that it failed to state a cause of action on which relief could be granted. At the same time and for the same reason it dismissed a similar complaint charging a Chicago plasterers' association and a local plasterers' union with violating § 1 of the Sherman Act. Both cases were brought here on direct appeal by the Government under authority of 15 U. S. C. § 29. We have just reversed the District Court's dismissal of the complaint against the plastering group, *United States* v. *Employing Plasterers Assn. of Chicago, ante,* p. 186. Despite some differences in the two complaints, the reasons for reversing the plasterers' case are equally applicable here.

This complaint shows:

> A substantial quantity of lathing material used on Chicago jobs is produced in states other than Illinois, sold by the producers to Chicago building material dealers, shipped interstate either to the Chicago dealers or to their plastering contractor customers, and finally delivered by the plastering contractor to his lathing contractor for use on local building jobs. The alleged conspiracy here is among these lathing contractors and the union whose members do the actual lathing. This combination, according to the complaint, has achieved almost complete mastery over the lathing business in the Chicago area. It limits the number of lathing contractors, prescribes their qualifications, decides who meets the standards

*The Government complaint also charged a violation of § 2 of the Sherman Act but that claim is not pressed here.

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prescribed, excludes persons from the business on varied grounds, including arbitrary racial standards, and assigns plastering contractors to each lathing contractor. All of these allegations and more show a substantial suppression of competition in the lathing business.

The complaint charges that an effect of the alleged combination and conspiracy has been that "[i]nterstate trade and commerce in lathing and related building materials has been unlawfully restrained." Other allegations emphasize this charge by asserting that any restraint upon lathing work in Chicago "necessarily and directly restrains and affects the interstate flow of lathing materials, and . . . building materials . . . ."

The complaint does state a cause of action on which relief can be granted on proper proof.

*Reversed.*

[For dissenting opinion of MR. JUSTICE MINTON, joined by MR. JUSTICE DOUGLAS, see *ante,* p. 190.]

# MAZER ET AL., DOING BUSINESS AS JUNE LAMP MANUFACTURING CO., *v.* STEIN ET AL., DOING BUSINESS AS REGLOR OF CALIFORNIA.

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

No. 228. Argued December 3, 1953.—Decided March 8, 1954.

Respondents are engaged in the manufacture and sale of electric lamps. One of the respondents created original works of sculpture, from the models of which china statuettes were made. The statuettes were used as bases for fully equipped electric lamps, which respondents sold. Respondents submitted the statuettes, without any lamp components added, for registration under the copyright law as "works of art" or reproductions thereof. *Held:* The statuettes were copyrightable. Pp. 202–219.

(a) The successive Copyright Acts, the legislative history of the 1909 Act, and the practice of the Copyright Office show that "works of art" and "reproductions of works of art" were intended by Congress to include the authority to copyright such statuettes. Pp. 208–214.

(b) That the statuettes, fitted as lamps or unfitted, may be patentable does not bar their copyright as works of art. Pp. 215–217.

(c) The intended or actual use in industry of an article eligible for copyright does not bar or invalidate its registration. P. 218.

(d) The subsequent registration of a work of art published as an element in a manufactured article is not a misuse of the copyright. Pp. 218–219.

204 F. 2d 472, affirmed.

Respondents sued petitioners for copyright infringement, and the District Court dismissed the complaint. 111 F. Supp. 359. The Court of Appeals reversed. 204 F. 2d 472. This Court granted certiorari. 346 U. S. 811. *Affirmed,* p. 219.

*Max R. Kraus* and *Robert L. Kahn* argued the cause and filed a brief for petitioners.

*George E. Frost* argued the cause for respondents. With him on the brief were *Will Freeman* and *Charles F. Barber.*

By special leave of Court, *Benjamin Forman* argued the cause for the Register of Copyrights, as *amicus curiae,* urging affirmance. With him on the brief were *Acting Solicitor General Stern, Assistant Attorney General Burger* and *Paul A. Sweeney.*

MR. JUSTICE REED delivered the opinion of the Court.

This case involves the validity of copyrights obtained by respondents for statuettes of male and female dancing figures made of semivitreous china. The controversy centers around the fact that although copyrighted as "works of art," the statuettes were intended for use and used as bases for table lamps, with electric wiring, sockets and lamp shades attached.

Respondents are partners in the manufacture and sale of electric lamps. One of the respondents created original works of sculpture in the form of human figures by traditional clay-model technique. From this model, a production mold for casting copies was made. The resulting statuettes, without any lamp components added, were submitted by the respondents to the Copyright Office for registration as "works of art" or reproductions thereof under § 5 (g) or § 5 (h) of the copyright law,[1] and certifi-

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[1] 17 U. S. C. (Supp. V, 1952) § 4:

"The works for which copyright may be secured under this title shall include all the writings of an author."

*Id.,* § 5:

"The application for registration shall specify to which of the following classes the work in which copyright is claimed belongs:

. . . . . .

"(g) Works of art; models or designs for works of art.

"(h) Reproductions of a work of art."

Errors of classification are immaterial. See note 19, *infra.*

cates of registration issued. Sales (publication in accordance with the statute) as fully equipped lamps preceded the applications for copyright registration of the statuettes. 17 U. S. C. (Supp. V, 1952) §§ 10, 11, 13, 209; Rules and Regulations, 37 CFR, 1949, §§ 202.8 and 202.9. Thereafter, the statuettes were sold in quantity throughout the country both as lamp bases and as statuettes. The sales in lamp form accounted for all but an insignificant portion of respondents' sales.

Petitioners are partners and, like respondents, make and sell lamps. Without authorization, they copied the statuettes, embodied them in lamps and sold them.

The instant case is one in a series of reported suits brought by respondents against various alleged infringers of the copyrights, all presenting the same or a similar question.[2] Because of conflicting decisions,[3] we granted certiorari. 346 U. S. 811. In the present case respond-

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[2] An unreported action, *Stein* v. *Zuckerman and DuBeshter,* was pending in the Eastern District of New York. Note, 66 Harv. L. Rev. 877, 878, n. 8. We are advised that it was dismissed by consent February 24, 1953.

[3] *Stein* v. *Expert Lamp Co.,* 188 F. 2d 611. *Stein* v. *Expert Lamp Co.,* 96 F. Supp. 97, was the first action brought. Through an accident in presentation, the trial court determined the case as though the copyright was on a statuette with lamp attachments. It held the statuettes not copyrightable because this "was evidence of the practical use" intended. *Id.,* at 98. On petition for reconsideration, it held the presence or absence of the attachments immaterial. *Stein* v. *Mazer,* 111 F. Supp. 359, 361; *Rosenthal* v. *Stein,* 205 F. 2d 633, 634. The Court of Appeals for the Seventh Circuit affirmed on the ground that the Copyright Act "does not refer to articles of manufacture having a utilitarian purpose nor does it provide for a previous examination by a proper tribunal as to the originality of the matter offered for copyright . . . ." *Stein* v. *Expert Lamp Co.,* 188 F. 2d 611, 613.

*Stein* v. *Rosenthal,* 103 F. Supp. 227, was a second infringement case. It was there held "Protection is not dissipated by taking an unadulterated object of art as copyrighted and integrating it into commercially valuable merchandise." *Id.,* at 230. On appeal, the Court

ents sued petitioners for infringement in Maryland. *Stein* v. *Mazer,* 111 F. Supp. 359. Following the *Expert* decision and rejecting the reasoning of the District Court in the *Rosenthal* opinion, both referred to in the preceding note, the District Court dismissed the complaint. The Court of Appeals reversed and held the copyrights valid. *Stein* v. *Mazer,* 204 F. 2d 472.[4] It said: "A subsequent utilization of a work of art in an article of manufacture in no way affects the right of the copyright owner to be protected against infringement of the work of art itself." *Id.,* at 477.

Petitioners, charged by the present complaint with infringement of respondents' copyrights of reproductions of their works of art, seek here a reversal of the Court of Appeals decree upholding the copyrights. Petitioners in their petition for certiorari present a single question:

> "Can statuettes be protected in the United States by copyright when the copyright applicant intended primarily to use the statuettes in the form of lamp

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of Appeals for the Ninth Circuit affirmed, saying "The theory that the use of a copyrighted work of art loses its status as a work of art if and when it is put to a functional use has no basis in the wording of the copyright laws and there is nothing in the design-patent laws which excludes a work of art from the operation of the copyright laws." *Rosenthal* v. *Stein,* 205 F. 2d 633, 635.

In *Stein* v. *Benaderet,* 109 F. Supp. 364, 365, a district court of Michigan held that it is the "intent and purpose" of the designer which determines whether an object is copyrightable as a work of art. The court said plaintiffs should have applied for a design patent and held for defendants. An appeal is pending now in the Court of Appeals for the Sixth Circuit.

The opinions in the above cases and those of the District Court and the Court of Appeals in the present litigation deserve careful reading.

[4] In this case the Register of Copyrights participated as *amicus curiae* and supported respondents. Through the Solicitor General he has also filed a brief in this Court, and participated in the oral argument. 346 U. S. 882.

> bases to be made and sold in quantity and carried the intentions into effect?
>
> "Stripped down to its essentials, the question presented is: Can a lamp manufacturer copyright his lamp bases?"

The first paragraph accurately summarizes the issue. The last gives it a quirk that unjustifiably, we think, broadens the controversy. The case requires an answer, not as to a manufacturer's right to register a lamp base but as to an artist's right to copyright a work of art intended to be reproduced for lamp bases. As petitioners say in their brief, their contention "questions the validity of the copyright based upon the actions of the respondents." Petitioners question the validity of a copyright of a work of art for "mass" production. "Reproduction of a work of art" does not mean to them unlimited reproduction. Their position is that a copyright does not cover industrial reproduction of the protected article. Thus their reply brief states:

> "When an artist becomes a manufacturer or a designer for a manufacturer he is subject to the limitations of design patents and deserves no more consideration than any other manufacturer or designer."

It is not the right to copyright an article that could have utility under §§ 5 (g) and (h), note 1, *supra,* that petitioners oppose. Their brief accepts the copyrightability of the great carved golden saltcellar of Cellini but adds:

> "If, however, Cellini designed and manufactured this item in quantity so that the general public could have salt cellars, then an entirely different conclusion would be reached. In such case, the salt cellar becomes an article of manufacture having utility in addition to its ornamental value and would therefore have to be protected by design patent."

It is publication as a lamp and registration as a statue to gain a monopoly in manufacture that they assert is such a misuse of copyright as to make the registration invalid.

No unfair competition question is presented. The constitutional power of Congress to confer copyright protection on works of art or their reproductions is not questioned.[5] Petitioners assume, as Congress has in its

[5] We do not reach for constitutional questions not raised by the parties. *Chicago & G. T. R. Co.* v. *Wellman,* 143 U. S. 339, 345; *New York ex rel. Rosevale Realty Co.* v. *Kleinert,* 268 U. S. 646, 651; *C. I. O.* v. *McAdory,* 325 U. S. 472, 475. The fact that the issue was mentioned in argument does not bring the question properly before us. *Herbring* v. *Lee,* 280 U. S. 111, 117.

No question of our jurisdiction emerges. *Chicot County Dist.* v. *Bank,* 308 U. S. 371. Compare *Kalb* v. *Feuerstein,* 308 U. S. 433, and *Continental Illinois Nat. Bank & Trust Co.* v. *Chicago, R. I. & P. R. Co.,* 294 U. S. 648, 667.

Compare on the constitutional question the following: *Burrow-Giles Lithographic Co.* v. *Sarony,* 111 U. S. 53, upheld the copyright of a photograph unanimously. It was said: "By writings in that clause is meant the literary productions of those authors, and Congress very properly has declared these to include all forms of writing, printing, engraving, etching, &c., by which the ideas in the mind of the author are given visible expression." *Id.,* at 58.

"These findings, we think, show this photograph to be an original work of art, the product of plaintiff's intellectual invention, of which plaintiff is the author, and of a class of inventions for which the Constitution intended that Congress should secure to him the exclusive right to use, publish and sell, as it has done by section 4952 of the Revised Statutes." *Id.,* at 60.

*Bleistein* v. *Donaldson Lithographing Co.,* 188 U. S. 239, 249–250, upheld a copyright on circus posters. The Court said:

"We shall do no more than mention the suggestion that painting and engraving unless for a mechanical end are not among the useful arts, the progress of which Congress is empowered by the Constitution to promote. The Constitution does not limit the useful to that which satisfies immediate bodily needs. . . . Personality always contains something unique. It expresses its singularity even

enactments and as do we, that the constitutional clause empowering legislation "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their

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in handwriting, and a very modest grade of art has in it something irreducible, which is one man's alone. That something he may copyright unless there is a restriction in the words of the act."

*Kalem Co.* v. *Harper Bros.*, 222 U. S. 55, 63, involved pirating by motion pictures of the copyrighted dramatic rights of a book. This Court said:

"It is argued that the law construed as we have construed it goes beyond the power conferred upon Congress by the Constitution, to secure to authors for a limited time the exclusive right to their writings. Art. I, § 8, cl. 8. It is suggested that to extend the copyright to a case like this is to extend it to the ideas as distinguished from the words in which those ideas are clothed. But there is no attempt to make a monopoly of the ideas expressed. The law confines itself to a particular, cognate and well known form of reproduction. If to that extent a grant of monopoly is thought a proper way to secure the right to the writings this court cannot say that Congress was wrong."

See also *Schreiber* v. *Thornton*, 17 F. 603, reversed on other grounds, *Thornton* v. *Schreiber*, 124 U. S. 612.

See Fenning, The Origin of the Patent and Copyright Clause of the Constitution, 17 Geo. L. J. 109; 2 Story, Constitution (5th ed.), c. XIX.

*Trade-Mark Cases*, 100 U. S. 82, 94. Congress had passed a trade-mark act under the Patent and Copyright Clause. A unanimous Court held this effort to protect trade-marks was unconstitutional:

"The ordinary trade-mark has no necessary relation to invention or discovery. . . . If we should endeavor to classify it under the head of writings of authors, the objections are equally strong. In this, as in regard to inventions, originality is required. And while the word *writings* may be liberally construed, as it has been, to include original designs for engravings, prints, &c., it is only such as are *original*, and are founded in the creative powers of the mind. The writings which are to be protected are *the fruits of intellectual labor*, embodied in the form of books, prints, engravings, and the like." The trade-mark does not "depend upon novelty, invention, discovery,

respective Writings and Discoveries," Art. I, § 8, cl. 8, includes within the term "Authors" the creator of a picture or a statue. The Court's consideration will be limited to the question presented by the petition for the writ of certiorari.[6] In recent years the question as to utilitarian use of copyrighted articles has been much discussed.[7]

In answering that issue, a review of the development of copyright coverage will make clear the purpose of the Congress in its copyright legislation. In 1790 the First Congress conferred a copyright on "authors of any map, chart, book or books already printed." [8] Later, designing, engraving and etching were included; [9] in 1831 musical

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or any work of the brain. It requires no fancy or imagination, no genius, no laborious thought. It is simply founded on priority of appropriation."

See as to commerce, *id.*, at 95–98; Robert, Commentary on the Lanham Trade-Mark Act, 15 U. S. C. A. (§§ 81–1113, 1948) p. 265.

[6] *National Licorice Co.* v. *Labor Board,* 309 U. S. 350, 357, n. 2; *General Talking Pictures Corp.* v. *Western Electric Co.,* 304 U. S. 175; *Crown C. & S. Co.* v. *Ferdinand Gutmann Co.,* 304 U. S. 159, and cases cited; *Gunning* v. *Cooley,* 281 U. S. 90. The policy is incorporated in Rule 38 (2), Revised Rules of the Supreme Court of the United States, and the practice of bringing "additional questions into a case" has been condemned recently in *Irvine* v. *California,* 347 U. S. 128, 129.

[7] Ball, Law of Copyright and Literary Property (1944), 390; Howell, Copyright Law (1952), 130; 1 Ladas, The International Protection of Literary and Artistic Property (1938), 247; Weil, Copyright Law (1917), 227; Derenberg, Copyright No-Man's Land: Fringe Rights in Literary and Artistic Property, 1953 Copyright Problems Analyzed (CCH), 215; Pogue, Borderland—Where Copyright and Design Patent Meet, 52 Mich. L. Rev. 33; Notes, 21 Geo. Wash. L. Rev. 353; 66 Harv. L. Rev. 877; 27 Ind. L. J. 130. See Report of the Copyright Committee, Board of Trade (London, October 1952), Artistic Copyright and Industrial Designs, 82 *et seq.*

[8] 1 Stat. 124.

[9] 2 Stat. 171.

compositions;[10] dramatic compositions in 1856;[11] and photographs and negatives thereof in 1865.[12]

The Act of 1870 defined copyrightable subject matter as:

> ". . . any book, map, chart, dramatic or musical composition, engraving, cut, print, or photograph or negative thereof, or of a painting, drawing, chromo, *statue, statuary, and of models or designs intended to be perfected as works of the fine arts.*" (Emphasis supplied.)[13]

The italicized part added three-dimensional work of art to what had been protected previously.[14] In 1909 Con-

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[10] 4 Stat. 436.

[11] 11 Stat. 139.

[12] 13 Stat. 540. Between 1789 and 1904, there were in all some twenty-five laws dealing with copyrights. Solberg, Copyright in Congress (1905), 89–93.

[13] § 86, 16 Stat. 212. This Act also vested control of records relating to copyrights in the Librarian of Congress and provided he should administer the law. *Id.*, § 85.

[14] In connection with the phrase in the 1870 Act "intended to be perfected as works of the fine arts," see the 1874 amendatory Act, 18 Stat. 78, and *Bleistein* v. *Donaldson Lithographing Co.*, 188 U. S. 239. Section 3 contained the following provision: "That in the construction of this act, the words 'Engraving,' 'cut' and 'print' shall be applied only to pictorial illustrations or works connected with the fine arts, and no prints or labels designed to be used for any other articles of manufacture shall be entered under the copyright law, but may be registered in the Patent Office."

This was repealed in 1939 and the following enacted:

"SEC. 2. Section 5 (k) of the Act entitled 'An Act to amend and consolidate the Acts respecting copyright' approved March 4, 1909, is hereby amended to read: '(k) Prints and pictorial illustrations including prints or labels used for articles of merchandise.'" 53 Stat. 1142. This was an amendment to § 5 (k) of the Act of 1909, 35 Stat. 1077. It is to be noted, however, that the 1909 Act did not conform to the 1874 language, but the present Act, 17 U. S. C. (Supp. V, 1952) § 5 (k), does contain the amendatory language of the 1939 Act.

gress again enlarged the scope of the copyright statute.[15] The new Act provided in § 4:

> "That the works for which copyright may be secured under this Act shall include all the writings of an author." [16]

Some writers interpret this section as being coextensive with the constitutional grant,[17] but the House Report, while inconclusive, indicates that it was "declaratory of existing law" only.[18] Section 5 relating to classes of writings in 1909 read as shown in the margin with subsequent additions not material to this deci-

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[15] S. Rep. No. 6187, 59th Cong., 2d Sess. 4:

"The existing statutes attempt specifications which are unfortunate because necessarily imperfect and requiring frequent additions to cover new forms or new processes. The bill in its general definition substitutes a general term, 'all the works of an author.' The term used in the constitution is 'writings.' But Congress has always construed this term broadly, and in doing so has been uniformly supported by judicial decision. It has, for instance, interpreted it as authorizing subject-matter so remote from its popular significance as photographs, paintings, statuary, and dramas, even if unwritten.

"As thus interpreted, the word 'writings' would to-day in popular parlance be more nearly represented by the word 'works;' and this the bill adopts; referring back, however, to the word 'writings' by way of safe anchorage, but regarding this as including 'all forms of record in which the thought of an author may be recorded and from which it may be read or reproduced.' "

*Burrow-Giles Lithographic Co.* v. *Sarony,* 111 U. S. 53 (1884), has held that photographs were copyrightable in spite of the argument that the Constitution only specified protection for "writings" of an "author." This decision made clear that "writings" was not limited to chirography and typography.

[16] 35 Stat. 1076.

[17] Weil, Copyright Law (1917), 214; Howell, The Copyright Law (3d ed. 1952), 8.

[18] H. R. Rep. No. 2222, 60th Cong., 2d Sess. 10. The report is not very clear on the point, however.

sion.[19] Significant for our purposes was the deletion of the fine-arts clause of the 1870 Act.[20] Verbal distinctions between purely aesthetic articles and useful works of art ended insofar as the statutory copyright language is concerned.[21]

The practice of the Copyright Office, under the 1870 and 1874 Acts and before the 1909 Act, was to allow registration "as works of the fine arts" of articles of the same character as those of respondents now under challenge. Seven examples appear in the Government's

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[19] "The application for registration shall specify to which of the following classes the work in which copyright is claimed belongs:

"(a) Books including composite and cyclopaedic works, directories, gazetteers, and other compilations;

"(b) Periodicals, including newspapers;

"(c) Lectures, sermons, addresses, prepared for oral delivery;

"(d) Dramatic or dramatico-musical compositions;

"(e) Musical compositions;

"(f) Maps;

"(g) Works of art; models or designs for works of art;

"(h) Reproductions of a work of art;

"(i) Drawings or plastic works of a scientific or technical character;

"(j) Photographs;

"(k) Prints and pictorial illustrations:

"*Provided, nevertheless,* That the above specifications shall not be held to limit the subject-matter of copyright as defined in section four of this Act, nor shall any error in classification invalidate or impair the copyright protection secured under this Act." 35 Stat. 1076.

Subsection (k) was amended by the addition of the words "including prints or labels used for articles of merchandise" in 1939. 53 Stat. 1142. See note 14, *supra.* Two more classes "(l) Motion-picture photoplays" and "(m) Motion pictures other than photoplays" were added in 1912. 37 Stat. 488.

[20] See note 14, *supra,* for repeal of clause defining engraving cuts and prints in terms of "fine art."

[21] Title 17 of the United States Code entitled "Copyrights" was codified into positive law in 1947 without change in the pertinent provisions. 61 Stat. 652, 17 U. S. C. (Supp. V, 1952) §§ 4, 5.

brief *amicus curiae*.[22] In 1910, interpreting the 1909 Act, the pertinent Copyright Regulations read as shown in the margin.[23] Because, as explained by the Government, this regulation "made no reference to articles which might fairly be considered works of art although they might also serve a useful purpose," it was reworded in 1917 as shown below.[24] The *amicus* brief gives sixty examples selected at five-year intervals, 1912–1952, said to be typical of registrations of works of art possessing utilitarian aspects.[25] The current pertinent regulation, published in 37 CFR, 1949, § 202.8, reads thus:

> "*Works of art (Class G)*—(a) *In General.* This class includes works of artistic craftsmanship, in so far as their form but not their mechanical or utilitarian aspects are concerned, such as artistic jewelry,

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[22] *E. g.*, "A female figure bearing an urn in front partly supported by drapery around the head. The figure nude from the waist up and below this the form concealed by conventionalized skirt draperies which flow down and forward forming a tray at the base. Sides and back of skirt in fluted form. The whole being designed as a candlestick with match tray. The figure standing and bent forward from hips and waist."

[23] "*Works of art.*—This term includes all works belonging fairly to the so-called fine arts. (Paintings, drawings, and sculpture.)

"Productions of the industrial arts utilitarian in purpose and character are not subject to copyright registration, even if artistically made or ornamented." Rules and Regulations for the Registration of Claims to Copyright, Bulletin No. 15 (1910), 8.

[24] "Works of art and models or designs for works of art. This term includes all works belonging fairly to the so-called fine arts. (Paintings, drawings, and sculpture.)

"The protection of productions of the industrial arts utilitarian in purpose and character even if artistically made or ornamented depends upon action under the patent law; but registration in the Copyright Office has been made to protect artistic drawings notwithstanding they may afterwards be utilized for articles of manufacture." 37 CFR, 1939, § 201.4 (7).

[25] *E. g.*, "*Lighting fixture design.* By F. E. Guitini. [Bowl-shaped bracket embellished with figure of half-nude woman standing

> enamels, glassware, and tapestries, as well as all works belonging to the fine arts, such as paintings, drawings and sculpture. . . ."

So we have a contemporaneous and long-continued construction of the statutes by the agency charged to administer them that would allow the registration of such a statuette as is in question here.[26]

This Court once essayed to fix the limits of the fine arts.[27] That effort need not be appraised in relation to this copyright issue. It is clear Congress intended the scope of the copyright statute to include more than the traditional fine arts. Herbert Putnam, Esq., then Librarian of Congress and active in the movement to amend the copyright laws, told the joint meeting of the House and Senate Committees:

> "The term 'works of art' is deliberately intended as a broader specification than 'works of the fine arts' in the present statute with the idea that there is subject-matter (for instance, of applied design, not yet within the province of design patents), which may properly be entitled to protection under the copyright law." [28]

The successive acts, the legislative history of the 1909 Act and the practice of the Copyright Office unite to show

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in bunch of flowers.] Copyright December 28, 1912. Registration number G 42645. Copyright claimant: Kathodion Bronze Works, New York."

[26] *Great Northern R. Co.* v. *United States,* 315 U. S. 262, 275.

[27] *United States* v. *Perry,* 146 U. S. 71, 74.

[28] Arguments before the Committees on Patents of the Senate and House of Representatives, conjointly, on S. 6330 and H. R. 19853, To Amend and Consolidate the Acts Respecting Copyright, 59th Cong., 1st Sess., June 6–9, 1906, p. 11. The statement is applicable to the 1909 Act since §§ 5 (g) and (h) of the 1909 Act are identical with the same sections of S. 6330 and H. R. 19853. Although there were other hearings and reports (see 51 House Committee Hearings before

that "works of art" and "reproductions of works of art" are terms that were intended by Congress to include the authority to copyright these statuettes. Individual perception of the beautiful is too varied a power to permit a narrow or rigid concept of art. As a standard we can hardly do better than the words of the present Regulation, § 202.8, *supra,* naming the things that appertain to the arts. They must be original, that is, the author's tangible expression of his ideas. Compare *Burrow-Giles Lithographic Co.* v. *Sarony,* 111 U. S. 53, 59–60. Such expression, whether meticulously delineating the model or mental image or conveying the meaning by modernistic form or color, is copyrightable.[29] What cases there are confirm this coverage of the statute.[30]

The conclusion that the statues here in issue may be copyrighted goes far to solve the question whether their intended reproduction as lamp stands bars or invalidates their registration. This depends solely on statutory interpretation. Congress may after publication protect by copyright any writing of an author. Its statute creates the copyright.[31] It did not exist at common law even

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Committee on Patents (1906–1912), on Consolidating and Revising the Copyright Laws; H. R. Rep. No. 2222, 60th Cong., 2d Sess. 3), this statement of Mr. Putnam is the only explanation of the change in statutory language, though S. Rep. No. 6187, 59th Cong., 2d Sess., p. 11, refers to "works of art" as a new designation and mentioned the deletion of "fine" from the category.

[29] Cf. *H. C. White Co.* v. *Morton E. Converse & Son Co.,* 20 F. 2d 311.

[30] *Burrow-Giles Lithographic Co.* v. *Sarony,* 111 U. S. 53, 60; *Bleistein* v. *Donaldson Lithographing Co.,* 188 U. S. 239, 250; *Louis De Jonge & Co.* v. *Breuker & Kessler Co.,* 182 F. 150, 152; *F. W. Woolworth Co.* v. *Contemporary Arts,* 193 F. 2d 162, 164; see same case, 344 U. S. 228; *Yuengling* v. *Schile,* 12 F. 97, 100; *Schumacher* v. *Schwencke,* 25 F. 466; *Pellegrini* v. *Allegrini,* 2 F. 2d 610.

[31] *Wheaton and Donaldson* v. *Peters and Grigg,* 8 Pet. 591, 661; *Fox Film Corp.* v. *Doyal,* 286 U. S. 123, 127.

though he had a property right in his unpublished work.[32]

But petitioners assert that congressional enactment of the design patent laws should be interpreted as denying protection to artistic articles embodied or reproduced in manufactured articles.[33] They say:

> "Fundamentally and historically, the Copyright Office is the repository of what each claimant considers to be a cultural treasure, whereas the Patent Office is the repository of what each applicant considers to be evidence of the advance in industrial and technological fields."

Their argument is that design patents require the critical examination given patents to protect the public against monopoly. Attention is called to *Gorham Co.* v. *White,* 14 Wall. 511, interpreting the design patent law of 1842, 5 Stat. 544, granting a patent to anyone who by "their own industry, genius, efforts, and expense, may have invented or produced any new and original design for a manufacture . . . ." A pattern for flat silver was there upheld.[34] The intermediate and present law differs

[32] Lord Brougham and Lord St. Leonards in *Jefferys* v. *Boosey,* IV H. L. C. 815, 968, 979, 10 Eng. Rep. 681, 741, 745.

[33] Two cases are relied upon to support the position of the petitioners. *Taylor Instrument Companies* v. *Fawley-Brost,* 139 F. 2d 98, and *Brown Instrument Co.* v. *Warner,* 82 U. S. App. D. C. 232, 161 F. 2d 910. These cases hold that the Mechanical Patent Law and Copyright Laws are mutually exclusive. As to overlapping of Design Patent and Copyright Laws, however, a different answer has been given by the courts. *Louis De Jonge & Co.* v. *Breuker & Kessler Co.,* 182 F. 150, affirmed on other grounds in 191 F. 35, and 235 U. S. 33; see also cases cited in note 37, *infra.*

[34] This Court said, p. 525: "It is a new and original design for a manufacture, whether of metal or other material; . . . to be either worked into, or on, any article of manufacture; or a new and original shape or configuration of any article of manufacture—it is one or all of these that the law has in view. And the thing invented or pro-

little. "Whoever invents any new, original and ornamental design for an article of manufacture may obtain a patent therefor, . . ." subject generally to the provisions concerning patents for invention. § 171, 66 Stat. 805. As petitioner sees the effect of the design patent law:

> "If an industrial designer can not satisfy the novelty requirements of the design patent laws, then his design as used on articles of manufacture can be copied by anyone."

Petitioner has furnished the Court a booklet of numerous design patents for statuettes, bases for table lamps and similar articles for manufacture, quite indistinguishable in type from the copyrighted statuettes here in issue.[35] Petitioner urges that overlapping of patent and copyright legislation so as to give an author or inventor a choice between patents and copyrights should not be permitted. We assume petitioner takes the position that protection for a statuette for industrial use can only be obtained by patent, if any protection can be given.[36]

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duced, for which a patent is given, is that which gives a peculiar or distinctive appearance to the manufacture, or article to which it may be applied, or to which it gives form. . . . It therefore proposes to secure for a limited time to the ingenious producer of those appearances the advantages flowing from them. . . . It is the appearance itself, therefore, no matter by what agency caused, that constitutes mainly, if not entirely, the contribution to the public which the law deems worthy of recompense."

[35] *E. g.*, Design Patent 170.445 Base for table lamps, a fanciful statuette of a girl standing in front of a high rock in bathing costume.

[36] The English Copyright Act, 1911, § 22, 4 Halsbury's Statutes of England (2d ed.), p. 800, does not protect designs registrable under the Patents and Designs Act (now the Registered Designs Act, 1949, 17 Halsbury's Statutes of England (2d ed.)) unless such designs are not used or intended to be used as models or patterns to be multiplied by any industrial process. The Board of Trade has ruled that a design shall be deemed to be used as a model or pattern to be multi-

As we have held the statuettes here involved copyrightable, we need not decide the question of their patentability. Though other courts have passed upon the issue as to whether allowance by the election of the author or patentee of one bars a grant of the other, we do not.[37] We do hold that the patentability of the statuettes, fitted as lamps or unfitted, does not bar copyright as works of art. Neither the Copyright Statute nor any other says that because a thing is patentable it may not be copyrighted. We should not so hold.[38]

Unlike a patent, a copyright gives no exclusive right to the art disclosed; protection is given only to the expression of the idea—not the idea itself.[39] Thus, in *Baker* v. *Selden,* 101 U. S. 99, the Court held that a copyrighted book on a peculiar system of bookkeeping was not infringed by a similar book using a similar plan which achieved similar results where the alleged infringer made a different arrangement of the columns and used different headings. The distinction is illustrated in *Fred Fisher, Inc.* v. *Dillingham,* 298 F. 145, 151, when the court speaks of two men, each a perfectionist, independently making

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plied by industrial process within the meaning of § 22 when the design is reproduced or intended to be reproduced in more than fifty single articles. The Copyright (Industrial Designs) Rules, 1949, No. 2367, 1 Statutory Instruments 1949, p. 1453.

[37] See *Rosenthal* v. *Stein,* note 3, *supra; In re Blood,* 57 App. D. C. 351, 23 F. 2d 772; *Korzybski* v. *Underwood & Underwood, Inc.,* 36 F. 2d 727; *William A. Meier Glass Co.* v. *Anchor Hocking Glass Corp.,* 95 F. Supp. 264, 267; *Jones Bros. Co.* v. *Underkoffler,* 16 F. Supp. 729; *Louis De Jonge & Co.* v. *Breuker & Kessler Co.,* 182 F. 150; 66 Harv. L. Rev. 884; 52 Mich. L. Rev. 33; cf. *Taylor Instrument Companies* v. *Fawley-Brost,* 139 F. 2d 98.

[38] See, Pogue, Borderland—Where Copyright and Design Patent Meet, 52 Mich. L. Rev. 33, 58.

[39] *F. W. Woolworth Co.* v. *Contemporary Arts,* 193 F. 2d 162; *Ansehl* v. *Puritan Pharmaceutical Co.,* 61 F. 2d 131; *Fulmer* v. *United States,* 122 Ct. Cl. 195, 103 F. Supp. 1021; *Muller* v. *Triborough Bridge Authority,* 43 F. Supp. 298.

maps of the same territory. Though the maps are identical, each may obtain the exclusive right to make copies of his own particular map, and yet neither will infringe the other's copyright. Likewise a copyrighted directory is not infringed by a similar directory which is the product of independent work.[40] The copyright protects originality rather than novelty or invention—conferring only "the sole right of multiplying copies." [41] Absent copying there can be no infringement of copyright.[42] Thus, respondents may not exclude others from using statuettes of human figures in table lamps; they may only prevent use of copies of their statuettes as such or as incorporated in some other article. Regulation § 202.8, *supra,* makes clear that artistic articles are protected in "form but not their mechanical or utilitarian aspects." See *Stein* v. *Rosenthal,* 103 F. Supp. 227, 231. The dichotomy of protection for the aesthetic is not beauty and utility but art for the copyright and the invention of original and ornamental design for design patents. We find nothing in the copyright statute to support the argument that the intended use or use in industry of an article eligible for copyright bars or invalidates its registration. We do not read such a limitation into the copyright law.

Nor do we think the subsequent registration of a work of art published as an element in a manufactured article, is a misuse of the copyright. This is not different from

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[40] *Sampson & Murdock Co.* v. *Seaver-Radford Co.,* 140 F. 539. See, Anno. 26 A. L. R. 585.

[41] *Jeweler's Circular Pub. Co.* v. *Keystone Publishing Co.,* 281 F. 83, 94.

[42] *White-Smith Music Pub. Co.* v. *Apollo Co.,* 209 U. S. 1; *Bleistein* v. *Donaldson Lithographing Co.,* 188 U. S. 239, 249; *Arnstein* v. *Porter,* 154 F. 2d 464, 468–469; *Alfred Bell & Co., Ltd.* v. *Catalda Fine Arts, Inc.,* 191 F. 2d 99, 103; *Ansehl* v. *Puritan Pharmaceutical Co., supra; Christie* v. *Cohan,* 154 F. 2d 827.

the registration of a statuette and its later embodiment in an industrial article.

"The copyright law, like the patent statutes, makes reward to the owner a secondary consideration." *United States* v. *Paramount Pictures,* 334 U. S. 131, 158. However, it is "intended definitely to grant valuable, enforceable rights to authors, publishers, etc., without burdensome requirements; 'to afford greater encouragement to the production of literary [or artistic] works of lasting benefit to the world.' " *Washingtonian Co.* v. *Pearson,* 306 U. S. 30, 36.

The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in "Science and useful Arts." Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered.

*Affirmed.*

Opinion of MR. JUSTICE DOUGLAS, in which MR. JUSTICE BLACK concurs.

An important constitutional question underlies this case—a question which was stirred on oral argument but not treated in the briefs. It is whether these statuettes of dancing figures may be copyrighted. Congress has provided that "works of art," "models or designs for works of art," and "reproductions of a work of art" may be copyrighted (17 U. S. C. § 5); and the Court holds that these statuettes are included in the words "works of art." But may statuettes be granted the monopoly of the copyright?

Article I, § 8 of the Constitution grants Congress the power "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors . . . the

exclusive Right to their respective Writings . . . ." The power is thus circumscribed: it allows a monopoly to be granted only to "authors" for their "writings." Is a sculptor an "author" and is his statue a "writing" within the meaning of the Constitution? We have never decided the question.

*Burrow-Giles Lithographic Co.* v. *Sarony,* 111 U. S. 53, held that a photograph could be copyrighted.

*Bleistein* v. *Donaldson Lithographing Co.,* 188 U. S. 239, held that chromolithographs to be used as advertisements for a circus were "pictorial illustrations" within the meaning of the copyright laws. Broad language was used in the latter case, ". . . a very modest grade of art has in it something irreducible, which is one man's alone. That something he may copyright unless there is a restriction in the words of the act." 188 U. S., at 250. But the constitutional range of the meaning of "writings" in the field of art was not in issue either in the *Bleistein* case nor in *Woolworth Co.* v. *Contemporary Arts,* 344 U. S. 228, recently here on a writ of certiorari limited to a question of damages.

At times the Court has on its own initiative considered and decided constitutional issues not raised, argued, or briefed by the parties. Such, for example, was the case of *Continental Bank* v. *Rock Island R. Co.,* 294 U. S. 648, 667, in which the Court decided the constitutionality of § 77 of the Bankruptcy Act though the question was not noticed by any party. We could do the same here and decide the question here and now. This case, however, is not a pressing one, there being no urgency for a decision. Moreover, the constitutional materials are quite meager (see Fenning, The Origin of the Patent and Copyright Clause of the Constitution, 17 Geo. L. J. 109 (1929)); and much research is needed.

The interests involved in the category of "works of art," as used in the copyright law, are considerable. The

Copyright Office has supplied us with a long list of such articles which have been copyrighted—statuettes, book ends, clocks, lamps, door knockers, candlesticks, inkstands, chandeliers, piggy banks, sundials, salt and pepper shakers, fish bowls, casseroles, and ash trays. Perhaps these are all "writings" in the constitutional sense. But to me, at least, they are not obviously so. It is time that we came to the problem full face. I would accordingly put the case down for reargument.

# INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, LOCAL 37, ET AL. *v.* BOYD, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON.

No. 195. Argued January 6, 1954.—Decided March 8, 1954.

A labor union and some of its alien members sued to enjoin a District Director of Immigration and Naturalization from so construing § 212 (d) (7) of the Immigration and Nationality Act of 1952 as to treat aliens domiciled in the continental United States returning from temporary work in Alaska as if they were aliens entering the United States for the first time. They also prayed for a declaratory judgment that, if so construed, § 212 (d) (7) is unconstitutional. The record did not show that any sanctions under the section had been set in motion against individuals on whose behalf relief was sought, or that any occasion for doing so had arisen. *Held:* The complaint must be dismissed as not presenting a "case or controversy" appropriate for adjudication. Pp. 222–224.

111 F. Supp. 802, judgment vacated and cause remanded.

*A. L. Wirin* argued the cause for appellants. With him on the brief was *Norman Leonard.*

*Charles Gordon* argued the cause for appellee. With him on the brief were *Acting Solicitor General Stern, Assistant Attorney General Olney, John F. Davis, Beatrice Rosenberg* and *L. Paul Winings.*

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

This is an action by Local 37 of the International Longshoremen's and Warehousemen's Union and several of its alien members to enjoin the District Director of Immigration and Naturalization at Seattle from so construing § 212 (d) (7) of the Immigration and Nationality

Act of 1952* as to treat aliens domiciled in the continental United States returning from temporary work in Alaska as if they were aliens entering the United States for the first time. Declaratory relief to the same effect is also sought. Since petitioners asserted in the alternative that such a construction of the challenged statute would be unconstitutional, a three-judge district court was convened. The case came before it on stipulated facts and issues of law, from which it appeared that the union has over three thousand members who work every summer in the herring and salmon canneries of Alaska, that some of these are aliens, and that if alien workers going to Alaska for the 1953 canning season were excluded on their return, their "contract and property rights [would] be jeopardized and forfeited." The District Court entertained the suit but dismissed it on the merits. 111 F. Supp. 802. In our order of October 12, 1953, we postponed the question of jurisdiction to the hearing on the merits. 346 U. S. 804.

On this appeal, appellee contends that the District Court should not have reached the statutory and constitutional questions—that it should have dismissed the suit for want of a "case or controversy," for lack of standing on the union's part to bring this action, because the Attorney General was an indispensable party, and because habeas corpus is the exclusive method for judicial inquiry in deportation cases. Since the first objection is conclusive, there is an end of the matter.

Appellants in effect asked the District Court to rule that a statute the sanctions of which had not been set in motion against individuals on whose behalf relief was

*This section states that the exclusionary provisions of § 212 (a) shall, with exceptions not here relevant, "be applicable to any alien who shall leave Hawaii, Alaska, Guam, Puerto Rico, or the Virgin Islands of the United States, and who seeks to enter the continental United States . . . ." 8 U. S. C. § 1182 (d) (7).

sought, because an occasion for doing so had not arisen, would not be applied to them if in the future such a contingency should arise. That is not a lawsuit to enforce a right; it is an endeavor to obtain a court's assurance that a statute does not govern hypothetical situations that may or may not make the challenged statute applicable. Determination of the scope and constitutionality of legislation in advance of its immediate adverse effect in the context of a concrete case involves too remote and abstract an inquiry for the proper exercise of the judicial function. *United Public Workers* v. *Mitchell,* 330 U. S. 75; see *Muskrat* v. *United States,* 219 U. S. 346, and *Alabama State Federation of Labor* v. *McAdory,* 325 U. S. 450. Since we do not have on the record before us a controversy appropriate for adjudication, the judgment of the District Court must be vacated, with directions to dismiss the complaint.

*It is so ordered.*

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

This looks to me like the very kind of "case or controversy" courts should decide. With the abstract principles of law relied on by the majority for dismissing the case, I am not in disagreement. Of course federal courts do not pass on the meaning or constitutionality of statutes as they might be thought to govern mere "hypothetical situations . . . ." Nor should courts entertain such statutory challenges on behalf of persons upon whom adverse statutory effects are "too remote and abstract an inquiry for the proper exercise of the judicial function." But as I read the record it shows that judicial action is absolutely essential to save a large group of wage earners on whose behalf this action is brought from irreparable harm due to alleged lawless enforcement of a federal statute. My view makes it necessary for me to set out the facts

with a little more detail than they appear in the Court's opinion.

Every summer members of the appellant union go from the west coast of continental United States to Alaska to work in salmon and herring canneries under collective-bargaining agreements. As the 1953 canning season approached the union and its members looked forward to this Alaska employment. A troublesome question arose, however, on account of the Immigration and Nationality Act of 1952, 66 Stat. 163. Section 212 (d)(7) of this new Act has language that given one construction provides that all aliens seeking admission to continental United States from Alaska, even those previously accepted as permanent United States residents, shall be examined as if entering from a foreign country with a view to excluding them on any of the many grounds applicable to aliens generally. This new law created an acute problem for the union and its numerous members who were lawful alien residents, since aliens generally can be excluded from this country for many reasons which would not justify deporting aliens lawfully residing here. The union and its members insisted on another construction. They denied that Congress intended to require alien workers to forfeit their right to live in this country for no reason at all except that they went to Alaska, territory of the United States, to engage in lawful work under a lawfully authorized collective-bargaining contract. The defendant immigration officer announced that the union's interpretation was wrong and that workers going to Alaska would be subject to examination and exclusion. This is the controversy.

It was to test the right of the immigration officer to apply § 212 (d)(7) to make these workers subject to exclusion that this suit was filed by the union and two of its officers on behalf of themselves and all union members who are aliens and permanent residents. True, the action

was begun before the union members went to Alaska for the 1953 canning season. But it is not only admitted that the immigration official intended to enforce § 212 (d)(7) as the union and these workers feared. It is admitted here that he has since done precisely that. All 1953 alien cannery workers have actually been subjected to the wearisome routine of immigration procedure as though they had never lived here. And some of the union members are evidently about to be denied the right ever to return to their homes on grounds that could not have been legally applied to them had they stayed in California or Washington instead of going to Alaska to work for an important American industry.

Thus the threatened injury which the Court dismisses as "remote" and "hypothetical" has come about. For going to Alaska to engage in honest employment many of these workers may lose the home this country once afforded them. This is a strange penalty to put on productive work. Maybe this is what Congress meant by passing § 212 (d)(7). And maybe in these times such a law would be held constitutional. But even so, can it be that a challenge to this law on behalf of those whom it hits the hardest is so frivolous that it should be dismissed for want of a controversy that courts should decide? Workers threatened with irreparable damages, like others, should have their cases tried.

# REMMER *v.* UNITED STATES.

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

No. 304. Argued February 1–2, 1954.—Decided March 8, 1954.

During the trial of petitioner in a Federal District Court on charges of willful evasion of federal income taxes, an unnamed person communicated with a juror who afterwards became the jury foreman, and remarked to him that he could profit by bringing in a verdict favorable to petitioner. The juror reported the incident to the judge, who informed the prosecuting attorneys and advised with them. As a result, the Federal Bureau of Investigation made an investigation and report, which was considered by the judge and prosecutors alone, but nothing further was said or done. Petitioner and his counsel first learned of the matter after a verdict of guilty had been rendered, and petitioner thereupon moved for a new trial, which was denied. *Held:* The case is remanded to the District Court with directions to hold a hearing to determine whether the incident complained of was harmful to petitioner, and if found to have been harmful, to grant a new trial. Pp. 228–230.

(a) In a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties. P. 229.

(b) The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant. P. 229.

205 F. 2d 277, judgment vacated.

*J. Louis Monarch* argued the cause for petitioner. With him on the brief were *Spurgeon Avakian, John R. Golden* and *Leslie C. Gillen.*

*Philip Elman* argued the cause for the United States. With him on the brief were *Acting Solicitor General Stern, Assistant Attorney General Holland, Ellis N. Slack* and *Joseph M. Howard.*

MR. JUSTICE MINTON delivered the opinion of the Court.

The petitioner was convicted by a jury on several counts charging willful evasion of the payment of federal income taxes. A matter admitted by the Government to have been handled by the trial court in a manner that may have been prejudicial to the petitioner, and therefore confessed as error, is presented at the threshold and must be disposed of first.

After the jury had returned its verdict, the petitioner learned for the first time that during the trial a person unnamed had communicated with a certain juror, who afterwards became the jury foreman, and remarked to him that he could profit by bringing in a verdict favorable to the petitioner. The juror reported the incident to the judge, who informed the prosecuting attorneys and advised with them. As a result, the Federal Bureau of Investigation was requested to make an investigation and report, which was accordingly done. The F. B. I. report was considered by the judge and prosecutors alone, and they apparently concluded that the statement to the juror was made in jest, and nothing further was done or said about the matter. Neither the judge nor the prosecutors informed the petitioner of the incident, and he and his counsel first learned of the matter by reading of it in the newspapers after the verdict.

The above-stated facts were alleged in a motion for a new trial, together with an allegation that the petitioner was substantially prejudiced, thereby depriving him of a fair trial, and a request for a hearing to determine the circumstances surrounding the incident and its effect on the jury.* A supporting affidavit of the petitioner's

*The motion for a new trial was also grounded on many other contentions, several of which have also been presented to this Court. Because of our disposition of the case on the issue treated herein, we do not pass upon these additional questions.

attorneys recited the alleged occurrences and stated that if they had known of the incident they would have moved for a mistrial and requested that the juror in question be replaced by an alternate juror. Two newspaper articles reporting the incident were attached to the affidavit. The Government did not file answering affidavits. The District Court, without holding the requested hearing, denied the motion for a new trial. The Court of Appeals held that the District Court had not abused its discretion, since the petitioner had shown no prejudice to him. 205 F. 2d 277, 291. The case is here on writ of certiorari. 346 U. S. 884.

In a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties. The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant. *Mattox* v. *United States,* 146 U. S. 140, 148–150; *Wheaton* v. *United States,* 133 F. 2d 522, 527.

We do not know from this record, nor does the petitioner know, what actually transpired, or whether the incidents that may have occurred were harmful or harmless. The sending of an F. B. I. agent in the midst of a trial to investigate a juror as to his conduct is bound to impress the juror and is very apt to do so unduly. A juror must feel free to exercise his functions without the F. B. I. or anyone else looking over his shoulder. The integrity of jury proceedings must not be jeopardized by unauthorized invasions. The trial court should not decide and take final action *ex parte* on information such

as was received in this case, but should determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial, in a hearing with all interested parties permitted to participate.

We therefore vacate the judgment of the Court of Appeals and remand the case to the District Court with directions to hold a hearing to determine whether the incident complained of was harmful to the petitioner, and if after hearing it is found to have been harmful, to grant a new trial.

*Judgment vacated.*

THE CHIEF JUSTICE took no part in the consideration or decision of this case.

## WALTERS ET AL. *v.* CITY OF ST. LOUIS ET AL.

APPEAL FROM THE SUPREME COURT OF MISSOURI.

No. 389. Argued February 2–3, 1954.—Decided March 15, 1954.

Pursuant to a state statute, a city promulgated an ordinance levying an income tax on the *gross salaries* and wages of employed persons but only on the *net profits* of self-employed persons, of corporations and of business enterprises after deducting the necessary expenses of operation. A few days after the effective date of the ordinance and before its actual application could be ascertained, certain wage earners sued in a state court for a declaratory judgment that the tax was void and for an injunction to prevent their employer from withholding the tax and the city from collecting it. There was no issue as to extraterritorial application of the tax or as to any burden on interstate commerce. *Held:* On its face, neither the statute nor the ordinance violates the Due Process Clause or the Equal Protection Clause of the Fourteenth Amendment. Pp. 232–238.

(a) Since the State Supreme Court did not pass on the interpretation or validity of the administrative regulations issued under the ordinance, this Court will not do so. P. 233.

(b) In view of widespread taxing practices, it cannot be said that the difference between income from salaries and wages and income from profits of business is insignificant or fanciful; and a difference in treatment of taxpayers based on such a classification of sources of income is not *per se* a prohibited discrimination. *Quaker City Cab Co.* v. *Pennsylvania*, 277 U. S. 389, distinguished. Pp. 236–237.

(c) Equal protection only requires that classification rest on real and not feigned differences, that the distinction have some relevance to the purpose for which the classification is made, and that the different treatments be not so disparate, relative to the difference in classification, as to be wholly arbitrary. Pp. 237–238.

364 Mo. —, 259 S. W. 2d 377, affirmed.

*Stanley M. Rosenblum* argued the cause for appellants. With him on the brief was *Harry H. Craig.*

*Samuel H. Liberman* argued the cause for appellees. With him on the brief was *John P. McCammon.*

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MR. JUSTICE JACKSON delivered the opinion of the Court.

This appeal challenges a municipal income tax ordinance which excises gross salaries and wages of the employed but only net profits of the self-employed, of corporations and of business enterprises. Appellants, who are wage earners, sued in the state courts for a declaratory judgment and injunction to prevent their employer from withholding the tax and the City from collecting it. Their contention is that the discrimination between wages and profits which results from allowing certain deductions only to profits violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment. It has been overruled by the state courts and is brought here for determination.

The power or jurisdiction of the City to tax these appellants on their earnings is not open to question on federal grounds. There is no issue as to extraterritorial application of the tax or as to burden upon interstate commerce. The taxpayers, the withholding employer, the taxable income earned, were all clearly within the territorial jurisdiction and power of the State and of the municipality to which its taxing authority was delegated. The sole question here is whether in levying a tax on those whom it has plenary power to tax, the City has introduced classification and discriminations so unreasonable as to deny to appellants due process or equal protection of the law.

A weakness of the appellants' case is that its anticipatory character precludes consideration of any contentions insofar as they depend upon actual application of the tax or the regulations promulgated for its administration. This action was commenced almost immediately after the Act became effective. A portion of appellants' wages has been withheld by their employer, but the City has not yet collected the tax. There is no evidence as to

how the amount withheld from appellants compares with taxes collected from self-employed persons or businesses. The complaint attacks only the state legislative Act delegating power to the City of St. Louis and the taxing ordinance enacted by that City.

In the courts below the appellants also attempted to rely upon claims of discrimination resulting from regulations adopted by the municipal taxing authorities. But the Supreme Court of Missouri held the regulations were not before the court, declined to consider them to be a part of the ordinance, and intimated that the regulations might be held void hereafter without invalidating the ordinance. 364 Mo. ——, 259 S. W. 2d 377. Missouri authorizes a petition for amendment or repeal of regulations promulgated by an administrative officer and grants a full judicial review of his final decision thereon or any other order that affects private rights.[1] Appellants have taken no steps to procure such relief. We are uninformed either as to what the administrative practice actually is or whether it conforms with Missouri law. Of course, we will not undertake to review what the court below did not decide. The state court has not passed on any question of discrimination arising from the regulations or any question as to the interpretation or validity thereof. We have here only the very limited issue—does the statute or the ordinance on its face violate the Fourteenth Amendment?

[1] Mo. Const., Art. 5, § 22, provides: "All final decisions, findings, rules and orders of any administrative officer or body existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights, shall be subject to direct review by the courts as provided by law; and such review shall include the determination whether the same are authorized by law, and in cases in which a hearing is required by law, whether the same are supported by competent and substantial evidence upon the whole record." This provision is supplemented by Mo. Rev. Stat. Ann., 1949, §§ 536.010–536.140.

The Act of the Missouri Legislature is simply a general enabling Act, so far as relevant, authorizing the City to levy "an earnings tax on the salaries, wages, commissions and other compensation earned by its residents; . . . on the net profits of associations, businesses or other activities conducted by residents; . . . and on the net profits earned by all corporations as the result of work done or services performed or rendered and business or other activities conducted in the city." [2] However, it authorizes the municipality to provide "for deductions and exemptions from salaries, wages and commissions of employees . . . ." [3] It directs that net profits shall be ascertained "by deducting the necessary expenses of operation from the gross profits or earnings." [4] It does not limit deductions allowable to wage earners or define the necessary expenses allowable in arriving at net profits.

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[2] "Any constitutional charter city in this state which now has or may hereafter acquire a population in excess of seven hundred thousand inhabitants, according to the last federal decennial census, is hereby authorized to levy and collect, by ordinance for general revenue purposes, an earnings tax on the salaries, wages, commissions and other compensation earned by its residents; on the salaries, wages, commissions and other compensation earned by nonresidents of the city for work done or services performed or rendered in the city; on the net profits of associations, businesses or other activities conducted by residents; on the net profits of associations, businesses or other activities conducted in the city by nonresidents; and on the net profits earned by all corporations as the result of work done or services performed or rendered and business or other activities conducted in the city." Mo. Rev. Stat. Ann. (1953 Supp.), § 92.110.

[3] "The municipal assembly of any such city may provide for deductions and exemptions from salaries, wages and commissions of employees and may provide for exemptions on account of the wives, husbands and dependents of such employees." Mo. Rev. Stat. Ann. (1953 Supp.), § 92.140.

[4] "The net profits or earnings of associations, businesses or other activities, and corporations shall be ascertained and determined by deducting the necessary expenses of operation from the gross profits or earnings." Mo. Rev. Stat. Ann. (1953 Supp.), § 92.150.

As to the matters complained of, the ordinance is almost as general. It imposes the same rate of tax on salaries, wages, commissions and other earned compensation of individuals as it does on the net profits of the self-employed, corporations, associations and businesses.[5] But it does not make any express provision for deductions from earned income by wage earners such as appellants. As to those in business, it provides generally for deducting "the necessary expenses of operation from the gross profits or earnings." [6] It does not define necessary expenses, but it authorizes the City Collector to promulgate appropriate rules and regulations.[7]

Appellants claim that the ordinance will allow self-employed persons and businesses to deduct such items as taxes (which appellants claim will include federal income taxes) and charitable contributions not in excess of five

[5] The pertinent part of the ordinance is as follows: "A tax for general revenue purposes of one-half of one per centum is hereby imposed on (a) salaries, wages, commissions and other compensation earned after August 31, 1952, by resident individuals of the City, including the entire distributive share of any member of a partnership or association, less the amount thereof, if any, which may be shown to have been taxed under the provisions hereof to said association or partnership; and on (b) salaries, wages, commissions and other compensation earned after August 31, 1952, by non-resident individuals of the City, for work done or services performed or rendered in the City; and on (c) the net profits earned after August 31, 1952, of associations, businesses, or other activities conducted by a resident or residents, and on (d) the net profits earned after August 31, 1952, of associations, businesses, or other activities conducted in the City by a non-resident or non-residents; and (e) on the net profits earned after August 31, 1952, by all corporations as a result of work done or services performed or rendered, and business or other activities conducted in the City." City of St. Louis Ordinance 46222, § 2.

[6] Section 1 of the ordinance defines "net profits" as used in § 2 as "The net income of any association, business or corporation remaining after deducting the necessary expenses of operation from the gross profits or earnings."

[7] Section 9 of the ordinance.

percent of net income, which deductions are not allowed to those who earn wages or salaries. This may be true if the ordinance is applied as they expect. Whether this will be the application of the tax we cannot tell, for the record before us does not show its actual impact on classes of taxpayers or its methods of administration. Therefore, appellants' basic position must be that any legislative classification which distinguishes on its face between wage earners and the self-employed is constitutionally prohibited.

On its face, the ordinance classifies incomes for taxation according to their sources, one category consisting of salary and wage income and the other of profits from self-employment or business enterprise. Classification of earned income as against profits is not uncommon, sometimes to the advantage of the wage earner and sometimes to his disadvantage. It is a classification employed extensively in federal taxation, which under appropriate circumstances allows deductions to the self-employed not allowed to employees,[8] discriminates sharply between earned income and capital gains,[9] and sets apart certain types of wage earnings for social security tax and for benefits.[10] We cannot say that a difference in treatment of the taxpayers deriving income from these different sources is *per se* a prohibited discrimination. There is not so much similarity between them that they must be placed in precisely the same classification for tax purposes.

The assertion is made that wage earners and self-employed persons are in competition on the same level of endeavor, and reliance is placed on such cases as *Quaker City Cab Co.* v. *Pennsylvania,* 277 U. S. 389. There the Court found discrimination between identical sources of revenue depending only on the incorporated

[8] *E. g.,* I. R. C., §§ 22 (n), 23 (aa).

[9] Compare I. R. C., § 22 (a), with I. R. C., §§ 117 (b), (c).

[10] *E. g.,* I. R. C., §§ 1400, 1426.

or unincorporated character of the taxpayer. But here, varying taxes are not laid upon taxpayers engaged in precisely the same form of activity. Instead, this is a broad tax on income, and the income springs from many activities carried on by many types of business entities. Here the classification rests on the State's view that wage or salary income is relatively fixed, predictable and certain, while profits of business are fluctuating and unstable. In view of widespread taxing practices, we cannot say that this difference is insignificant or fanciful.

The power of the State to classify according to occupation for the purpose of taxation is broad. Equal protection does not require identity of treatment. It only requires that classification rest on real and not feigned differences, that the distinction have some relevance to the purpose for which the classification is made, and that the different treatments be not so disparate, relative to the difference in classification, as to be wholly arbitrary. Cf. *Dominion Hotel, Inc.* v. *Arizona,* 249 U. S. 265; *Great Atlantic & Pacific Tea Co.* v. *Grosjean,* 301 U. S. 412; *New York Rapid Transit Corp.* v. *City of New York,* 303 U. S. 573; *Skinner* v. *Oklahoma ex rel. Williamson,* 316 U. S. 535. "In its discretion it may tax all, or it may tax one or some, taking care to accord to all *in the same class* equality of rights." *Southwestern Oil Co.* v. *Texas,* 217 U. S. 114, 121. It may even tax wholesalers of specified articles on account of their occupation without exacting a similar tax on the occupations of wholesale dealers in other articles. Our disapproval of the wisdom or fairness of so doing is not a ground for interference. *Ibid.* "When a state legislature acts within the scope of its authority it is responsible to the people, and their right to change the agents to whom they have entrusted the power is ordinarily deemed a sufficient check upon its abuse. When the constituted authority of the State undertakes to exert the taxing power, and the question of the validity of its

action is brought before this court, every presumption in its favor is indulged, and only clear and demonstrated usurpation of power will authorize judicial interference with legislative action." *Green* v. *Frazier*, 253 U. S. 233, 239.

*Judgment affirmed.*

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK joins, concurring in the result.

I am less confident than my Brethren that the Supreme Court of Missouri did not pass on the regulations as well as the ordinance. But I bow to their reading of the record, saving for a future day the serious and substantial question under the Equal Protection Clause raised by the regulations which grant employers deductions for taxes paid the Federal Government, yet do not allow employees a deduction for the same tax.

Syllabus.

# FEDERAL POWER COMMISSION *v.* NIAGARA MOHAWK POWER CORP.

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

No. 28. Argued October 15–16, 1953.—Decided March 15, 1954.

The Federal Water Power Act of 1920 has not abolished private proprietary rights, existing under state law, to use waters of a navigable stream for power purposes; and, in computing the amortization reserve of the federal licensee in this case, which is required under § 10 (d) of that Act, as amended, the Federal Power Commission was not justified in disallowing the expenses paid or incurred by the licensee for the use of such rights along the Niagara River. Pp. 240–256.

(a) This Court accepts the Court of Appeals' conclusion that this licensee's water rights are valid under the law of New York. Pp. 245–246.

(b) The water rights claimed by this licensee are usufructuary rights to use the water for the generation of power, as distinguished from claims to the legal ownership of the running water itself; and, under New York law, they constitute a form of real estate known as corporeal hereditaments. Pp. 246–247.

(c) Even though this licensee's water rights are of a kind that is within the scope of the Government's dominant servitude, the Government has not exercised its power to abolish them. Pp. 248–256.

(d) There is a dominant servitude, in favor of the United States, under which private persons hold physical properties obstructing navigable waters of the United States and all rights to use the waters of those streams; but the exercise of that servitude, without making allowances for preexisting rights under state law, requires clear authorization. Pp. 249–252.

(e) The plan of the Federal Water Power Act is one of reasonable regulation of the use of navigable waters, coupled with encouragement of their development as power projects by private parties. P. 251.

(f) Riparian water rights, like other real property rights, are determined by state law. The Federal Water Power Act merely imposes upon their owners the additional obligation of using them in compliance with that Act. P. 252.

(g) Neither the United States nor the State of New York claims such an exclusive right to the waters here in question as to eliminate the limited use which the licensee here seeks to make of them. P. 256.

(h) The expenses in question, whereby this licensee acquired its water rights, are not shown on this record to have been otherwise unreasonable. P. 256.

91 U. S. App. D. C. 395, 202 F. 2d 190, affirmed.

On respondent's petition to review an order of the Federal Power Commission, 9 F. P. C. 228, the Court of Appeals remanded the case to the Commission with instructions to modify its order. 91 U. S. App. D. C. 395, 202 F. 2d 190. This Court granted certiorari. 345 U. S. 955. *Affirmed,* p. 256.

*Willard W. Gatchell* argued the cause for petitioner. With him on the brief were *Acting Solicitor General Stern, Assistant Attorney General Burger, Murray L. Schwartz, Paul A. Sweeney, Hubert H. Margolies, Herman Marcuse* and *Joseph B. Hobbs.*

*John W. Davis* argued the cause for respondent. With him on the brief were *Randall J. LeBoeuf, Jr., Lauman Martin, Taggart Whipple* and *Chauncey P. Williams, Jr.*

*Nathaniel L. Goldstein,* Attorney General, filed a brief for the State of New York, as *amicus curiae,* setting forth the views of the State of New York upon questions of title to water rights in the Niagara River.

MR. JUSTICE BURTON delivered the opinion of the Court.

The most significant issue raised by this case is whether the Federal Water Power Act of 1920 [1] has abolished pri-

[1] The Federal Water Power Act of 1920, 41 Stat. 1063, as amended, is now Part I of the Federal Power Act, 49 Stat. 838, 16 U. S. C. §§ 791a–825r.

vate proprietary rights, existing under state law, to use waters of a navigable stream for power purposes. We agree with the Court of Appeals that it has not. We agree also that in computing a federal licensee's amortization reserve, required by § 10 (d) of that Act, as amended,[2] the Federal Power Commission was not justified in disallowing the expenses paid or incurred by the licensee in this case for the use of such rights.

March 2, 1921, Niagara Falls Power Company, a New York corporation, predecessor in interest of Niagara Mohawk Power Corporation, a New York corporation, respondent herein, secured from the Federal Power Commission the federal license with which we are concerned. It was the first such license issued under the Federal Water Power Act of 1920. Its term was 50 years. It authorized the diversion of water for power purposes from the Niagara River, above the Falls, and the return of it below the Falls, all in New York. The daily diversion, in the aggregate, could not exceed 19,500 cubic feet per second (c. f. s.).[3]

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

. . . . . .

"(d) That after the first twenty years of operation, out of surplus earned thereafter, if any, accumulated in excess of a specified reasonable rate of return upon the net investment of a licensee in any project or projects under license, the licensee shall establish and maintain amortization reserves, which reserves shall, in the discretion of the Commission, be held until the termination of the license or be applied from time to time in reduction of the net investment. Such specified rate of return and the proportion of such surplus earnings to be paid into and held in such reserves shall be set forth in the license. . . ." 49 Stat. 842, 843, 16 U. S. C. § 803 (d).

[3] This limit soon was increased to 19,725 c. f. s., 6 F. P. C. 184, 185, and later to 20,000 c. f. s., see 9 F. P. C. 228, 244, n. 28. The Treaty between the United States and Great Britain relating to boundary waters between the United States and Canada, proclaimed May 13,

Section 10 (d) of the Act requires each licensee, after 20 years of operation under such a license, to establish and maintain amortization reserves out of any surplus thereafter earned and accumulated in excess of a reasonable return upon the licensee's net investment. Section 14 makes such net investment, plus severance damages, a principal measure of the price the Government is to pay when and if it takes over all or part of the property.[4]

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1910, limited the diversion from the United States side to 20,000 and from the Canadian side to 36,000 c. f. s. 36 Stat. 2448, 2450. As to additional emergency and temporary diversions, see 55 Stat. 1276, 1380; 1 U. S. Treaties and Other International Agreements 694.

[4] 49 Stat. 844–845, 16 U. S. C. § 807. See also, § 16 as to compensation to be paid for temporary use of the property by the Government, 41 Stat. 1072, 16 U. S. C. § 809; § 20 as to rate fixing, 41 Stat. 1073–1074, 16 U. S. C. § 813; and § 26 as to a purchase by the Government at a judicial sale, 41 Stat. 1076, 16 U. S. C. § 820. "Net investment" is defined in § 3 as follows:

"(13) 'net investment' in a project means the actual legitimate original cost thereof as defined and interpreted in the 'classification of investment in road and equipment of steam roads, issue of 1914, Interstate Commerce Commission,' plus similar costs of additions thereto and betterments thereof, minus the sum of the following items properly allocated thereto, if and to the extent that such items have been accumulated during the period of the license from earnings in excess of a fair return on such investment: (a) Unappropriated surplus, (b) aggregate credit balances of current depreciation accounts, and (c) aggregate appropriations of surplus or income held in amortization, sinking fund, or similar reserves, or expended for additions or betterments or used for the purposes for which such reserves were created. . . ." 49 Stat. 839, 16 U. S. C. § 796 (13).

In the instant case the Commission explains that—

"Section 10 (d) is part of a larger pattern of fairness set up by the act to induce water-power development. Licensees are assured a 'fair return,' but the public is safeguarded against profiteering by a licensee through profits beyond a fair return. At the end of the license period and upon 'recapture' by the Federal Government, earnings throughout the license period are to be tested against a fair return standard set up in section 3 (13)." 9 F. P. C., at 248.

In 1942, the Commission expressly held that § 14 applied to this licensee.[5]

In 1947, Article 11 of the license was amended so as to specify a 6% rate of return and to require 50% of the licensee's surplus earnings to be paid into its amortization reserves. As so amended, the article read:

> "After the first twenty (20) years of operation of the project under this license, namely after March 1, 1941, six (6) per cent per annum shall be the specified rate of return on the net investment in the project for determining surplus earnings in accordance with the provisions of Section 10 (d) of the Act for the establishment and maintenance of amortization reserves to be held until termination of the license, or in the discretion of the Commission, to be applied from time to time in reduction of the net investment in the project, and one-half of all surplus earnings in excess of six (6) per cent per annum received in any calendar year shall be paid into and held in such amortization reserves." [6]

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[5] This resulted from the decision that the "fair value" provisions of § 23 (a), 49 Stat. 846, 16 U. S. C. § 816, applied to licenses to use water rights previously held under permits from the Federal Government, whereas this licensee's prior water rights, if any, arise under the law of New York. *In re Niagara Falls Power Co.*, 3 F. P. C. 206, aff'd by the Court of Appeals for the Second Circuit in *Niagara Falls Power Co.* v. *Federal Power Commission*, 137 F. 2d 787.

[6] A proceeding seeking the Commission's approval of a further amendment to Article 11 was consolidated with the show-cause proceedings in the instant case. In response, the Commission, in 1950, ordered that article amended to read:

"After the first 20 years of operation of the project under this license, 6 percent per annum shall be the specified rate of return on the net investment in the project for determining surplus earnings and for the establishment and maintenance of amortization reserves, pursuant to section 10 (d) of the act; one-half of all earnings in excess of 6 percent per annum shall be paid into such amorti-

In 1948, the Commission began this proceeding to determine the licensee's amortization reserve liability. It was the Commission's first such effort under § 10 (d). In 1949, pursuant to a revised staff report, the Commission directed the holder of this license to show cause why one-half of its surplus earnings from March 2, 1941, through December 31, 1946, in the amount of $994,521.33, should not be set aside in an amortization reserve, and why a like proportion of its subsequent surplus earnings should not be set aside annually upon a comparable basis. In 1950, the Commission's presiding examiner recommended that the licensee's initial reserve be $914,432.04, and the Commission approved that figure in preference to $515,432.04 proposed by the licensee. One Commissioner filed a concurring statement and one dissented. 9 F. P. C. 228. However, the Court of Appeals for the District of Columbia Circuit, one judge dissenting, upheld the licensee and remanded the case to the Commission with instructions to modify its order accordingly. 91 U. S. App. D. C. 395, 202 F. 2d 190.[7] The decision turned primarily upon the court's conclusion that neither the Federal Water Power Act nor the issuance of a license thereunder had abolished the licensee's private proprietary rights to use the waters of Niagara River for power purposes. That issue was inescapable because the Commission, in computing the licensee's required amortization reserve, had found that certain annual payments and discounts made by the

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zation reserves and such amortization reserves shall be established, maintained and disposed of in accordance with the terms of the act and such rules, regulations and orders of the Commission as may be adopted pursuant thereto." 9 F. P. C., at 259.

Under the above amendment, the method of setting aside the amortization reserves may be prescribed by the Commission. 9 F. P. C., at 232–233, 239.

[7] *Per curiam.* Kimbrough Stone, Circuit Judge, retired, from the Eighth Circuit, sitting by designation; Wilbur K. Miller, Circuit Judge. Dissenting, Bazelon, Circuit Judge.

licensee for its use of private water rights, existing under state law, along the Niagara River, were not allowable expenses for the reason that the Commission considered those rights no longer existent. The Court of Appeals held precisely the contrary and we granted certiorari because of the important bearing of the decision upon the Federal Water Power Act. 345 U. S. 955.

The immediate issue thus presented is whether the licensee's amortization reserve under § 10 (d), for the period from March 2, 1941, through December 31, 1946, should be $914,432.04 or $515,432.04.[8] That difference of $399,000 is one-half of the $798,000 which the Commission believes should be included in the surplus earnings of the licensee for the period. It consists of—

> 1. $577,500 paid by the licensee, at the rate of $99,000 a year, for its use, for power purposes, of 730 c. f. s. of the "International Paper water rights," and
>
> 2. $220,500 allowed by the licensee as a discount, at the rate of $37,800 a year, on certain sales of electric power in consideration of permission to use, for power purposes, 262.6 c. f. s. of the "Pettebone-Cataract water rights."

The Court of Appeals held that although respondent's predecessor, in 1921, had received a federal license for this project, it nevertheless was justified in continuing to meet the financial obligations which it had assumed in return for permission to use water rights originally granted and still existing under the law of New York. That court, accordingly, approved each of the foregoing items of expense and fixed the licensee's initial amortization reserve at $515,432.04.

It was not questioned in the Court of Appeals or here that the licensee originally had acquired, in return

[8] For computations, see Appendix, *infra*, p. 257.

for the above-stated payments and discounts, some kind or degree of private proprietary rights under the law of New York to use water from the Niagara River for power purposes. Accordingly, we do not consider it necessary to review here the intricate transactions which resulted in the above-described payments and discounts. We accept the conclusion of the Court of Appeals "that the International Paper and Pettebone-Cataract water rights are valid under the law of New York." 91 U. S. App. D. C., at 406, 202 F. 2d, at 202.[9] For further recognition of these water rights under state law, see *Water Power & Control Commission* v. *Niagara Falls Power Co.*, 262 App. Div. 460, 30 N. Y. S. 2d 371, aff'd, 289 N. Y. 353, 45 N. E. 2d 907; *Niagara Falls Power Co.* v. *Duryea*, 185 Misc. 696, 57 N. Y. S. 2d 777.

Neither is it necessary for us to discuss the licensee's expenses in 1947 or thereafter. They must be treated in the same way as those above mentioned, except to note that the discounts allowed in return for the Pettebone-Cataract water rights ceased with the licensee's purchase of those rights in 1947. See 91 U. S. App. D. C., at 400–401, 202 F. 2d, at 196.

We are not required to determine the nature of the rights claimed by respondent except to recognize that they are usufructuary rights to use the water for the generation of power, as distinguished from claims to the legal ownership of the running water itself. They are rights to use the force of the fall of the water, coupled with an obliga-

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[9] Respondent's corporate history and the devolution of the title to the International Paper and the Pettebone-Cataract water rights are described by the Court of Appeals in 91 U. S. App. D. C. 395, at 398–402, 402–407, 202 F. 2d 190, at 194–197, 198–202. See also, *Niagara Falls Power Co.* v. *Federal Power Commission*, 137 F. 2d 787. For a detailed examination of the facts and issues of the instant case, see Schwartz, Niagara Mohawk v. FPC: Have Private Water Rights Been Destroyed by the Federal Power Act?, 102 U. of Pa. L. Rev. 31.

tion to return the water to the river under specified conditions.[10] The rights under consideration originally were attached to riparian lands above and below the Falls. However, they long have been separated from such lands and, thus separated, they have been transferred or leased to respondent. Under the law of New York, they constitute a form of real estate known as corporeal hereditaments.[11] The Commission does not now contest the pur-

[10] ". . . While the right to its use, as it flows along in a body, may become a property right, yet the water itself, the *corpus* of the stream, never becomes or, in the nature of things, can become, the subject of fixed appropriation or exclusive dominion, in the sense that property in the water itself can be acquired, or become the subject of transmission from one to another. Neither sovereign nor subject can acquire anything more than a mere usufructuary right therein, and in this case the state never acquired, or could acquire, the ownership of the aggregated drops that comprised the mass of flowing water in the lake and outlet, though it could and did acquire the right to its use." *Sweet* v. *Syracuse,* 129 N. Y. 316, 335, 27 N. E. 1081, 1084.

[11] A riparian owner in New York has a right to use the waters of an abutting stream as part of his estate. *United Paper Board Co.* v. *Iroquois Pulp & Paper Co.,* 226 N. Y. 38, 123 N. E. 200; *Waterford Electric Light Co.* v. *New York,* 208 App. Div. 273, 203 N. Y. S. 858, aff'd without opinion, 239 N. Y. 629, 147 N. E. 225.

Recovery by the International Paper Company for the deprivation of its use of the instant water rights in 1917 was authorized by this Court in 1931. Referring to the 730 c. f. s. now before us, Mr. Justice Holmes said for the Court: "From this canal the petitioner, the International Paper Company, was entitled, by conveyance and lease, to draw and was drawing 730 cubic feet per second,—a right that by the law of New York was a corporeal hereditament and real estate." *International Paper Co.* v. *United States,* 282 U. S. 399, 405. The Government was obliged to pay for taking those diversionary rights by condemnation and they are the ones for which respondent is now paying an annual rental of $99,000. The deprivation, therefore, was not an exercise of the Government's dominant servitude, but was a compensable taking by condemnation of the paper company's recognized right to use the water. "[T]he Government took the property that the petitioner owned as fully as the Power Company owned the residue of the water power

chase prices which have been paid for any of these rights. The Commission's present objection is limited to respondent's deduction, in the computation of its amortization reserves, of the annual payments and discounts it has made and which it proposes to make for the use of such rights. The Commission contends (1) that Congress not only may constitutionally abolish such local water rights without compensation but that it already has done so, and (2) that, although the licensee's contested expenditures may be lawful, or even obligatory, between the parties, they must be disallowed in computing the licensee's amortization reserve under § 10 (d).

We conclude, as did the Court of Appeals, that, even though respondent's water rights are of a kind that is within the scope of the Government's dominant servitude, the Government has not exercised its power to abolish them.[12]

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in the canal." *Id.*, at 408. See also, *Van Etten* v. *City of New York*, 226 N. Y. 483, 124 N. E. 201, and *People ex rel. Niagara Falls Hydraulic Power Co.* v. *Smith*, 70 App. Div. 543, 546, 75 N. Y. S. 1100, 1101, aff'd without opinion, 175 N. Y. 469, 67 N. E. 1088.

[12] The existence of the Pettebone-Cataract water rights, under the law of New York prior to the Federal Water Power Act, is recognized by the courts of that state. *Hydraulic Power Co.* v. *Pettibone Cataract Paper Co.*, 112 Misc. 528, 183 N. Y. Supp. 373, aff'd, 198 App. Div. 644, 191 N. Y. Supp. 12.

Furthermore, Article 13 of the license recognizes at least the possibility of the survival of these rights after the issuance of the license. It provides that in the event the United States or a new licensee shall take over the project "Such taking over of the project shall also be subject *to the rights, if any, of Pettebone-Cataract Paper Company and Cataract City Milling Company to withdraw water at a rate not exceeding 265 cubic feet per second from the Hydraulic Canal or Basin of Licensee, and* to the rights, if any, of International Paper Company. (Italics supplied.)" 6 F. P. C. 184, 185.

In 1947, the licensee secured the approval of the New York Public Service Commission, and of the Securities & Exchange Commission (under § 12 (d) of the Public Utility Holding Company Act of 1935, 49 Stat. 824, 15 U. S. C. § 79*l* (d)), of its purchase of the Pettebone-

While we recognize the dominant servitude, in favor of the United States, under which private persons hold physical properties obstructing navigable waters of the United States and all rights to use the waters of those streams,[13] we recognize also that the exercise of that servitude, without making allowances for preexisting rights under state law, requires clear authorization. A classic example of such a clear authorization appears in *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53. The Act of March 3, 1909, there authorized the exercise of the dominant right of the United States to take all of a navigable river's flow for purposes of interstate commerce. It did so in explicit terms. It said:

> "SEC. 11. . . . the ownership in fee simple absolute by the United States of all lands and property of every kind and description north of the present Saint Marys Falls Ship Canal throughout its entire length and lying between said ship canal and the

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Cataract rights from the licensee's parent corporation for $728,415.48. Having thus completed their purchase, the licensee petitioned the Commission to amend Article 13 by striking from it the above italicized reference to these rights. The Commission declined and, accordingly, the original reference to the Pettebone-Cataract rights, as well as that to the rights of the International Paper Company, remains in the license.

The Commission's denial of the requested amendment was on the ground that its consent to the omission of the original equivocal reference to the rights "might be construed as recognizing other alleged water rights claimed by another company." 6 F. P. C., at 188. The Commission took the position that the rights in question had no existence after the enactment of the Federal Water Power Act and it now regards itself as controlled by that reasoning. 9 F. P. C., at 252, 258–259. Its action, however, was not considered by the Court of Appeals to be dispositive of the issue and it is not binding upon us.

[13] *United States* v. *Willow River Power Co.*, 324 U. S. 499; *United States* v. *Chicago, M., St. P. & P. R. Co.*, 312 U. S. 592; *United States* v. *Appalachian Power Co.*, 311 U. S. 377. See also, *United States* v. *Kansas City Ins. Co.*, 339 U. S. 799.

international boundary line at Sault Sainte Marie, in the State of Michigan, is necessary for the purposes of navigation of said waters and the waters connected therewith.

"The Secretary of War is hereby directed to take proceedings immediately for the acquisition by condemnation or otherwise of all of said lands and property of every kind and description, in fee simple absolute. . . .

. . . . . .

"Every permit, license, or authority of every kind, nature, and description heretofore issued or granted by the United States, or any official thereof, to the Chandler-Dunbar Water Power Company . . . shall cease and determine and become null and void on January first, nineteen hundred and eleven . . . ." 35 Stat. 820, 821.

In that case the Government took the entire flow of the stream exclusively for purposes of interstate commerce. The Court accordingly recognized the Government's absolute right, within the bed of the stream, to use all of the waters flowing in the stream, for purposes of interstate commerce, without compensating anyone for the use of those waters.[14]

That decision is not applicable here. The issue here is whether the much more general and regulatory language of the Federal Water Power Act shall be given the same drastic effect as was required there by the language of the Act of March 3, 1909. We find nothing in the Federal Water Power Act justifying such an interpretation. Neither it, nor the license issued under it, expressly

[14] It was in this connection that the Court pointed out the inconceivability of private *ownership in the running water* of navigable streams as distinguished from private proprietary *rights to the use of such water* for power and other purposes. *United States* v. *Chandler-Dunbar Co.*, 229 U. S., at 69–70.

abolishes any existing proprietary rights to use waters of the Niagara River. Unlike the statute in the *Chandler-Dunbar* case, the Federal Water Power Act mentions no specific properties. It makes no express assertion of the paramount right of the Government to use the flow of the Niagara or of any other navigable stream to the exclusion of existing users. On the contrary, the plan of the Act is one of reasonable regulation of the use of navigable waters, coupled with encouragement of their development as power projects by private parties.[15]

The Act—

> "discloses both a vigorous determination of Congress to make progress with the development of the long idle water power resources of the Nation and a determination to avoid unconstitutional invasion of the jurisdiction of the States. . . .
>
> "The Act leaves to the States their traditional jurisdiction subject to the admittedly superior right of the Federal Government, through Congress, to regulate interstate and foreign commerce . . . ." *First Iowa Cooperative* v. *Federal Power Commission,* 328 U. S. 152, 171.

The Act treats usufructuary water rights like other property rights. While leaving the way open for the exercise of the federal servitude and of federal rights of purchase or condemnation, there is no purpose expressed

[15] *Chapman* v. *Federal Power Commission,* 345 U. S. 153, 167–168; *First Iowa Cooperative* v. *Federal Power Commission,* 328 U. S. 152, 180–181. The Act was dedicated to "encouraging private enterprise and the investment of private capital" in power projects on a basis consistent with the public interest. H. R. Rep. No. 61, 66th Cong., 1st Sess. 3. The bill was to provide "a method by which the water powers of the country, wherever located, can be developed by public or private agencies under conditions which will give the necessary security to the capital invested and at the same time protect and preserve every legitimate public interest." Statement of David F. Houston, Secretary of Agriculture. *Id.,* at 5.

to seize, abolish or eliminate water rights without compensation merely by force of the Act itself.[16]

The references in the Act to preexisting water rights carry a natural implication that those rights are to survive, at least until taken over by purchase or otherwise.[17] Riparian water rights, like other real property rights, are determined by state law. Title to them is acquired in conformity with that law. The Federal Water Power Act merely imposes upon their owners the additional obligation of using them in compliance with that Act.

The legislative history of the Act discloses no substantial support for the drastic policy which the Commission seeks to read into it. To convert this Act from a regulatory Act to one automatically abolishing preexisting

[16] Section 14 even provides: "nor shall the values allowed for *water rights*, rights-of-way, lands, or interest in lands [used in computing a licensee's net investment] be in excess of the actual reasonable cost thereof at the time of acquisition by the licensee: . . . ." (Emphasis supplied.) 49 Stat. 844–845, 16 U. S. C. § 807.

[17] In § 3 (11) "project" is said to include "all water-rights . . . necessary or appropriate in the maintenance and operation of such unit," 49 Stat. 838, 839; § 4 (b) empowers the Commission, in determining the original cost of a project and the net investment in it, to require licensees to show "the price paid for water rights" as well as for lands, 49 Stat. 839; § 9 (b) requires an applicant for a license to submit evidence of whatever compliance he has made with the requirements of state law with respect to "the appropriation, diversion, and use of water for power purposes," 41 Stat. 1068; § 14 requires, when taking over a licensed project, that the "values allowed for water rights" shall not be "in excess of the actual reasonable cost thereof at the time of acquisition by the licensee" (Commissioner Smith emphasized the significance of this clause, 9 F. P. C., at 261), 49 Stat. 844–845; § 23 (b) recognizes the application of state laws to projects where interstate or foreign commerce, public lands and reservations are not affected, 49 Stat. 846; § 27 provides that "nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein," 41 Stat. 1077. See 16 U. S. C. §§ 796–821.

water rights on a nationwide scale calls for a convincing explanation of that purpose. We find none. In fact, the legislative history points the other way. Representative William L. La Follette, of Washington, a member of the House Special Committee on Water Power which reported substantially the same bill as that which in 1920 became the Federal Water Power Act, said of it in 1918:

> "This bill is not based on either the Government's ownership or its sovereign authority, but on the hypothesis that we as representatives of the States have authority to act for the States in matters of this character and pass laws for the general good, by the establishment of a limited trusteeship or commission composed of officials of the Government, to carry out and administer this law in such a way as not to infringe any of the rights of the States nor to impede or restrict navigation, but rather to benefit it. . . . Under this bill we only allow the commission a supervisory power over those functions entirely within the State's jurisdiction for the period covered by any license, the State having exercised its rights in advance of issue." 56 Cong. Rec. 9110.

Shortly thereafter he added:

> "If we put in this language [of § 9 (b)], which is practically taken from that Supreme Court decision [*United States* v. *Cress*, 243 U. S. 316], as to the property rights of the States as to the bed and the banks and to the diversion of the water, then it is sure that we have not infringed any of the rights of the States in that respect, or any of their rules of property . . . . We are earnestly trying not to infringe the rights of the States." *Id.*, at 9810.[18]

[18] In 1917, the Senate Committee on Commerce said:
"[T]he bill is so framed as to protect and maintain the constitutional power and control of the Federal Government over navigable

In 1930, this Court passed upon the basic question now before us when it came here in a different connection. In *Ford & Son* v. *Little Falls Co.*, 280 U. S. 369, Mr. Justice Stone, writing for a unanimous Court, held that a riparian owner of a right to use water for power purposes in the navigable Mohawk River, in New York State, was entitled to an injunction against the uncompensated destruction of that right by a subsequent licensee under the Federal Water Power Act. The New York Supreme Court had granted such an injunction and awarded damages. This Court affirmed that decision, although the federal license then before the Court had authorized the licensee to raise the navigable waters of the Hudson River to such an extent that they would destroy the value of the riparian owner's right, under state law, to use the fall of tributary waters of the Mohawk for power purposes. It was thus held that the Federal Water Power Act had not abolished the complainant's private proprietary water rights, existing under New York law, to use navigable waters for power purposes.[19]

> "[E]ven though the rights which the respondents [the riparian owners] here assert be deemed subordinate to the power of the national government to control navigation, the present legislation does not purport to authorize a licensee of the Commission

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streams, as well as the sovereignty of the States and the rights of riparian proprietors over and in the beds and waters of those streams, and allow the full exercise and enjoyment of the latter, subject to the paramount authority of Congress to regulate the same for navigation purposes." S. Rep. No. 179, 65th Cong., 2d Sess. 4, as to S. 1419.

For a history of the congressional debates and hearings, see Kerwin, Federal Water-Power Legislation (1926).

[19] The Court refrained from determining whether § 21 of the Act, as to eminent domain, gave the licensee a further right to condemn and thus pay for the preexisting rights. *Id.*, at 379.

to impair such rights recognized by state law without compensation." *Id.*, at 377.

After quoting from §§ 10 (c) (liability for damages caused by the licensed project), 27 (saving clause as to proprietary rights under state law), 21 (condemnation rights) and 6 (licensee's acceptance of the conditions of the Act), the Court added:

> "While these sections are consistent with the recognition that state laws affecting the distribution or use of water in navigable waters and the rights derived from those laws may be subordinate to the power of the national government to regulate commerce upon them, they nevertheless so restrict the operation of the entire act that the powers conferred by it on the Commission do not extend to the impairment of the operation of those laws or to the extinguishment of rights acquired under them without remuneration. We think the interest here asserted by the respondents, so far as the laws of the state are concerned, is a vested right acquired under those laws and so is one expressly saved by § 27 from destruction or appropriation by licensees without compensation, and that it is one which petitioner [the licensee], by acceptance of the license under the provisions of § 6, must be deemed to have agreed to recognize and protect." *Id.*, at 378–379.

Parallel reasoning has been applied in a case involving a conflict between a licensee and the holder of state-recognized rights to use water from a navigable stream for irrigation purposes. *United States* v. *Gerlach Live Stock Co.*, 339 U. S. 725, 734. See also, as to state-created water rights for power purposes, *Grand River Dam Authority* v. *Grand-Hydro*, 335 U. S. 359, 372; *Pike Rapids Power Co.* v. *Minneapolis, St. P. & S. S. M. R. Co.*, 99 F. 2d 902; *United States* v. *Central Stockholders' Corp.*, 52 F. 2d 322; *Rank* v. *Krug*, 90 F. Supp. 773, 793; *Great*

*Northern R. Co.* v. *Washington Electric Co.,* 197 Wash. 627, 86 P. 2d 208.

In *First Iowa Cooperative* v. *Federal Power Commission,* 328 U. S. 152, at 175–176, § 27 of the Act was discussed in relation to conditions controlling the approval of projects. The language there used is applicable to proprietary water rights for power purposes as well as those for other proprietary uses. To any extent that statements in *Alabama Power Co.* v. *Gulf Power Co.,* 283 F. 606, cited in the *First Iowa* case, indicate a different interpretation, they are not controlling.

Respondent's private property rights are rooted in state law, subject to the paramount rights of the State and Nation. In the instant case, both the State and the Nation have made limited assertions of their superior rights. New York has done so through its rental charges and the Nation through its license. Neither, however, has laid claim to such an exclusive right to the waters as eliminates the limited use which respondent here seeks to make of them.

The findings of the Commission and the action of the Court of Appeals disclose no sufficient additional circumstances demonstrating the unreasonableness of the expenses in question.[20]

The judgment of the Court of Appeals, accordingly, is

*Affirmed.*

MR. JUSTICE REED withdrew from the consideration and decision of this case.

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

[For dissenting opinion, see p. 258.]

[20] Claims of the State of New York, in its own favor, suggested in its brief or oral argument as *amicus curiae,* are not before us.

*Appendix.*—The Commission's computation, 9 F. P. C., at 258, is reached as follows:

| "Period | Base | Earnings | Specified return (6 percent) | Surplus earnings | Amortization reserve credits |
|---|---|---|---|---|---|
| Mar. 2, 1941 to Dec. 31, 1941 | $36, 101, 556. 74 | $2, 480, 131. 61 | $1, 805, 077. 84 | $675, 053. 77 | $337, 526. 88 |
| Year 1942 | 35, 817, 450. 85 | 2, 600, 032. 64 | 2, 149, 047. 05 | 450, 985. 59 | 225, 492. 80 |
| Year 1943 | 35, 464, 320. 95 | 2, 298, 684. 44 | 2, 127, 859. 26 | 170, 825. 18 | 85, 412. 59 |
| Year 1944 | 34, 925, 610. 46 | 1, 952, 641. 25 | 2, 095, 536. 63 | (142, 895. 38) | |
| Year 1945 | 34, 076, 789. 61 | 2, 027, 324. 21 | 2, 044, 607. 38 | (17, 283. 17) | |
| Year 1946 | 33, 286, 819. 28 | 2, 689, 387. 25 | 1, 997, 209. 16 | 692, 178. 09 | 265, 999. 77 |
| Mar. 2, 1941 to Dec. 31, 1946 | | 14, 048, 201. 40 | 12, 219, 337. 32 | 1, 828, 864. 08 | 914, 432. 04" |

The above computation offsets the deficits of 1944 and 1945 against the surplus earnings of 1946 and reduces the total amortization reserve from the $994,521.33, recommended in the revised staff report, to the $914,432.04 approved by the presiding examiner and Commission. See *id.*, at 248–250.

Respondent's computation, approved by the Court of Appeals, is reached as follows:

| "Period | Base | Earnings | Specified Return (6%) | Surplus Earnings | Amortization Reserve Credits |
|---|---|---|---|---|---|
| Mar. 2, 1941 to Dec. 31, 1941 | $36, 101, 556. 74 | $2, 366, 131. 61 | $1, 805, 077. 84 | $561, 053. 77 | $280, 526. 89 |
| Year 1942 | 35, 817, 450. 85 | 2, 463, 232. 64 | 2, 149, 047. 05 | 314, 185. 59 | 157, 092. 79 |
| Year 1943 | 35, 464, 320. 95 | 2, 161, 884. 44 | 2, 127, 859. 26 | 34, 025. 18 | 17, 012. 59 |
| Year 1944 | 34, 925, 610. 46 | 1, 815, 841. 25 | 2, 095, 536. 63 | (279, 695. 38) | |
| Year 1945 | 34, 076, 789. 61 | 1, 890, 524. 21 | 2, 044, 607. 38 | (154, 083. 17) | |
| Year 1946 | 33, 286, 819. 28 | 2, 552, 587. 25 | 1, 997, 209. 16 | 555, 378. 09 | 60, 799. 77 |
| Mar. 2, 1941 to Dec. 31, 1946 | | $13, 250, 201. 40 | $12, 219, 337. 32 | $1, 030, 864. 08 | $515, 432. 04" |

This reduces the earnings by deducting from them the payments and discounts here in controversy. See 91 U. S. App. D. C., at 397–398, 202 F. 2d, at 193.

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

Section 10 (d) of the Federal Power Act, 41 Stat. 1069, as amended, 16 U. S. C. § 803 (d), requires licensees to set up amortization reserves out of their surplus earnings. The Commission enforced this requirement by ordering Niagara to make a book transfer of surplus earnings to an amortization reserve account. In determining the amount of earnings available for amortization the Commission refused to allow certain water-right payments as expenses. The only question before the Court is whether the Commission could lawfully disregard these expenses in computing Niagara's earnings for § 10 (d) purposes.

The amortization reserve required by § 10 (d) serves the function of reducing Niagara's net investment. § 3 (13). Niagara's net investment is the measure of the amount the United States must pay if it decides to recapture Niagara's plant under § 14 of the Act.[1] By allowing these water-right payments as expenses for this purpose the Court increases the ultimate obligation of the United States.

It may be that Niagara is under a legal duty to pay for its water rights under state law. And I agree that the Federal Power Act was not intended to interfere with water rights created by state law. But it is not true that the United States can be made to pay, directly or indirectly, for the use of the waters of a navigable stream. That has been settled at least since *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53.[2] "Ownership of a private stream wholly upon the lands of an individual is

[1] The same is true in case the United States moves to acquire the properties under § 26 by judicial sale.

[2] See also *United States* v. *Chicago, M., St. P. & P. R. Co.*, 312 U. S. 592; *United States* v. *Commodore Park, Inc.*, 324 U. S. 386; *United States* v. *Willow River Co.*, 324 U. S. 499.

conceivable; but that the running water in a great navigable stream is capable of private ownership is inconceivable." *Id.*, p. 69. If Niagara must pay for its water rights without being reimbursed by the United States, that is the price Niagara must pay for its federal license. See *United States* v. *Appalachian Power Co.*, 311 U. S. 377; cf. *Regents* v. *Carroll*, 338 U. S. 586. The Federal Power Act should not be construed as requiring the United States to pay for something it already owns.[3] But that is precisely what the Court does today.

[3] The command of § 14 is otherwise. It excludes from the "net investment," which must be paid if the Federal Government decides to recapture the project, "the value of any lands, rights-of-way, or other property of the United States licensed by the Commission under this Act."

# UNITED STATES EX REL. ACCARDI *v.* SHAUGHNESSY, DISTRICT DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE.

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

No. 366. Argued February 2, 1954.—Decided March 15, 1954.

By a habeas corpus proceeding in a federal district court, petitioner challenged the validity of the denial of his application for suspension of deportation under the provisions of § 19 (c) of the Immigration Act of 1917. Admittedly deportable, petitioner alleged, *inter alia,* that the denial of his application by the Board of Immigration Appeals was prejudged through the issuance by the Attorney General in 1952, prior to the Board's decision, of a confidential list of "unsavory characters" including petitioner's name, which made it impossible for petitioner "to secure fair consideration of his case." Regulations promulgated by the Attorney General and having the force and effect of law delegated the Attorney General's discretionary power under § 19 (c) in such cases to the Board and required the Board to exercise its own discretion when considering appeals. *Held:* Petitioner is entitled to an opportunity in the district court to prove the allegation; and, if he does prove it, he should receive a new hearing before the Board without the burden of previous proscription by the list. Pp. 261–268.

(a) As long as the Attorney General's administrative regulation conferring "discretion" on the Board remains operative, the Attorney General denies himself the right to sidestep the Board or dictate its decision in any manner. Pp. 265–267.

(b) The allegations of the habeas corpus petition in this case were sufficient to charge the Attorney General with dictating the Board's decision. Pp. 267–268.

(c) This Court is not here reviewing and reversing the *manner* in which discretion was exercised by the Board, but rather regards as error the Board's alleged *failure to exercise* its own discretion, contrary to existing valid regulations. P. 268.

(d) Petitioner's application for suspension of deportation having been made in 1948, this proceeding is governed by § 19 (c) of the 1917 Act rather than by the Immigration and Nationality Act of 1952. P. 261, n. 1.

(e) The doctrine of *res judicata* is inapplicable to habeas corpus proceedings. P. 263, n. 4.

206 F. 2d 897, reversed.

Petitioner's application for a writ of habeas corpus was denied by the District Court. The Court of Appeals affirmed. 206 F. 2d 897. This Court granted certiorari. 346 U. S. 884. *Reversed,* p. 268.

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

*Marvin E. Frankel* argued the cause for respondent. With him on the brief were *Acting Solicitor General Stern, Assistant Attorney General Olney, Beatrice Rosenberg* and *Robert G. Maysack.*

MR. JUSTICE CLARK delivered the opinion of the Court.

This is a habeas corpus action in which the petitioner attacks the validity of the denial of his application for suspension of deportation under the provisions of § 19 (c) of the Immigration Act of 1917.[1] Admittedly deport-

[1] 39 Stat. 889, as amended, 8 U. S. C. (1946 ed., Supp. V) § 155 (c). Section 405 is the savings clause of the Immigration and Nationality Act of 1952 and its subsection (a) provides that:

"Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to affect the validity of any . . . proceeding which shall be valid at the time this Act shall take effect; or to affect any . . . proceedings . . . brought . . . at the time this Act shall take effect; but as to all such . . . proceedings, . . . the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect. . . . An application for suspension of deportation under section 19 of the Immigration Act of 1917, as amended, . . . which is pending on the date of enactment of this Act [June 27, 1952], shall be regarded as a proceeding within the meaning of this subsection." 66 Stat. 280, 8 U. S. C. (1952 ed.), p. 734.

Since Accardi's application for suspension of deportation was made in 1948, § 19 (c) of the 1917 Act continues to govern this proceeding rather than its more stringent equivalent in the 1952 Act, § 244, 66 Stat. 214, 8 U. S. C. (1952 ed.) § 1254.

able, the petitioner alleged, among other things, that the denial of his application by the Board of Immigration Appeals was prejudged through the issuance by the Attorney General in 1952, prior to the Board's decision, of a confidential list of "unsavory characters" including petitioner's name, which made it impossible for him "to secure fair consideration of his case." The District Judge refused the offer of proof, denying the writ on the allegations of the petitioner without written opinion. A divided panel of the Court of Appeals for the Second Circuit affirmed. 206 F. 2d 897. We granted certiorari. 346 U. S. 884.

The Justice Department's immigration file on petitioner reveals the following relevant facts. He was born in Italy of Italian parents in 1909 and entered the United States by train from Canada in 1932 without immigration inspection and without an immigration visa. This entry clearly falls under § 14 of the Immigration Act of 1924 [2] and is the uncontested ground for deportation. The deportation proceedings against him began in 1947. In 1948 he applied for suspension of deportation pursuant to § 19 (c) of the Immigration Act of 1917. This section as amended in 1948 provides, in pertinent part, that:

> "In the case of any alien (other than one to whom subsection (d) of this section is applicable) who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may . . . suspend deportation of such alien if he is not ineli-

[2] "Any alien who at any time after entering the United States is found to have been at the time of entry not entitled under this Act to enter the United States . . . shall be taken into custody and deported in the same manner as provided for in sections 19 and 20 of the Immigration Act of 1917 . . . ." 43 Stat. 162, 8 U. S. C. (1946 ed.) § 214. This ground for deportation is perpetuated by § 241 (a) (1) and (2) of the Immigration and Nationality Act of 1952. 66 Stat. 204, 8 U. S. C. (1952 ed.) § 1251 (a) (1) and (2).

gible for naturalization or if ineligible, such ineligibility is solely by reason of his race, if he finds (a) that such deportation would result in serious economic detriment to a citizen or legally resident alien who is the spouse, parent, or minor child of such deportable alien; or (b) that such alien has resided continuously in the United States for seven years or more and is residing in the United States upon July 1, 1948." 8 U. S. C. (1946 ed., Supp. V) § 155 (c).

Hearings on the deportation charge and the application for suspension of deportation were held before officers of the Immigration and Naturalization Service at various times from 1948 to 1952. A hearing officer ultimately found petitioner deportable and recommended a denial of discretionary relief. On July 7, 1952, the Acting Commissioner of Immigration adopted the officer's findings and recommendation. Almost nine months later, on April 3, 1953, the Board of Immigration Appeals affirmed the decision of the hearing officer. A warrant of deportation was issued the same day and arrangements were made for actual deportation to take place on April 24, 1953.

The scene of action then shifted to the United States District Court for the Southern District of New York. One day before his scheduled deportation petitioner sued out a writ of habeas corpus. District Judge Noonan dismissed the writ on April 30 and his order, formally entered on May 5, was never appealed. Arrangements were then made for petitioner to depart on May 19.[3] However, on May 15, his wife commenced this action by filing a petition for a second writ of habeas corpus.[4] New

[3] Meanwhile, Accardi moved the Board of Immigration Appeals to reconsider his case. The motion was denied on May 8.

[4] *Res judicata* does not apply to proceedings for habeas corpus. *Salinger* v. *Loisel*, 265 U. S. 224 (1924); *Wong Doo* v. *United States*, 265 U. S. 239 (1924).

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grounds were alleged, on information and belief, for attacking the administrative refusal to suspend deportation.[5] The principal ground is that on October 2, 1952—after the Acting Commissioner's decision in the case but before the decision of the Board of Immigration Appeals—the Attorney General announced at a press conference that he planned to deport certain "unsavory characters"; on or about that date the Attorney General prepared a confidential list of one hundred individuals, including petitioner, whose deportation he wished; the list was circulated by the Department of Justice among all employees in the Immigration Service and on the Board of Immigration Appeals; and that issuance of the list and related publicity amounted to public prejudgment by the Attorney General so that fair consideration of petitioner's case by the Board of Immigration Appeals was made impossible. Although an opposing affidavit submitted by government counsel denied "that the decision was based on information outside of the record" and contended that the allegation of prejudgment was "frivolous," the same counsel repeated in a colloquy with the

[5] The first ground was that "in all similar cases the Board of Immigration Appeals has exercised favorable discretion and its refusal to do so herein constitutes an abuse of discretion." This is a wholly frivolous contention, adequately disposed of by the Court of Appeals. 206 F. 2d 897, 901. Another allegation charged "that the Department of Justice maintains a confidential file with respect to [Joseph Accardi]." But at no place does the petition elaborate on this charge, nor does the petition allege that discretionary relief was denied because of information contained in a confidential file. Although the petition does allege that "because of consideration of matters outside the record of his immigration hearing, discretionary relief has been denied," this allegation seems to refer to the "confidential list" discussed in the body of the opinion. Hence we assume that the charge of reliance on confidential information merely repeats the principal allegation that the Attorney General's prejudgment of Accardi's case by issuance of the "confidential list" caused the Board to deny discretionary relief.

court a statement he had made at the first habeas corpus hearing—"that this man was on the Attorney General's proscribed list of alien deportees."

District Judge Clancy did not order a hearing on the allegations and summarily refused to issue a writ of habeas corpus. An appeal was taken to the Court of Appeals for the Second Circuit with the contention that the allegations required a hearing in the District Court and that the writ should have been issued if the allegations were proved. A majority of the Court of Appeals' panel thought the administrative record amply supported a refusal to suspend deportation; found nothing in the record to indicate that the administrative officials considered anything but that record in arriving at a decision in the case; and ruled that the assertion of mere "suspicion and belief" that extraneous matters were considered does not require a hearing. Judge Frank dissented.

The same questions presented to the Court of Appeals were raised in the petition for certiorari and are thus properly before us. The crucial question is whether the alleged conduct of the Attorney General deprived petitioner of any of the rights guaranteed him by the statute or by the regulations issued pursuant thereto.

Regulations [6] with the force and effect of law [7] supplement the bare bones of § 19 (c). The regulations prescribe the procedure to be followed in processing an alien's application for suspension of deportation. Until

[6] The applicable regulations in effect during most of this proceeding appear at 8 CFR, 1949, Pts. 150 and 90 and 8 CFR, 1951 Pocket Supp., Pts. 150, 151 and 90. The corresponding sections in the 1952 revision of the regulations, promulgated pursuant to the Immigration and Nationality Act of 1952, may be found at 8 CFR, Rev. 1952, Pts. 242–244 and 6; 8 CFR, 1954 Pocket Supp., Pts. 242–244 and 6; 19 Fed. Reg. 930.

[7] See *Boske* v. *Comingore,* 177 U. S. 459 (1900); *United States ex rel. Bilokumsky* v. *Tod,* 263 U. S. 149, 155 (1923); *Bridges* v. *Wixon,* 326 U. S. 135, 150–156 (1945).

the 1952 revision of the regulations, the procedure called for decisions at three separate administrative levels below the Attorney General—hearing officer, Commissioner, and the Board of Immigration Appeals. The Board is appointed by the Attorney General, serves at his pleasure, and operates under regulations providing that: "In considering and determining . . . appeals, the Board of Immigration Appeals shall exercise such discretion and power conferred upon the Attorney General by law as is appropriate and necessary for the disposition of the case. The decision of the Board . . . shall be final except in those cases reviewed by the Attorney General . . . ." 8 CFR, 1949, § 90.3 (c). See 8 CFR, Rev. 1952, § 6.1 (d)(1). And the Board was required to refer to the Attorney General for review all cases which:

> "(a) The Attorney General directs the Board to refer to him.
>
> "(b) The chairman or a majority of the Board believes should be referred to the Attorney General for review of its decision.
>
> "(c) The Commissioner requests be referred to the Attorney General by the Board and it agrees." 8 CFR, 1949, § 90.12. See 8 CFR, Rev. 1952, § 6.1 (h)(1).

The regulations just quoted pinpoint the decisive fact in this case: the Board was required, as it still is, to exercise its own judgment when considering appeals. The clear import of broad provisions for a final review by the Attorney General himself would be meaningless if the Board were not expected to render a decision in accord with its own collective belief. In unequivocal terms the regulations delegate to the Board discretionary authority as broad as the statute confers on the Attorney General; the scope of the Attorney General's discretion became the yardstick of the Board's. And if the word "discre-

tion" means anything in a statutory or administrative grant of power, it means that the recipient must exercise his authority according to his own understanding and conscience. This applies with equal force to the Board and the Attorney General. In short, as long as the regulations remain operative, the Attorney General denies himself the right to sidestep the Board or dictate its decision in any manner.

We think the petition for habeas corpus charges the Attorney General with precisely what the regulations forbid him to do: dictating the Board's decision. The petition alleges that the Attorney General included the name of petitioner in a confidential list of "unsavory characters" whom he wanted deported; public announcements clearly reveal that the Attorney General did not regard the listing as a mere preliminary to investigation and deportation; to the contrary, those listed were persons whom the Attorney General "planned to deport." And, it is alleged, this intention was made quite clear to the Board when the list was circulated among its members. In fact, the Assistant District Attorney characterized it as the "Attorney General's proscribed list of alien deportees." To be sure, the petition does not allege that the "Attorney General ordered the Board to deny discretionary relief to the listed aliens." It would be naive to expect such a heavy-handed way of doing things. However, proof was offered and refused that the Commissioner of Immigration told previous counsel of petitioner, "We can't do a thing in your case because the Attorney General has his [petitioner's] name on that list of a hundred." We believe the allegations are quite sufficient where the body charged with the exercise of discretion is a nonstatutory board composed of subordinates within a department headed by the individual who formulated, announced, and circulated such views of the pending proceeding.

It is important to emphasize that we are not here reviewing and reversing the *manner* in which discretion was exercised. If such were the case we would be discussing the evidence in the record supporting or undermining the alien's claim to discretionary relief. Rather, we object to the Board's alleged *failure to exercise* its own discretion, contrary to existing valid regulations.

If petitioner can prove the allegation, he should receive a new hearing before the Board without the burden of previous proscription by the list. After the recall or cancellation of the list, the Board must rule out any consideration thereof and in arriving at its decision exercise its own independent discretion, after a fair hearing, which is nothing more than what the regulations accord petitioner as a right.[8] Of course, he may be unable to prove his allegation before the District Court; but he is entitled to the opportunity to try. If successful, he may still fail to convince the Board or the Attorney General, in the exercise of their discretion, that he is entitled to suspension, but at least he will have been afforded that due process required by the regulations in such proceedings.

*Reversed.*

MR. JUSTICE JACKSON, whom MR. JUSTICE REED, MR. JUSTICE BURTON, and MR. JUSTICE MINTON join, dissenting.

We feel constrained to dissent from the legal doctrine being announced. The doctrine seems proof of the adage that hard cases make bad law.

Peculiarities which distinguish this administrative decision from others we have held judicially reviewable must be borne in mind. The hearings questioned here as to their fairness were not hearings on which an order

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[8] See the *Bilokumsky* and *Bridges* cases cited in note 7, *supra*.

of deportation was based and which, under some limitations, may be tested by habeas corpus. *Ekiu* v. *United States,* 142 U. S. 651. Neither is this a case involving questioned personal status, as whether one is eligible for citizenship, which we have held reviewable under procedures for declaratory judgment and injunction. *McGrath* v. *Kristensen,* 340 U. S. 162. Petitioner admittedly is in this country illegally and does not question his deportability or the validity of the order to deport him. The hearings in question relate only to whether carrying out an entirely legal deportation order is to be suspended.

Congress vested in the Attorney General, and in him alone, discretion as to whether to suspend deportation under certain circumstances. We think a refusal to exercise that discretion is not reviewable on habeas corpus, first, because the nature of the power and discretion vested in the Attorney General is analogous to the power of pardon or commutation of a sentence, which we trust no one thinks is subject to judicial control; and second, because no legal right exists in petitioner by virtue of constitution, statute or common law to have a lawful order of deportation suspended. Even if petitioner proves himself eligible for suspension, that gives him no right to it as a matter of law but merely establishes a condition precedent to exercise of discretion by the Attorney General. Habeas corpus is to enforce legal rights, not to transfer to the courts control of executive discretion.

The ground for judicial interference here seems to be that the Board of Immigration Appeals did find, or may have found, against suspension on instructions from the Attorney General. Even so, this Board is neither a judicial body nor an independent agency. It is created by the Attorney General as part of his office, he names its members, and they are responsible only to him. It operates under his supervision and direction, and its every

decision is subject to his unlimited review and revision. The refusal to suspend deportation, no matter which subordinate officer actually makes it, is in law the Attorney General's decision. We do not think its validity can be impeached by showing that he overinfluenced members of his own staff whose opinion in any event would be only advisory.

The Court appears to be of the belief that habeas corpus will issue to review a decision by the Board. It is treating the Attorney General's regulations as if they vested in the Board final authority to exercise his discretion. But, in our view, the statute neither contemplates nor tolerates a redelegation of his discretion by the Attorney General so as to make the decision of the Board, even if left standing by him, final in the sense of being subject to judicial review as the Board's own decision. Even the Attorney General was not entrusted with this discretion free of all congressional control, for Congress specifically reserved to itself power to overrule his acts of grace. 54 Stat. 672, 8 U. S. C. (1946) § 155 (c), as amended, 8 U. S. C. (Supp. V) § 155 (c). It overtaxes our naïveté about politics to believe Congress would entrust the power to a board which is not the creature of Congress and whose members are not subject to Senate confirmation.

Cases challenging deportation orders, such as *Bridges* v. *Wixon,* 326 U. S. 135, whatever their merits or demerits, have no application here. In cases where the question is the validity of a deportation order, habeas corpus will issue at least to review jurisdictional questions. In those cases, also, the petitioner has a legal right to assert, *viz.,* a private right not to be deported except upon grounds prescribed by Congress. Neither the validity of deportation nor a private right is involved here.

Of course, it may be thought that it would be better government if even executive acts of grace were subject to judicial review. But the process of the Court seems adapted only to the determination of legal rights, and here the decision is thrusting upon the courts the task of reviewing a discretionary and purely executive function. Habeas corpus, like the currency, can be debased by over-issue quite as certainly as by too niggardly use. We would affirm and leave the responsibility for suspension or execution of this deportation squarely on the Attorney General, where Congress has put it.

# ALABAMA *v.* TEXAS ET AL.

NO. —, ORIGINAL. ON MOTION FOR LEAVE TO FILE BILL OF COMPLAINT.*

Argued February 3–4, 1954.—
Decided March 15, 1954.

The motions of the States of Alabama and Rhode Island for leave to file complaints challenging the constitutionality of the Submerged Lands Act of 1953, are denied in view of Art. IV, § 3, cl. 2 of the Federal Constitution and the cases cited. Pp. 273–274.

*William E. Powers,* Attorney General of Rhode Island, *Si Garrett,* Attorney General of Alabama, *Benjamin V. Cohen* and *Marx Leva* argued the cause for complainants. On the briefs were *Mr. Powers, Mr. Cohen, Thomas G. Corcoran* and *Eugene Gressman* for the State of Rhode Island; and *Mr. Garrett,* and *M. Roland Nachman, Jr.* and *Gordon Madison,* Assistant Attorneys General, for the State of Alabama, complainants.

*Edmund G. Brown,* Attorney General of California, *John L. Madden,* Assistant Attorney General of Louisiana, *Jesse P. Luton, Jr.,* Special Assistant Attorney General of Texas, and *Oscar H. Davis* argued the cause for defendants. On the briefs were *Mr. Brown, William V. O'Connor,* Chief Deputy Attorney General, *Everett W. Mattoon,* Assistant Attorney General, and *George G. Grover,* Deputy Attorney General, for the State of California, and *Richard W. Ervin,* Attorney General, *Howard S. Bailey* and *Fred M. Burns,* Assistant Attorneys General, and *John D. Moriarty,* Special Assistant Attorney General, for the State of Florida; *Fred S. LeBlanc,* At-

*Together with No. —, Original, *Rhode Island* v. *Louisiana et al.,* also on motion for leave to file bill of complaint.

torney General, *Mr. Madden* and *Bailey Walsh,* Special Assistant Attorney General, for the State of Louisiana; *John Ben Shepperd,* Attorney General, *Robert S. Trotti,* First Assistant Attorney General, *Mr. Luton,* and *William H. Holloway* and *Phillip Robinson,* Assistant Attorneys General, for the State of Texas; and *Attorney General Brownell, Acting Solicitor General Stern, Assistant Attorney General Rankin, Oscar H. Davis, John F. Davis* and *George S. Swarth* for Humphrey et al., defendants.

PER CURIAM.

The motions for leave to file these complaints are denied. Article IV, § 3, Cl. 2, United States Constitution. *United States* v. *Gratiot,* 14 Pet. 526, 537: The power of Congress to dispose of any kind of property belonging to the United States "is vested in Congress without limitation." *United States* v. *Midwest Oil Company,* 236 U. S. 459, 474: "For it must be borne in mind that Congress not only has a legislative power over the public domain, but it also exercises the powers of the proprietor therein. Congress 'may deal with such lands precisely as a private individual may deal with his farming property. It may sell or withhold them from sale.' *Camfield* v. *United States,* 167 U. S. 524; *Light* v. *United States,* 220 U. S. 536." *United States* v. *San Francisco,* 310 U. S. 16, 29–30: "Article 4, § 3, Cl. 2 of the Constitution provides that 'The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory and other Property belonging to the United States.' The power over the public land thus entrusted to Congress is without limitations. 'And it is not for the courts to say how that trust shall be administered. That is for Congress to determine.' " *United States* v. *California,* 332 U. S. 19, 27: "We have said that the con-

stitutional power of Congress [under Article IV, § 3, Cl. 2] is without limitation. *United States* v. *San Francisco,* 310 U. S. 16, 29–30."

THE CHIEF JUSTICE took no part in the consideration or decision of these cases.

MR. JUSTICE REED, concurring.

The *per curiam* opinion in these cases bases its conclusion that the Submerged Lands Act of 1953, 67 Stat. 29, is constitutional on the language in Art. IV, § 3, of the Constitution: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; . . . ." I agree with that result. Neither Alabama nor Rhode Island has questioned or would question that power, if the applicability of that clause were accepted.

Those states, however, do not accept the applicability of the quoted clause. It is their position that the resources under the marginal sea do not, under *United States* v. *Texas,* 339 U. S. 707, *United States* v. *Louisiana,* 339 U. S. 699, and *United States* v. *California,* 332 U. S. 19, constitute property either of the United States or of any state. The complainant states assert those cases held that the "paramount rights" in the United States decreed by this Court arose from the sovereignty of the United States and the duty to provide for the common defense. Further, they urge that the rights are held in trust for all the states as a federal responsibility and to cede them to individual states would take away the "equal footing" among states by extending state power into the domain of national responsibility. See *United States* v. *Texas, supra,* at 719, and *Coyle* v. *Oklahoma,* 221 U. S. 559.

This Court is the only court for the trial and discussion of the points upon which Alabama and Rhode Island

rely. We have heard complainants on all these points and I desire to state why I think the arguments extracted by the states from this Court's ruling authorities on these same rights do not justify a hearing.

The fact that Alabama and the defendant states were admitted into the Union "upon the same footing with the original states, in all respects whatever," 2 Stat. 701, 3 Stat. 489, 5 Stat. 742, 797, 9 Stat. 452, does not affect Congress' power to dispose of federal property. The requirement of equal footing does not demand that courts wipe out diversities "in the economic aspects of the several States," but calls for "parity as respects political standing and sovereignty." *United States* v. *Texas, supra,* at 716. The power of Congress to cede property to one state without corresponding cession to all states has been consistently recognized. See, *e. g., United States* v. *Wyoming,* 335 U. S. 895, and cases cited by the Court.

While this Court did not hold in express terms in the *Texas, Louisiana* and *California* cases that the area in question belonged to the United States as proprietor, it did hold that "the Federal Government rather than the state has paramount rights in and power over that belt, an incident to which is full dominion over the resources of the soil under that water area, including oil." 332 U. S., at 38–39. This incident is a property right and Congress had unlimited power to dispose of it.

If the marginal lands were thus declared by the *California* and following cases to belong to the United States, they were ceded to the states through the subsequent Submerged Lands Act of 1953 by the clause: "[T]itle to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters . . . are hereby . . . recognized, confirmed, established, and vested in and assigned to the respective States . . . ."

§ 3 (a). If, on the other hand, the marginal lands were not declared by those cases to belong to the United States, title to them remained in the respective states. Either by original ownership or by the cession of the Act, the lands are now the property of the respective states. The use or control of the undersea area and its resources by the respective states cannot, therefore, now be challenged by any other state on the ground of lack of sovereignty in the challenged state.

The cession challenged here does not affect the power and responsibility of the United States as sovereign to foster and protect against foreign and domestic enemies that area or resources ceded to the proprietorship of the respective states. The Federal Government, of course, owes the same duty to the undersea area that it does to the uplands, the tidelands or the beds of the inland waters. Moreover, the Submerged Lands Act purports to convey to the states only "the lands beneath navigable waters" and "the natural resources within such lands and waters" and expressly provides that "[t]he United States retains all its navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs, all of which shall be paramount to, but shall not be deemed to include, proprietary rights of ownership, or the rights of management, administration, leasing, use, and development of the lands and natural resources which are specifically recognized, confirmed, established, and vested in and assigned to the respective States and others by section 3 of this Act." § 6 (a). Surely this provision negatives any contention that the Act empowers individual states to alter the historic relationship of the states respecting navigation of the ocean. See *Kelly* v. *Washington,* 302 U. S. 1; cf. *Toomer* v. *Witsell,* 334 U. S. 385.

The United States holds resources and territory in trust for its citizens in one sense, but not in the sense that a private trustee holds for a *cestui que trust*. The responsibility of Congress is to utilize the assets that come into its hands as sovereign in the way that it decides is best for the future of the Nation. That is what it has done here. Such congressional determination as the legislation here in question is not subject to judicial review.

MR. JUSTICE BLACK, dissenting.

Alabama and Rhode Island asked leave to file complaints to challenge an Act of Congress which purports to convey to some of the states an indefeasible title to and ownership of soil under the Gulf of Mexico and the Atlantic and Pacific Oceans. The Act includes a similar gift of all the "natural resources within such lands and waters." Some states are given a three-mile strip of ocean; some states are given about ten miles; most states are given no ocean at all. Some states that are thus receiving gifts claim even more. Louisiana by law makes claims extending 30 miles into the Gulf of Mexico. Texas, it is said, claims that at some points its state borders project as far as 150 miles into the Gulf. If Congress can cede three miles of ocean I see no reason why it could not later cede 150 miles or more.

Alabama and Rhode Island deny that Congress has any power to dispose of the national interest in the Ocean or its uncaptured resources. These States assert that whatever power the United States has over the Ocean is an inseparable part of national sovereignty which cannot be irrevocably parcelled out or delegated to states, individuals or private business groups. Admitting the power of Congress to control and regulate the use of the Ocean and the capturing of its assets, Alabama and Rhode Island deny that any part of this sovereign

national control can be vested in any state. Such an unauthorized abdication of essential national sovereignty, so the two States urge, is precisely the effect of the challenged Act. If true, this subjection of Alabama and Rhode Island to regulation by other states deprives them of that "equal footing" as States which is theirs by right. *United States* v. *Texas,* 339 U. S. 707, 719. The Court, however, summarily denies Alabama and Rhode Island a right even to file their complaint. This I assume must be done on the ground that the claims they present are so clearly without merit as to be frivolous. I am unable to agree to this and would grant leave to file in order that the case might be considered in the usual manner. My reasons can be briefly stated.

Ocean waters are the highways of the world. They are no less such because they happen to lap the shores of different nations that border them. Freedom of the seas everywhere is essential to trade, commerce, travel and communication among the nations. These far-flung international activities have frequently led to conflict and war. The War of 1812 bears witness to this. In ocean waters bordering our country, if nowhere else, day-to-day national power—complete, undivided, flexible, and immediately available—is an essential attribute of federal sovereignty. The present Act might be construed in such way that this power would not be substantially impaired, weakened or made less easily available at all times. But the Court is not construing it that way.

The Act's language purports to convey "all right, title, and interest of the United States" to immense ocean areas as though the Ocean could be divided up and sold like town lots. If valid, the Act grants to states all "proprietary rights of ownership, or the rights of management, administration, leasing, use, and development of the lands and natural resources" of the Ocean. The result is that some favored states can say how, when, for what pur-

poses and to what extent other states and their citizens may use the Ocean or its resources. This raises serious and difficult questions with respect to the authority of Congress to relinquish elements of national sovereignty over the Ocean.

Once private property rights in ocean waters are recognized, I am uncertain where lines can be drawn. The Court's decision today in *Federal Power Commission* v. *Niagara Mohawk Power Corp., ante,* p. 239, goes a long way toward partitioning up the running rivers of America into conceptualistic segments.[1] Under that case the Government is likely to have to pay large sums if it wishes to use its rivers. MR. JUSTICE DOUGLAS' dissent in the *Niagara Mohawk* case should warn us to beware of extending the concept of state ownership of land under inland streams to the vast ocean areas of the world.[2] The results in that case are in my view bad enough. But it could be far worse to permit agencies other than the United States to clutter up the Ocean with multitudinous wells and derricks and deeds and leases and time-consuming lawsuits. All of these things suggest some of the dangers of depriving the United States of complete, unhampered control of the Ocean bordering our Nation. We should not forget that the Ocean "belongs to no one nation, but is the common property of all." *Lord* v. *Steamship Co.,* 102 U. S. 541, 544.[3]

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[1] This Court has referred to ownership of submerged lands under navigable streams as "theoretical ownership and dominion," "a qualified title," and "a bare technical title." *Scranton* v. *Wheeler,* 179 U. S. 141, 160, 163. See also *United States* v. *Commodore Park, Inc.,* 324 U. S. 386, 390.

[2] See *United States* v. *California,* 332 U. S. 19, 36.

[3] It is true that the Act does purport to reserve for the United States "all its navigational servitude and rights in and powers of regulation and control . . . for the constitutional purposes of commerce, navigation, national defense, and international affairs . . . ." But surely this reserves nothing that Congress could give away. Any

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The Constitution does give Congress power to dispose of and regulate "Territory or other Property belonging to the United States." This power, where it applies, has been declared to be unlimited. Congress, the Court has said, "may deal with such lands precisely as a private individual may deal with his farming property." *Camfield* v. *United States,* 167 U. S. 518, 524. Of course, this authorizes Congress at will to sell or dispose of property it owns as property. It could produce oil from the Ocean and sell that property. It could have that oil produced by its agents. But I have difficulty in believing that any state can be granted power under our Constitution to exact tribute from any other state that wants to take oil or fish from the Ocean which is the common "property" of all. And I have trouble also in thinking Congress could sell or give away the Atlantic or Pacific Ocean. If it can treat those Oceans as "Territory" within the Constitution's meaning, why could it not deed away thousands of miles of the Atlantic or Pacific at will? I suppose no one would say that the Constitution permits Congress to create new states at least in part out of submerged lands with state power to govern and rule over the "Territory" so disposed of. Would this Court sustain the power of Congress to sell the Mississippi or any of the other great navigable rivers of this country? The Court's decisions here and in the *Niagara Mohawk* case leave me in doubt.

The issues presented are too grave and too doubtful for me to assent to closing the doors of this Court to these States without a more careful consideration of the question than the Court has afforded. For there is a great

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attempt to relinquish the National Government's power over the Ocean to that extent would ignore the fact that "Navigation on the high seas is necessarily national in its character. Such navigation is clearly a matter of 'external concern,' affecting the nation as a nation in its external affairs. It must, therefore, be subject to the national government." *Lord* v. *Steamship Co.*, 102 U. S. 541, 544.

deal more involved than who gets what oil. Congress has here transferred to the states substantial power over the Ocean. This necessarily makes less readily available the Nation's power to protect the freedom of the seas—a power essential to keep peace and friendship among the nations of the world. I cannot agree to deny these States a full opportunity to challenge the Act.

MR. JUSTICE DOUGLAS, dissenting.

California lost her claim to the sea beyond the low-water mark by a six-to-two decision. *United States* v. *California,* 332 U. S. 19. Then came a change in the Court's membership; and Texas lost her claim to the marginal sea by a four-to-three decision. *United States* v. *Texas,* 339 U. S. 707. Only three of the majority that decided those cases survive. It would therefore be quite understandable if a majority of the present Court were to take the position of the earlier minority and overrule those decisions. But if those decisions are to stand, it is inconceivable to me that we can deny leave to file the complaints in the present cases. To deny these motions we must hold that the issues tendered are frivolous and insubstantial. But if the earlier decisions are to stand, certainly that cannot be said.

If the issue before us were only the power of Congress to dispose of public lands, the claims of Alabama and Rhode Island would be foreclosed by Art. IV, § 3 of the Constitution. But the entire point of the earlier litigation in the *California* and *Texas* cases was that more than property rights was involved. As we said in *United States* v. *Texas, supra,* p. 719, "once low-water mark is passed the international domain is reached. Property rights must then be so subordinated to political rights as in substance to coalesce and unite in the national sovereign." Any "property interests" which the States may *earlier* have held in the bed of the marginal sea

were "so subordinated to the rights of sovereignty as to follow sovereignty." *Id.*

Thus we are dealing here with incidents of national sovereignty. The marginal sea is not an oil well; it is more than a mass of water; it is a protective belt for the entire Nation over which the United States must exercise exclusive and paramount authority. The authority over it can no more be abdicated than any of the other great powers of the Federal Government. It is to be exercised for the benefit of the whole. As MR. JUSTICE BLACK aptly states in his dissent in these cases, "In ocean waters bordering our country, if nowhere else, day-to-day national power—complete, undivided, flexible, and immediately available—is an essential attribute of federal sovereignty."

Could Congress cede the great Columbia River or the mighty Mississippi to a State or a power company? I should think not. For they are arteries of commerce that attach to the national sovereignty and remain there until and unless the Constitution is changed. What is true of a great river would seem to be even more obviously true of the marginal sea. For it is not only an artery of commerce among the States but the vast buffer standing between us and the world. It therefore would seem that unless we are to change our form of government, that domain must by its very nature attach to the National Government and the authority over it remain nondelegable.

It is said, however, that the interests in the marginal sea may be chopped up, the States being granted the economic ones and the Federal Government keeping the political ones. We rejected, however, that precise claim in the earlier cases. We said, for example, that the "equal footing" clause in the Joint Resolution admitting Texas to the Union precluded the argument that Texas surrendered only political rights over the marginal sea

and retained all property rights in it. 339 U. S., at 716–720.

If it were necessary for Texas to surrender all her property and political rights in the marginal sea in order to enter the Union on an "equal footing" with the other States, pray how can she get back some of those rights and still remain on an "equal footing" with the other States? That is the unresolved question in these cases. That is the question which points up the grievances of Alabama and Rhode Island. For what Texas (and a few other States) obtain by the present Act of Congress is what we held the "equal footing" clause forbade them to retain. The "equal footing" clause, in other words, prevents one State from laying claim to a part of the national domain from which the other States are excluded. 339 U. S., at 719–720. Today we permit that precise "inequality among the States" which we earlier said was precluded by the "equal footing" clause.

Alabama and Rhode Island can justly complain. So can the other States. Our Union is one of equal sovereigns, none entitled to preferment denied the others. That is what the "equal footing" standard means or it means nothing. Today powerful political forces are marshalled to wipe out our prior decisions for the benefit of a favored few. But those decisions were sound in constitutional theory and they should stand. If they presented a question suitable for judicial review, so does the present controversy.

# FEDERAL COMMUNICATIONS COMMISSION *v.* AMERICAN BROADCASTING CO., INC.

NO. 117. APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.*

Argued February 1, 1954.—Decided April 5, 1954.

Regulations of the Federal Communications Commission providing for the denial of licenses to radio and television broadcasting stations which broadcast so-called "give-away" programs, in which prizes are given to persons selected by chance who answer certain questions correctly but who are not required to contribute any money or other valuable consideration, *held* invalid as going beyond the scope of 18 U. S. C. § 1304 and thus exceeding the rule-making power of the Commission. Pp. 285–297.

(a) Unless such "give-away" programs are illegal under 18 U. S. C. § 1304, the Commission cannot employ the statute to make them so by agency action. Pp. 289–290.

(b) The contribution of money or other valuable consideration by the contestants is an essential element of the offense proscribed by 18 U. S. C. § 1304, which forbids the broadcasting of "any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance." Pp. 290–291.

(c) The increased advertising value of a "give-away" program resulting from the requirement, direct or indirect, that home contestants listen to the program does not constitute a valuable consideration for purposes of 18 U. S. C. § 1304. Pp. 291–295.

(d) Section 1304 of 18 U. S. C. is a penal statute, and it must be construed strictly. P. 296.

110 F. Supp. 374, affirmed.

The District Court enjoined enforcement of certain provisions of regulations of the Federal Communications Commission relating to the broadcasting of so-called "give-away" programs. 110 F. Supp. 374. On direct

*Together with No. 118, *Federal Communications Commission* v. *National Broadcasting Co., Inc.*, and No. 119, *Federal Communications Commission* v. *Columbia Broadcasting System, Inc.*, also on appeal from the same court.

appeal to this Court under 28 U. S. C. §§ 1253 and 2101 (b), *affirmed,* p. 297.

*J. Roger Wollenberg* argued the cause for appellant. With him on the brief was *Daniel R. Ohlbaum.*

*Alfred McCormack* argued the cause for appellee in No. 117. With him on the brief was *George B. Turner.*

*Paul W. Williams* argued the cause for appellee in No. 118. With him on the brief were *Thomas E. Ervin* and *Dudley B. Tenney.*

*Max Freund* argued the cause for appellee in No. 119. With him on the brief was *Ralph F. Colin.*

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

These cases are before us on direct appeal from the decision of a three-judge District Court in the Southern District of New York, enjoining the Federal Communications Commission from enforcing certain provisions in its rules relating to the broadcasting of so-called "give-away" programs. The question presented is whether the enjoined provisions correctly interpret § 1304 of the United States Criminal Code, formerly § 316 of the Communications Act of 1934. This statute prohibits the broadcasting of ". . . any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance . . . ." [1]

The appellees are national radio and television broadcasting companies. They are, in addition, the operators

[1] 18 U. S. C. § 1304 (derived from former § 316 of the Communications Act of 1934, 48 Stat. 1088–1089, repealed by 62 Stat. 862, 866):

"Whoever broadcasts by means of any radio station for which a license is required by any law of the United States, or whoever, operating any such station, knowingly permits the broadcasting of, any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by

of radio and television stations licensed by the Commission. Each of the appellees broadcasts, over its own and affiliated stations, certain programs popularly known as "give-away" programs. Generally characteristic of this type of program is the distribution of prizes to home listeners, selected wholly or in part on the basis of chance, as an award for correctly solving a given problem or answering a question.[2]

The rules challenged in this proceeding, §§ 3.192, 3.292, and 3.656 of the Commission's Rules and Regulations,

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means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

"Each day's broadcasting shall constitute a separate offense."

[2] Examples of the "give-away" programs involved here are "Stop the Music" (American Broadcasting Company), "What's My Name" (National Broadcasting Company), and "Sing It Again" (Columbia Broadcasting System).

"Stop the Music" is described in American's complaint in No. 117 as follows: The home contestants are called on the telephone during the program. On the radio version, home contestants are selected at random from telephone directories. On the television version, home contestants are selected by lot from among those listeners who express in advance, through postcards sent to the network, their desire to participate. On both the radio and television versions, however, the home contestant is not required to be listening to the broadcast at the time he is called in order to participate. When called, the home contestant is asked to give the title of a musical selection that has just been played. In the event he was not listening, or for some other reason desires to have the tune repeated, the master of ceremonies hums or sings it to him over the telephone. If he answers correctly, he receives a merchandise prize; if not, he gets a less valuable "consolation" prize and a member of the studio audience is then given an opportunity to win the merchandise prize by identifying the same tune. If the home contestant answers correctly, he receives, in addition to the merchandise prize, an opportunity to identify another tune, called the "Mystery Melody." If he identifies this tune, he wins the "jackpot" prize, usually valued at several thousand dollars. Should he fail to identify the "Mystery Melody," another home contestant is called and the process is repeated. Addi-

were designed to prevent the broadcast of such programs.[3] The rules are identically worded and apply, respectively, to standard radio broadcasting (AM), FM radio broad-

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tions to the "jackpot" prize are made each week so long as the "Mystery Melody" remains unidentified.

"What's My Name" is described in National's complaint in No. 118 as follows: Prizes are awarded to contestants for correctly identifying famous persons on the basis of clues given by the master of ceremonies and in a short skit performed by professional actors. All but one of the contestants on the program are chosen from members of the studio audience. The remaining contestant is chosen at random from postcards sent in by listeners, and is called on the telephone during the program. For answering the telephone, he is awarded a watchband manufactured by the sponsor of the program and is also given the opportunity to win a valuable "jackpot" prize in Government bonds by identifying the famous person described in the "jackpot" clues. If the home contestant fails to make a correct identification, the amount of the "jackpot" is added to the "jackpot" for the following week's program. The subject of the "jackpot" clues, however, is changed every week.

"Sing It Again" is described in Columbia's complaint in No. 119 as follows: Performers sing a popular song and then repeat it but this time with parody lyrics describing some person, place, or event. Contestants, selected at random from telephone directories, are called by long distance telephone during the program. If the contestant correctly identifies the subject described by the parody lyrics, he wins a merchandise prize and an opportunity to win a "jackpot" prize by identifying the "Phantom Voice," the voice of a famous but unrevealed person. Clues as to the identity of the "Phantom Voice" are given on the program and on other programs broadcast over the same network. The "jackpot" is increased week by week until the correct identification is made. If the home contestant fails to identify the subject of the parody lyrics, he receives a "consolation prize," and a member of the studio audience is given the opportunity to answer and win the merchandise prize.

[3] 47 CFR, 1952 Cum. Supp., §§ 3.192, 3.292, 3.656. The language of the rules is broad enough to cover contest programs drawing contestants solely from members of the studio audience. In the court below, however, the Commission took the position that such coverage was not intended, and the controversy was delimited to programs involving the distribution of prizes to contestants participating from their homes. 110 F. Supp. 374, 381.

casting, and television broadcasting. Paragraph (a) of each rule provides that "An application for construction permit, license, renewal of license, or any other authorization for the operation of a broadcast station, will not be granted where the applicant proposes to follow or continue to follow a policy or practice of broadcasting . . . ," programs of a sort forbidden by § 1304. Paragraph (b) provides that a program will fall within the ban

> ". . . if in connection with such program a prize consisting of money or thing of value is awarded to any person whose selection is dependent in whole or in part upon lot or chance, if as a condition of winning or competing for such prize:
>
> "(1) Such winner or winners are required to furnish any money or thing of value or are required to have in their possession any product sold, manufactured, furnished or distributed by a sponsor of a program broadcast on the station in question; or
>
> "(2) Such winner or winners are required to be listening to or viewing the program in question on a radio or television receiver; or
>
> "(3) Such winner or winners are required to answer correctly a question, the answer to which is given on a program broadcast over the station in question or where aid to answering the question correctly is given on a program broadcast over the station in question. For the purposes of this provision the broadcasting of the question to be answered over the radio station on a previous program will be considered as an aid in answering the question correctly; or
>
> "(4) Such winner or winners are required to answer the phone in a prescribed manner or with a prescribed phrase, or are required to write a letter in a prescribed manner or containing a prescribed phrase, if the prescribed manner of answering the

> phone or writing the letter or the prescribed phrase to be used over the phone or in the letter (or an aid in ascertaining the prescribed phrase or the prescribed manner of answering the phone or writing the letter) is, or has been, broadcast over the station in question."

After promulgation of the rules, the present actions were brought by the appellees.[4] The District Court sustained the Commission's general authority to adopt such rules, and sustained subdivision (1) of paragraph (b) as a correct interpretation of § 1304. But, with one dissent, the court held that subdivisions (2), (3), and (4) were beyond the scope of § 1304 and hence invalid. The court was of the view that § 1304 applied only to contest programs requiring contestants to contribute a "price" or "thing of value." [5] We noted probable jurisdiction and consolidated the cases for argument.[6]

Like the court below, we have no doubt that the Commission, concurrently with the Department of Justice, has power to enforce § 1304. Indeed, the Commission would be remiss in its duties if it failed, in the exercise of its licensing authority, to aid in implementing the statute, either by general rule or by individual decisions.[7]

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[4] The actions were brought under § 402 (a) of the Communications Act of 1934, 48 Stat. 1093, 47 U. S. C. § 402 (a); 28 U. S. C. §§ 1336, 1398, 2284, 2321–2325; and § 10 of the Administrative Procedure Act, 60 Stat. 243, 5 U. S. C. § 1009. Pub. L. No. 901, 81st Cong., 2d Sess., 64 Stat. 1129, 5 U. S. C. § 1031, has since changed the procedure under § 402 (a), but is inapplicable to actions commenced prior to its enactment.

[5] 110 F. Supp. 374.

[6] 346 U. S. 808.

[7] The Commission is authorized by § 4 (i) of the Communications Act to "make such rules and regulations, and issue such orders, . . . as may be necessary in the execution of its functions"; by § 303 (r) to "Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to

But the Commission's power in this respect is limited by the scope of the statute. Unless the "give-away" programs involved here are illegal under § 1304, the Commission cannot employ the statute to make them so by agency action. Thus, reduced to its simplest terms, the issue before us is whether this type of program constitutes a "lottery, gift enterprise, or similar scheme" proscribed by § 1304.

All the parties agree that there are three essential elements of a "lottery, gift enterprise, or similar scheme": (1) the distribution of prizes; (2) according to chance; (3) for a consideration.[8] They also agree that prizes on the programs under review are distributed according to

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carry out the provisions of this chapter"; by § 307 (a) and § 309 (a) to grant station licenses and license renewals "if public convenience, interest, or necessity" would thereby be served; by § 312 (a) to revoke a license for a violation of any regulation authorized by the Act. 48 Stat. 1068, 47 U. S. C. § 154 (i); 50 Stat. 191, 47 U. S. C. § 303 (r); 48 Stat. 1083, 47 U. S. C. § 307 (a); 48 Stat. 1085, 47 U. S. C. § 309 (a); 48 Stat. 1086–1087, 47 U. S. C. § 312 (a). The "public interest, convenience, or necessity" standard for the issuance of licenses would seem to imply a requirement that the applicant be law-abiding. In any event, the standard is sufficiently broad to permit the Commission to consider the applicant's past or proposed violation of a federal criminal statute especially designed to bar certain conduct by operators of radio and television stations. And if this consideration is a proper one in individual cases, there is no reason why it may not be stated in advance by the Commission in interpretative regulations defining the prohibited conduct with greater clarity. See *National Broadcasting Co.* v. *United States*, 319 U. S. 190, 222–224; cf. *Southern Steamship Co.* v. *National Labor Relations Board*, 316 U. S. 31, 46–47.

[8] A typical "lottery" is a scheme in which tickets are sold and prizes are awarded among the ticket holders by lot. See *Stone* v. *Mississippi*, 101 U. S. 814. A typical "gift enterprise" differs from this in that it involves the purchase of merchandise or other property; the purchaser receives, in addition to the merchandise or other property, a "free" chance in a drawing. See *Horner* v. *United States*, 147 U. S. 449. But whatever may be the factual differences between

chance, but they fall out on the question of whether the home contestant furnishes the necessary consideration.

The Commission contends that there is such consideration; in its brief, it urges that these programs

> ". . . are nothing but age old lotteries in a slightly new form. The new form results from the fact that the schemes here are illicit appendages to legitimate advertising. The classic lottery looked to advance cash payments by the participants as the source of profit; the radio give-away looks to the equally material benefits to stations and advertisers from an increased radio audience to be exposed to advertising."

It contends that consideration in the form of money or a thing of value is not essential, and that a commercial benefit to the promoter satisfies the consideration requirement:

> ". . . Where a scheme of chance is successfully designed to reap profits for its promoter, there will ultimately be consideration flowing from the participants, and it is of no consequence whether such consideration be direct or indirect. In either event, the gambling spirit—the lure of obtaining something for nothing or almost nothing—is exploited for the benefit of the promoter of the scheme."

As against this claim the appellees insist that something more is required than just a benefit to the promoter; that the participation of the home audience by merely listening to a broadcast does not constitute the necessary consideration.

Section 1304 itself does not define the type of consideration needed for a "lottery, gift enterprise, or similar

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a "lottery," a "gift enterprise," and a "similar scheme," the traditional tests of chance, prize, and consideration are applicable to each. We are aware of no decision, federal or state, which has distinguished among them on the basis of their legal elements.

scheme." Nor do the postal lottery statutes from which this language was taken.[9] The legislative history of § 1304 and the postal statutes is similarly unilluminating.[10] For guidance, therefore, we must look primarily to American decisions, both judicial and administrative, construing comparable antilottery legislation.

Enforcing such legislation has long been a difficult task. Law enforcement officers, federal and state, have been plagued with as many types of lotteries as the seemingly inexhaustible ingenuity of their promoters could devise in their efforts to circumvent the law. When their schemes reached the courts, the decision, of necessity,

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[9] Section 1304 is one of five sections—§ 1301 through § 1305—which constitute "Chapter 61—Lotteries" of Title 18. Section 1305, added in 1950, exempts certain "fishing contests" from the operation of the other four sections. Section 1301 prohibits the importing or transporting of lottery tickets; § 1302, the mailing of lottery tickets and related matter; § 1303, the participation in lottery schemes by postmasters and postal employees; and § 1304, the broadcasting of lottery information. These four sections use the same terminology—"any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance." This language first appeared in the 1909 amendments to the federal lottery laws. 35 Stat. 1129, 1130, 1136. It was adopted verbatim in § 316 of the Communications Act of 1934, which was the first federal statute to ban the broadcasting of lotteries. With only slight modifications not material here, § 316 became § 1304 of the Criminal Code in the 1948 revision of Title 18.

For the early history of lotteries in this country, see Spofford, Lotteries in American History, at p. 171 of 1892 Report of American Historical Association, S. Misc. Doc. No. 57, 52d Cong., 2d Sess.

[10] See S. Rep. No. 1620, 80th Cong., 2d Sess. (1948); H. R. Rep. No. 304, 80th Cong., 1st Sess., p. A99 (1947); S. Rep. No. 781, 73d Cong., 2d Sess., p. 8 (1934); H. R. Rep. No. 1850, 73d Cong., 2d Sess. (1934); H. R. Rep. No. 1918, 73d Cong., 2d Sess., p. 49 (1934); S. Rep. No. 564, 72d Cong., 1st Sess., p. 10 (1932); H. R. Rep. No. 221, 72d Cong., 1st Sess., p. 8 (1932); S. Rep. No. 10, Part 1, 60th Cong., 1st Sess., p. 23 (1908); H. R. Rep. No. 2, Part 1, 60th Cong., 1st Sess., p. 22 (1908).

usually turned on whether the scheme, on its own peculiar facts, constituted a lottery. So varied have been the techniques used by promoters to conceal the joint factors of prize, chance, and consideration, and so clever have they been in applying these techniques to feigned as well as legitimate business activities, that it has often been difficult to apply the decision of one case to the facts of another.

And so it is here. We find no decisions precisely in point on the facts of the cases before us. The courts have defined consideration in various ways, but so far as we are aware none has ever held that a contestant's listening at home to a radio or television program satisfies the consideration requirement.[11] Some courts—with vigorous protest from others—have held that the requirement is satisfied by a "raffle" scheme giving free chances to persons who go to a store to register in order to participate in the drawing of a prize,[12] and similarly by a "bank night" scheme giving free chances to persons who

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[11] In the only previous decision on the legality of a "give-away" program of the type involved here, a state trial court held that the program did not constitute a lottery because the consideration element was lacking. *Clef, Inc.* v. *Peoria Broadcasting Co.*, Equity No. 21368, Circuit Court of Peoria County, Illinois (1939).

Similarly, cases under the postal lottery laws (see note 9, *supra*) appear to be uniform in requiring a "valuable" consideration for a "lottery, gift enterprise, or similar scheme." See *Garden City Chamber of Commerce, Inc.* v. *Wagner*, 100 F. Supp. 769 (E. D. N. Y.), stay denied, 192 F. 2d 240 (C. A. 2d Cir.); *Post Publishing Co.* v. *Murray*, 230 F. 773 (C. A. 1st Cir.), cert. denied, 241 U. S. 675. But cf. dictum in *Brooklyn Daily Eagle* v. *Voorhies*, 181 F. 579, 581–582 (C. C. E. D. N. Y.).

[12] A leading case is *Maughs* v. *Porter*, 157 Va. 415, 161 S. E. 242; see also *State ex rel. Regez* v. *Blumer*, 236 Wis. 129, 294 N. W. 491. Contra, *Cross* v. *People*, 18 Colo. 321, 32 P. 821; cf. *Garden City Chamber of Commerce, Inc.* v. *Wagner*, 100 F. Supp. 769 (E. D. N. Y.), stay denied, 192 F. 2d 240 (C. A. 2d Cir.). For critical com-

gather in front of a motion picture theatre in order to participate in a drawing held for the primary benefit of the paid patrons of the theatre.[13] But such cases differ substantially from the cases before us. To be eligible for a prize on the "give-away" programs involved here, not a single home contestant is required to purchase anything or pay an admission price or leave his home to visit the promoter's place of business; the only effort required for participation is listening.[14]

We believe that it would be stretching the statute to the breaking point to give it an interpretation that would make such programs a crime. Particularly is this true when through the years the Post Office Department and the Department of Justice have consistently given the words "lottery, gift enterprise, or similar scheme" a contrary administrative interpretation. Thus the Solicitor of the Post Office Department has repeatedly ruled that the postal lottery laws do not preclude the mailing of circulars advertising the type of "give-away" program here under attack.[15] Similarly, the Attorney General—

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mentary on the *Maughs* decision, *supra*, see Notes, 18 Va. L. Rev. 465 and 80 U. of Pa. L. Rev. 744; Pickett, Contests and the Lottery Laws, 45 Harv. L. Rev. 1196, 1206.

[13] *E. g., Affiliated Enterprises, Inc.* v. *Waller*, 40 Del. 28, 5 A. 2d 257; *Affiliated Enterprises, Inc.* v. *Gantz*, 86 F. 2d 597 (C. A. 10th Cir.). Contra, *e. g., Darlington Theatres, Inc.* v. *Coker*, 190 S. C. 282, 2 S. E. 2d 782; *Affiliated Enterprises, Inc.* v. *Rock-Ola Mfg. Corp.*, 23 F. Supp. 3 (N. D. Ill.).

[14] Some of the programs involved here (*e. g.*, "Stop the Music," described in note 2, *supra*) do not even make this requirement. As a practical matter, however, few home contestants on a "give-away" program would be in a position to answer correctly the questions asked of them unless they listened to the program.

[15] In 1949 the Solicitor ruled that material relating to "Stop the Music" (described in note 2, *supra*) would be mailable. In 1950 he ruled that material relating to a comparable contest conducted on the

charged directly with the enforcement of federal criminal laws—has refused to bring criminal action against broadcasters of such programs.[16] And in this very action, it is noteworthy that the Department of Justice has not joined the Commission in appealing the decision below.

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program "Truth or Consequences" would be mailable. While earlier rulings on a "give-away" program called "Mu$ico" had been to the contrary, the Solicitor in 1949 informally advised that the material relating to the program would be mailable. These unreported rulings were made part of the record below.

In accord with these rulings, the Solicitor in 1947 had instructed local postmasters that at least "an expenditure of substantial effort or time" was required in order to find an enterprise to be a "lottery, gift enterprise, or similar scheme." The instructions provided:

"In order for a prize scheme to be held in violation of this section, it is necessary to show (in addition to the fact that the prizes are awarded by means of lot or chance) that the 'consideration' involves, for example, the payment of money for the purchase of merchandise, chance or admission ticket, or as payment on an account, or requires an expenditure of substantial effort or time. *On the other hand, if it is required merely that one's name be registered at a store in order to be eligible for the prize, consideration is not deemed to be present.*" (Italics added.) Postal Bulletin, Feb. 13, 1947. The italicized language, *supra,* was judicially confirmed in *Garden City Chamber of Commerce, Inc.* v. *Wagner,* 100 F. Supp. 769 (E. D. N. Y.), stay denied, 192 F. 2d 240 (C. A. 2d Cir.). In 1953, on the basis of the *Garden City* case and the District Court decision in this case, the Solicitor issued new instructions further narrowing the meaning of "an expenditure of substantial effort or time." Postal Bulletin, June 4, 1953.

[16] Apparently no prosecutions have ever been instituted under either the former § 316 of the Communications Act or the present § 1304 of the Criminal Code. In a series of letters made part of the record below, the Chairman of the Commission in 1940 urged the Attorney General to institute criminal proceedings against a number of stations because of their broadcasting of "give-away" programs similar to those involved here. In response to each letter, the Attorney General advised that "careful consideration has been given to this matter and it has been concluded that no action is warranted by this Department."

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It is true, as contended by the Commission, that these are not criminal cases, but it is a criminal statute that we must interpret. There cannot be one construction for the Federal Communications Commission and another for the Department of Justice. If we should give § 1304 the broad construction urged by the Commission, the same construction would likewise apply in criminal cases. We do not believe this construction can be sustained. Not only does it lack support in the decided cases, judicial and administrative, but also it would do violence to the well-established principle that penal statutes are to be construed strictly.

It is apparent that these so-called "give-away" programs have long been a matter of concern to the Federal Communications Commission; that it believes these programs to be the old lottery evil under a new guise, and that they should be struck down as illegal devices appealing to cupidity and the gambling spirit. It unsuccessfully sought to have the Department of Justice take criminal action against them.[17] Likewise, without success, it urged Congress to amend the law to specifically prohibit them.[18] The Commission now seeks to accomplish the same result through agency regulations. In doing so, the Commission has overstepped the boundaries of interpretation and hence has exceeded its rule-making power.

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[17] See note 16, *supra*.

[18] In a letter made part of the record below, the Chairman of the Commission in 1943 urged the Senate Interstate Commerce Committee to approve a proposed amendment to § 316 of the Communications Act, later to become § 1304 of the Criminal Code. The proposed amendment would have retained the existing language as to "any lottery, gift enterprise, or similar scheme," but would have extended the prohibition to "any program which offers money, prizes, or other gifts to members of the radio audience (as distinguished from the studio audience) selected in whole or in part by lot or chance." No action was ever taken on the proposal.

Regardless of the doubts held by the Commission and others as to the social value of the programs here under consideration, such administrative expansion of § 1304 does not provide the remedy.[19]

The judgments are

*Affirmed.*

MR. JUSTICE DOUGLAS took no part in the decision of these cases.

[19] Cf. *United States* v. *Halseth,* 342 U. S. 277, 280–281.

# ST. JOE PAPER CO. ET AL. *v.* ATLANTIC COAST LINE RAILROAD CO.

NO. 24. CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT.*

Argued October 15, 1953.—Decided April 5, 1954.

The Interstate Commerce Commission does not have the power under § 77 of the Bankruptcy Act to initiate and submit to a district court a plan of reorganization whereby a debtor railroad would be compelled to merge with another railroad having no prior connection with the debtor. Pp. 299–315.

(a) Subsection (b) (5) of § 77 of the Bankruptcy Act does not give to the Commission a power which Congress has repeatedly denied to the Commission under the Interstate Commerce Act—*i. e.*, the power to initiate the merger or consolidation of two independent railroads. Pp. 303–306.

(b) The "consistency" clause of § 77 (f) of the Bankruptcy Act incorporates by reference § 5 of the Interstate Commerce Act, as amended, under which a merger of two independent carriers may be approved by the Commission only if it originates as a voluntary proposal by the merging carriers. Pp. 306–310.

201 F. 2d 325, reversed.

In a railroad reorganization proceeding under § 77 of the Bankruptcy Act, the Interstate Commerce Commission formulated a plan of reorganization which provided for a forced merger of the debtor railroad and another railroad. 282 I. C. C. 81. The District Court set the plan aside. 103 F. Supp. 825. The Court of Appeals reversed. 201 F. 2d 325. This Court granted certiorari. 345 U. S. 948. *Reversed and remanded,* p. 315.

*William D. Mitchell* argued the cause for petitioners. With him on a brief for petitioners in No. 24 were *John*

*Together with No. 33, *Lynch et al.* v. *Atlantic Coast Line Railroad Co.;* No. 36, *Aird et al., Trustees,* v. *Atlantic Coast Line Railroad Co.;* and No. 37, *Welbon et al.* v. *Atlantic Coast Line Railroad Co.,* all on certiorari to the same court.

*B. Marsh* and *Edward E. Watts, Jr.* Also on the brief were *Howard P. Macfarlane* and *George W. Ericksen* for Conn et al., *Henry P. Adair* and *Donald Russell* for the Trustees under the duPont Will, and *Giles J. Patterson* and *John R. Turney* for the St. Joe Paper Company, petitioners.

*Henry L. Walker* and *Sidney S. Alderman* filed a brief for the Southern Railway Company et al., and with them on the brief were *Harold J. Gallagher, Walter H. Brown, Jr.* and *James B. McDonough, Jr.* for the Seaboard Air Line Railroad Company, petitioners in No. 24.

*Clarence M. Mulholland* and *Edward J. Hickey, Jr.* filed a brief for the Railway Labor Executives' Association, petitioner in No. 24.

*Fred N. Oliver, Willard P. Scott* and *J. Turner Butler* filed a brief for petitioners in No. 33.

*Clifton S. Thomson* and *Chester Bedell* filed a brief for petitioners in No. 36.

*Miller Walton* filed a brief for petitioners in No. 37.

*Edward W. Bourne* argued the cause for respondent. With him on the brief were *Charles Cook Howell, Richard B. Gwathmey* and *Charles Cook Howell, Jr.*

Mr. Justice Frankfurter delivered the opinion of the Court.

The sole question for decision in this case is whether the Interstate Commerce Commission has the power under § 77 of the Bankruptcy Act to submit a plan of reorganization to a district court whereby a debtor railroad would be compelled to merge with another railroad having no prior connection with the debtor. Answer to this problem depends on understanding of a long legislative history. First, however, it is necessary to put the problem into its relevant context.

In August of 1931, the Florida East Coast Railway was thrown into equity receivership. It operated in this manner until January of 1941, when a committee representing the owners of a substantial portion of the debtor's principal bond issue filed a petition for reorganization under § 77 of the Bankruptcy Act in the United States District Court for the Southern District of Florida. The petition was approved by the court, and, as provided in the statute, proceedings were initiated before the Interstate Commerce Commission for hearings on a plan of reorganization formulated by the bondholders' committee.

In the course of the next ten years, many proposals have been considered by the Commission. Most of them were rejected for one reason or another, but three have in turn been certified by it to the District Court. None has as yet been confirmed by that court. The initial plan provided for a simple internal reorganization. It was rejected by the court, and the case was remanded to the Commission with directions to take account of an intervening improvement in the debtor's cash position. 52 F. Supp. 420. Atlantic Coast Line Railroad, the present respondent, first appeared on the scene in November 1944 when, after the Commission's hearings for the purpose of devising a second plan had been closed, one Lynch, joined by other bondholders of the debtor, sought to reopen the proceedings for the purpose of proposing a new plan whereby each recipient of stock in the reorganized debtor would be required to sell 60% of his interest at par to Atlantic, a connecting carrier, thereby giving that railroad operating control of the debtor. On November 30, 1944, Atlantic was allowed to intervene before the Commission in support of the Lynch proposal. The St. Joe Paper Co., on the other hand, which had by that time acquired a majority interest in the debtor's principal bond issue, opposed the Lynch plan. The Commission re-

jected the Lynch proposal, indicating that, in view of Atlantic's operating deficits over the past years, combining the two railroads would not be in the public interest at that time. 261 I. C. C. 151, 187.

The subsequent struggle for control of the debtor has been largely between these two interests—the St. Joe Paper Co., owner of the major interest in the debtor, and Atlantic, a connecting carrier anxious to acquire the debtor's coveted Florida east coast traffic from Jacksonville to Miami. Shortly after the Commission's rejection of the Lynch plan, Atlantic proposed its own plan providing for the merger of the debtor into Atlantic in return for the distribution of cash and various types of Atlantic's securities to the debtor's bondholders. St. Joe again opposed, as did various other bondholders, two competitors of Atlantic, an association representing the debtor's employees, and other interested parties. The matter was referred to an Examiner who, after a lengthy investigation, found that such a merger would not be in the public interest, and that the Atlantic plan would not constitute "fair and equitable" treatment for all the unwilling bondholders who were in substance the owners of the debtor railroad.[1] The Commission, however, by a sharply divided decision overruled the Examiner and sanctioned

[1] Examiner Jewell stated that under the plan previously approved by the Commission "control would vest in the St. Joe Company by reason of its ownership of a majority in amount of the debtor's outstanding first and refunding mortgage bonds, these bonds being the only securities of the debtor exchangeable under the plan for the new securities of the reorganized debtor." R., VI, p. 736. The only other outstanding bond issue of the debtor was, under that plan, to be paid off out of available cash. Previously the Commission had decided that the claims of unsecured creditors and the equity of the stockholders could not be recognized, and that these parties would therefore be denied participation in the reorganization. 252 I. C. C. 423, 465.

a "forced merger." [2] 267 I. C. C. 295.[3] Circuit Judge Sibley, sitting in the District Court, set the plan aside on the ground that the Commission had no power under the statute to force a merger; in addition, he held the plan not "fair and equitable." 81 F. Supp. 926. On appeal to the Court of Appeals for the Fifth Circuit, two judges sustained the Commission's authority to propose such a plan while the third agreed with Judge Sibley; but a majority agreed with the District Court that the plan was not "fair and equitable." 179 F. 2d 538.

The Commission then formulated another plan, which likewise provided for a forced merger of the debtor and Atlantic, 282 I. C. C. 81, and Circuit Judge Strum, sitting in the District Court, while bound on the question of the Commission's power by the prior Court of Appeals decision, again set the plan aside as unfair and inequitable. 103 F. Supp. 825. The Court of Appeals was now convened *en banc*. Three of its judges, without further consideration of the Commission's power, reversed the District Court and found the plan fair and equitable. The other two judges dissented and adopted the reasoning of Judge Sibley in the earlier case, *i. e.*, that the Commission had no power under the statute to propose such a compelled merger plan.[4] 201 F. 2d 325.

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[2] By "forced merger" plan, or "compulsory merger" plan, is meant a merger plan foisted upon one of the parties by the Commission, as distinguished from a merger voluntarily initiated by the participating carriers.

[3] Under the Commission's statutory power to revise an approved plan upon objections received within sixty days of its promulgation, 11 U. S. C. § 205 (d), this decision was shortly thereafter reaffirmed by another close vote of the full Commission membership. 267 I. C. C. 729.

[4] The Circuit Judges of the Fifth Circuit who have at some stage in these proceedings passed on this question of the Commission's power have thus divided evenly on the issue. Judges Hutcheson, Holmes and Rives concluded that the Commission had such power; Judges Sibley, Borah, and Russell concluded that it did not.

Because of the importance of this question in the administration of § 77 of the Bankruptcy Act, we granted certiorari. 345 U. S. 948.

The procedure by which the Commission is authorized to consider and approve a plan of reorganization and then submit it to the interested parties for acceptance, as well as the courts for judicial confirmation, is governed by an elaborate statutory scheme. See § 77 of the Bankruptcy Act, 47 Stat. 1474, as amended, 11 U. S. C. § 205. Any question such as the one now here must be resolved by reference to this governing law and its underlying purpose, imbedded as that is not merely in the formal words of the statute but in the history which gives them meaning. If ever a long course of legislation is to be treated as an organic whole, whose parts are not *disjecta membra,* this is true of § 77.

The respondent relies on subsection (b)(5) to sustain the Commission's power to submit a forced merger plan of the type here involved.[5] This was subsection (b)(3) of the original § 77 of the Bankruptcy Act as enacted in 1933, 47 Stat. 1474, 1475. It then read, insofar as here material,

> "(b) A plan of reorganization within the meaning of this section . . . (3) shall provide adequate means for the execution of the plan, which may, so far as may be consistent with the provisions of sections 1 and 5 of the Interstate Commerce Act as amended, include . . . the merger of the debtor with any other railroad corporation . . . ."

The permissive merger provision in plans of reorganization was thus made expressly conditional on compliance with the requirements of §§ 1 and 5 of the Interstate

[5] "A plan of reorganization . . . (5) shall provide adequate means for the execution of the plan, which may include . . . the merger or consolidation of the debtor with another corporation or corporations . . . ."

Commerce Act. The reason for this proviso, commonly referred to as the "consistency clause," was stated as follows by Commissioner Joseph Eastman, Chairman of the Legislative Committee of the Interstate Commerce Commission and one of the weightiest voices before Congress on railroad matters: [6]

> "*Explanation.*—This act ought not to authorize railroad mergers . . . which are inconsistent with the applicable provisions of the Interstate Commerce Act, particularly the consolidation-plan provisions. These amendments are intended to avoid that possibility."

In the ensuing floor debates it was further made clear that the purpose of the consistency clause was to subject mergers under § 77 to whatever restrictions obtained for mergers under the Interstate Commerce Act. Representative Hatton Sumners, Chairman of the Judiciary Committee which had reported out the bill and floor manager of the bill, gave this assurance:

> "Mr. HORR. May I inquire whether or not, where the word 'reorganization' is used, the gentleman is of the opinion that this would encourage consolidations of railroads?
>
> "Mr. SUMNERS of Texas. They could not be consolidated in violation of the interstate commerce act.
>
> "Mr. HORR. They would first have to go through that?
>
> "Mr. SUMNERS of Texas. They would first have to go through that." 76 Cong. Rec. 2909.

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[6] Letter from Chairman Eastman to Senator Hastings, the sponsor of § 77, dated Jan. 31, 1933, reproduced in Hearings before the Senate Committee on Interstate Commerce on S. 1869, 76th Cong., 1st Sess. 288, 300. As to Eastman's authority in the field of railroad regulation, see Fuess, Joseph B. Eastman—Servant of the People.

And Congressman Rayburn, Chairman of the Committee on Interstate and Foreign Commerce, put it thus:

> "Fear has been expressed that with the enactment of this bill the powers of the Interstate Commerce Commission and the courts over consolidations and mergers would be expanded. It is my firm conviction that this proposal in specific provisions safeguards the present consolidation and merger provisions of the interstate commerce act and gives no additional authority to the commission or the courts in these matters." 76 Cong. Rec. 2917–2918.

In view of this deliberate and explicit incorporation of the restrictions attending mergers under the Interstate Commerce Act into § 77 of the Bankruptcy Act, it is necessary to give some consideration to the merger and consolidation provisions of the former, 49 U. S. C. § 5. The history of these provisions is long and tortuous; its detailed summary is relegated to an appendix, *post,* p. 315. Suffice it to say here that one clear thread which runs through a course of legislation extending over a period of twenty years, as well as through the various commentaries upon it, is that only mergers voluntarily initiated by the participating carriers are encompassed by that statute and sanctioned by it. From the initial enactment in the Transportation Act of 1920, 41 Stat. 456, 480, to the most recent comprehensive re-examination of these provisions in the Transportation Act of 1940, 54 Stat. 898, 905, Congress has consistently and insistently denied the Interstate Commerce Commission the power to take the initiative in getting one railroad to turn over its properties to another railroad in return for assorted securities of the latter. The rôle of the Commission in this regard has traditionally been confined to approving or disapproving mergers proposed by the railroads to be merged. And this adamant position taken by Congress has not

been for want of attempts to secure relaxation. Advocacy of giving the Commission power to propose and enforce mergers has been steady and, at times, strong, but it has consistently failed in Congress.

The reasons for this hostility to mergers imposed by the Commission derive largely from the disadvantages attributed by Congress to such far-reaching corporate revampings. Employees of the constituent railroads would, it has been feared, almost certainly be adversely affected. Shippers and communities adequately served by railroad A may suddenly find themselves unfavorably dependent upon railroad B. Investors in one railroad would, contrary to their expectations, find their holdings transmuted into securities of a different railroad. As the Commission in its 1938 Annual Report said of consolidations:

> "Projects of this character cannot be crammed down the throats of those who must carry them out or conform to them. Legal compulsion can be used with advantage to bring recalcitrants and stragglers into line, but not to drive hostile majorities into action." (P. 23.)[7]

We therefore conclude that the Commission does not have under § 77 of the Bankruptcy Act a power which Congress has repeatedly denied it under the Interstate Commerce Act, namely to initiate the merger or consolidation of two railroads. In light of the continuously and vehemently reiterated policy against endowing the ICC with such a power under § 5 of the Interstate Commerce Act, it is inconceivable, wholly apart from the consistency clause, that such was the *sub silentio* effect of § 77, an emergency statute hurriedly enacted with scarcely any debate. The consistency clause serves but to strengthen

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[7] See also the remarks of Senator Couzens, Chairman of the Committee on Interstate Commerce, at 74 Cong. Rec. 6041 *et seq.*

this natural presumption against such a tacit grant. It would require unambiguous language indeed to accomplish a contrary result; yet nowhere in the committee reports and the debates on the original § 77, nor in any of the legislative materials relating to the thorough re-examination of that statute in 1935,[8] can we find so much as one word which conveys the impression that as to mergers under the Bankruptcy Act, Congress stealth-

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[8] In the course of the 1935 revision of § 77, the consistency clause was taken out of subsection (b)(3), combined with a similar clause in subsection (e), and, as thus combined, placed in subsection (f) of the statute, 49 Stat. 911, 920. Judge Sibley indicated that he thought the consistency clause "became accidentally misplaced in redrafting the Act." 81 F. Supp., at 932. However that may be, it seems quite clear that Congress did not intend to alter the deliberately established relationship between § 5 of the Commerce Act and § 77 (b)(3) of the Bankruptcy Act merely by a change in the position of the consistency clause, unaccompanied by any explanatory comment. It would be a gross disregard of the meaning of legislation to be controlled by the bare words of the present merger provision detached from, and in defiance of, the whole history of the section.

In this connection it is interesting to note that in the course of a proposed comprehensive revision of § 77 in 1939, the question here in issue would have been made absolutely clear by the addition of the following proviso to the merger subsection:

> "*Provided,* That nothing in this section shall authorize compulsory merger or consolidation . . . ." S. 1869, 76th Cong., 1st Sess., March 20, 1939, p. 19.

After extensive hearings before the Senate Committee on Interstate Commerce, the bill was reported out and subsequently passed by the Senate, 84 Cong. Rec. 6257. Even more extensive hearings were then held by the House Committee, but the bill was never reported out, probably because of the controversial provision in the bill establishing a special reorganization court for § 77 cases.

In the course of the House hearings, the Commission was requested to submit its views on the bill. After commenting in detail on various sections of the bill, not including the proviso above referred to, the Commission simply added that it deemed it "unnecessary" to comment on the other "minor amendments" included in

ily designed to jettison its long-standing and oft-reiterated policy against compulsory mergers. On the contrary, after the enactment of § 77 in 1933, the Commission in its annual reports, and the Federal Coordinator of Transportation in his several reports, had frequent occasion to discuss § 77 of the Bankruptcy Act and § 5 of the Interstate Commerce Act. It would indeed be strange for these railroad authorities to bemoan the Commission's inability to initiate mergers and consolidations [9] if it had been a fact that as to the substantial portion of the Nation's railroad mileage then in receivership or § 77 proceedings [10] the Commission clearly had this very power. Had it been the declared intention of the drafters of § 77 to confer such a power, it is fair to assume that, in view of the persistent opposition of organized labor and other groups

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the bill. Hearings before Special Subcommittee on Bankruptcy and Reorganization of the House Committee on the Judiciary on S. 1869, 76th Cong., 1st Sess., Serial No. 11, pt. 1, p. 571.

Cassius M. Clay, Assistant General Counsel of the RFC and intimately acquainted with problems of railroad reorganization, questioned the need for the proviso on the ground that the consistency clause in subsection (f) already covered the matter and that the proviso might be construed to prevent the merger of a parent and its subsidiaries. Hearings before Senate Committee on Interstate Commerce on S. 1869, 76th Cong., 1st Sess. 329.

[9] See, *e. g.*, Report of the Federal Coordinator of Transportation, H. R. Doc. No. 89, 74th Cong., 1st Sess. 41 (1935); 52 I. C. C. Ann. Rep. 22 (1938).

[10] During the years 1933–1940 the percentage of railroad mileage representing roads in § 77 proceedings or receivership was as follows:

| *Year* | *Percent* | *Year* | *Percent* |
|---|---|---|---|
| 1933 | 16 | 1937 | 28 |
| 1934 | 16 | 1938 | 31 |
| 1935 | 27 | 1939 | 31 |
| 1936 | 28 | 1940 | 31 |

(Figures computed from Table 1 of the ICC's Annual Reports on the Statistics of Railways in the United States for 1933–1940, and the cumulative Table 151 in the 1940 volume.)

to such attempts under the Commerce Act,[11] the statute would not have passed.

All this of course is not to say that mergers cannot be carried out in the course of a § 77 reorganization. It merely means that if they are, they must be consummated in accordance with all the requirements and restrictions applicable to mergers under the Act primarily concerned with railroad amalgamations, the Interstate Commerce Act. So far as here relevant, that means that the merger must be worked out and put before the Commission by the merging carriers.[12] It also means that one carrier

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[11] See Appendix, *post*, p. 315.

[12] We are not aware of any case other than the present where this requirement was not observed. In all the reported cases of reorganizations involving mergers, the merger was either proposed by the debtor in conjunction with the other party, or the merger involved a parent and its subsidiaries, and was treated essentially as an internal reorganization. In any event, we are not now called upon to pass on the validity of the latter type of merger.

In this connection it is important to remember that a railroad in § 77 proceedings is not a defunct organism but remains a live and going concern. See the references throughout § 77 to "the debtor" as an active entity; also *Van Schaick* v. *McCarthy*, 116 F. 2d 987, 992–993. During the entire period that the Florida East Coast has been in receivership or trusteeship there have been annual stockholders' meetings at which a Board of Directors was elected. See the Florida East Coast's Annual Reports on file with the Interstate Commerce Commission. Indeed the desire to provide a ready remedy for the overhauling of a railroad's financial structure without impairing its primary responsibilities as a regularly functioning carrier was one of the principal reasons for the enactment of § 77. See 5 Collier, Bankruptcy, § 77.02. Thus it follows from the consistency clause, when viewed in the light of this corporate continuity of a railroad in reorganization, that those who in the absence of § 77 would wield the corporate merger powers must initiate and work out the merger now. Cf. § 77 (d), which not only permits but requires the debtor railroad itself to file a plan of reorganization ("the debtor . . . shall file a plan"; certain other interested parties "may" also file a plan).

cannot be railroaded by the Commission into an undesired merger with another carrier.

In short, the consistency clause of § 77 incorporates by reference § 5 of the Interstate Commerce Act, as amended. And the very heart of § 5 is that a merger of two carriers may be approved by the Interstate Commerce Commission only if it originates as a voluntary proposal by the merging carriers. This essential prerequisite for a merger between Florida East Coast and Atlantic Coast Line—two existing corporate entities—must be complied with, for by virtue of the consistency clause the command of Congress applies even if one of these carriers is in § 77 proceedings just as much as it would if neither of the carriers were in receivership or trusteeship. The legislative incorporation of § 5 into § 77 should not result in its judicial mutilation.

The most recent occasion on which the Senate Committee on Interstate Commerce comprehensively re-examined the subject of railroad reorganization was the report submitted in 1946 by Chairman Wheeler, the guiding spirit of most of the legislation here under consideration.[13] Much of what the Committee says there under the heading of "Avoidance of consolidation statute" is highly relevant here:

> "In view of [the] many interests, immediately and directly affected by any proposed consolidation, Congress has provided a series of safeguards and procedural steps, in section 5 of the Interstate Commerce Act. . . .
>
> . . . . . .
>
> "This statute and its statutory procedure, statutory safeguards, and statutory rights have been set to one side in the proceedings under section 77 of

[13] S. Rep. No. 1170, 79th Cong., 2d Sess. 80–85.

the Bankruptcy Act. The institutional and other groups, and the Commission, have assumed that they could effect consolidations, not under the Interstate Commerce Act, but under the Bankruptcy Act; not under a statute dealing with transportation, but under a statute dealing with financial reorganization; not under a section which considers and specifies one single financial question, the effect of consolidation on fixed charges, but under a section which deals with all sorts of financial problems, most of them not related to consolidation. They have assumed to effect consolidations, not under legislation which deals primarily with the rights and interests of States, local communities, and employees, but under a bankruptcy law which deals primarily with the interests of securityholders.

. . . . . .

"Those who are trying to bypass this statute and to consolidate railroads as part of a financial reorganization proceeding bring consolidation into the proceeding as something subsidiary, a mere tail to the main kite. When governors of States and representatives of communities and employees organizations are invited to the proceedings by the Commission, they find the issue which primarily concerns them enveloped in all sorts of other questions of a financial and technical nature. If they should want to appeal to a court from a consolidation decision in this grab bag of proceedings, their task would be far more complicated and far more difficult than Congress intended when it passed section 5 of the Interstate Commerce Act. There is always the available cry—the courts should not disapprove any part of the reorganization plan, even though it be a consolidation matter, lest all the time and labor and expense

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which has gone into the reorganization proceeding be lost.

. . . . . .

"The Commission justifies its course of action by citing two subsections of section 77 of the Bankruptcy Act. Subsection (b) lists a number of the substantive changes which can be made through a plan of reorganization under section 77. Then it lists a number of 'means for the execution of the plan,' . . . . Among these 'means for the execution of the plan' is included 'the merger or consolidation of the debtor with another corporation or corporations.' Subsection (f) authorizes the Commission, after the court confirms the plan, 'without further proceedings' to authorize the issuance of securities, transfer of property, sale, 'consolidation or merger of the debtor's property, or pooling of traffic, to the extent contemplated by the plan and not inconsistent with the provisions and purposes of the Interstate Commerce Act as now or hereafter amended.'

"Note should be taken of the Commission's position. It could, under its construction of the statute, authorize not only mergers, but also pooling of traffic, without complying with the requirements laid down by Congress in section 5 of the Interstate Commerce Act. Consolidations, mergers, and pooling of traffic have long been regarded as dangerous, if not carefully regulated and supervised; Congress has long had those evils in mind and sought to prevent excesses, while saving what is good in such transactions; to this end Congress carefully elaborated a considerable number of safeguards in section 5 of that act. None of those safeguards is elaborated in section 77 of the Bankruptcy Act.

"It may not be assumed that Congress intended, in section 77, to permit it to bypass the section 5

procedure and proceedings. Section 77 was hurriedly passed by Congress. It was not considered by either a subcommittee or full committee of the Senate, before being taken up on the floor. It was pushed through in the final days of the Seventy-second Congress on the plea that it would prevent receiverships. Congress would not, in such a manner, legislate out of existence, for companies requiring reorganizations, its carefully elaborated safeguards with respect to consolidations or traffic pools. If the Commission's construction of section 77 is sound, that it can avoid the necessity of considering consolidations under section 5 of the Interstate Commerce Act, it is obvious that the legislation enacted as section 77 of the Bankruptcy Act contained a 'joker' of serious and dangerous proportions.

. . . . . .

*"The most that the Commission may claim under section 77 is that, if it has approved a consolidation by an order under section 5 of the Transportation Act, it may perhaps be able to give effect to that action in the course of reorganization proceedings.*

"This is of importance in administering both statutes. The procedure and safeguards of the Transportation Act must be preserved as a matter of law and of right; . . . ." (Emphasis added.)

The crucial question, therefore, is whether this merger plan meets the statutory requirements. Since it does not, as we have found, because it is sought to be imposed by Commission fiat rather than proposed by the merging carriers, it matters not that the security holders might ultimately accept it if it were put to them for a formal vote. The kind of Hobson's choice, more or less, to which security holders are put when voting on a merger plan is not to be put to them on a plan initiated by the Commission

rather than by their own corporation. And so, if a plan does not satisfy the basic conditions which circumscribe the Commission's power, it has a congenital defect, and any interested party can object to its attempted effectuation.

Likewise, the so-called "cramdown" clause, much relied on by respondent, has no bearing on this case. That provision was added to § 77 of the Bankruptcy Act in 1935, 49 Stat. 911, 919, 11 U. S. C. § 205 (e), because under the prior law a plan had to be accepted by at least two-thirds (in amount) of each class of creditors and stockholders affected by the plan. This enabled a small dissentient minority to block any plan of reorganization, no matter how "fair and equitable," in order to exact inequitable adjustments as the price of its acquiescence. Under the "cramdown" provision the district court may, under the appropriate circumstances and after making certain required findings, confirm a plan despite the disapproval of more than one-third of each class affected. From the existence of this general power in the *district court* to *confirm* a plan despite the opposition of dissentient elements, the conclusion is sought to be drawn that the *Commission* must therefore have initial power to *submit* a compulsory merger plan to the court. Obviously this does not follow. Since the vast majority of § 77 proceedings involve internal reorganizations, the "cramdown" provision has a purpose and scope of application wholly independent of mergers, and it therefore has no bearing one way or the other on the question at issue in this case.[14] It is true that in view of our holding here that merger plans cannot be proposed by the Commission under the Bankruptcy Act, the "cramdown" provision can never be applied to such involuntary plans. But there

[14] There is nothing in the legislative history of this provision to indicate that it was intended to have any effect on the law governing mergers in reorganization plans.

is nothing particularly startling about this. Once its terms are found to be valid, a plan may be imposed on recalcitrant dissenters. But the validity of a plan cannot be derived from the existence of such "cramdown" power. It is still true that a horse-chestnut is not a chestnut horse.

The judgment is reversed and the case is remanded to the District Court for further proceedings in accordance with this opinion.

*Reversed and remanded.*

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

[For dissenting opinion, see *post*, p. 321.]

## APPENDIX TO OPINION OF THE COURT.

*A brief outline of the history of the consolidation provisions of the Interstate Commerce Act.*

Prior to 1920, competition was the *desideratum* of our railroad economy. Section 5 of the original Interstate Commerce Act of 1887 forbade any agreements for the pooling of freights or revenues,[1] and the policy of the antitrust legislation was also applied to the railroads.[2]

In 1919, when the Government was planning to return the railroads to private ownership, many of the smaller railroads were in very weak condition and their continued survival was in jeopardy.[3] Hence, for the first time, governmental encouragement of railroad consolidation was discussed. It was agreed that the Interstate Commerce Commission should be directed to prepare a plan for the

[1] 24 Stat. 379, 380.

[2] 26 Stat. 209, *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290; *United States* v. *Joint Traffic Assn.*, 171 U. S. 505; 38 Stat. 730.

[3] See S. Rep. No. 1182, pt. 2, 76th Cong., 3d Sess. 518–520; also Van Metre, Transportation in the United States, 80.

consolidation of the railroads of the country into a limited number of systems. But there was sharp disagreement over ways and means for carrying out this program. The House Committee opposed grant of power to the Commission to compel consolidations.[4] The Senate Committee, however, under the leadership of Senator Cummins, an ardent advocate of compulsory consolidation, recommended a bill providing for voluntary consolidation in accordance with a master plan for a period of seven years, but authorizing compulsory consolidations thereafter.[5] Although many groups, including virtually all the railroads, opposed the compulsory provisions,[6] the Senate passed the bill, 59 Cong. Rec. 952. But in conference, "[t]he Senate receded from the provisions for compulsory consolidation" and the House version was adopted.[7]

In 1921, the Commission promulgated a tentative consolidation plan.[8] Strong opposition immediately developed and long hearings before the Commission ensued.

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[4] H. R. Rep. No. 456, 66th Cong., 1st Sess. 6: "In our opinion, the interests of the public will be better served where the consolidations are voluntarily entered into, upon approval by the Interstate Commerce Commission, and where such consolidation or merger is in the interest of better service to the public, or economy in operation, or otherwise of advantage to the convenience or commerce of the people."

[5] S. Rep. No. 304, 66th Cong., 1st Sess. 15.

[6] See statement of Senator Cummins at 59 Cong. Rec. 226; see also Leonard, Railroad Consolidation Under the Transportation Act of 1920, 50, 61.

[7] H. R. Rep. No. 650, 66th Cong., 2d Sess. 64; see also S. Rep. No. 1182, pt. 2, 76th Cong., 3d Sess. 524: "It will be noted that the whole program of consolidation . . . was voluntary. Although the Commission could promulgate a plan, it was given no affirmative power to put the plan into effect. It was entitled merely to insist that any consolidations submitted to it for approval should conform to the plan. Thus the whole problem of initiating and developing actual consolidations was left in the hands of the carriers themselves. . . ."

[8] 63 I. C. C. 455.

The upshot was that in 1925, the Commission, recognizing the unfeasibility of working out a national plan of consolidation, asked Congress to be relieved of this burden.[9] This request was left unheeded until 1940, and in 1929 the Commission adopted its final plan of consolidation.[10]

Meanwhile Senator Cummins renewed his efforts to give the Interstate Commerce Commission power to compel consolidations if after a certain number of years the voluntary program had made no progress.[11] This bill again met with strong opposition,[12] but prior to his defeat in 1926, Senator Cummins made two further attempts to endow the Commission with power to force consolidations.[13] All these legislative efforts failed.

In February of 1933, the drive for compulsory consolidation gained new impetus when the National Transportation Committee, headed by ex-President Coolidge, issued a report recommending legislation along these lines.[14] Again the opposition was so vigorous [15] that the Emergency Railroad Transportation Act of 1933, passed some months later, contained no such provision; on the contrary it had a special section designed to protect labor against further cutbacks in employment.[16]

The 1933 Act also established the office of a Federal Coordinator of Transportation to investigate the entire transportation problem and make appropriate recommendations. In his first Report, the Coordinator, Commis-

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[9] For the Commission's letter to the Chairman of the Committee on Interstate Commerce, see Exhibit C–1814, S. Rep. No. 1182, pt. 3, 76th Cong., 3d Sess. 1578; see also 39 I. C. C. Ann. Rep. 13 (1925).

[10] 159 I. C. C. 522.

[11] S. 2224, 68th Cong., 1st Sess.

[12] See Leonard, *supra,* note 6, at 135, 175–179.

[13] S. 1870, 69th Cong., 1st Sess.; S. 3840, 69th Cong., 1st Sess.

[14] Report of the National Transportation Committee, February 13, 1933, p. 11.

[15] See, *e. g.,* 77 Cong. Rec. 4873 *et seq.;* Leonard, Railroad Consolidation under the Transportation Act of 1920, 221–222.

[16] 48 Stat. 211, 214.

sioner Joseph Eastman, reviewed the subject of railroad consolidations and concluded that the sweeping proposal of his legal adviser, Mr. Leslie Craven, for compulsory consolidation should not be followed, but that the remedy lay along lines of greater coordination and pooling, with some forced mergers on a "trial" basis.[17] The third and fourth Reports reiterated the Commission's inability to compel mergers.[18] Again no legislative action resulted.[19]

In 1938, President Roosevelt appointed Commissioners Eastman, Splawn, and Mahaffie of the Interstate Commerce Commission to make another comprehensive study of the railroad problem. This "Committee of Three," after pointing out that "voluntary consolidation of railroad companies may now be accomplished, subject to certain limitations, with the approval of the Commission," recommended new legislation, giving the Commission "authority . . . to require a unification, where it is sought by at least one carrier." [20] Subsequently the President also appointed another Committee consisting of three railroad executives and three representatives of railway labor, known as the "Committee of Six." This Committee's recommendations were vastly different: [21]

> "We do not think the country is ready for any compulsory system of consolidations. Whether ulti-

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[17] S. Doc. No. 119, 73d Cong., 2d Sess. 30–33, 36–37, 86–88.

[18] H. R. Doc. No. 89, 74th Cong., 1st Sess. 41; H. R. Doc. No. 394, 74th Cong., 2d Sess. 45–47.

[19] Shortly before the termination of his office in 1936, the Federal Coordinator, disturbed by the lack of initiative among the carriers, attempted to order the unification of 11 terminal properties. The orders met with considerable objection from railway labor and were ignored by the carriers. See Leonard, *supra*, note 15, at 233.

[20] H. R. Doc. No. 583, 75th Cong., 3d Sess. 36, 39. For the adverse reaction of the Railroad Brotherhoods to these proposals, see *id.*, at 67, 70.

[21] Report of Committee appointed Sept. 20, 1938, by the President of the United States to Submit Recommendations upon the General Transportation Situation, Dec. 23, 1938, p. 31.

> mate resort must be had to the principle of compulsion is a question which we think it better to defer until after there has been an opportunity to see what can be accomplished if the railroads are relieved from these limitations and restrictions [of the consolidation plan]. In our opinion the best results will be achieved by leaving all initiative in the matter to the railroads themselves, . . . ."

The Transportation Act of 1940—Congress' last word on the subject of consolidation—essentially rejected the recommendations of the Committee of Three and adopted those of the Committee of Six. The Commission was finally relieved of its duty to promulgate a national consolidation plan, and the power to initiate mergers and consolidations was left completely in the hands of the carriers.[22]

Perhaps the best insight into the prevailing attitude towards compulsory mergers can be obtained from the following statements of Chairman Wheeler of the Senate Committee on Interstate Commerce during the hearings on S. 2009, which ultimately became the Transportation Act of 1940. In response to some fear expressed by the General Counsel of the Brotherhood of Railroad Trainmen that the pending bill would encourage consolidations, Senator Wheeler said: [23]

> "Of course, as you well know, some people maintain that we ought to give the Interstate Commerce Commission the power to force consolidations.
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> "There is a very strong sentiment on the part of a great many people that consolidation should be compelled. They say that nothing will be done until such time as that happens.

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[22] 54 Stat. 898, 905.

[23] Hearings before the Senate Committee on Interstate Commerce on S. 1310, S. 2016, S. 1869 and S. 2009, 76th Cong., 1st Sess. 391–395.

"The railroad executives do not want forced consolidation; they are opposed to it. The railroad men are opposed to it, generally speaking.

. . . . . .

"After all, when you speak of that [encouraging consolidations], the Interstate Commerce Commission has studied it for years, and no consolidation can take place under this bill until such time as it is a voluntary consolidation. . . .

. . . . . .

"I cannot understand why you are talking about consolidations before this committee, because there is nothing in this bill to indicate that we have taken the position that we are in favor of forced consolidations. There is nothing in the bill that will change the situation at all.

. . . . . .

"As a matter of fact, much of the objection to this bill on the part of a number of people has been that it has not got some provision in it making it easier for consolidations; as a matter of fact, forcing consolidations and coordinations, or at least setting up in the Interstate Commerce Commission a committee that will go ahead and suggest how consolidations ought to be made.

"We have taken that out, and I have refused to adhere to that or to listen to agruments [*sic*] about it, but you are coming in here and telling us that there is something in here about consolidations that you do not want.

. . . . . .

"I have repeatedly said that you could not get a bill to force consolidations, or to have in here a provision that the Commission should have an opportunity of carrying on investigations of the subject to

> try to force consolidations, and so forth. So, as far as this committee is concerned, with reference to this bill, you are just wasting our time in talking about consolidations, because that subject is out the window."

Thus, hostility to the consolidation of railroads except by the voluntary action of the merging roads has been the undeviating policy of Congress since 1920. In assessing the failure of the consolidation program initiated by the Transportation Act of 1920, most students of transportation problems agree that one difficulty was this persistent refusal on the part of Congress to give the Commission power to take the initiative in proposing and enforcing particular mergers.[24] Yet that is the policy deliberately and explicitly followed by Congress each time it considered this problem.

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

The Court misstates the issue in these cases. The sole question, the Court says, is whether the Interstate Commerce Commission has the statutory power to submit a plan of reorganization under § 77 of the Bankruptcy Act "whereby a debtor railroad would be compelled to merge with another railroad." That is not the issue. Neither the Interstate Commerce Commission nor the reorganization court has attempted to force a merger of these railroads. If at some future time any such attempt is made, it will be time enough to deal with it. Hence it is misleading for the Court to say that the issue is whether a merger may be "foisted upon one of the parties by the

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[24] Leonard, Railroad Consolidation Under the Transportation Act of 1920, 267–269; Van Metre, Transportation in the United States, 86; Moulton, The American Transportation Problem, 857–858; Dearing and Owen, National Transportation Policy, 322, 342–343, 376.

Commission." The one and only issue before us at the present time is whether the Commission may include in a plan of reorganization a provision that the debtor or bankrupt railroad should be merged with another road and submit that plan for approval or disapproval to the security holders who are entitled to vote on a plan. To understand the issue in these cases it is necessary to have an understanding of the respective functions of the Commission and the reorganization court under § 77.

*First.* Under § 77 the Commission is the chief architect of any plan of reorganization. The plan must originate with the Commission. § 77 (d). *Second.* Once a plan is certified by the Commission it goes to the Court for a hearing. § 77 (e). *Third.* After that hearing the judge either approves or disapproves the plan. § 77 (e). *Fourth.* If the judge disapproves the plan, he either dismisses the proceedings or refers the matter back to the Commission. § 77 (e). *Fifth.* If the judge approves the plan, he sends a certified copy of his opinion and order to the Commission. § 77 (e). *Sixth.* In that case the Commission submits the plan to the security holders for a vote. § 77 (e). *Seventh.* The Commission certifies the results of the submission to the court. § 77 (e). *Eighth.* The judge then confirms the plan, if the creditors and stockholders of each class entitled to vote and holding "more than two-thirds" of the claims in each class have accepted the plan. § 77 (e). *Ninth.* If that percentage of creditors and stockholders does not approve the plan, the judge, by terms of § 77 (e), may nevertheless approve the plan. This is the so-called "cram down" provision and it reads as follows:

> "if the plan has not been so accepted by the creditors and stockholders, the judge may nevertheless confirm the plan if he is satisfied and finds, after hearing, that it makes adequate provision for fair and equi-

> table treatment for the interests or claims of those rejecting it; that such rejection is not reasonably justified in the light of the respective rights and interests of those rejecting it and all the relevant facts; and that the plan conforms to the requirements of clauses (1) to (3), inclusive, of the first paragraph of this subsection (e)." [1]

The case has been discussed as if we are at the *Ninth* stage of the reorganization. Rather, only the *Fifth* stage has been completed and the *Sixth* stage is about to start.

The case has been discussed as if the creditors will vote the plan down and the judge, in the face of that, will force the plan on the creditors through the "cram down" provision.

But as yet no vote has been taken. Perhaps the powerful interests represented by the petitioners will vote solidly and overwhelmingly against the plan. Perhaps not. Election campaigns sometimes change votes. Perhaps the creditors will eventually approve the plan.

Our present problem must be weighed in light of both of those contingencies.

If the creditors approve the plan by "more than two-thirds" vote but less than 100 percent, would it be lawful

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[1] Clauses (1) and (2) referred to read as follows:

"the judge shall approve the plan if satisfied that: (1) It complies with the provisions of subsection (b) of this section, is fair and equitable, affords due recognition to the rights of each class of creditors and stockholders, does not discriminate unfairly in favor of any class of creditors or stockholders, and will conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders; (2) the approximate amounts to be paid by the debtor, or by any corporation or corporations acquiring the debtor's assets, for expenses and fees incident to the reorganization, have been fully disclosed so far as they can be ascertained at the date of such hearing, are reasonable, are within such maximum limits as are fixed by the Commission, and are within such maximum limits to be subject to the approval of the judge; . . . ."

to confirm it? I think it plainly would be for the following reasons:

Section 77 contemplates the use of reorganizations to consummate mergers. Section 77 (b)(5) says that a plan "may include the transfer of any interest in or control of all or any part of the property of the debtor to another corporation or corporations, *the merger or consolidation of the debtor* with another corporation or corporations," etc. (Italics supplied.) So it is clear that Congress contemplated that mergers of railroads could be effected by a § 77 plan of reorganization.[2] Since mergers could be accomplished that way, Congress felt—as the legislative history abundantly shows—that the Commission must apply in this class of mergers the same standards it must apply in other mergers. Accordingly Congress wrote into § 77 (f) the "consistency clause"—that on confirmation of a plan the Commission shall grant authority for the "transfer of any property, sale, consolidation or merger of the debtor's property . . . to the extent contemplated by the plan and *not inconsistent with the provisions and purposes*" of the Interstate Com-

[2] The Commission has repeatedly proposed and approved reorganization plans requiring consolidations or mergers. See, *e. g., Alton R. Co. Reorganization,* 261 I. C. C. 343; *New York, N. H. & H. R. Co. Reorganization,* 254 I. C. C. 63, 405; *Missouri Pac. R. Co. Reorganization,* 239 I. C. C. 7; *Denver & R. G. W. R. Co. Reorganization,* 233 I. C. C. 515, 239 I. C. C. 583, 254 I. C. C. 349. As a result of some of these proceedings the Commission has been criticized for misapplying or disregarding the standards set up for mergers by § 5 of the Interstate Commerce Act. S. Rep. No. 1170, 79th Cong., 2d Sess. 80–85. In the present case, however, no argument is made that the proper standards have not been applied. Indeed that question is not before us. Moreover, not even the Senate Report, *supra,* suggests that the Commission cannot ever approve reorganization mergers. That Report says only that the "procedure and safeguards of the Transportation Act must be preserved . . . ." And, as we shall see, the standards prescribed in § 5 have been satisfied here, so far as this record reveals.

merce Act. (Italics supplied.) Section 5 of the Interstate Commerce Act prescribes both a *procedure* for the Commission to follow in those cases and the *standards* which the Commission must apply.

The *procedure* includes among other things (a) notification to the Governors of each State in which the properties of the carriers are situated; and (b) a reasonable opportunity for the "interested parties" to be heard. No objection is made in these cases (and no showing is attempted) that that procedure was not followed.

The *standards* for the Commission's action on mergers are different from those prescribed in case of reorganizations. In reorganizations the Commission is concerned with matters of valuation, the amount of fixed charges, the ratio of bonds to stock, and like financial problems. See *Ecker* v. *Western Pacific R. Corp.*, 318 U. S. 448. Congress by § 5 of the Interstate Commerce Act has prescribed special *standards* for mergers. Section 5 (2)(c) states:

> "In passing upon any proposed transaction under the provisions of this paragraph (2), the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected."

There is no objection made nor showing attempted that in these cases the Commission failed to make findings on those issues nor that the findings as made were inadequate. The Commission indeed was most explicit. It said that control of Florida East Coast by the petitioner in No. 24, St. Joe Paper Co., would be "contrary to the

public interest" since that company, "particularly because of its large banking interests," would be in a position to influence the routing of shipments. 282 I. C. C., p. 187. It found that the merger of the Florida East Coast with Atlantic Coast Line

—would be in the public interest.[3] *Id.*, pp. 187, 188.
—would adequately protect the interests of employees.[4] *Id.*, p. 187.
—would result in savings as a result of unification.[5] *Id.*, p. 187.

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[3] "The public interest in its broader concept will be better served by integration of the debtor into a large railroad system than by its continued operation as an independent railroad.

. . . . . .

"The effect of a merger upon the Southern Railway system and Seaboard Air Line Railroad Company, if any, will not adversely affect the public interest.

. . . . . .

"The record is sufficient in all respects for a determination of the issue of the public interests involved in an acquisition of the debtor's properties by the Coast Line.

"It will be compatible with the public interest for the Coast Line to control the debtor's property.

"While the plan proposed by the Coast Line is inequitable in that it does not provide for the full equitable equivalent of the rights to be surrendered by the debtor's creditors, the plan as hereinabove modified will comply with such requirements, will be fair and equitable, and otherwise in the public interest."

[4] "The interests of the railroad employees affected by the merger will be adequately protected."

[5] "There should eventually result savings through a unification of the two carriers of between $850,000 and $1,000,000 per annum, through (*a*) eventual unification of the executive and supervisory forces of the two carriers; (*b*) consolidation of interchange yards and shop facilities at Jacksonville; (*c*) unification of operations of the freight stations of the two carriers at Jacksonville; and (*d*) coordination and consolidation of off-line traffic offices of the two carriers."

—would result in a betterment of service to the public.[6] *Id.*, p. 187.

—would not adversely affect the citizens and communities of the east coast of Florida.[7] *Id.*, pp. 187–188.

—would give the debtor greater financial stability.[8] *Id.*, p. 188.

—would give a better service than service under an operation by St. Joe Paper Co.,[9] petitioner in No. 24. *Id.*, p. 188.

We are not asked to set aside those findings. They are indeed not challenged. On their face they plainly meet the *standards* of § 5 of the Interstate Commerce Act. We cannot say on this record that they are not consistent with § 5 within the meaning of the consistency clause of § 77 (f). So far as this record shows, the Commission has faithfully, painstakingly, and conscientiously performed the obligations which § 5 of the Interstate Commerce Act

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[6] "There would be betterment of service to the public resulting from a unification of the debtor's line with that of the Coast Line."

[7] "The apprehensions of the citizens and communities of the east coast of Florida that a merger would adversely affect their interests are not justified since (*a*) it would be to the interest of the Coast Line to serve all its territory impartially, (*b*) existing through routes via Jacksonville will be maintained, and (*c*) while the Coast Line would attempt to retain its long haul, its appeal to the public would be based primarily on the quality of its service, and the traffic relationships between trunk-line carriers would prevent any abuse of power such as would be possible under control of the debtor's line by the St. Joe Company."

[8] "The merger of the debtor with the Coast line will be of appreciable benefit in assuring greater financial stability for the debtor."

[9] "In general, there is a substantial preponderance of evidence that a merger will insure a more adequate, economical, and efficient transportation service than will operation of the debtor by the St. Joe Company."

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imposes on it. It would seem obvious, therefore, that the Commission should be allowed to submit the plan, including the provision for a merger, to the security holders for their approval or disapproval.

The Court, however, disallows the submission and rests its action on a curious reason. It says that consent of the railroads has not been obtained and without that consent no merger can be consummated in § 77 proceedings. But that reason is wholly at war with the statutory scheme of railroad reorganizations.

Once a petition for reorganization is approved, the court appoints trustees who have full management of the business under the court's supervision. § 77 (c). The trustees take over the functions of the officers and board of directors. But apparently the Court, when it refers to "the debtor," does not mean the trustees, for it speaks of "those who in the absence of § 77 would wield the corporate merger powers." That must mean either the old management or the stockholders. Yet such a reading cannot square with § 77. One can look through § 77 in vain for any status granted the old management to approve or disapprove a plan. "The debtor" commonly is identified with the stockholders, *i. e.*, the equitable owners of the road. But the method of getting their consent to any plan of reorganization is prescribed in § 77. They may or may not be entitled to vote, depending on whether their stock represents a value in the railroad. If the stock has no value, they are not entitled to vote. If it has value, they are entitled to vote. § 77 (e). If the security holders who have a vote approve the plan, the consent necessary to effect both the recapitalization and the merger has been given. *To allow the old management or the stockholders a veto power where Congress has provided they shall not vote is to indulge in as bold a piece of judicial legislation as one can find in the books.*

It is said that the consistency clause of § 77 incorporates by reference § 5 of the Interstate Commerce Act. And so it does. But that does not mean that because the initiation of merger plans rested with the management *prior* to bankruptcy, it rests with the old management *after* bankruptcy. The conclusion that it does reveals a basic misunderstanding of the system of bankruptcy reorganization contained in § 77. When Congress designed that legislation, it prescribed precisely how the consent necessary for each step in the reorganization should be obtained. Section 77 gives the old management no vote on any measure. If the equity votes, the stockholders cast the ballot. And a procedure is designed to deprive them of a vote if their securities no longer represent any value, as is the case here.

No comfort can be found in § 77 (d), which gives the debtor, *i. e.,* the old management, standing to propose a plan of reorganization. Plans of reorganization may be *proposed* by the debtor, by the trustees, by 10 percent of any class of creditors or of stockholders "or with the consent of the Commission by any party in interest." § 77 (d). The proposal of a plan expresses merely the wish. In logic and in history there is no reason why a plan containing a merger may not be proposed by the new management as well as the old, by creditors as well as stockholders. Standing to present a plan has no relevancy to the fairness or feasibility of the plan presented. To say that only "the debtor" may submit a plan that contains provisions for a merger is to give a whip hand to people who do not even have enough of an interest to vote on a plan. The debtor commonly represents the equity; and when, as here, the equity is so far under that it can have no possible interest in the reorganization (except possibly a nuisance value created by long-drawn-out litigation), it violates all sense of fairness

and disregards the mandate of Congress to let the equity have the preferred position the Court now creates. Congress has set the standards for the protection of the "equitable owners." Where, as here, they have no value in the enterprise, Congress said they should be disregarded.

Much emphasis is placed by the Court on S. Rep. No. 1170, 79th Cong., 2d Sess. 80–85, a report by the Senate Committee on Interstate Commerce headed by Chairman Wheeler. There are two reasons why that Report is irrelevant to the present issue. *First,* that Report condemned the use of § 77 "to bypass" § 5 of the Interstate Commerce Act. As I have shown, § 5 was not "bypassed" in the present case. The procedures, safeguards, and standards it prescribes were fully satisfied by the Commission. *Second,* that Report covered a bill which endeavored to make changes in the existing law and practices. *But that bill never was enacted. It is, however, now used as an authoritative interpretation of a law which it sought to change.*

An unjaundiced reading of § 5 of the Interstate Commerce Act and of § 77 of the Bankruptcy Act results, I submit, in the following conclusions:

Any person with standing to submit a plan of reorganization may include in it provisions for a merger.

Section 5 of the Interstate Commerce Act provides the standards for the Commission to apply in passing on such a plan and those standards have been wholly satisfied here.

Section 77 prescribes the *procedure* for getting the consent to a plan, including a plan that provides for a merger.

What reason then can there be for not letting the security holders vote to adopt or reject this plan?

It is said that if the security holders reject the plan, the reorganization court may nonetheless force it on them.

There are several answers to that, as I have already suggested:

(1) The security holders may not reject the plan.

(2) Even if they do reject the plan, the reorganization court may decide not to force the plan on them. To force it on them the court must have a hearing and find, among other things, that the rejection "is not reasonably justified in the light of the respective rights and interests of those rejecting it and all the relevant facts . . . ." § 77 (e).

(3) Even if the reorganization court undertook to force any plan on the security holders, we might well overrule that order. In the only case of the "cram down" provision on which we have passed, *R. F. C.* v. *Denver & R. G. W. R. Co.*, 328 U. S. 495—one involving issues different from those now tendered [10]—we reserved decision on the power of the reorganization court. We said, p. 535:

> "this does not mean that if a plan is approved as fair and equitable by the Commission and the court, there cannot be a reasonable justification for its rejection by a class of claimants on submission. Reasons to make their rejection reasonable may arise . . . ."

I say we might well stop any attempt of the court to invoke the "cram down" provision because we cannot tell in advance what a particular situation might disclose. Under § 77 (e), it will be remembered, "more than two-thirds" of each class entitled to vote can vote for a plan and force it on the minority. Unanimous consent is not necessary.

(1) Suppose the election returns bring approval by a bare two-thirds. Suppose the judge is satisfied that one

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[10] See note 11, *infra*.

block of securities voting against the plan has a special ax to grind, as the Commission suggests is true in this case of the St. Joe Paper Co., petitioner in No. 24. Would it be unlawful for the court to invoke the "cram down" provision in that case? "Consent" has not been obtained since Congress provided that "more than two-thirds" should approve a plan. But the public interest might well justify use of the "cram down" provision in that case as the only effective method for dealing with a recalcitrant (or even blackmailing) minority. In light of what we said in the *Denver & Rio Grande* case (328 U. S., at 535) such rejection by the one-third minority might well be deemed to have no "reasonable justification" in light of all the facts and circumstances.

(2) Suppose the election returns bring approval from only 1 percent of the security holders. Could the "cram down" provision properly be invoked in that case? It is difficult even to imagine a case where it would be proper to do so. The "cram down" is a harsh remedy, the use of which would require special reasons.

But the fact that the occasions for its use should be closely guarded should not mean that it can never be used in connection with a § 77 plan of reorganization involving a merger, unless "the debtor" (here representing security holders not even entitled to vote on a plan) proposes the merger. Under § 77 and § 5 of the Interstate Commerce Act, read together, it is plain that Congress subjected plans containing mergers to the same "consent" requirements as plans not containing mergers. There is not a word in the statute or in the legislative history to indicate that the old management or stockholders not entitled to vote on a plan nevertheless have a veto over it.

The question of the application of the "cram down" provision of § 77 *to plans involving mergers* has never been

presented to us.[11] That question is premature here, for it may never be reached. It is a large question of great importance and one that should be decided, not in the abstract, but only on the specific facts of specific cases. In these cases we should specifically reserve decision on it until it is presented. We should affirm the judgment in these cases, allowing the plan to be submitted for approval or rejection, explicitly saving the rights of all parties in case the "cram down" provision is used against them.

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[11] We have considered the "cram down" provision of § 77 (e) only once. See *R. F. C.* v. *Denver & R. G. W. R. Co.*, 328 U. S. 495, 531. A merger was involved in that reorganization but it was not at issue before this Court. The complaint there was by junior creditors on matters that were purely financial: that the valuation and allocation of securities proposed had left them too small a participation. We decided that the "cram down" provision could be and was in that case constitutionally and properly applied. On the facts we held that the objecting class was without "reasonable justification," since it complained only of financial aspects of the plan which were fair and equitable. We made no decision regarding mergers and laid down no rule of law. We left the reorganization courts free to confirm or reject future plans as the facts, the equities, and the votes required.

# THOMPSON *v.* LAWSON, DEPUTY COMMISSIONER OF THE UNITED STATES BUREAU OF EMPLOYEES COMPENSATION, ET AL.

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

No. 352. Argued March 9, 1954.—Decided April 5, 1954.

Otis and Julia Thompson were married in 1921, and lived together as husband and wife until 1925, when Otis deserted her. They were never divorced but they never lived together again, and he never contributed anything to her support or that of their two children, nor did she ever seek to have him do so. Otis "married" another woman in 1929. In 1940 Julia "married" another man, and thereafter lived and held herself out as the latter's wife. She was divorced from him in 1949. Shortly before Otis' death, he asked Julia to "take him back," but she refused, having no intention of ever again living with him and resuming the relationship of husband and wife. *Held:* At the time of Otis' death in 1951, Julia was not his "widow" within the meaning of the Longshoremen's and Harbor Workers' Act, 33 U. S. C. § 902 (16), and was not entitled under the Act to compensation for his death. Pp. 335–337.

(a) Since, at the time of the decedent's death, Julia was not living apart from him "by reason of his desertion," she was not his "widow" within the scope of the provision. P. 336.

(b) By her purported remarriage, Julia severed the bond which was the basis of her right to claim a death benefit as the decedent's statutory dependent. P. 337.

205 F. 2d 527, affirmed.

*David Carliner* argued the cause for petitioner. With him on the brief was *Henry H. Glassie.*

*George W. Ericksen* argued the cause and filed a brief for the Gulf Florida Terminal Co., Inc. et al., respondents.

*Lester S. Jayson* argued the cause for the Deputy Commissioner, respondent. With him on the brief were *Robert L. Stern,* then Acting Solicitor General, *Assistant Attorney General Burger* and *Samuel D. Slade.*

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

On June 15, 1951, Otis Thompson died from injuries suffered while loading a ship for his employer. Two women sought a death benefit under the Longshoremen's and Harbor Workers' Compensation Act, each claiming to be his "widow." The Deputy Commissioner denied both claims, that of one woman on the ground that she was not the lawful wife of the decedent, and that of the other because at the time of Otis' death she was living apart from him not "by reason of his desertion," 33 U. S. C. § 902 (16). On a review of the latter dismissal, the District Court sustained the Deputy Commissioner's order, and the Court of Appeals for the Fifth Circuit affirmed. 205 F. 2d 527. In doing so, that court rejected contrary decisions of the Courts of Appeals for the Second and Ninth Circuits, *Associated Operating Co.* v. *Lowe,* 138 F. 2d 916, *Moore Dry Dock Co.* v. *Pillsbury,* 169 F. 2d 988. We granted certiorari to resolve this conflict. 346 U. S. 921.

The Deputy Commissioner made these findings. Otis and Julia Thompson were married in 1921, and lived together as husband and wife until November 1925, when Otis deserted her. They never lived together again, and he never contributed anything to the support of Julia or their two children, nor did she ever endeavor to secure such support. Meanwhile Otis had taken up with one Sallie Williams, and they went through a marriage ceremony in 1929. Julia, in turn, found another mate, one Jimmy Fuller, whom she "married" in 1940. Thereafter she was known as Julia Fuller. She was formally divorced from Fuller in 1949. Shortly before Otis' death, he asked Julia to "take him back," but she refused, having no intention of ever again living with him and resuming the relationship of husband and wife.

The single, unentangled question before us is whether, on these unchallenged facts, Julia was at the time of Otis' death in 1951, his statutory "widow," as that term is described by Congress in the Longshoremen's Act: "The term 'widow' includes only the decedent's wife living with or dependent for support upon him at the time of his death; or living apart for justifiable cause or by reason of his desertion at such time," 33 U. S. C. § 902 (16). We agree with the court below that since she was not at the time of her husband's death living apart from him "by reason of his desertion," she was not a "widow" within the scope of this provision.* Whatever may have been the situation prior to her "marriage" to Jimmy Fuller in 1940, it is clear that after that date she lived as the wife of Jimmy Fuller, held herself out as his wife, and had severed all meaningful relationship with the decedent.

We do not reach this conclusion by assessing the marital conduct of the parties. That is an inquiry which may be relevant to legal issues arising under State domestic relations law. Our concern is with the proper interpretation of the Federal Longshoremen's Act. Congress might have provided in that Act that a woman is entitled to compensation so long as she is still deemed to be the lawful wife of the decedent under State law, as, for example, where a foreign divorce obtained by her is without constitutional validity in the forum State. But Congress did not do so. It defined the requirements which every claimant for compensation must meet. Considering the purpose of this federal legislation and the manner in which Congress has expressed that purpose, the essential requirement is a conjugal nexus between the claimant

*It was not contended before us that in the circumstances of this case the phrase "for justifiable cause" has a different reach than the phrase "by reason of his desertion."

and the decedent subsisting at the time of the latter's death, which, for present purposes, means that she must continue to live as the deserted wife of the latter. That nexus is wholly absent here. Julia herself, by her purported remarriage, severed the bond which was the basis of her right to claim a death benefit as Otis' statutory dependent. The very practical considerations of this Compensation Act should not be subordinated to the empty abstraction that once a wife has been deserted, she always remains a deserted wife, no matter what—the no matter what in this case being the wife's conscious choice to terminate her prior conjugal relationship by embarking upon another permanent relationship.

The judgment is

*Affirmed.*

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

Petitioner's husband, a longshoreman, was killed in 1951 on a job governed by the Longshoremen's and Harbor Workers' Compensation Act. Petitioner was not then living with her husband and had not done so since he deserted her and their two children in 1925. Petitioner went through a marriage ceremony with another man in 1940 living with him as his wife until 1949 when they were divorced. Of course this marriage was invalid and petitioner remained the wife of her husband until he was killed. The Court now holds as a matter of law that petitioner's second "marriage" amounts to a forfeiture of her right to recover compensation under the Act as a widow. In so holding, the Court follows decisions of the Court of Appeals for the Fifth Circuit.[1] The Courts of Appeals for the Second and Ninth Circuits have held to

[1] *Ryan Stevedoring Co.* v. *Henderson,* 138 F. 2d 348; *American Mutual Liability Ins. Co.* v. *Henderson,* 141 F. 2d 813.

the contrary.[2] I agree with the Second and Ninth Circuits.

Not a word in the Compensation Act suggests that the deserted widow of a deceased longshoreman automatically forfeits all right to statutory compensation because she has lived with a man other than her husband. What the Act actually does is to entitle a widow to compensation if at the time of her husband's death she is either: (1) living with him; (2) dependent upon him for support; (3) living apart from him for justifiable cause; (4) living apart from him by reason of his desertion. Obviously these issues cannot be decided without hearing evidence and determining facts. The Act vests deputy commissioners, not courts, with power "to hear and determine all questions in respect of such claim." 33 U. S. C. § 919 (a). And their findings of fact when supported by substantial evidence are conclusive on courts.[3]

Here there were only two factual issues presented to the Deputy Commissioner. Was the wife living apart from her husband for "justifiable cause"? Was she living apart from him because of his "desertion"? I think there was evidence before the Deputy Commissioner on which he could have fairly decided these questions of fact either way. He made findings and entered an order against the petitioner, but it is admitted that he did so because he felt bound by prior holdings of the Fifth Circuit that an attempted marriage by a wife barred her recovery of compensation as a matter of law. The Court now affirms the judgment although the Deputy Commissioner has never passed on the factual issues of whether

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[2] *Associated Operating Co.* v. *Lowe*, 138 F. 2d 916, affirming 52 F. Supp. 550; *Moore Dry Dock Co.* v. *Pillsbury*, 169 F. 2d 988.

[3] *Voehl* v. *Indemnity Ins. Co.*, 288 U. S. 162, 166; *Parker* v. *Motor Boat Sales, Inc.*, 314 U. S. 244, 246; *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U. S. 504, 507–508.

the wife's living apart from her husband was either "justifiable" or by reason of his "desertion." That the Court treats its holding as one of statutory construction cannot obscure the actual effect of what it is doing. The Court is taking from the deputy commissioners their congressionally granted power to determine from all the facts and circumstances whether a widow is entitled to compensation.

I would reverse with directions to remand the cause to the Deputy Commissioner to determine, free from judicial compulsion, whether, as a fact, petitioner's living apart was for "justifiable cause" or on account of her husband's "desertion." If either of these issues should be decided in favor of the petitioner, she is entitled to compensation.

# MILLER BROTHERS CO. *v.* MARYLAND.

APPEAL FROM THE COURT OF APPEALS OF MARYLAND.

No. 160. Argued January 5, 1954.—Decided April 5, 1954.

A Delaware merchandising corporation sells directly to customers at its store in Delaware. It does not accept mail or telephone orders, and makes no solicitation of customers other than by newspaper, radio, and occasional direct mail advertising. Residents of nearby Maryland come to the store and make purchases which they take away or which are delivered to them in Maryland by common carrier or by the store's own truck. Maryland lays upon its residents an excise tax on "the use, storage, or consumption" in the State of such articles, and it requires every vendor to collect and remit the tax to the State. The Delaware store did not do this, and a truck belonging to it was seized in Maryland and held liable for the use tax on all goods sold to Maryland residents, however delivered. *Held:* The Maryland taxing act, as applied to this Delaware store, violates the Due Process Clause of the Fourteenth Amendment. Pp. 341–347.

(a) Seizure of property by a State under pretext of taxation when there is no jurisdiction or power to tax is confiscation and a denial of due process of law. P. 342.

(b) The Delaware corporation, by its acts or course of dealing, has not subjected itself to the taxing power of Maryland and has not afforded to that State a jurisdiction or power to impose upon it a liability for collection of the Maryland tax. Pp. 344–346.

(c) Due process requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax. Pp. 344–345.

(d) Maryland could not have reached this Delaware vendor with a sales tax on these sales, and cannot make them a basis for imposing on the vendor liability for use taxes due from Maryland residents. Pp. 345–346.

(e) *General Trading Co.* v. *State Tax Comm'n,* 322 U. S. 335, distinguished. Pp. 346–347.

201 Md. 535, 95 A. 2d 286, reversed and remanded.

*William L. Marbury* argued the cause for appellant. With him on the brief were *James Piper, William Poole* and *James L. Latchum.*

*Francis D. Murnaghan, Jr.,* Assistant Attorney General of Maryland, argued the cause for appellee. With him on the brief were *Edward D. E. Rollins,* Attorney General, and *J. Edgar Harvey,* Deputy Attorney General.

Opinion of the Court by MR. JUSTICE JACKSON, announced by MR. JUSTICE REED.

Appellant is a Delaware merchandising corporation which only sells directly to customers at its store in Wilmington, Delaware. It does not take orders by mail or telephone. Residents of nearby Maryland come to its store and make purchases, some of which they carry away, some are delivered to them in Maryland by common carrier, and others by appellant's own truck. Maryland lays upon its residents an excise tax on "the use, storage or consumption" in the State of such articles,[1] and it requires every vendor to collect and remit the tax to the State.[2] This the appellant did not do. Finding appellant's truck in Maryland, the State seized it, and the State's highest court has held it liable for the use tax on all goods sold in the Delaware store to Maryland residents, however delivered.[3] This was against appellant's timely contention that the Maryland taxing act, so construed, conflicts with the federal commerce power and attempts to extend the power of the State beyond its borders in violation of the Due Process Clause of the Fourteenth Amendment. The parties have stipulated facts in detail, and, so far as they seem important, we set them forth in the Appendix.[4]

The grounds advanced by Maryland for holding the Delaware vendor liable come to this: (1) the vendor's advertising with Delaware papers and radio stations, though not especially directed to Maryland inhabitants,

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[1] All footnotes to this opinion are carried in an Appendix, *post,* p. 347.

reached, and was known to reach, their notice; (2) its occasional sales circulars mailed to all former customers included customers in Maryland; (3) it delivered some purchases to common carriers consigned to Maryland addresses; (4) it delivered other purchases by its own vehicles to Maryland locations. The question is whether these factors, separately or in the aggregate, in each or all of the above types of sales, establish a state's power to impose a duty upon such an out-of-state merchant to collect and remit a purchaser's use tax.

It is a venerable if trite observation that seizure of property by the state under pretext of taxation when there is no jurisdiction or power to tax is simple confiscation and a denial of due process of law. "No principle is better settled than that the power of a State, even its power of taxation, in respect to property, is limited to such as is within its jurisdiction." *New York, L. E. & W. R. Co.* v. *Pennsylvania,* 153 U. S. 628, 646. "Where there is jurisdiction neither as to person nor property, the imposition of a tax would be *ultra vires* and void. If the legislature of a State should enact that the citizens or property of another State or country should be taxed in the same manner as the persons and property within its own limits and subject to its authority, or in any other manner whatsoever, such a law would be as much a nullity as if in conflict with the most explicit constitutional inhibition. Jurisdiction is as necessary to valid legislative as to valid judicial action." *St. Louis* v. *Ferry Co.,* 11 Wall. 423, 430.

But visible territorial boundaries do not always establish the limits of a state's taxing power or jurisdiction. In the last twenty years, revenue needs have come to exceed the demands that legislatures feel it expedient to make upon accumulated wealth or property with fixed location within the state. The states therefore have turned to taxing activities connected with the movement

of commerce, such as exchange and consumption. If there is some jurisdictional fact or event to serve as a conductor, the reach of the state's taxing power may be carried to objects of taxation beyond its borders. When it has the taxpayer within its power or jurisdiction, it may sometimes, through him, reach his extraterritorial income or transactions. On the other hand, if it has jurisdiction of his taxable property or transactions, it may sometimes, through these, reach the nonresident. Whether this is one of these cases we must inquire.

We are dealing with a relatively new and experimental form of taxation.[5] Taxation of sales or purchases and taxation of use or possession of purchases are complementary and related but serve very different purposes. The former, a fiscal measure of considerable importance, has the effect of increasing the cost to the consumer of acquiring supplies in the taxing state. The use tax, not in itself a relatively significant revenue producer,[6] usually appears as a support to the sales tax in two respects. One is protection of the state's revenues by taking away from inhabitants the advantages of resort to untaxed out-of-state purchases. The other is protection of local merchants against out-of-state competition from those who may be enabled by lower tax burdens to offer lower prices. In this respect, the use tax has the same effect as a protective tariff becoming due not on purchase of the goods but at the moment of bringing them into the taxing states.[7] The collection of the use tax from inhabitants is a difficult administrative problem, and if out-of-state vendors can be compelled to collect it and remit it to the taxing state, it simplifies administration. But this raises questions of great importance to particular taxpayers, to the course of commercial dealing among the states and as to appropriation by other states of tax resources properly belonging to the state where the event occurs.

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The practical and legal effect of the Maryland statute as it has been applied to this Delaware vendor is to make the vendor liable for a use tax due from the purchaser. In economic consequence, it is identical with making him pay a sales tax. The liability arises only because of a Delaware sale and is measured by its proceeds. But at the time of the sale, no one is liable for a Maryland use tax. That liability arises only upon importation of the merchandise to the taxing state, an event which occurs after the sale is complete and one as to which the vendor may have no control or even knowledge, at least as to merchandise carried away by the buyer. The consequence is that liability against the Delaware vendor is predicated upon use of the goods in another state and by another person. We do not understand the State to contend that it could lay a use tax upon mere possession of goods in transit by a carrier or vendor upon entering the State, nor do we see how such a tax could be consistent with the Commerce Clause.

The question here is whether this vendor, by its acts or course of dealing, has subjected itself to the taxing power of Maryland or whether it has afforded that State a jurisdiction or power to create this collector's liability. Despite the increasing frequency with which the question arises, little constructive discussion can be found in responsible commentary as to the grounds on which to rest a state's power to reach extraterritorial transactions or nonresidents with tax liabilities. Our decisions are not always clear as to the grounds on which a tax is supported, especially where more than one exists; nor are all of our pronouncements during the experimental period of this type of taxation consistent or reconcilable. A few have been specifically overruled, while others no longer fully represent the present state of the law. But the course of decisions does reflect at least consistent adherence to one time-honored concept: that due process requires some

definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.

Thus, the Court has frequently held that domicile or residence, more substantial than mere presence in transit or sojourn, is an adequate basis for taxation, including income,[8] property,[9] and death [10] taxes. Since the Fourteenth Amendment makes one a citizen of the state wherein he resides, the fact of residence creates universally recognized reciprocal duties of protection by the state and of allegiance and support by the citizen. The latter obviously includes a duty to pay taxes, and their nature and measure is largely a political matter. Of course, the situs of property may tax it regardless of the citizenship, domicile or residence of the owner, the most obvious illustration being a tax on realty laid by the state in which the realty is located.[11] Also, the keeping of tangible [12] or intangible [13] personalty within a state may give it a similar taxable situs there (sometimes called a business or commercial situs or domicile). Certain activities or transactions carried on within a state, such as the use [14] and sale [15] of property, may give jurisdiction to tax whomsoever engages therein, and the use of highways may subject the use to certain types of taxation.[16] These cases overlap with those in which incorporation by a state [17] or permission to do business there [18] forms the basis for proportionate taxation of a company, including its franchise, capital, income and property. Recent cases in which a taxable sale does not clearly take place within the taxing state, elements of the transaction occurring in different states, have presented peculiar difficulties,[19] as have those where the party liable for a use tax does not use the product within the taxing state.[20]

We are unable to find in any of our cases a precedent for sustaining the liability asserted by Maryland here. In accordance with the principles of earlier cases, it was recently settled that Maryland could not have reached

this Delaware vendor with a sales tax on these sales. *McLeod* v. *Dilworth Co.*, 322 U. S. 327. Can she then make the same Delaware sales a basis for imposing on the vendor liability for use taxes due from her own inhabitants? It would be a strange law that would make appellant more vulnerable to liability for another's tax than to a tax on itself.

The decisions relied upon by Maryland do not, in our view, support her. This is not the case of a merchant entering a state to maintain a branch and engaging in admittedly taxable retail business but trying to allocate some part of his total sales to nontaxable interstate commerce. Under these circumstances, the State has jurisdiction to tax the taxpayer, and all that he can question on Due Process or Commerce Clause grounds is the validity of the allocation. Cf. *Nelson* v. *Montgomery Ward & Co.*, 312 U. S. 373; *Nelson* v. *Sears, Roebuck & Co.*, 312 U. S. 359; *Norton Co.* v. *Department of Revenue*, 340 U. S. 534.

The nearest support for Maryland's position is *General Trading Co.* v. *State Tax Comm'n*, 322 U. S. 335. The writer of this opinion dissented in that case and, whether or not in so doing he made a correct application of principles of jurisdiction to the particular facts, it is clear that circumstances absent here were there present to justify the Court's approval of liability for collecting the tax. That was the case of an out-of-state merchant entering the taxing state through traveling sales agents to conduct continuous local solicitation followed by delivery of ordered goods to the customers, the only nonlocal phase of the total sale being acceptance of the order. Probably, except for credit reasons, acceptance was a mere formality, since one hardly incurs the cost of soliciting orders to reject. The Court could properly approve the State's decision to regard such a rivalry with its local merchants as equivalent to being a local merchant. But

there is a wide gulf between this type of active and aggressive operation within a taxing state and the occasional delivery of goods sold at an out-of-state store with no solicitation other than the incidental effects of general advertising. Here was no invasion or exploitation of the consumer market in Maryland. On the contrary, these sales resulted from purchasers traveling from Maryland to Delaware to exploit its less tax-burdened selling market. That these inhabitants incurred a liability for the use tax when they used, stored or consumed the goods in Maryland, no one doubts. But the burden of collecting or paying their tax cannot be shifted to a foreign merchant in the absence of some jurisdictional basis not present here.

In this view of the case, we need not consider whether the statute imposes an unjustifiable burden upon interstate commerce.

The judgment appealed from is reversed and the case remanded for further proceedings not inconsistent herewith.

*Reversed and remanded.*

[For dissenting opinion, see *post,* p. 357.]

## APPENDIX TO OPINION OF THE COURT.

[1] The statute reads: "An excise tax is hereby levied and imposed on the use, storage or consumption in this State of tangible personal property purchased from a vendor within or without this State on or after the effective date of this Act, for use, storage or consumption within this State. The tax imposed by this section shall be paid by the purchaser and shall be computed as follows: . . . ." Flack's Md. Ann. Code, 1951, Art. 81, § 369.

[2] "Every vendor engaging in business in this State and making sales of tangible personal property for use, storage or consumption in this State which are taxable under the provisions of this sub-title, at the time of making such sales, or if the use, storage or consumption is not then taxable hereunder, at the time when such use, storage or

consumption becomes taxable hereunder, shall collect the tax imposed by this sub-title from the purchaser." Flack's Md. Ann. Code, 1951, Art. 81, § 371.

"As used in this sub-title, the following terms shall mean or include:

. . . . . .

"(k) 'Engaged in business in this State' means the selling or delivering in this State, or any activity in this State in connection with the selling or delivering in this State, of tangible personal property for use, storage or consumption within this State. This term shall include, but shall not be limited to the following acts or methods of transacting business.

"(1) The maintaining, occupying or using, permanently or temporarily, directly or indirectly, or through a subsidiary or agent, by whatever name called, of any office, place of distribution, sales or sample room or place, warehouse or storage place, or other place of business.

"(2) The having of any representative, agent, salesman, canvasser, or solicitor operating in this State for the purpose of selling, delivering, or the taking of orders for any tangible personal property." Flack's Md. Ann. Code, Art. 81, § 368.

"Every vendor required or permitted to collect the tax shall collect the tax imposed by the provision of this sub-title, notwithstanding the following:

"(a) That the purchaser's order or the contract of sale is delivered, mailed, or otherwise transmitted by the purchaser to the vendor at a point outside of this State as a result of solicitation by the vendor through the medium of a catalog or other written advertisement; or

"(b) That the purchaser's order or contract of sale made or closed by acceptance or approval outside of this State or before said tangible personal property enters this State; or

"(c) That the purchaser's order or contract of sale provides that said property shall be, or it is in fact, procured or manufactured at a point outside of this State and shipped directly to the purchaser from the point of origin; or

"(d) That said property is mailed to the purchaser in this State from a point outside this State or delivered to a carrier at a point outside this State, F.O.B., or otherwise, and directed to the vendor in this State, regardless of whether the cost of transportation is paid by the vendor or by the purchaser; or

"(e) That said property is delivered directly to the purchaser at a point outside this State, if it is intended to be brought to this State

for use, storage or consumption in this State." Flack's Md. Ann. Code, Art. 81, § 373.

"The vendor and any other officer of any corporate vendor required or permitted to collect the tax imposed by this sub-title shall be personally liable for the tax collected, and such vendor shall have the same right in respect to collecting the tax from the purchaser, or in respect to non-payment of the tax by the purchaser, as if the tax were a part of the purchase price of the property and payable at the time of the sale. Any vendor who fails to collect the tax pursuant to this sub-title and the regulations prescribed hereunder shall, in addition to all other penalties, be personally liable to the State for the amount uncollected." Flack's Md. Ann. Code, 1951, Art. 81, § 375.

[3] *Miller Brothers Co.* v. *Maryland,* 201 Md. 535, 95 A. 2d 286.

[4] "It is hereby stipulated and agreed by and between the attorneys for the above named parties and on their behalf that:

"1. Defendant, Miller Brothers Company, is a corporation organized and existing under the laws of the State of Delaware with its principal place of business at Ninth and King Streets, Wilmington, Delaware. It has no resident agent in Maryland.

"2. Defendant is and for all times material to this suit has been engaged in the retail household furniture business by selling its merchandise from its only retail store located in Wilmington, Delaware.

"3. The only methods of advertising used by the Defendant are the following:

"(a) *Radio and Television.* The Defendant has engaged in no radio or television advertising of any sort, anywhere, since January 1, 1951. Prior to that date, the Defendant had limited radio advertising over the Wilmington, Delaware, stations. In the fall of 1950, for a period of about six weeks, the Defendant had a small amount of television advertising over Station WDEL–TV in connection with the broadcasting of football scores. The facilities of those stations are located in Delaware entirely. In the radio and television advertising the Defendant has never had any script or copy which made an appeal for out-of-state business or in any way was designed directly or indirectly to appeal particularly to Maryland residents. The radio slogan adopted by the Defendant was 'Furniture Fashion Makers for Delaware'.

"(b) *Newspapers.* The Defendant advertises regularly in the Wilmington Morning News and the Wilmington Journal every evening. It also advertises occasionally in the Wilmington Sunday Star. All of these newspapers are published in Wilmington and

undoubtedly have some circulation in some portions of Maryland. The volume of such circulation is unknown to either the Plaintiff or the Defendant. In its newspaper advertising the Defendant has never used advertising copy which mentions Maryland customers or is prepared for the purpose of directly or indirectly making any special appeal to the Maryland customers. No advertising has ever been done by the Defendant in any newspapers published in Maryland.

"(c) *Use of the Mails.* The Defendant uses an automatic card mailing system and with this system distributes about four pieces a year. These mailing pieces go out to everyone who has purchased from the Defendant and whose name and address is on the Defendant's records. This means that Maryland residents do receive these mailing pieces, but no specific advertising copy has ever been sent through the mails for the specific purpose of attracting Maryland buyers. No advertising copy has been sent to Maryland buyers alone and the only advertising copy which these Maryland buyers receive is that which is sent to all customers whose names and addresses are on the records.

"4. Defendant has made and does make certain sales of tangible personal property, some of which sales being the subject matter of this action, to residents of the State of Maryland, who have used, consumed or stored or will use, consume or store the purchased personal property in the State of Maryland.

"5. The transactions between the Defendant and the said Maryland purchasers are and have been as follows:

"(a) It is the Defendant's policy never to accept telephone orders. Most of the merchandise sold by the Defendant requires personal inspection and selection, and it is for this reason that telephone orders are refused. The Defendant maintains no mail-order business and does not make use of coupons in connection with its newspaper advertising.

"(b) The purchaser appears at Defendant's retail store, located in Wilmington, Delaware. In about thirty per cent (30%) of the sales the exact item selected by the customer is tagged in the store and that same item is delivered to the customer from the store, in Wilmington, Delaware. In the remainder of the sales, an item identical to that selected by the customer is delivered from the Defendant's storeroom or warehouse in Wilmington, Delaware.

"(c) Delivery is made in one of three ways and no other:

"(1) The article is taken away by the purchaser. Within the taxable period of July 1, 1947, through December 31, 1951, tangible

personal property sold for at least $2,500 was delivered in this manner.

"(2) The article is delivered in Maryland to the purchaser in a motor vehicle owned and operated by Defendant, directly from Defendant's store in Wilmington, Delaware, to the residence of the Maryland purchaser. The cost of the delivery in such a case is borne by Defendant and no charge therefor is made to the purchaser. Within the taxable period July 1, 1947, through December 31, 1951, tangible personal property sold for at least $8,000 was delivered in this manner.

"(3) The article is delivered in Maryland to the purchaser by common carrier to which delivery is made by Defendant in Wilmington, Delaware. Such common carrier is usually an independent trucking line authorized to do business as a commercial carrier by the Interstate Commerce Commission. The cost of the delivery in such a case is borne by the Defendant and no charge therefor is made to the purchaser. Within the taxable period July 1, 1947, through December 31, 1951, tangible personal property sold for at least $1,500 was delivered in this manner.

"6. (a) Payment for some purchases is completed at the time the purchaser appears at the Defendant's retail store and prior to the delivery.

"(b) The Defendant does make sales to some Maryland residents on credit in exactly the same way as it sells to Delaware residents on credit. In the case of most of such credit sales to Maryland customers, the Defendant enters into conditional sales contracts with its Maryland customers in the same way that it enters into conditional sales contracts with its Delaware customers. In many other instances, the Defendant notes the terms of the credit transaction on the sales slip without requiring a conditional sales agreement, and this method of business is used without any distinction between Maryland and Delaware customers. This method is frequently designated as a 60 or 90-day charge account. At no time within the past eight years has the Defendant ever recorded its conditional sales contracts in Maryland.

"(c) The Defendant has never repossessed by legal process any furniture or other merchandise for any customers in Maryland or elsewhere within the last fifteen years. The Defendant has on occasion accepted back merchandise which has not been satisfactory to the customer. In the event of delinquency in payments, the Defendant uses collection letters, which are sent through the mails. During the past ten years the Defendant has never instituted legal

action through a Magistrate's or other Court in Maryland, nor has it in that period used a collection agent in Maryland. The Defendant employs no collectors. The Maryland customers make payments to the Defendant personally at the store in Wilmington, Delaware, or by check, cash or money order sent through the mails.

"(d) No C. O. D. deliveries are made.

"7. Except to the extent, if any, disclosed above, Defendant does not maintain, occupy or use, nor has it ever in the past maintained, occupied or used, permanently or temporarily, directly or indirectly, or through a subsidiary or agent, by whatever name called, any office, branch, place of distribution, sales or sample rooms or place, warehouse or storage place, or other place of business in the State of Maryland.

"8. Except to the extent, if any, disclosed above, Defendant does not have, nor has it ever had, any representative, agent, salesman, canvasser or solicitor operating in the State of Maryland for the purpose of selling or taking any orders for tangible personal property, or delivering the same.

"9. Defendant is not, nor has it ever been, qualified or registered to do business in the State of Maryland.

"10. On or about March 10, 1952, the Comptroller of the State of Maryland assessed a deficiency in Use Tax against the Defendant in the amount of $356.40, $240.00 thereof representing the use tax claimed to be due, $32.40 thereof as interest claimed to be due and $84.00 thereof as a penalty claimed to be due for the tax period from July 1, 1947, through December 31, 1951, based upon all the sales referred to in paragraph 5 above.

"11. Defendant has not applied for a permit nor been authorized by the Comptroller to collect any use tax under Section 312 of Article 81 of the Annotated Code of Maryland (1947 Supp.).

"12. Defendant has not applied for, nor paid the license fee required to obtain, nor has been issued, a license pursuant to Sections 331–333 of Article 81 of the Annotated Code of Maryland (1947 Supp.).

"13. Except as indicated above, Defendant does not engage and has not engaged in any activities in the State of Maryland."

[5] Criz, The Use Tax, 1 (Public Administration Service No. 78, 1941); Hellerstein, State and Local Taxation (1952), 4–12, 338; Haig and Shoup, The Sales Tax in the American States (1934), 83.

[6] Criz, *supra*, at 3–4, 36–39. For an example of the revenue features in a particular state, see McLees, The Use Tax After One Year, 4 Ark. L. Rev. 337, 339 (1950).

[7] Criz, *supra*, at 1–2; Hellerstein, *supra*, at 116, 408–409, 418; Jacoby, Retail Sales Taxation (1938), c. VI.

[8] *Maguire* v. *Trefry*, 253 U. S. 12; *Lawrence* v. *State Tax Comm'n*, 286 U. S. 276; *New York ex rel. Cohn* v. *Graves*, 300 U. S. 308; *Guaranty Trust Co.* v. *Virginia*, 305 U. S. 19.

The collection of cases in footnotes 8 through 20 is not intended as a guide to their holdings but only as an illustration of the types of jurisdictional standards sanctioned at one time or another by the Court.

[9] Most of these cases deal with intangible property and apply the maxim *mobilia sequuntur personam*. *Kirtland* v. *Hotchkiss*, 100 U. S. 491; *Darnell* v. *Indiana*, 226 U. S. 390; *Hawley* v. *City of Malden*, 232 U. S. 1; *Fidelity & Columbia Trust Co.* v. *Louisville*, 245 U. S. 54; *Citizens National Bank* v. *Durr*, 257 U. S. 99; *Klein* v. *Board of Tax Supervisors*, 282 U. S. 19, 24; *Greenough* v. *Tax Assessors of Newport*, 331 U. S. 486. See *Nevada Bank* v. *Sedgwick*, 104 U. S. 111; *Bonaparte* v. *Tax Court*, 104 U. S. 592, 595; *Sturges* v. *Carter*, 114 U. S. 511, 521; *Dewey* v. *Des Moines*, 173 U. S. 193; *Kidd* v. *Alabama*, 188 U. S. 730, 731.

[10] *Blackstone* v. *Miller*, 188 U. S. 189; *Bullen* v. *Wisconsin*, 240 U. S. 625; *Blodgett* v. *Silberman*, 277 U. S. 1; *Farmers Loan & Trust Co.* v. *Minnesota*, 280 U. S. 204; *Baldwin* v. *Missouri*, 281 U. S. 586; *Beidler* v. *South Carolina Tax Comm'n*, 282 U. S. 1; *First National Bank* v. *Maine*, 284 U. S. 312; *Curry* v. *McCanless*, 307 U. S. 357; *Graves* v. *Elliott*, 307 U. S. 383; *Graves* v. *Schmidlapp*, 315 U. S. 657; *Central Hanover Bank & Trust Co.* v. *Kelly*, 319 U. S. 94. See *Carpenter* v. *Pennsylvania*, 17 How. 456; *Wachovia Bank & Trust Co.* v. *Doughton*, 272 U. S. 567; *Burnet* v. *Brooks*, 288 U. S. 378, 400–405. Cf. *Worcester County Trust Co.* v. *Riley*, 302 U. S. 292; *Pearson* v. *McGraw*, 308 U. S. 313. See also *Keeney* v. *Comptroller of New York*, 222 U. S. 525, 537, which involved an excise tax on an *inter vivos* transfer of stocks and bonds.

[11] The Court has never had a case in which a state attempted a direct tax on land located in another state. See *Union Refrigerator Transit Co.* v. *Kentucky*, 199 U. S. 194, 204. Instead, the cases in point speak of the problem by way of dicta or deal with interests attached to the realty, such as incorporeal hereditaments. See *Witherspoon* v. *Duncan*, 4 Wall. 210; *State Tax on Foreign-Held Bonds*, 15 Wall. 300, 319; *Savings & Loan Society* v. *Multnomah County*, 169 U. S. 421; *Paddell* v. *City of New York*, 211 U. S. 446; *First National Bank* v. *Maine*, 284 U. S. 312, 326; *Senior* v. *Braden*, 295

U. S. 422. Cf. *Louisville & Jeffersonville Ferry Co.* v. *Kentucky,* 188 U. S. 385; *Central R. Co.* v. *Jersey City,* 209 U. S. 473.

[12] *Coe* v. *Errol,* 116 U. S. 517, 524; *Adams Express Co.* v. *Ohio State Auditor,* 165 U. S. 194, 226–227; *American Refrigerator Transit Co.* v. *Hall,* 174 U. S. 70; *Union Refrigerator Transit Co.* v. *Lynch,* 177 U. S. 149; *Carstairs* v. *Cochran,* 193 U. S. 10; *Old Dominion S. S. Co.* v. *Virginia,* 198 U. S. 299; *Hannis Distilling Co.* v. *Mayor and City Council,* 216 U. S. 285; *Johnson Oil Refining Co.* v. *Oklahoma ex rel. Mitchell,* 290 U. S. 158; *City Bank Farmers Trust Co.* v. *Schnader,* 293 U. S. 112; *Ott* v. *Mississippi Valley Barge Line Co.,* 336 U. S. 169. See *Hays* v. *Pacific Mail S. S. Co.,* 17 How. 596; *St. Louis* v. *Ferry Co.,* 11 Wall. 423; *Morgan* v. *Parham,* 16 Wall. 471; *Gloucester Ferry Co.* v. *Pennsylvania,* 114 U. S. 196, 210–211; *Marye* v. *Baltimore & O. R. Co.,* 127 U. S. 117, 123; *Pullman's Palace Car Co.* v. *Pennsylvania,* 141 U. S. 18, 22; *Pittsburgh, C., C. & St. L. R. Co.* v. *Backus,* 154 U. S. 421, 427–428; *Henderson Bridge Co.* v. *Henderson City,* 173 U. S. 592, 609, 613, 622 (bridge); *Diamond Match Co.* v. *Ontonagon,* 188 U. S. 82; *Fargo* v. *Hart,* 193 U. S. 490; *Delaware, L. & W. R. Co.* v. *Pennsylvania,* 198 U. S. 341; *Union Refrigerator Transit Co.* v. *Kentucky,* 199 U. S. 194; *Thompson* v. *Kentucky,* 209 U. S. 340, 347; *Gromer* v. *Standard Dredging Co.,* 224 U. S. 362, 371–372; *Wells, Fargo & Co.* v. *Nevada,* 248 U. S. 165, 167; *Union Tank Line Co.* v. *Wright,* 249 U. S. 275; *Frick* v. *Pennsylvania,* 268 U. S. 473; *Treichler* v. *Wisconsin,* 338 U. S. 251; *Standard Oil Co.* v. *Peck,* 342 U. S. 382. Whether the property is sufficiently situated in the state to become part of the general mass of taxable property or whether it is merely in transit is frequently treated as an interstate commerce question rather than a jurisdictional one. *E. g., Brown* v. *Houston,* 114 U. S. 622, 632–633; *Pittsburg & Southern Coal Co.* v. *Bates,* 156 U. S. 577, 588–589; *Kelley* v. *Rhoads,* 188 U. S. 1; *General Oil Co.* v. *Crain,* 209 U. S. 211; *Champlain Realty Co.* v. *Brattleboro,* 260 U. S. 366. As to the situs of personalty within various counties of a single state, see *Columbus Southern R. Co.* v. *Wright,* 151 U. S. 470.

[13] *Tappan* v. *Merchants' National Bank,* 19 Wall. 490, 499–500; *Adams Express Co.* v. *Ohio State Auditor,* 166 U. S. 185; *New Orleans* v. *Stempel,* 175 U. S. 309; *Bristol* v. *Washington County,* 177 U. S. 133; *State Board of Assessors* v. *Comptoir National D'Escompte,* 191 U. S. 388; *Metropolitan Life Ins. Co.* v. *New Orleans,* 205 U. S. 395; *Liverpool & London & Globe Ins. Co.* v. *Board of Assessors,* 221 U. S. 346; *Orient Ins. Co.* v. *Board of Assessors,* 221 U. S. 358; *Wheeler* v. *Sohmer,* 233 U. S. 434; *Rogers* v. *Hennepin County,* 240

U. S. 184; *Iowa* v. *Slimmer,* 248 U. S. 115; *Safe Deposit & Trust Co.* v. *Virginia,* 280 U. S. 83; *Virginia* v. *Imperial Coal Sales Co.,* 293 U. S. 15; *Wheeling Steel Corp.* v. *Fox,* 298 U. S. 193; *New York ex rel. Whitney* v. *Graves,* 299 U. S. 366; *First Bank Stock Corp.* v. *Minnesota,* 301 U. S. 234. See *Railroad Co.* v. *Jackson,* 7 Wall. 262; *Adams Express Co.* v. *Kentucky,* 166 U. S. 171; *Scottish Union & National Ins. Co.* v. *Bowland,* 196 U. S. 611, 619–620; *Buck* v. *Beach,* 206 U. S. 392; *Selliger* v. *Kentucky,* 213 U. S. 200; *Brooke* v. *City of Norfolk,* 277 U. S. 27. Cf. *Board of Assessors* v. *New York Life Ins. Co.,* 216 U. S. 517, 523. In some of these cases, the property would appear to be tangible as well as intangible in nature.

[14] This is generally discussed as an interstate commerce question. *E. g., Bowman* v. *Continental Oil Co.,* 256 U. S. 642; *Eastern Air Transport, Inc.* v. *South Carolina Tax Comm'n,* 285 U. S. 147; *Gregg Dyeing Co.* v. *Query,* 286 U. S. 472; *Nashville, C. & St. L. R. Co.* v. *Wallace,* 288 U. S. 249; *Edelman* v. *Boeing Air Transport, Inc.,* 289 U. S. 249; *Monamotor Oil Co.* v. *Johnson,* 292 U. S. 86; *Henneford* v. *Silas Mason Co.,* 300 U. S. 577. See also footnote 20.

[15] *New York ex rel. Hatch* v. *Reardon,* 204 U. S. 152, 158–159. See *Department of Treasury* v. *Wood Preserving Corp.,* 313 U. S. 62; *McLeod* v. *J. E. Dilworth Co.,* 322 U. S. 327. Cf. *Sonneborn Bros.* v. *Cureton,* 262 U. S. 506; *Graniteville Mfg. Co.* v. *Query,* 283 U. S. 376 (creation of promissory notes). See also footnote 19.

[16] *Kane* v. *New Jersey,* 242 U. S. 160; *Interstate Busses Corp.* v. *Blodgett,* 276 U. S. 245; *Continental Baking Co.* v. *Woodring,* 286 U. S. 352; *Hicklin* v. *Coney,* 290 U. S. 169. See *Hendrick* v. *Maryland,* 235 U. S. 610; *Clark* v. *Poor,* 274 U. S. 554. Cf. *Sprout* v. *South Bend,* 277 U. S. 163; *Interstate Transit, Inc.* v. *Lindsey,* 283 U. S. 183; *Clark* v. *Paul Gray, Inc.,* 306 U. S. 583; *Bode* v. *Barrett,* 344 U. S. 583.

[17] *Society for Savings* v. *Coite,* 6 Wall. 594, 607; *Delaware Railroad Tax,* 18 Wall. 206, 231; *Henderson Bridge Co.* v. *Kentucky,* 166 U. S. 150; *Corry* v. *Mayor and Council of Baltimore,* 196 U. S. 466; *Ayer & Lord Tie Co.* v. *Kentucky,* 202 U. S. 409; *New York ex rel. New York C. & H. R. R. Co.* v. *Miller,* 202 U. S. 584; *Southern Pacific Co.* v. *Kentucky,* 222 U. S. 63; *Kansas City, F. S. & M. R. Co.* v. *Botkin,* 240 U. S. 227, 232, 235; *Kansas City, M. & B. R. Co.* v. *Stiles,* 242 U. S. 111, 118–119; *Cream of Wheat Co.* v. *County of Grand Forks,* 253 U. S. 325; *Schwab* v. *Richardson,* 263 U. S. 88; *Matson Navigation Co.* v. *State Board of Equalization,* 297 U. S. 441; *Schuylkill Trust Co.* v. *Pennsylvania,* 302 U. S. 506, 514–516; *Newark Fire Ins. Co.* v. *State Board of Tax Appeals,* 307 U. S. 313;

*Northwest Airlines, Inc.* v. *Minnesota,* 322 U. S. 292. See *Baker* v. *Baker, Eccles & Co.,* 242 U. S. 394, 400–401; *Maxwell* v. *Bugbee,* 250 U. S. 525, 539–540; *State Tax Comm'n* v. *Aldrich,* 316 U. S. 174. In many of these cases the company was also doing business in the state of incorporation.

[18] *State Railroad Tax Cases,* 92 U. S. 575, 603; *Horn Silver Mining Co.* v. *New York,* 143 U. S. 305; *Baltic Mining Co.* v. *Massachusetts,* 231 U. S. 68; *St. Louis Southwestern R. Co.* v. *Arkansas,* 235 U. S. 350, 364; *Equitable Life Assurance Society* v. *Pennsylvania,* 238 U. S. 143; *Underwood Typewriter Co.* v. *Chamberlain,* 254 U. S. 113; *Pullman Co.* v. *Richardson,* 261 U. S. 330; *Bass, Ratcliff & Gretton, Ltd.* v. *State Tax Comm'n,* 266 U. S. 271; *Great Northern R. Co.* v. *Minnesota,* 278 U. S. 503; *Great Atlantic & Pacific Tea Co.* v. *Grosjean,* 301 U. S. 412, 424–427; *Atlantic Refining Co.* v. *Virginia,* 302 U. S. 22, 29–31; *Illinois Central R. Co.* v. *Minnesota,* 309 U. S. 157; *Wisconsin* v. *J. C. Penney Co.,* 311 U. S. 435; *International Harvester Co.* v. *Wisconsin Department of Taxation,* 322 U. S. 435; *International Harvester Co.* v. *Evatt,* 329 U. S. 416, 420–421; *Interstate Oil Pipe Line Co.* v. *Stone,* 337 U. S. 662, 667–668. See *Erie R. Co.* v. *Pennsylvania,* 21 Wall. 492; *Western Union Telegraph Co.* v. *Attorney General,* 125 U. S. 530, 548; *Maine* v. *Grand Trunk R. Co.,* 142 U. S. 217, 227–228; *Central Pacific R. Co.* v. *California,* 162 U. S. 91, 126; *Western Union Telegraph Co.* v. *Missouri ex rel. Gottlieb,* 190 U. S. 412; *Western Union Telegraph Co.* v. *Kansas ex rel. Coleman,* 216 U. S. 1, 30, 38; *Pullman Co.* v. *Kansas ex rel. Coleman,* 216 U. S. 56, 61–63; *Ludwig* v. *Western Union Telegraph Co.,* 216 U. S. 146, 162–163; *Atchison, T. & S. F. R. Co.* v. *O'Connor,* 223 U. S. 280, 285; *Provident Savings Life Assurance Society* v. *Kentucky,* 239 U. S. 103; *Looney* v. *Crane Co.,* 245 U. S. 178, 187–188; *International Paper Co.* v. *Massachusetts,* 246 U. S. 135; *Wallace* v. *Hines,* 253 U. S. 66; *Southern R. Co.* v. *Watts,* 260 U. S. 519, 527; *Baker* v. *Druesedow,* 263 U. S. 137; *Air-Way Electric Appliance Corp.* v. *Day,* 266 U. S. 71, 81–82; *Alpha Portland Cement Co.* v. *Massachusetts,* 268 U. S. 203, 217–218; *Rhode Island Hospital Trust Co.* v. *Doughton,* 270 U. S. 69; *Hans Rees' Sons, Inc.* v. *North Carolina ex rel. Maxwell,* 283 U. S. 123; *Connecticut General Life Ins. Co.* v. *Johnson,* 303 U. S. 77; *Wisconsin Gas & Electric Co.* v. *United States,* 322 U. S. 526, 530–531. Cf. *Armour & Co.* v. *Virginia,* 246 U. S. 1; *St. Louis & E. St. L. E. R. Co.* v. *Missouri,* 256 U. S. 314, 318; *Rowley* v. *Chicago & Northwestern R. Co.,* 293 U. S. 102; *James* v. *Dravo Contracting Co.,* 302 U. S. 134, 138–140; *Nippert* v. *Richmond,* 327 U. S. 416, 423–424. The same principle applies to indi-

viduals engaged in business within the state. *Ficklen* v. *Shelby County Taxing District,* 145 U. S. 1; *Shaffer* v. *Carter,* 252 U. S. 37; *Travis* v. *Yale & Towne Mfg. Co.,* 252 U. S. 60. See also *Haavik* v. *Alaska Packers Assn.,* 263 U. S. 510, where license and poll taxes were imposed on an individual who was working in Alaska but was not a resident or domiciliary there.

[19] Compare *Norton Co.* v. *Department of Revenue,* 340 U. S. 534, with *International Harvester Co.* v. *Department of Treasury,* 322 U. S. 340; *McGoldrick* v. *Berwind-White Coal Mining Co.,* 309 U. S. 33, and *McGoldrick* v. *Felt & Tarrant Mfg. Co.,* 309 U. S. 70.

[20] Compare *Southern Pacific Co.* v. *Gallagher,* 306 U. S. 167, 180–181, with *General Trading Co.* v. *State Tax Comm'n,* 322 U. S. 335; *Nelson* v. *Sears, Roebuck & Co.,* 312 U. S. 359; *Nelson* v. *Montgomery Ward & Co.,* 312 U. S. 373, and *Felt & Tarrant Mfg. Co.* v. *Gallagher,* 306 U. S. 62.

MR. JUSTICE DOUGLAS, with whom THE CHIEF JUSTICE, MR. JUSTICE BLACK and MR. JUSTICE CLARK concur, dissenting.

The States have been increasingly turning to sales and use taxes to raise the revenues they need to educate, protect, and serve their growing number of citizens. Unless the States can collect a sales or use tax upon goods being purchased out-of-state, there is a fertile opportunity for the citizen who wants state benefits without paying taxes to buy out-of-state. And there are just-across-the-state-line merchants who capitalize upon this opportunity. After today's decision there will be more.

I see no constitutional difficulty in making appellant a tax collector for Maryland under the general principles announced in *General Trading Co.* v. *Tax Commission,* 322 U. S. 335. When appellant's sales clerks make out the sales slips and arrange for the shipment of the purchased goods, they surely will know which are destined for Maryland, which for some other State. Hence to make appellant add the Maryland use tax to the bill when the purchaser requests that the goods be shipped to Maryland is only a minimal burden. Appellant will be paid

for its trouble.[1] If liability were sought to be imposed under circumstances indicating that appellant had been taken by surprise or treated unfairly, different considerations would come into play. But appellant in this case pleads immunity, not ignorance of the Maryland law nor harshness in its application.

This is not a case of a minimal contact between a vendor and the collecting State. Appellant did not sell cash-and-carry without knowledge of the destination of the goods; and its delivery truck was not in Maryland upon a casual, nonrecurring visit. Rather there has been a course of conduct in which the appellant has regularly injected advertising into media reaching Maryland consumers and regularly effected deliveries within Maryland by its own delivery trucks and by common carriers.[2]

Jurisdiction over appellant in this suit was obtained when its motor vehicle was attached while it was being used in Maryland. *Pennoyer* v. *Neff,* 95 U. S. 714; *Ownbey* v. *Morgan,* 256 U. S. 94. If appellant chooses to keep out of Maryland entirely, then the Maryland courts will of course have no jurisdiction over it. But as long as appellant chooses to do some business there, I see nothing in the Due Process Clause which would prevent Maryland from making it a collector for taxes on sales which appellant knows are destined for Maryland homes.

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[1] The Maryland statute provides that the vendor-collector may retain 3 percent of the gross tax as compensation for collection and remittance expenses. Flack's Md. Ann. Code, 1951, Art. 81, § 384.

[2] The parties stipulated that appellant advertises in Maryland, both by Delaware newspapers which circulate across the state line and by direct mail to Maryland customers. It was also stipulated that, over a four-and-a-half-year period, at least $12,000 worth of merchandise was sold by appellant to Maryland purchasers for Maryland use. Approximately two-thirds of this merchandise was delivered by appellant to its Maryland customers in a motor vehicle owned and operated by appellant.

# RAILWAY EXPRESS AGENCY, INC. *v.* VIRGINIA.

APPEAL FROM THE SUPREME COURT OF APPEALS OF VIRGINIA.

No. 163. Argued January 5, 1954.—Decided April 5, 1954.

A Virginia statute provides a separate and detailed system of taxation for express companies. In addition to "taxes on property of express companies," it provides that, "for the privilege of doing business in this State," express companies shall pay an "annual license tax" upon gross receipts earned in the State "on business passing through, into or out of this State." *Held:* The gross-receipts tax is in fact and effect a privilege tax, and its application to a foreign corporation doing an exclusively interstate business violates the Commerce Clause of the Federal Constitution. Pp. 360–369.

(a) In a case involving the line between permissible state taxation of property at its full value, including going-concern value, and prohibited taxation of gross receipts from interstate commerce, neither the state courts nor the legislature, by giving the tax a particular name or by the use of some form of words, can relieve this Court of its duty to consider the nature and effect of the tax, in which inquiry this Court is concerned only with the practical operation of the tax. P. 363.

(b) When assessing tangible property, the State has the right to use any fair formula which will give effect to the intangible factors which influence real values, but that is not what the State did here. P. 364.

(c) The practical effect of the challenged tax conforms to its statutory description as one whose impact is squarely upon gross receipts without consideration of their relation to the value of any of the classes of property recognized elsewhere in the statute. Pp. 364–369.

(d) Local incidents such as gathering up or putting down interstate commodities as an integral part of their interstate movement are not adequate grounds for a state license, privilege or occupation tax. Pp. 367–368.

(e) *Baltimore Steam Packet Co.* v. *Virginia,* 343 U. S. 923, and *Norfolk, B. & C. Line* v. *Virginia,* 343 U. S. 923, distinguished. Pp. 368–369.

194 Va. 757, 75 S. E. 2d 61, reversed.

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The Supreme Court of Appeals of Virginia sustained the constitutionality of a state tax as applied to appellant. 194 Va. 757, 75 S. E. 2d 61. On appeal to this Court, *reversed and remanded,* p. 369.

*Thomas B. Gay* argued the cause for appellant. With him on the brief were *J. H. Mooers, W. H. Waldrop, Jr.* and *H. Merrill Pasco.*

*Frederick T. Gray,* Assistant Attorney General of Virginia, argued the cause for appellee. With him on the brief was *J. Lindsay Almond, Jr.,* Attorney General.

Opinion of the Court by MR. JUSTICE JACKSON, announced by MR. JUSTICE REED.

This appeal from the Supreme Court of Appeals of Virginia presents another variation in the seemingly endless problems raised by efforts of the several states to tax commerce as it moves among them.

In the 1920's the railroads of the country took over the express business theretofore separately handled. Their instrumentality was this appellant, a Delaware corporation, chartered for interstate and intrastate operation throughout the Union and actually so operating in every state except Virginia. It sought to do a general express business there, but that State has a constitutional provision which forbids a foreign corporation to exercise any public-service powers or functions therein.[1] This prohibition was invoked by the State Corporation Commission [2] to deny appellant authority to do any intrastate business. This exclusion was sustained by Virginia's highest court [3] and by this Court.[4]

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[1] Va. Const., Art. XII, § 163.

[2] Case No. 3900, Virginia Corporation Commission Report (1929), p. 252.

[3] *Railway Express Agency, Inc.* v. *Commonwealth ex rel. State Corporation Comm'n,* 153 Va. 498, 150 S. E. 419.

[4] 282 U. S. 440.

As a consequence of the State's own policy, this appellant does no business in Virginia which the State has power to prohibit but does only such as it can conduct under protection of the Commerce Clause of the Federal Constitution. To handle such intrastate express as falls within the power of the State to control, a separate Virginia subsidiary necessarily was organized. That local company annually has been assessed and has paid the type of tax here in controversy, based upon its total gross receipts. Those payments are not before us.

Virginia provides by statute [5] a separate and detailed system of taxation for express companies. It allocates

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[5] The tax in question is laid under Va. Code, 1950, § 58–547. This section and the section immediately preceding it read as follows:

"§ 58–546. Taxes on property of express companies.—Each and every one of the express companies doing business in this State shall, on or before the first day of October of each and every year, pay to the State and to the several counties, cities and towns of the State wherein they may have taxable properties located, the taxes levied on such property as follows:

"(1) The State tax on the intangible personal property (other than shares of stock, and bonds issued by counties, cities and towns or other political subdivisions of this State) owned by every such company shall be at the rate of fifty cents on every one hundred dollars of the assessed value thereof;

"(2) The State tax on the money of every such company shall be twenty cents on every one hundred dollars of the assessed value thereof;

"(3) There shall be no local levies assessed on such intangible personal property or money;

"(4) On the real estate and tangible personal property of every such company there shall be local levies at the same rate or rates as are assessed upon other real estate and tangible personal property located in such localities, the proceeds of which local levies shall be applied as is provided by law.

"The provisions of this section shall apply to the assessment for the tax year nineteen hundred forty-nine and annually thereafter, unless otherwise provided by law.

"§ 58–547. Annual license tax.—Every such company, for the privilege of doing business in this State, in addition to the annual regis-

to state taxation, free of all local levies, two kinds of property, *viz.*, intangible personal property and money. It sets off real estate and tangible personal property for local levies at the same rates as other similar properties. These, taxable at different rates, are all included in the statute under the rubric "Taxes on property of express companies." Then follows a section headed "Annual license tax" providing that "for the privilege of doing business in this State" express companies shall pay "in addition to . . . the property tax as herein provided" an "annual license tax" upon gross receipts earned in the State "on business passing through, into or out of this State."

Appellant has protested the gross-receipts tax, and for some years the protesting company and the state authorities appear to have come together on a compromise formula, as to the portion of receipts attributable to Virginia, the details of which need not concern us, since it does not affect the issue of power now adequately raised, passed upon by the State Corporation Commission and the Supreme Court of Appeals and duly brought before us.

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tration fee and the property tax as herein provided, shall pay an annual license tax as follows:

"The tax shall be equal to two and three-twentieths per centum upon the gross receipts from operations of such companies and each of them within this State. When such companies are operating partly within and partly without this State, the gross receipts within this State shall be deemed to be all receipts on business beginning and ending within this State and all receipts earned in this State on business passing through, into or out of this State; provided, unless otherwise clearly shown, such last-mentioned receipts shall be deemed to be that portion of the total receipts from such business which the entire mileage over which such business is done bears to the mileage operated within this State.

"The provisions of this section shall apply to the assessment for the tax year nineteen hundred forty-nine and annually thereafter, unless otherwise provided by law."

Since admittedly the State did not grant any privilege but on the contrary denied every privilege in its power to withhold, and since it concedes that appellant does nothing within the State except interstate commerce, appellant contends that the assessment is invalid for contravention of the Commerce Clause of the Federal Constitution.

The State counters with the contention that we should regard this, not as a privilege tax, even though it was labeled as such by the statute imposing it, but, instead, as a property tax measured by gross income and laid on the intangible value of good-will or going-concern status. The Corporation Commission said that the physical properties were assessed at dead value or bare-bones value for local taxation, while here the "live, or going concern value" is being separately taxed by the State "for the protection and services rendered by it." [6] The State's highest court approved. While great respect is due these conclusions, it has long been held that in a case involving the line between permissible state taxation of property at its full value, including going-concern value, and prohibited taxation of gross receipts from interstate commerce, "neither the state courts nor the legislatures, by giving the tax a particular name or by the use of some form of words, can take away our duty to consider its nature and effect," *Galveston, H. & S. A. R. Co.* v. *Texas,* 210 U. S. 217, 227, in which inquiry "we are concerned only with its practical operation." *Lawrence* v. *State Tax Comm'n,* 286 U. S. 276, 280. See *Wisconsin* v. *J. C. Penney Co.,* 311 U. S. 435, 443–444.

We start with the taxing statute, in which the Legislature gave a trinity of characterizations to the tax. It

[6] Cases Nos. 10,629 and 10,767, Virginia Corporation Commission Report (1952). The Commission was quoting from the opinion of the Supreme Court of Appeals in *Commonwealth* v. *Baltimore Steam Packet Co.,* 193 Va. 55, 70, 68 S. E. 2d 137, 147.

was declared to be in addition to the "property tax," not an additional property tax; it was named "an annual license tax," and it was laid "for the privilege of doing business in this State." It is not an easy conclusion that the Legislature did not know the actual character of the tax it was laying or that it misconceived what it was taxing. If the tax was in purpose and effect one on property, tangible or intangible, no reason is apparent for casting it in the mold of a privilege tax. Indeed, as the Corporation Commission finally said, the opposite is true, and some other basis for the tax must be found if it is to be saved as valid. This both the Commission and the court below sought to do.

The Virginia court, in this and earlier cases, considered that gross earnings measure the value of a good-will or going-concern element which is a separate intangible property of the company.

Of course, we have held, and it is but common sense to hold, that a physical asset may fluctuate in value according to the income it can be made to produce. A live horse is worth more than a dead one, though the physical object may be the same, and a smooth-going automobile is worth more than an unassembled collection of all its parts. The physical facilities used in carrying on a prosperous business are worth more than the same assets in bankruptcy liquidation or on sale by the sheriff. No one denies the right of the State, when assessing tangible property, to use any fair formula which will give effect to the intangible factors which influence real values. *Adams Express Co.* v. *Ohio State Auditor,* 166 U. S. 185. But Virginia has not done this.

Instead, the practical effect of the tax conforms to its statutory description as one whose impact is squarely upon gross receipts without consideration of their effect on the value of any of the classes of property recognized else-

where in the statute. A summary of appellant's total taxation for 1951 will illustrate this point.[7] It reported money on deposit in Virginia of $109,906.38, on which it paid a tax of $219.81 at the rate of twenty cents per $100. We may drop this item from consideration of additional going-concern value, for money is money and is a medium of exchange which does not deflate or inflate according to the owner's use of it. A dollar to an express company is worth as much as and no more than a dollar to one of its employees. But this company had real property and tangible personal property, items no doubt possessing a going-concern as well as an intrinsic value. These properties were assessed at $129,279, on which it paid taxes of $3,389.65 at local rates, probably varied but averaging 2.6 per centum.

[7] The figures discussed in the text are summarized in the following chart for the year 1951.

| Types of Property Taxed | Statutory Tax Rate | Assessed Value of Appellant's Property | Taxes Paid by Appellant |
|---|---|---|---|
| 1. Intangible personal property | 50¢ on every $100 | Unknown ($13,290,942.00 if disputed tax is intangible property tax) | Unknown ($66,454.71 if disputed tax is intangible property tax) |
| 2. Money | 20¢ on every $100 | $109,906.38 | $219.81 |
| 3. Real estate and tangible personal property | Local levies (average of 2.6 per centum) | $129,279.00 | $3,389.65 |
| 4. Gross receipts | 2⅔₀ per centum | $3,090,916.55 | $66,454.71 |

Appellant's tax, under the questioned portion of the statute, amounted to $66,454.71, so that its *tax* on a gross-receipts basis was over fifty percent of the *total value* of its real and tangible personal property. It is this tax which Virginia says is really a tax on the intangible value of this tangible property.

Neither the state court nor the Commission has seen fit to state any amount which it considers to be the going-concern valuation. We know the amount of the tax, and we know the rates of taxation, and from that can compute a possible valuation base. If this going-concern value be treated as separable "intangible property," the statutory rate is fifty cents per $100, at which rate tangible property worth only $129,279 must be deemed to have an intangible going-concern value of $13,290,942. In other words, every dollar invested in the tangible property of an express business is deemed worth over $100 for tax purposes. This may not overtax the express company, but it does overtax our credulity, and neither the court nor the Commission, while treating this as an intangible, expressly treated it as entitled to the intangible property rate or classification.

But the $66,454.71 of tax and the statutory gross-earnings tax rate of 2 3/20 per centum produce a base of $3,090,916.55, which is exactly the amount of gross revenues reported by appellant. To ascribe a going-concern value of over three million dollars to tangible property of $129,279 is on its face an extreme attribution. To base the value on appellant's gross revenues is to assume that every dollar of annual intake adds a dollar of intangible value to the company's assets regardless of how much it cost in labor, interest and other expense, including other taxes, to produce it. On the other hand, as a forthright tax on gross receipts, the tax involves no irrational or impractical assumption.

We have sustained and would now sustain the power of a state to tax, without discrimination, all property within its jurisdiction and to include in its assessment, or to assess separately, the value added by the property's assemblage into a going business, even if that business be solely interstate commerce. Cf. *Meyer* v. *Wells, Fargo & Co.,* 223 U. S. 298; *Baker* v. *Druesedow,* 263 U. S. 137; *Adams Express Co.* v. *Ohio State Auditor,* 166 U. S. 185. The impact of the tax is thus upon the proportionate total worth of the property. But the tax in dispute here does not depend on owning any physical property, nor upon the value thereof, but would be levied on gross revenues even if the company found some way to dispense with all local, physical property. The fact that its measure is gross revenue is consistent with a tax on the privilege of doing a volume of business which would yield that revenue, just as the Legislature indicated. But we have declined to regard mere gross receipts as a sound measure of going-concern value in a practical world of commerce, where values depend on profitableness of a business, not merely its volume. Cf. *United States Glue Co.* v. *Oak Creek,* 247 U. S. 321, 328–329.

Here the State excises every receipt from movement of express in interstate commerce. It takes a portion of gross revenue from "all receipts earned in this State on business passing through, into or out of this State." It contends that this obvious burden on interstate commerce is validated by state protection of a localized incident in the course of the business. The three incidents are originating the interstate movement, which requires local pickup of the parcels; terminating the movement, which requires delivery, and movement through the State. If each of these incidents is sufficient warrant for taxing gross revenues from wholly interstate commerce, a concern doing a nationwide business is vulnerable to a gross-revenue tax in every one of the forty-eight states. But

it is argued that this is permissible, provided the states formulate their burden so as each to burden it proportionately, not encroaching on the other's right to burden. It is enough to say that we recently have ruled that local incidents such as gathering up or putting down interstate commodities as an integral part of their interstate movement are not adequate grounds for a state license, privilege or occupation tax. *Spector Motor Service, Inc.* v. *O'Connor,* 340 U. S. 602; *Memphis Steam Laundry Cleaner, Inc.* v. *Stone,* 342 U. S. 389; *Michigan-Wisconsin Pipe Line Co.* v. *Calvert,* 347 U. S. 157; *New Jersey Bell Telephone Co.* v. *State Board,* 280 U. S. 338.

The Supreme Court of Appeals placed reliance upon our dismissal of the appeals in *Baltimore Steam Packet Co.* v. *Virginia,* 343 U. S. 923, and *Norfolk, Baltimore & Carolina Line* v. *Virginia,* 343 U. S. 923, and may well have been misled, since we assigned no reasons and cited no authority. In those cases, the Virginia court held an almost identical tax to be a property tax. *Commonwealth* v. *Baltimore Steam Packet Co.,* 193 Va. 55, 68 S. E. 2d 137.[8] But a vital distinction, so far as our jurisdiction is concerned, will account for dismissal of the appeals. One of those appellants was a Virginia corporation and derived its privilege to exist from that State. Both were engaged in intrastate as well as interstate commerce and were therefore subject to some privilege tax from the State. For our purposes, it mattered not whether the

[8] The Corporation Commission commented on the *Baltimore Steam Packet* case in this manner: "So, when the Virginia Supreme Court of Appeals held that the license taxes on steamship and express companies were property taxes, all danger of an adverse decision in the Supreme Court of the United States was averted, and that court dismissed the appeal without comment, presumably on the ground that no federal question worth discussing was involved." Cases Nos. 10,629 and 10,767, Virginia Corporation Commission Report (1952).

right to tax was based on those companies' privileges or on their property, since they were taxable on either basis. This fact distinguishes those dismissed cases from the one at bar and from *Spector Motor Service, Inc.* v. *O'Connor, supra.* Those appeals did not question the fairness of apportionment of revenues between the interstate and intrastate business so as to require such consideration as we gave in *Central Greyhound Lines* v. *Mealey,* 334 U. S. 653. It was therefore a mistake to assume that this Court, by dismissal of the appeals, approved the holding of the Virginia court that this statute imposes what in reality is a property tax though otherwise named and shaped.

We think we can only regard this tax as being in fact and effect just what the Legislature said it was—a privilege tax, and one that cannot be applied to an exclusively interstate business.

The judgment is reversed and the cause remanded for any further proceeding not inconsistent herewith.

*Reversed and remanded.*

MR. JUSTICE CLARK, whom THE CHIEF JUSTICE, MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS join, dissenting.

The tax in question is nondiscriminatory, fairly apportioned, and not excessive. That much is conceded by appellant. Whatever the Court's mathematics may prove, it does not establish that the tax is unfair in any respect. In *Spector Motor Service, Inc.* v. *O'Connor,* 340 U. S. 602, 610–615 (1951), I reasoned that a state tax with such attributes may properly be levied against a corporation which obviously could not engage in interstate commerce in the state without using the facilities and services of the state. I would uphold the tax here on the same grounds. But even accepting the Court's approach in *Spector,* the instant tax is valid.

*Spector* held that a state tax imposed on a foreign corporation engaged solely in interstate commerce for "the privilege of carrying on or doing business in the state" violates the Commerce Clause of the United States Constitution. The "operating incidence" of the tax—"the privilege of carrying on or doing business in the state"—was determined by the state court and not questioned by this Court. That label formed the nub of the Court's rationale in striking down the tax. That decision did not purport to cover a tax bearing a different name. In fact, the Court there specifically noted that the tax was *not* "collected in lieu of an ad valorem property tax"; presumably had such been the case the tax would have been upheld. *Id.*, at 607.

The Supreme Court of Appeals of Virginia has held that the instant tax is an ad valorem tax on intangible property; the "operating incidence" of the tax has been labeled the "going concern" value of appellant's physical assets in Virginia. The state court specifically held that the tax "is not a tax upon the privilege of carrying on a business exclusively interstate in character. . . ." 194 Va. 757, 760–761, 75 S. E. 2d 61, 63. Hence, if we accept the determination of the state court, there is little question but that the tax is valid even under *Spector*.

This Court, however, refuses to accept the Virginia court's determination and assigns to the Virginia tax the same "privilege" label that condemned the tax in *Spector*. Although the Court refused to pierce the label in *Spector*, I do not dispute its right to re-examine a label affixed by a state court. In some cases the label may be wholly inconsistent with the state's taxing scheme; or it may be true—though I doubt it—that a state court might deliberately misbrand a tax to avoid decisions of this Court. But neither fact justifies the Court's refusal to accept the determination of the state court in this case. The name given the tax by the Virginia court meshes with the state's

taxing scheme. And I do not believe that the Virginia court deliberately mislabeled the tax. Indeed, the holding of the state court is perfectly consistent with its earlier expressions on the subject and those of the State Corporation Commission, some antedating *Spector*. *Commonwealth* v. *Baltimore Steam Packet Co.,* 193 Va. 55, 68 S. E. 2d 137 (1951), appeal dismissed, 343 U. S. 923 (1952); *City of Richmond* v. *Commonwealth,* 188 Va. 600, 50 S. E. 2d 654 (1948). Moreover, this Court does not question the existence of a going-concern value aside from the value of a business unit's physical assets. Nor does appellant; in its brief appellant "freely admits that a going business, if operated at a profit or if there is a reasonable expectation of earning a profit on future operations, may have a going concern or what is sometimes called an 'organization' value." Since appellant does not contend that it is not operating at a profit or that it has no reasonable expectation of earning a profit in the future, even it would be forced to admit, as must the majority of this Court, that a substantial element of property values is being immunized from the reach of Virginia's current taxes which are neither excessive nor unfair.

From 1942 until *Spector,* appellant had recognized the validity of the tax and paid it. As a result of the immunity given by today's decision, appellant and others similarly situated receive a windfall in the form of a valid claim for tax refunds extending back as far as limitations will permit. This is the result of today's twist to the *Spector* doctrine. If the label makes the tax invalid, the label is accepted; if the label validates the tax, the Court will pierce the label. This approach is rather hard on the states and creates additional obstacles for them in their continuing effort to make purely interstate business units pay a fair share of the cost of state facilities and services essential to the functioning of these enterprises.

In sum, Virginia's tax should not be held unconstitutional merely because of the name the state's legislature gave it. Since no one asserts that the amount of the tax is unfair or discriminatory, presumably the same tax assessed under a different name by the use of different words would be upheld. The constitutionality of a state's tax laws should not depend on the ability of state legislatures to foresee what tax language would most likely meet this Court's approval.

Syllabus.

# FRANKLIN NATIONAL BANK OF FRANKLIN SQUARE *v.* NEW YORK.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 427. Argued March 9–10, 1954.—Decided April 5, 1954.

Insofar as it forbids national banks to use the word "saving" or "savings" in their business or advertising, the New York statute here involved is invalid, because it conflicts with federal laws expressly authorizing national banks to receive savings deposits and to exercise incidental powers. Pp. 374–379.

(a) The provision of § 24 of the Federal Reserve Act authorizing national banks to "continue hereafter as heretofore to receive time and savings deposits" is declaratory of the right of national banks to enter into or remain in that type of business, and their authority to receive savings deposits is not limited or qualified by the expression "continue hereafter as heretofore." P. 377.

(b) Nor are national banks precluded from advertising for the savings deposits which they are expressly authorized to accept. Pp. 377–378.

(c) Congress did not intend to make this phase of national banking subject to local restrictions because of the special significance attached to the word "savings" in some states. P. 378.

305 N. Y. 453, 113 N. E. 2d 796, reversed.

*Samuel O. Clark, Jr.* argued the cause for appellant. With him on the brief were *F. Gloyd Awalt, W. V. T. Justis, Keith Kelly* and *Sidney Friedman.*

By special leave of Court, *Solicitor General Sobeloff* argued the cause for the United States, as *amicus curiae,* urging reversal. With him on the brief were *Assistant Attorney General Burger, Marvin E. Frankel* and *Melvin Richter.*

*Daniel M. Cohen,* Assistant Attorney General of New York, argued the cause for appellee. With him on the brief were *Nathaniel L. Goldstein,* Attorney General, and *Wendell P. Brown,* Solicitor General.

*Peter Keber* filed a brief for the New York State Bankers Association, as *amicus curiae,* urging reversal.

*Fred N. Oliver* and *Michael F. McCarthy* filed a brief for the Savings Banks Association of the State of New York, as *amicus curiae,* supporting appellee.

Opinion of the Court by MR. JUSTICE JACKSON, announced by MR. JUSTICE FRANKFURTER.

This appeal from the Court of Appeals of New York presents the narrow question whether federal statutes which authorize national banks to receive savings deposits conflict with New York legislation which prohibits them from using the word "saving" or "savings" in their advertising or business. We think the federal and state statutes are incompatible, and in such circumstances the policy of the State must yield.

It is the policy of New York to charter and foster the mutual savings bank, a nonprofit institution whose earnings inure to the benefit of depositors rather than to stockholders. These institutions have a long history as relatively stable and safe depositaries for the accumulations of thrifty New Yorkers and as a source of credit for limited uses. They have grown to be an important part of New York's banking and economic structure. That State also charters the savings and loan association, an institution of a different type, intended to serve somewhat similar ends. The Legislature was concerned lest commercial banks, in seeking to induce deposits of the same character, so use the word "savings" as to lead uninformed and indiscriminating persons to believe that they were dealing with the chartered savings institutions. Hence, by its Banking Law, New York has forbidden use of the word "savings," or its variants, by any banks other than its own chartered savings banks and savings and loan associations.[1]

[1] McKinney's N. Y. Laws, Banking Law, § 258 (1), reads: "No bank, trust company, national bank, individual, partnership, unincorporated association or corporation other than a savings bank or

However, the Federal Government is a rival chartering authority for banks. Since *McCulloch* v. *Maryland,* 4 Wheat. 316, it has not been open to question that the Federal Government may constitutionally create and govern such institutions within the states. The United States has set up a system of national banks as federal instrumentalities to perform various functions such as providing circulating medium and government credit, as well as financing commerce and acting as private depositaries. Some of their functions, especially as a source for federal credit, depend upon their success in attracting private deposits. That these federal institutions may be at no disadvantage in competition with state-created institutions, the Federal Government has frequently expanded their functions and authority. Of such nature are the measures now before us.

The Federal Reserve Act provides that a national bank "may continue hereafter as heretofore to receive time and savings deposits and to pay interest on the same, but the rate of interest which such association may pay upon such time deposits or upon savings or other deposits shall not exceed the maximum rate authorized by law to be paid upon such deposits by State banks or trust com-

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a savings and loan association shall make use of the word 'saving' or 'savings' or their equivalent in its banking or financial business, or use any advertisement containing the word 'saving' or 'savings,' or their equivalent in relation to its banking or financial business, nor shall any individual or corporation other than a savings bank in any way solicit or receive deposits as a savings bank; but nothing herein shall be construed to prohibit the use of the word 'savings' in the name of the Savings and Loan Bank of the State of New York or in the name of a trust company all of the stock of which is owned by not less than twenty savings banks. Any bank, trust company, national bank, individual, partnership, unincorporated association or corporation violating this provision shall forfeit to the people of the state for every offense the sum of one hundred dollars for every day such offense shall be continued."

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panies organized under the laws of the State in which such association is located." [2] The Act authorizes the Board of Governors of the Federal Reserve System to make necessary rules and regulations,[3] which the Board has done by defining such terms as "time deposits" and "savings deposits." [4] The National Bank Act authorizes national banks to receive deposits without qualification or limitation, and it provides that they shall possess "all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of this chapter." [5]

Appellant, believing it was authorized by the Federal Government to do so, used the word "saving" and "savings" in advertising, in signs displayed in the bank, on its deposit and withdrawal slips, and in its annual reports. It is beyond question that appellant violated the State's prohibition if it is a valid one.

The Attorney General of the State initiated this case by a complaint alleging such violations, seeking a broad injunction. The trial accumulated a large record devoted mainly to the merits and demerits of the New York legislation and its consequences upon banks and depositors. The trial court found no purposeful deception of the public. It held that the advertising and other use of the forbidden terms were in pursuit of implied and incidental powers conferred upon national banks by the

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[2] 38 Stat. 273, 44 Stat. 1232, as amended, 12 U. S. C. (1952 ed.) § 371.

[3] 38 Stat. 262, 12 U. S. C. (1952 ed.) § 248 (i). See also 49 Stat. 714, 12 U. S. C. (1952 ed.) § 461.

[4] 12 CFR §§ 204.1, 217.1.

[5] R. S. § 5136, 12 U. S. C. (1952 ed.) § 24 (seventh).

Acts of Congress and that the New York statute in conflict with them must yield. The Appellate Division disagreed and directed a permanent injunction prohibiting the use of the term. The Court of Appeals affirmed, and we noted probable jurisdiction of an appeal.[6]

We are unable to support the contention that the authorization for national banks to receive savings deposits is limited or qualified because of the expression that they may "continue hereafter as heretofore" to do so. It appears that previous to the enactment, acceptance of such accounts by national banks had been usual but was not expressly authorized. We do not think the Federal Reserve Act should be construed to freeze individual banks or those located within any state to the customs and practices preceding the statute. We read the Act as declaratory of the right of a national bank to enter into or remain in that type of business. That has been the administrative construction, and we think it is correct.

Nor can we construe the two Federal Acts as permitting only a passive acceptance of deposits thrust upon them. Modern competition for business finds advertising one of the most usual and useful of weapons. We cannot believe that the incidental powers granted to national banks should be construed so narrowly as to preclude the use of advertising in any branch of their authorized business. It would require some affirmative indication to justify an interpretation that would permit a national

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[6] 200 Misc. 557, 105 N. Y. S. 2d 81, rev'd, 281 App. Div. 757, 118 N. Y. S. 2d 210, aff'd, 305 N. Y. 453, 113 N. E. 2d 796, probable jurisdiction noted, 346 U. S. 908. Appellee included in its complaint a charge that appellant solicited business as a "savings bank." However, the New York Court of Appeals held that there was no evidence of such practice. Therefore, the sole question before this Court relates to appellant's other use of the prohibited words in its advertising or business.

bank to engage in a business but gave no right to let the public know about it.

Appellee does not object to national banks taking savings deposits or even to their advertising that fact so long as they do not use the word "savings." It takes the position that this word is a misnomer in New York because depositors there, as a result of the state statute, have come to think of savings accounts as something entirely different from those to which the Federal Act is referring. Regardless of whether New Yorkers are really misled by the description, the fact is that Congress has given a particular label to this type of account. Whatever peculiar meaning the word may have in New York, it is a word which aptly describes, in a national sense, the type of business carried on by these national banks. They do accept and pay interest on time deposits of people's savings, and they must be deemed to have the right to advertise that fact by using the commonly understood description which Congress has specifically selected. We find no indication that Congress intended to make this phase of national banking subject to local restrictions, as it has done by express language in several other instances.[7]

There appears to be a clear conflict between the law of New York and the law of the Federal Government. We cannot resolve conflicts of authority by our judgment as to the wisdom or need of either conflicting policy. The

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[7] *E. g.*, R. S. § 5155, 12 U. S. C. (1952 ed.) § 36 (c) (establishment of branch banks); R. S. § 5136, 12 U. S. C. (1952 ed.) § 24 (eighth) (contributions to charitable instrumentalities); R. S. § 5153, 12 U. S. C. (1952 ed.) § 90 (security for the deposit of state funds); R. S. § 5197, 12 U. S. C. (1952 ed.) § 85, and part of the section involved in this case, 38 Stat. 273, 44 Stat. 1232, as amended, 12 U. S. C. (1952 ed.) § 371 (interest rates). Even in the absence of such express language, national banks may be subject to some state laws in the normal course of business if there is no conflict with federal law. Cf. *Anderson National Bank* v. *Luckett*, 321 U. S. 233; *McClellan* v. *Chipman*, 164 U. S. 347.

compact between the states creating the Federal Government resolves them as a matter of supremacy.[8] However wise or needful New York's policy, a matter as to which we express no judgment, it must give way to the contrary federal policy.

The judgment of the New York Court of Appeals is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

*Reversed and remanded.*

MR. JUSTICE REED, dissenting.

I dissent. It should be noted that the New York statute, note 1 of the Court's opinion, limits the use of the words "saving" or "savings" in relation to their banking business to certain types of New York financial institutions. These are those that are mutual in character as distinguished from stockholder-owned. Such mutual institutions can and do pay larger returns on deposits in New York than the commercial stock-type banks, state or national, both of which are barred by the New York statute from using the word "savings" "in relation to banking or financial business." The mutual banks have been successful in attracting a large proportion of savings deposits for over a century. They have a remarkable record for soundness in finance and profitable operation for the benefit of the depositors. The purpose of the New York law is to reserve the use of the word "savings" to identify the mutual type of bank operation for the public, just as the federal banking laws reserve the name "national" for a certain type of bank organized under federal law.

The Court's opinion permits the national banks to trade upon the good name of the savings banks to secure de-

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[8] *Easton* v. *Iowa,* 188 U. S. 220, 229–230; *Davis* v. *Elmira Savings Bank,* 161 U. S. 275, 283.

posits of that type. Now they may advertise "A Savings Bank" under their corporate name; their deposit slips may say "Savings Account." As no federal statute expressly authorizes the national banks to use the words "saving" or "savings" in their advertisements, I think they must conform to the New York law for the protection of the public from misunderstanding. I would not imply a federal privilege to use "savings" in advertising from the fact that national banks may accept savings deposits. The cases cited by the Court in note 7 sustain that view. I know of no precedents that approve such a limitation on state power as the Court now announces.

# UNITED STATES *v.* DIXON.

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

No. 500. Argued March 12, 1954.—Decided April 5, 1954.

Section 3116 of the Internal Revenue Code makes it "unlawful" to possess any property intended for use in violating the provisions of "this part" or the internal revenue laws and provides for the seizure and forfeiture of such property. Section 3115 of the same "part" makes punishable by fine or imprisonment or both a violation of "any of the provisions of this part" for which no "special penalty" is provided. *Held:* Read together, §§ 3115 and 3116 make it a criminal offense to possess property intended for use in producing liquor without the payment of taxes thereon in violation of the Code. Pp. 381–386.

(a) A different result is not required by the facts that § 3115 is applicable only where no "special penalty" is provided for the offense and § 3116 provides for the seizure and forfeiture of such property. P. 385.

(b) Nor is a different result required by the fact that § 3116 is captioned "Forfeitures and seizures." Pp. 385–386.

Reversed.

*Philip Elman* argued the cause for the United States. With him on the brief were *Robert L. Stern,* then Acting Solicitor General, *Assistant Attorney General Olney, Beatrice Rosenberg* and *J. F. Bishop.*

No appearance for appellee.

MR. JUSTICE CLARK delivered the opinion of the Court.

The sole question here is whether §§ 3116 and 3115 of the Internal Revenue Code make it a criminal offense to possess property intended for use in producing nontax-paid distilled spirits in violation of the Code. Appellee

was indicted under these sections for wilfully and knowingly possessing 800 pounds of sugar and parts of a still for the proscribed purpose. On motion the District Court, relying on dictum in a court of appeals decision,[1] dismissed the indictment on the ground that § 3116 is "preventative and remedial rather than criminal, and that it does not define a criminal offense." The Government appealed directly to this Court under the Criminal Appeals Act, 18 U. S. C. § 3731. 346 U. S. 930.

Section 3116 of the Internal Revenue Code is captioned "Forfeitures and seizures," and provides in pertinent part: "It shall be unlawful to have or possess any liquor or property intended for use in violating the provisions of this part, or the internal-revenue laws . . . and no property rights shall exist in any such liquor or property. . . . Nothing in this section shall in any manner limit or affect any criminal or forfeiture provision of the internal-revenue laws, or of any other law. . . ." The section also provides for search warrants and for procedure in seizure and forfeiture. Section 3115 bears the caption "Penalties" and provides that anyone violating any of the provisions of "this part" for which offense a special penalty is not prescribed "shall be liable, for the first offense, to a penalty of not exceeding $1,000, or imprisonment not exceeding thirty days, or both . . . ." The

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[1] *Kent* v. *United States,* 157 F. 2d 1 (1946). See also *United States* v. *Windle,* 158 F. 2d 196 (1946). In those cases the Government had invoked only the forfeiture provisions of the section; as applied to such a civil proceeding, characterization of the section as preventative and remedial was obviously accurate. The two reported cases which previously have faced squarely the present question have upheld the indictments. *United States* v. *Blair,* 97 F. Supp. 718 (1951); *United States* v. *Harvin,* 91 F. Supp. 249 (1950). See also *Godette* v. *United States,* 199 F. 2d 331 (1952), in which the present issue apparently was not raised.

two sections are included within the same "part" of the Code.[2]

The appellant's position is that § 3115 makes violation of any of the provisions of "this part" a criminal offense punishable by fine and imprisonment; § 3116 contains a provision making it unlawful to possess property intended

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[2] Part II ("Industrial Alcohol Plants") of Subchapter C ("Industrial Alcohol") of Chapter 26 ("Liquor"). The full text of the two sections is as follows:

"§ 3115. Penalties—(a) Violations as to operation of plants or unlawful withdrawal of taxable alcohol.

"Whoever operates an industrial alcohol plant or a denaturing plant without complying with the provisions of this part and lawful regulations made thereunder, or whoever withdraws or attempts to withdraw or secure tax free any alcohol subject to tax, or whoever otherwise violates any of the provisions of this part or of regulations lawfully made thereunder shall be liable, for the first offense, to a penalty of not exceeding $1,000, or imprisonment not exceeding thirty days, or both, and for a second or cognate offense to a penalty of not less than $100 nor more than $10,000, and to imprisonment of not less than thirty days nor more than one year. It shall be lawful for the Commissioner in all cases of second or cognate offense to refuse to issue for a period of one year a permit for the manufacture or use of alcohol upon the premises of any person responsible in any degree for the violation.

"(b) Violations in general.

"Any person violating the provisions of this part or of any regulations issued thereunder, for which offense a special penalty is not prescribed, shall be liable to the penalty or penalties prescribed in subsection (a). It shall be the duty of the prosecuting officer to ascertain, in the case of every violation of this part or the regulations made thereunder, for which offense a special penalty is not prescribed, whether the defendant has been previously convicted and to plead the prior conviction in the affidavit, information, or indictment.

"(c) Previous conviction.

"If any act or offense is a violation of this part, and also of any other law in regard to the manufacture or taxation of, or traffic in,

for use in violating the provisions of that part or the internal revenue laws; hence the indictment alleging a violation of §§ 3116 and 3115 by such possession charges a crime. We agree and so hold. We think the plain language of the two sections read together can lead only to the conclusion that the acts proscribed in § 3116 not only may result in forfeiture but likewise are made criminal and punishable under the general penalty provisions of § 3115.

The sections here involved were borrowed, with changes insignificant for present purposes, from the National Prohibition Act of 1919, 41 Stat. 305 *et seq.* There the sections appeared as §§ 25 (compare § 3116) and 29 (compare § 3115) of Title II, and presented a statutory pattern virtually identical to the present one. It is most persuasive that the courts consistently upheld criminal prosecutions brought under these sections for the analogous act of possessing property designed for the

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intoxicating liquor, a conviction for such act or offense under the one shall be a bar to prosecution therefor under the other.

"§ 3116. Forfeitures and seizures.

"It shall be unlawful to have or possess any liquor or property intended for use in violating the provisions of this part, or the internal-revenue laws, or regulations prescribed under such part or laws, or which has been so used, and no property rights shall exist in any such liquor or property. A search warrant may issue as provided in Title XI of the act of June 15, 1917, 40 Stat. 228, for the seizure of such liquor or property. Nothing in this section shall in any manner limit or affect any criminal or forfeiture provision of the internal-revenue laws, or of any other law. The seizure and forfeiture of any liquor or property under the provisions of this part, and the disposition of such liquor or property subsequent to seizure and forfeiture, or the disposition of the proceeds from the sale of such liquor or property, shall be in accordance with existing laws or those hereafter in existence relating to seizures, forfeitures, and disposition of property or proceeds, for violation of the internal-revenue laws."

manufacture of liquor intended for use in violation of Title II of the Prohibition Act.[3]

This consistency of interpretation, followed by Congress' utilization in the Code of the same provisions, is also helpful in dealing with the limitation in § 3115 which makes the penalties of that section applicable only where no "special penalty" is provided for the offense. As a *de novo* proposition it might be argued that in § 3116 a special penalty, forfeiture, is provided. But this argument was available with equal force under the Prohibition Act and appears to have barred no prosecution. Moreover, § 3116 contains a provision that "Nothing in this section shall in any manner limit or affect any criminal . . . provision of the internal-revenue laws." This would seem to settle the point.

Clearly Congress may impose both a criminal and a civil sanction in respect to the same act; this is neither unusual nor constitutionally objectionable. See *Helvering* v. *Mitchell,* 303 U. S. 391, 399–400 (1938). Likewise it is common in drafting legislation to declare certain acts unlawful in one section and set forth penalties for their commission in another.[4]

The only suggestion on the face of the statute that § 3116 was meant to be remedial and nothing more comes from its caption, "Forfeitures and seizures," supplied by the codifiers in 1939. But, in enacting the Code, Congress provided that "The arrangement and classification of the several provisions of the Internal Revenue Title have been made for the purpose of a more convenient and

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[3] *E. g., Reynolds* v. *United States,* 280 F. 1 (1922); *Adamson* v. *United States,* 296 F. 110 (1924); *Staker* v. *United States,* 5 F. 2d 312 (1925); *Patrilo* v. *United States,* 7 F. 2d 804, 805 (1925). Compare *Page* v. *United States,* 278 F. 41 (1922).

[4] *E. g.,* Fair Labor Standards Act, 29 U. S. C. §§ 215, 216; Internal Revenue Code (narcotics), 26 U. S. C. §§ 2553, 2554, 2557.

orderly arrangement of the same, and, therefore, no inference, implication or presumption of legislative construction shall be drawn or made by reason of the location or grouping of any particular section or provision or portion thereof, nor shall any outline, analysis, cross reference, or descriptive matter relating to the contents of said Title be given any legal effect." 53 Stat. 1a. To accomplish its primary purpose of bringing together all operative revenue laws and making them more comprehensible, the Code made "liberal use of catchwords." [5] Typically, § 3116 is included in a subchapter entitled "Industrial Alcohol" and in a part entitled "Industrial Alcohol Plants"; yet even under a most narrow interpretation of its terms the section is in no sense limited to industrial alcohol.

So far as light is to be had from legislative history, it is meager and inconclusive, in no way militating against the meaning we attribute to the statute.

*Reversed.*

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

Respondent was indicted for violating §§ 3116 and 3115 of the Internal Revenue Code by having in his possession sugar, wooden barrels, a metal cap, a heater box and mash pipe, all "intended for use" in unlawfully evading liquor taxes. The District Court dismissed the indictment for failure to charge a crime. I agree. The indictment did clearly charge a violation of § 3116 which makes it "unlawful" to hold property for such an intended use. But § 3116 does not make "unlawful" possession a crime; the only sanction it contains is forfeiture. This

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[5] H. R. Rep. No. 6, 76th Cong., 1st Sess. 3; S. Rep. No. 20, 76th Cong., 1st Sess. 3.

Court nevertheless holds that possession for such an "unlawful" purpose is made a crime by § 3115 (b). That section does not of itself define a crime; it merely authorizes fine or imprisonment for violations of other provisions of the Act which do not themselves prescribe a "special penalty." Hence the general penalties of § 3115 cannot apply to violations of § 3116, because this latter section prescribes its own "special penalty"—seizure and forfeiture of property. This forfeiture is plainly a penalty since there is no practical difference between taking a man's property by forfeiture and taking his money by a fine. And where Congress has specifically provided a property penalty I cannot agree to add a money penalty by dubious implication.

The accepted practice of construing criminal statutes narrowly should be especially appropriate here because of the unusual nature of the "crime" involved. The Court's interpretation of § 3115 makes possession of innocent property, such as an automobile, a crime if the possessor *intends* to use it illegally, even if he has not done so. Guilt is made to depend wholly on what is within the defendant's mind. Congress may well have been unwilling to apply sanctions other than forfeiture to an unexpressed intention to do something that has not even been attempted.

# SACHER *v.* ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK ET AL.

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

No. 307. Argued March 11, 1954.—Decided April 5, 1954.

In view of the entire record in this case, and the findings of the courts below, petitioner's permanent disbarment by the District Court for his conduct in the trial of the *Dennis* case is set aside as unnecessarily severe, and the cause is remanded for further proceedings. Pp. 388–389.

206 F. 2d 358, reversed and remanded.

*Telford Taylor* argued the cause and filed a brief for petitioner.

*Eli Whitney Debevoise* argued the cause and filed a brief for respondents.

PER CURIAM.

This is a proceeding brought by respondent bar associations in the United States District Court for the Southern District of New York for the disbarment of petitioner from practice in that court. Petitioner had previously been convicted of contempt in the same court. See *Sacher* v. *United States,* 343 U. S. 1.

The District Court, after disallowing eight of the specifications in the petition for disbarment, found as to the others that there was no conspiracy as charged therein and no moral turpitude involved, and that the proven contumacious conduct of petitioner stemmed from an excess of zeal for his clients that obscured his recognition of responsibility as an officer of the court. All of the conduct complained of occurred in one protracted trial involving many defendants and counsel. See *Dennis* v. *United States,* 341 U. S. 494. There was no allegation or proof

of prior misconduct in petitioner's twenty-four years of practice. The Court of Appeals divided upon the propriety of permanent disbarment, but unanimously questioned the importance of one of the two specifications principally relied on by the trial court.

At the time the District Court made its decision in this case, the contempt judgment was under review on appeal, and it did not know and could not know that petitioner would be obliged to serve, as he did, a six months' sentence for the same conduct for which it disbarred him.

In view of this entire record and of the findings of the courts below, we are of the opinion that permanent disbarment in this case is unnecessarily severe. The judgment is reversed and the case remanded to the District Court for further consideration and appropriate action not inconsistent with this opinion.

MR. JUSTICE BURTON would affirm the judgment of the Court of Appeals.

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

MR. JUSTICE REED, dissenting.

The conclusion of the Court that the conduct of Mr. Sacher in the trial of *Dennis* v. *United States,* 341 U. S. 494, did not justify the order of disbarment entered against him by the United States District Court for the Southern District of New York seems so inimical to the orderly administration of justice as to justify this expression of dissent. We trust that the purpose of the dissent will not be misinterpreted as an implied criticism of those members of the bar who undertake the task of the representation of unpopular clients. Those who provide such counsel in the spirit of justice and in accordance with the dignity of the courts are to be

commended. They enhance the tradition of American lawyers of seeing that all defendants have proper representation before the courts. The purpose of this dissent is to show that in reversing the disbarment of Mr. Sacher this Court departs from its previous practice of leaving exclusions from their bars to the district courts except when there has been an abuse of discretion.

If no protest against such action were made here, we think the danger of the adoption of tactics akin to those of Mr. Sacher by other lawyers in other cases of intense partisanship or involving deep feeling would be materially enlarged. The contagiousness of unethical practices is shown by the conduct in the *Dennis* case by another member of the bar that resulted in his conviction of contempt, 343 U. S. 1, and in his suspension from membership in the District Court Bar for two years.[1] The New Jersey Supreme Court disbarred this other lawyer from the practice of law in that State on the basis of such contempt conviction. 9 N. J. 269, 316, 87 A. 2d 903, 88 A. 2d 199. That action resulted in his disbarment from our Bar. 345 U. S. 286.

The misconduct charged against Mr. Sacher occurred in a long-drawn-out trial lasting from January 17, 1949, with occasional intermissions until a verdict of guilty, subsequently affirmed here, was reached on October 21, 1949. The charges and findings as to improper conduct do not refer to an isolated instance but to a course of reprehensible conduct throughout the trial. The

[1] The trial judge compared the conduct of this lawyer and Mr. Sacher (see note 5, *infra*) thus:

"I feel that [the other lawyer's conduct at the trial] is such as to require firm disciplinary action. However, his attitude as disclosed on the record and on his brief herein leaves room for reasonable expectation that the experience of discipline may have such restraining effect on his courtroom behavior that in the future he may be safely expected to exercise without abuse the privileges of membership in this Bar."

charges were filed by the Association of the Bar of the City of New York and the New York County Lawyers' Association after the verdict in the *Dennis* case. At that time the trial judge in the *Dennis* case had imposed on Mr. Sacher as punishment for his contemptuous conduct a sentence of six months.[2] This was upheld by this Court after the order of disbarment and has been served. The sentence was a punishment for Mr. Sacher's contempt of court. Disbarment is not punishment for contempt but a cleansing of the bar by ousting.[3] Punishment for contempt should not be considered as a prohibition of or in mitigation of discipline in disbarment proceedings. In fact, a prior conviction adds force to the need to disbar. The Court's *per curiam* opinion in this case seems to incline to the contrary view. Apparently it looks upon the affirmance of the contempt conviction as something that must soften the attitude toward disbarment.

Coming to the merits of this disbarment, we limited consideration on certiorari to the following question:

> "Accepting the facts as found in the memorandum decision of Chief Judge Hincks, does permanent disbarment exceed the bounds of fair discretion, particularly in view of the punishment of petitioner's

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[2] The sentence was later affirmed in the Court of Appeals, 182 F. 2d 416, and we denied certiorari, 341 U. S. 952. Later certiorari was granted, 342 U. S. 858. Disbarment followed. Thereafter we affirmed the sentence of contempt, 343 U. S. 1. The disbarment was subsequently affirmed, 206 F. 2d 358.

[3] *Ex parte Wall,* 107 U. S. 265, 273:

" 'The question is,' said Lord Mansfield, 'whether, after the conduct of this man, it is proper that he should continue a member of a profession which should stand free from all suspicion. . . . It is not by way of punishment; but the court in such cases exercise their discretion, whether a man whom they have formerly admitted is a proper person to be continued on the roll or not.' " See *In re Isserman,* 345 U. S. 286, 289.

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individual misconduct as a contempt and the finding that the proof does not establish that he so behaved pursuant to a conspiracy or a deliberate and concerted effort?" [4]

That limitation accepted the following findings made by Chief Judge Hincks as a valid and unassailable foundation for decision:

"As to Mr. Sacher, I find as charged in Par. 14,

"(1) that with intent to delay and obstruct the trial, he disregarded numerous warnings of the court concerning wilful, delaying tactics and persisted in making long and repetitious arguments and protests, . . . and made needless reiterations of objections of others, . . . .

"(2) that for the purpose of bringing the court into general discredit and disrepute, (a) he insinuated that various findings made by the court were made for purposes of newspaper headlines, . . . (b) he accused the court of prejudice and partiality, . . . and (c) made disrespectful, insolent and sarcastic comments and remarks to the court, many of which were with intent to provoke the court into intemperate action which might be availed of as ground for mistrial or later as error on appeal, . . . .

"Mr. Sacher's proved misconduct, as charged in this paragraph . . . in my judgment requires disbarment."

[Record references omitted.]

"3. By Paragraph 16 it is also charged that Mr. Sacher 'made insolent, sarcastic, impertinent and disrespectful remarks to the Court and conducted' himself 'in a provocative manner.' This charge also I find abundantly proved by the cited references to the record."

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[4] 346 U. S. 894.

It would take voluminous quotations from the huge record to document Chief Judge Hincks' conclusions. Our order on certiorari accepts their truth. The trial court commented:

> "That such conduct was unprofessional needs no exegesis: I so hold. Even more closely than that dealt with in the preceding Section it touches the vitals of the judicial process: even greater is its tendency to obstruct the attainment of personal justice. And the proven volume of this misconduct also was such as to constitute a serious obstruction to the proper conduct of the trial. Overpersistence in argument, as observed above, tends to breed confusion. Provocative conduct tends to breed turbulence. Insolent and disrespectful remarks to the Court tend to undermine the judicial authority indispensable to the power effectively to cope with such intrusions which by their very nature obstruct the development of the real merits of the case.
>
> "For proved misconduct falling within this branch of the charge, I conclude that an order of disbarment is required."

The Court, as it must by its grant of certiorari, bases its action on the facts of disrespect to the trial court, wilful delay, and a purpose to discredit the administration of justice. It differs from the trial court only as to the measure of discipline required.[5] By reversing the judgment below, without discussion of the accepted rule in

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[5] The Court refers to the language of the order, "permanently disbarred." This, of course, should be read as a disbarment subject to reinstatement. See Drinker, Legal Ethics, 49, and the cases collected in 7 C. J. S. 814; 5 Am. Jur. 443; 6 Fed. Dig. 355; 48 A. L. R. 1236. Reinstatement may follow "a sincere and timely change of attitude." Such an attitude on the part of Mr. Sacher, Chief Judge Hincks says in his decision, did not exist even at the time of the hearing of the charges.

federal courts that the exercise of judicial discretion in disbarment will not be overturned on review unless there is a clear abuse of discretion,[6] this Court now summarily places itself in the position of a trial court. It acts, not upon an abuse of discretion by the trial court, but upon a record to determine for itself the proper extent of punishment. Certainly this Court does not mean to rule that conduct such as the accepted facts disclose does not support the discretion of the trial judge in disbarring Mr. Sacher.[7]

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[6] The rule as to review of disbarment of *Ex parte Burr*, 9 Wheat. 529, announced by Chief Justice Marshall, has been the guide for United States Courts:

"There is, then, no irregularity in the mode of proceeding which would justify the interposition of this Court. It could only interpose, on the ground that the Circuit Court had clearly exceeded its powers, or had decided erroneously on the testimony. The power is one which ought to be exercised with great caution, but which is, we think, incidental to all Courts, and is necessary for the preservation of decorum, and for the respectability of the profession. Upon the testimony, this Court would not be willing to interpose where any doubt existed." *Id.*, at 531. *Ex parte Secombe*, 19 How. 9; *Ex parte Bradley*, 7 Wall. 364. These early cases were under mandamus practice. We now proceed by appeal and certiorari. See *Thatcher* v. *United States*, 212 F. 801, 804. The principles of the *Burr* case still govern and the weight accorded the conclusion of the trial court remains unchanged. *In re Sacher*, 206 F. 2d 358, 361; *In re Chopak*, 160 F. 2d 886, 887; *In re Schachne*, 87 F. 2d 887, 888; *In re Spicer*, 126 F. 2d 288, 289, 292; *In re Patterson*, 176 F. 2d 966, n. 1.

[7] *Burns* v. *United States*, 287 U. S. 216, 222–223:

"The question is simply whether there has been an abuse of discretion, and is to be determined in accordance with familiar principles governing the exercise of judicial discretion. That exercise implies conscientious judgment, not arbitrary action. . . . It takes account of the law and the particular circumstances of the case and 'is directed by the reason and conscience of the judge to a just result.' . . . While probation is a matter of grace, the probationer is entitled to fair treatment, and is not to be made the victim of whim or caprice." See *United States* v. *McWilliams*, 82 U. S. App. D. C. 259, 261, 163 F. 2d 695, 697, and cases cited.

Such a change of the course of decision is a disservice to the orderly progress of trials. It stimulates rather than deters the adoption of the strategy of the *Dennis* case. It intrudes unnecessarily this Court's views of the proprieties into the discipline of bars of regions and communities whose attitude toward courtroom behavior diverges from our own. It is enough if we stand ready to say that an abuse of discretion by a trial court will not be allowed to stand. We should not substitute our discretion for that of the trial judge. Calm and reasoned presentation of facts and law are not only more effective but are essential if administration of justice by the courts is not to be disrupted by such courtroom tactics as were used in the *Dennis* trial. We demand tolerance for those who differ. Conformity is not expected or desired. There is room for every shade of opinion and expression short of incitement to crime. But there is not room for violence, offensive expletives or interference with orderly procedure in a courtroom, and such an attitude is not to exalt order over liberty but to exalt reason over force. An atmosphere filled with unproven personal charges or innuendoes of wrongful action is not conducive to dispassionate appraisal of the truth of matters under judicial investigation. I would uphold the discipline administered by the bar and trial judge by affirming this judgment.

## ALASKA STEAMSHIP CO., INC. *v.* PETTERSON.

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

No. 287. Argued March 8–9, 1954.—Decided April 5, 1954.

The judgment below is affirmed on the authority of the cases cited. 205 F. 2d 478, affirmed.

*Robert V. Holland* argued the cause for petitioner. With him on the brief was *Stanley B. Long.*

*John Geisness* argued the cause for respondent. With him on the brief was *Samuel B. Bassett.*

PER CURIAM.

The judgment is affirmed. *Seas Shipping Co.* v. *Sieracki,* 328 U. S. 85, 100; *Pope & Talbot* v. *Hawn,* 346 U. S. 406.

MR. JUSTICE BURTON, with whom MR. JUSTICE FRANKFURTER and MR. JUSTICE JACKSON join, dissenting.

The *Sieracki*[1] and *Pope & Talbot*[2] cases cited as the basis for the Court's decision do not justify the result announced. They evidence this Court's latest and broadest statement of a shipowner's liability for the unseaworthiness of his ship and its equipment, but they do not reach the instant case. They assert the liability of a shipowner to stevedores and carpenters who, in consequence of the unseaworthiness of his ship or its equipment, are injured on board in navigable waters while engaged in work connected with loading or unloading the ship. Those cases establish that such liability for unseaworthiness exists although the injured maritime workers are not employees of the shipowner but

[1] *Seas Shipping Co.* v. *Sieracki,* 328 U. S. 85.

[2] *Pope & Talbot* v. *Hawn,* 346 U. S. 406.

are employees of a third party who is under contract to supply stevedoring services.

The question presented by the instant case goes further. It asks whether a shipowner is liable for injuries suffered on his ship by a stevedore, even when those injuries result from unseaworthiness of equipment that does not belong to the shipowner and is not part of the ship's equipment, but belongs to the stevedore's independent employer, is part of that employer's loading equipment, and is brought on board by such employer. There is no suggestion in the cited cases that the shipowner's responsibility extends beyond the seaworthiness of his ship and its equipment, and I see no adequate reason for judicially extending it beyond that limit.

As the instant case offers a new precedent, it is important to recite its facts so that its effect may be accurately measured and limited in the absence of a supporting opinion.

The Court of Appeals stated the question which it decided as follows:

> "The question presented is whether a vessel's owner is liable for injuries received by an employee of a stevedoring company (an independent contractor) on board ship while engaged in the loading of the ship where the injuries are caused by a breaking block brought on board by the stevedoring company." *Petterson* v. *Alaska S. S. Co.*, 205 F. 2d 478.

Respondent Petterson was an able-bodied stevedore, 73 years old, employed as a longshore foreman by the Alaska Terminal and Stevedoring Company. That company was engaged by petitioner Alaska Steamship Company, Inc., to load the latter's vessel, the S. S. *Susitna*. In May 1950 respondent thus became engaged in loading that vessel while it was docked in what is assumed to be navigable water in the State of Washington. Petterson's employer, the stevedoring company, was authorized by

the shipowner to use, in the loading operation, the contractor's own gear or the gear of the ship, at the contractor's option. Respondent and his fellow employees rigged a snatch block which had been standing or lying unused upon the deck of the vessel. It was of a type often found as part of a ship's gear aboard such vessels and also as part of a stevedoring company's gear. The block was treated by each court below as having been brought on board by the stevedoring company and as belonging to that company.[3]

[3] The record shows that the trial court found "There was no proof as to the ownership of said block." The trial court also said that—"the snatch block in question, at the time of the accident, was not under the control or supervision of the respondent [shipowner] but was under the exclusive control and supervision of the libelant [Petterson], his employer and his employer's agents.

. . . . . .

"The Libelant has failed to establish, through the evidence introduced, that the snatch block involved, which apparently caused the accident and injury to the Libelant, belonged to or was part of the ship gear of the Respondent [shipowner].

"Such finding was conceded, in effect, by Counsel for Libelant in his argument.

"Proceeding on that assumption, Counsel for Libelant argued that the logic or reasoning of the case of Seas Shipping Company, Inc., v. Sieracki, 328 U. S. 85, would impose the obligation of seaworthiness of the vessel upon Respondent [shipowner] as to gear—in this case a snatch block—not belonging to Respondent but being used by the stevedore in loading the ship.

"The Court can not agree that the Supreme Court ruling in that case would justify such a conclusion."

The Court of Appeals said:

"It is not clear whether the block belonged to the ship or the Stevedoring Co., it being the type of equipment commonly found as part of the gear of both ships and stevedoring firms. For the purposes of this appeal, it will be assumed that it was brought on board by Stevedoring Co. . . .

"The court below granted a decree for the Owner on the ground that it was not shown that the block belonged to or was a part of the gear of the Susitna. Petterson's argument that liability should be

While being put to a proper use in a proper manner, the block broke, thus causing some of the loading gear to fall and crush respondent's leg as he was engaged in supervising the work of longshoremen aboard the ship.

Petterson filed a libel *in personam* in the United States District Court for the Western District of Washington against the shipowner claiming $35,000 damages resulting from the unseaworthiness of the block. After trial, the libel was dismissed without a reported opinion. The Court of Appeals for the Ninth Circuit reversed the decree and remanded the cause for determination of damages. 205 F. 2d 478. Because of an alleged conflict with *Lopez* v. *American-Hawaiian S. S. Co.*, 201 F. 2d 418, and the importance of the decision in relation to a shipowner's liability for unseaworthiness, we granted certiorari. 346 U. S. 914.

The doctrine of seaworthiness was stated as a settled proposition in *The Osceola,* 189 U. S. 158, 175, as follows:

> "That the vessel and her owner are, both by English and American law, liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship."

That doctrine was a natural outgrowth of the dependence of a ship's crew upon the seaworthiness of the ship and its equipment. Services of a crew must be rendered with whatever equipment the shipowner supplies. Such seamen are not expected to supply maritime or loading equipment and it is only fair for the law to subject shipowners to an absolute liability to them for the unseaworthiness of the shipowner's ship or equipment.

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imposed even if the gear belonged to the Stevedoring Co. was rejected by the court on the ground that Seas Shipping Co. v. Sieracki, 328 U. S. 85, 66 S. Ct. 872, 90 L. Ed. 1099, did not go so far." 205 F. 2d, at 479.

In the *Sieracki* case, this Court extended the shipowner's traditional obligation so as to bring within its protection stevedores while engaged in loading or unloading the ship. This was largely on the premise that the stevedores were then rendering services usually and formerly performed by the crew. The decision assumed that the stevedores, like their predecessors, used the ship's equipment. "For these purposes he [the stevedore] is, in short, a seaman because he is doing a seaman's work and incurring a seaman's hazards." 328 U. S., at 99.[4] The historical analogy disappears in the instant case. The modern stevedores, who supply substantial loading equipment, are a far cry from the traditional wards of the admiralty around whom the Court threw its protection in *The Osceola* case.[5]

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[4] In discussing the stevedore's relation to his immediate employer, the independent stevedoring contractor, the Court assumed that in the usual case such a contractor likewise supplied no equipment. It said: "The latter [contractor] ordinarily has neither right nor opportunity to discover or remove the cause of the peril and it is doubtful, therefore, that he owes to his employees, with respect to these hazards, the employer's ordinary duty to furnish a safe place to work, unless perhaps in cases where the perils are obvious or his own action creates them." 328 U. S., at 95. The instant case is an example of the latter classification where the contractor supplied the defective block and it was taken on board by his employees. The implication is that, under such circumstances, the liability should rest on the contractor rather than upon the shipowner. The injury would then be covered by the stevedore's absolute right to compensation provided by Congress in the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, 33 U. S. C. § 901 *et seq.*

[5] For a statement of the contrast between the traditional wards of the admiralty and modern longshoremen, see dissent in *Pope & Talbot* v. *Hawn*, 346 U. S. 406, 423–426; *Isbrandtsen Co.* v. *Johnson*, 343 U. S. 779, 782–789; Norris, The Seaman as Ward of the Admiralty, 52 Mich L. Rev. 479. For a condensed review of the development of the law in this general field, see Howe, Rights of Maritime Workers, 5 NACCA L. J. 146, and 6 NACCA L. J. 131.

While the doctrine of absolute liability for unseaworthiness, expounded in *Mahnich* v. *Southern S. S. Co.*, 321 U. S. 96, is reasonable enough when applied to a shipowner in relation to his own ship and to its equipment, there is no comparable justification for applying it to equipment owned by others and brought on board by them. Thus to extend such absolute liability would make the shipowner responsible for the result of latent dangers he cannot prevent. The burden should be upon those best able to eliminate the hazard—in this case, the stevedoring contractor.[6]

Petitioner also has emphasized the fact that Petterson was injured while working in a part of the ship that was under the control of the stevedoring contractor rather than of the shipowner. This distinction, in favor of the shipowner, was relied upon in *Lopez* v. *American-Hawaiian S. S. Co., supra,* and has been considered decisive in other cases. However, if the unseaworthy equipment in the instant case had been a part of the ship's equipment, the principles underlying the *Sieracki* and *Pope & Talbot* decisions, *supra,* might justify the shipowner's liability, regardless of who was in control of the part of the ship where that equipment caused the injury.[7] It is precisely because the equipment in the instant case was not the ship's equipment that the general principles underlying those cases do not reach the issue before us.

Finally, the extension of a shipowner's absolute liability so as to include the unseaworthiness of equipment

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[6] See *Rogers* v. *United States Lines,* 205 F. 2d 57, pending here on petition for certiorari; 2 Norris, The Law of Seamen (1952), 251–253; Robinson on Admiralty (1939) 303–307; Recent Cases, 102 U. of Pa. L. Rev. 402–404.

[7] See *Strika* v. *Netherlands Ministry of Traffic,* 185 F. 2d 555, allowing recovery from a shipowner for an injury suffered by a longshoreman while on shore, but caused by the ship's unseaworthy tackle.

owned and brought on board by a stevedoring contractor makes such a marked change in the traditional responsibility of a shipowner as to call for legislative authorization rather than mere judicial recognition. "The legislative process is peculiarly adapted to determine which of the many possible solutions to this problem would be most beneficial in the long run." *Halcyon Lines* v. *Haenn Ship Corp.*, 342 U. S. 282, 286. That statement was made when this Court declined to recognize judicially the doctrine of contribution between joint tort-feasors as a shipowner's remedy against a stevedoring contractor. The statement is equally appropriate here. In fact, Congress already has demonstrated its interest here through the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, 33 U. S. C. § 901 *et seq.* That Act insures compensation to stevedores in comparable cases without proof of negligence. It specifically excludes from its operation members of the ship's crew and persons employed by the master to load, unload or repair "any small vessel under eighteen tons net." [8] It was thus tailored, in 1927, to provide precisely the kind of relief that Congress preferred in lieu of that provided by this Court, in 1926, through *International Stevedoring Co.* v. *Haverty*, 272 U. S. 50.

For the foregoing reasons, the judgment should be reversed and the extension of liability which it introduced should be left to legislative initiative. In any event, the effect of it should be restricted to its facts.

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[8] 44 Stat. 1426, 33 U. S. C. § 903.

# BROWNELL, ATTORNEY GENERAL, SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, *v.* SINGER.

NO. 401. CERTIORARI TO THE COURT OF APPEALS OF NEW YORK.*

Argued March 8, 1954.—Decided April 5, 1954.

The judgment below is reversed on the authority of *Zittman* v. *McGrath,* 341 U. S. 471.

*James D. Hill* argued the cause for petitioner in No. 401. With him on the brief were *Robert L. Stern,* then Acting Solicitor General, *Assistant Attorney General Townsend, George B. Searls* and *Irwin A. Seibel.*

*Edward Feldman* and *Daniel Gersen* submitted on brief for petitioner in No. 402.

*Albert R. Connelly* argued the cause for respondent. With him on the brief were *George S. Collins* and *George M. Billings.*

PER CURIAM.

Reversed. *Zittman* v. *McGrath,* 341 U. S. 471.

THE CHIEF JUSTICE did not participate in the consideration or decision of this case.

MR. JUSTICE JACKSON, with whom MR. JUSTICE FRANKFURTER and MR. JUSTICE DOUGLAS join, dissenting.

The Court's one-word decision reverses concurring judgments of three highly respected courts—the Court of Appeals of New York, the Appellate Division of the

*Together with No. 402, *Superintendent of Banks of the State of New York, Liquidator,* v. *Singer,* also on certiorari to the same court.

Supreme Court, First Department, and the Supreme Court, Special Term, New York County. It cites a single case, the implication being that the cited authority settled the question so fully and plainly that a contrary result could have been reached by the three lower courts only by failure to read or heed it. I think this Court owes those courts and the legal profession something more than a reference to an inapplicable decision. The facts of this case present novel questions that this Court should face and on which it should render a reasoned decision.

The Yokohama Specie Bank established its New York agency, pursuant to the State's permission, under a statute which provided that the bank's assets in the State should be subject to the claims of creditors arising out of transactions with the New York agency in preference to other claims. On December 8, 1941, when war was declared with Japan, this agency was in the possession of the United States Treasury, which was supervising freezing controls over Japanese nationals. The agency was immediately surrendered to the New York Superintendent of Banks for liquidation under state law. This respondent's claim was established thereafter as entitled to the preferences of the New York law but was payable only after a federal license therefor, and that position was confirmed by this Court. *Lyon* v. *Singer*, 339 U. S. 841.

In 1942, the President, pursuant to statutory authority, created the Office of Alien Property Custodian. As to property in the process of administration under judicial supervision, the Custodian was authorized to seize only that "which is payable or deliverable to, or claimed by, a designated enemy country or national thereof." This fund, earmarked for payment to an American creditor, is not within that description. No other authority for demanding its turnover can be found.

In September of 1942, the Custodian asserted power of supervision over the liquidation of the New York agency but advised the Superintendent of Banks to continue his liquidation of the business and property in New York. He requested the Superintendent to advise him of all claims which he intended to accept and to notify him when he had liquidated assets sufficient to pay and had paid all accepted and established claims and expenses of liquidation in order that the Custodian might take such action "at that time with respect to the assets remaining in your hands" as he might deem necessary. Thereafter, as various claims were allowed payable to preferred creditors who were enemy nationals, the Custodian issued vesting orders seizing such funds as were set aside for their payment. Of course, he cannot seize this claim on such a basis, for the claimant is not an enemy alien.

On February 15, 1943, the Custodian issued vesting order No. 915. By it, he only purported to vest in himself the excess proceeds of the liquidation remaining after the payment of creditors having claims accepted or established in accordance with the Banking Law of New York. Since such excess funds, under that law, were payable to the Japanese bank, this was obviously a proper vesting. But the limitation of the vesting order to such excess was no accident or oversight. In annual reports to the President and Congress, the Custodian repeatedly stated, in substance, that rights of creditors preferred by state laws would be respected, and only the excess vested.

The turnover order now sustained by the Court is quite contrary to this policy and was not issued until September 5, 1950, over five years after the cessation of hostilities with Japan and over eight years after the task of administration was left to the Superintendent of Banks.

The fund of over a half-million dollars which the Attorney General as successor to the Alien Property Cus-

todian now demands be paid over to him is a fund specifically held and earmarked by the Superintendent of Banks for the payment of the claim which we have previously upheld as entitled to a preference under New York law. *Lyon* v. *Singer, supra.*

All funds in the hands of the Superintendent in excess of allowed or established claims have been demanded by the Custodian, and the New York Supreme Court has authorized their payment, as under New York law such excess is payable to the Japanese bank. The New York courts, however, have refused to allow the Superintendent to turn over the funds allocated to the satisfaction of the judgment in favor of respondent and affirmed by us, to be paid if and when licensed by the Attorney General.

*Zittman* v. *McGrath,* 341 U. S. 471, cannot serve as a supporting authority for this decision. In *Zittman* the Custodian demanded transfer of a credit from a debtor bank which had no interest in the credit except that of a stakeholder. Here the Custodian would seize a fund from an officer of the State of New York who is administering it pursuant to his statutory duty and under the supervision of the Supreme Court of that State. In *Zittman* the claims adverse to the Custodian rested on an assertion of private rights and in no other way involving the public interest. Here there is a clash between two public interests. New York, through its Superintendent of Banks, took possession of the Yokohama Bank assets for administration pursuant to its own public policy of protecting creditors of institutions allowed to do business in the State of New York. After a lapse of many years, the Attorney General now would seize it from him to apply a different public policy—that of the Federal Government.

Moreover, in *Zittman* the vesting order specifically vested debts owed to a foreign national by a New York

debtor bank and debts evidenced by instruments endorsed by the foreign national and held by a Federal Reserve Bank. Those debts constituted the precise funds sought by the litigant. In this case, the vesting order purported to vest only such excess proceeds as remained after payment of established claims, and respondent shows that his is such a claim. His position, that the funds he seeks were never vested by the Custodian, is not analogous to that of the petitioner in *Zittman*.

Some effort was made on argument to reconsider whether this claim is entitled to a preference under the Banking Law of New York. The claim arose out of a foreign exchange transaction. Prior to the war, the Standard Vacuum Oil Company was delivering oil to Japanese purchasers who paid in yen. It is not questioned that such sales were in accordance with the national policy of the United States at that time. Standard entered into an agreement with the Yokohama Bank under which it sold the yen to the bank in Japan and was to receive credit in dollars in New York. This manner of remitting funds was conventional and was the function which the New York branch of a foreign bank would be expected to facilitate. The New York courts held that creditors created by such a foreign exchange transaction, including respondent, were among those whom the New York statutes sought to protect out of the New York assets. In the *Singer* case, *supra*, we approved that holding. Unless every principle of *res judicata* is to be disregarded by this Court, it is bound by its holding that this is a preferred claim under the New York Banking Law.

It was intimated in argument that the purpose of seizure of this fund is to defeat the preference for this claim in the interest of other creditors outside of New York who will not be paid in full. This would mean a distribution of the New York assets at odds with the New York Bank-

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ing Law. But it is apparent that a large number of New York creditors have been paid in full from the New York assets, and just why this creditor, who stands on an equality with them, should be deprived of his claim of preference while the others retain theirs is hard to understand.

This Court has been rather insistent that state courts disclose the reasoning behind their judgments.* I think the Court should reciprocate when faced with issues as serious and as doubtful as those raised in this case.

*E. g., *Minnesota* v. *National Tea Co.*, 309 U. S. 551; *Loftus* v. *Illinois*, 334 U. S. 804; *Chicago* v. *Willett Co.*, 341 U. S. 913.

# MARYLAND CASUALTY CO. ET AL. *v.* CUSHING ET AL.

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

No. 11. Argued April 27–28, 1953.—Reargued November 10, 12, 1953.—Decided April 12, 1954.

The owner and charterer of a vessel, which collided with a pier and capsized in navigable waters in Louisiana, filed consolidated petitions in admiralty in the Federal District Court in Louisiana to limit their liability under the provisions of 46 U. S. C. §§ 183 and 186. Subsequently, basing jurisdiction on diversity of citizenship and the Jones Act, the representatives of five seamen who had drowned brought this consolidated action in the same District Court against the liability underwriters of the owner and charterer of the vessel. For their right to proceed against the insurance companies, the plaintiffs relied on § 655 of the Louisiana Insurance Code which authorizes direct suit "against the insurer within the terms and limits of the policy," and on the McCarran Act, 15 U. S. C. § 1012. The District Court dismissed the consolidated suit against the insurers. The Court of Appeals reversed. *Held:* The judgment of the Court of Appeals is vacated and the case is remanded to the District Court to be continued until after the completion of the limitation proceeding. Pp. 410–427.

198 F. 2d 536, judgment vacated and cause remanded.

The District Court dismissed a consolidated suit brought by respondents against the petitioner insurance companies. 99 F. Supp. 681. The Court of Appeals reversed. 198 F. 2d 536. This Court granted certiorari. 345 U. S. 902. *Judgment of the Court of Appeals vacated and cause remanded to the District Court with directions,* p. 423.

*Eberhard P. Deutsch* argued the cause for petitioners. With him on the brief was *René H. Himel, Jr.*

*James J. Morrison* argued the cause and filed a brief for respondents.

MR. JUSTICE FRANKFURTER announced the judgment of the Court and an opinion in which MR. JUSTICE REED, MR. JUSTICE JACKSON and MR. JUSTICE BURTON join.

On the evening of May 19, 1950, the towboat *Jane Smith* in attempting to pass under a bridge over the Atchafalaya River in Louisiana collided with a concrete pier and capsized. The owner and charterer of the *Jane Smith* filed consolidated petitions in admiralty in the United States District Court in Louisiana to limit their liability under the provisions of 46 U. S. C. §§ 183 and 186.[1] The owner and charterer having complied with the procedural requirements of the Limitation Act, the District Court issued an injunction prohibiting suit against them elsewhere than in the limitation proceeding.

Subsequently, in the same District Court, the plaintiffs below, as representatives of five seamen who had been drowned, brought this consolidated action against the owner of the bridge and the liability underwriters of the owner and charterer of the ship.[2] Jurisdiction was based on diversity of citizenship and the Jones Act, 46 U. S. C. § 688. For their right to proceed against the insurance companies, the plaintiffs relied on § 655 of the Louisiana

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[1] 46 U. S. C. § 183: "(a) The liability of the owner of any vessel, whether American or foreign . . . for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending."

§ 186: "The charterer of any vessel, in case he shall man, victual, and navigate such vessel at his own expense, or by his own procurement, shall be deemed the owner of such vessel within the meaning of the provisions of this chapter relating to the limitation of the liability of the owners of vessels; . . . ."

[2] Prior to instituting this action, all five plaintiffs had filed in the limitation proceeding pleadings challenging the shipowner's and charterer's right to limit their liability and asserting claims for damages.

Insurance Code which authorizes direct suit "against the insurer within the terms and limits of the policy."

The two policies sued upon are (1) a workmen's compensation and employer's liability policy, in the amount of $10,000, issued by the Maryland Casualty Co. in which the charterer alone is named as the insured and which contains a special endorsement making its terms applicable to maritime employment; and (2) a "protection and indemnity" policy in the amount of $170,000 issued by the Home Insurance Company of New York in which both the owner and the charterer are named. Both policies by their terms preclude payment to anyone until the insured shall have been held liable to pay damages.[3]

The District Court granted a motion for summary judgment dismissing the consolidated suit against the insurers on the grounds that the Louisiana statute was, by its own terms, inapplicable to policies of marine insurance, and that in any case application of the statute here would "not only work material prejudice to the characteristic features of the general maritime law but would

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[3] The Protection and Indemnity policy issued by the Home Insurance Company contained the following clauses. "It is agreed that if the Assured, as shipowners, shall have become liable to pay, and shall have in fact paid, any sum or sums in respect of any responsibility, claim, demand, damages and/or expenses, or shall become liable for and shall pay any other loss arising from or occasioned by any of the following matters or things . . . ." There follows the types of injury and loss for which the Company is liable. A subsequent proviso reads "Liability hereunder shall in no event exceed that which would be imposed on the Assured by law in the absence of Contract."

Condition G of the policy issued by Maryland Casualty provides: "No action shall lie against the Company to recover upon any claim or for any loss under Paragraph I (b) foregoing unless brought after the amount of such claim or loss shall have been fixed and rendered certain either by final judgment against this Employer after trial of the issue or by agreement between the parties with the written consent of the Company, nor in any event unless brought within two years thereafter."

also contravene the essential purpose expressed by an Act of Congress in a field already covered by that Act. Title 46, § 183, U. S. C. A." 99 F. Supp. 681, 684.

The Court of Appeals, relying solely on diversity jurisdiction, reversed, holding that as a matter of local law the District Court had read the Louisiana statute too restrictively, a question not open here, and that the statute was nothing more than a permissible regulation of insurance authorized by the McCarran Act, 15 U. S. C. § 1012, and not in "conflict with any feature of substantive admiralty law, nor with any remedy peculiar to admiralty jurisdiction." 198 F. 2d 536, 539. Deeming this ruling important to the proper enforcement of the Limitation Act, we granted certiorari. 345 U. S. 902.

The only question presented in the petition for certiorari is whether the application of the Louisiana statute in this case would violate "the Jones Act, the Limited Liability Act and the constitutional grant to the federal government of exclusive jurisdiction in maritime matters." We agree with the Court of Appeals that since diversity supports federal jurisdiction, the Jones Act need not be drawn upon for jurisdiction. Nor need we be detained by petitioners' contention that as applied to claims against petitioners as underwriters of the charterer who employed the decedents, the State statute here conflicts with the Jones Act in that it would provide an alternative remedy where Congress has prescribed the means of recovery. Since that Act itself makes its remedy available to a seaman "at his election," we perceive no conflict between the Jones Act and the Louisiana direct action statute.

Respondents, on the other hand, seek to derive support for reliance on the Louisiana statute from the McCarran Act which provides "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to

the business of insurance . . . ." 15 U. S. C. § 1012. Suffice it to say that even the most cursory reading of the legislative history of this enactment makes it clear that its exclusive purpose was to counteract any adverse effect that this Court's decision in *United States* v. *South-Eastern Underwriters Association,* 322 U. S. 533, might be found to have on State regulation of insurance. The House Report on the Bill as enacted is decisive:

> "It is not the intention of Congress in the enactment of this legislation to clothe the States with any power to regulate or tax the business of insurance beyond that which they had been held to possess prior to the decision of the United States Supreme Court in the *Southeastern Underwriters Association case.*" H. R. Rep. No. 143, 79th Cong., 1st Sess. 3.

The question whether application of the direct action statute conflicts with federal maritime law is not touched by the *South-Eastern Underwriters* case. In the face of this unequivocal expression of congressional meaning, the statute cannot be read as doing something that Congress has told us it was not intended to do. The McCarran Act is not relevant here.

This brings us to the governing issue: does the Louisiana statute enter an area of maritime jurisdiction withdrawn from the States? Since Congress has provided a comprehensive legislative system for adjudicating maritime claims, we pass directly to considering whether the operation of the Louisiana statute conflicts with that system, putting to one side the question whether it encroaches upon the general body of non-statutory maritime law. Cf. *Red Cross Line* v. *Atlantic Fruit Co.,* 264 U. S. 109; *Just* v. *Chambers,* 312 U. S. 383.

Legislation limiting shipowners' liability was first enacted in 1851 to provide assistance to American shipowners and thereby place them in a favorable position

in the competition for world trade. 9 Stat. 635. It provides that in event of a collision or other maritime mishap, occurring "without the privity or knowledge" of the owner (including therein a charterer), liability will be limited to the value of the ship and freight pending.[4] The Act also permits the shipowner by instituting limitation proceedings to have all claims against him brought into concourse in an admiralty tribunal.

The legislation was designed to induce the heavy financial commitments the shipping industry requires by mitigating the threat of a multitude of suits and the hazards of vast, unlimited liability as a result of a maritime disaster. This Court has been faithful to this ultimate purpose and has read the statute's words "in a broad and popular sense in order not to defeat the manifest intent." *Flink* v. *Paladini,* 279 U. S. 59, 63. Particularly in view of the fact that Congress subjected the whole limitation scheme to scrutiny in 1935 and 1936 as a result of its application to personal injury and death claims resulting from the sinking of the *Morro Castle,* and did not alter those provisions of the legislation involved here, we must read the statute in the light of its expressed purposes. It is not for us to sit in judgment on the policy of Congress in having all claims disposed of in one proceeding or in apportioning maritime losses.

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[4] This Court has interpreted this as meaning the value *after* the accident. *Norwich Co.* v. *Wright,* 13 Wall. 104.

After the *Morro Castle* disaster, in which 135 lives were lost and the owners sought to limit their liability to $20,000, Congress changed the statute to provide that if the value of the vessel and freight pending is not enough to cover all claims, that portion of the total recovery applicable to personal injury or death claims shall be at least $60 per ton. 49 Stat. 960; 49 Stat. 1479. 46 U. S. C. § 183 (b)–(e). This provision is applicable, however, only to "seagoing vessels," defined as excluding towboats which is the type of vessel involved here. 46 U. S. C. § 183 (f).

The direct action statute clashes with the federal system for marshalling all claims arising from certain maritime causes of action. See the detailed provisions in Admiralty Rules 51–54, 334 U. S. 864. The heart of this system is a *concursus* of all claims to ensure the prompt and economical disposition of controversies in which there are often a multitude of claimants. The benefits a *concursus* bestows on the shipping industry were thus described in the hearings on the 1936 amendments to the Limitation Act:

> "Under the limitation statutes, as we have had them since 1851, they had two different purposes to serve; one was to limit the liability of the owner and the other was to draw into one court, in the case of a large accident, all of the claims, in order that they might be heard by one judge on one state of facts, in one trial, and intelligently disposed of. Suppose a big sea comes aboard a passenger liner and 15 or 20 people on that deck are washed up against the stanchions or something else, and the claim is that the ship ought to have slowed down, ought to have known by radio. Those passengers may live anywhere from Maine to Texas, and if you have 20 separate laws in 20 different jurisdictions, you just cannot handle an accident of that kind in any possibly intelligent way. One court will say the line was not negligent; another court will say it was negligent; a third court will say you are entitled to $1,500; the next one may say you are entitled to $45,000; and nobody knows where he is.
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> "So one of the most useful purposes of the limitation statute was that in a case like that you could file a petition bringing into one court all of the claimants and have one trial. Otherwise you would have to keep the crew off of the ship traveling around

the country for 2 or 3 years." Statement by Mr. Charles S. Haight, representing the French Line, Hearings before House Committee on Merchant Marine and Fisheries on H. R. 9969, Part 4, 74th Cong., 2d Sess. 69–70.

And commenting on the limitation of liability sections of the Admiralty Rules of this Court, Mr. Justice Bradley thus described their purpose:

> "In promulgating the rules referred to, this court expressed its deliberate judgment as to the proper mode of proceeding on the part of shipowners for the purpose of having their rights under the act declared and settled by the definitive decree of a competent court, which should be binding on all parties interested, and protect the ship owners from being harassed by litigation in other tribunals. . . . The questions to be settled by the statutory proceedings being, first, whether the ship or its owners are liable . . . and secondly, if liable, whether the owners are entitled to a limitation of liability, must necessarily be decided by the district court having jurisdiction of the case; and, to render its decision conclusive, it must have entire control of the subject to the exclusion of other courts and jurisdictions. If another court may investigate the same questions at the same time, it may come to a conclusion contrary to that of the district court; and if it does (as happened in this case), the proceedings in the district court will be thwarted and rendered ineffective to secure to the ship owners the benefit of the statute." *Providence & New York S. S. Co.* v. *Hill Co.*, 109 U. S. 578, 594–595.

Direct actions against the liability underwriter of the shipowner or charterer would detract from the benefit of a *concursus* and undermine the operation of the congres-

sional scheme for the "complete and just disposition of a many cornered controversy." *Hartford Accident & Indemnity Co.* v. *So. Pacific Co.*, 273 U. S. 207, 216. The ship's company would be subject to call as witnesses in more than one proceeding, perhaps in diverse forums. Conflicting judgments might result. Ultimate recoveries might vary from the proportions contemplated by the statute. Moreover, it is important to bear in mind that the *concursus* is not solely for the benefit of the shipowner. The elaborate notice provisions of the Admiralty Rules are designed to protect injured claimants. They ensure that all claimants, not just a favored few, will come in on an equal footing to obtain a pro rata share of their damages. To permit direct actions to drain away part or all of the insurance proceeds prejudices the rights of those victims who rely, and have every reason to rely, on the limitation proceeding to present their claims.[5]

Furthermore, insurers, unable to rely on the limitation of liability of their insured and denied the benefits of the *concursus,* would in all likelihood reflect the increased costs in their premiums, thus passing on to the very class sought to be benefited by the federal legislation the short-circuiting effects of the State statute.[6]

In addition to encroachment upon the federal statutory system for bringing all claims into concourse, the direct action statute is in conflict with the congressional policy

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[5] For example, in this case the representatives of a sixth victim may be relying on the limitation action to prove "privity or knowledge" and thus seek a judgment substantially in excess of the ship's value. They will be penalized for relying on the federal legislation and the Rules if the direct actions drain away the insurance proceeds and the shipowner and charterer are unable to meet additional judgments.

[6] That the cost and indeed the availability of insurance depends on limited liability was brought to the attention of Congress in the hearings on the 1936 amendments to the Limitation Act. See Hearings before House Committee on Merchant Marine and Fisheries on H. R. 9969, Part 4, 74th Cong., 2d Sess. 66–67, 129.

of limited liability. The complaints in those two of the five consolidated suits which are by agreement part of the record here total $600,000 in alleged damages. Thus, we are certainly on notice that the total damages of the respondents may exceed the $180,000 sum which the policies would cover. If the present actions were to result in judgments equaling the face amount of the policies, the insurers would be exonerated of any further obligation to indemnify the owner and charterer under the policies. The shipowner and charterer would then have to face whatever claims may be presented stripped of their insurance protection. How this may come about is easily seen if we assume that the salvaged ship will finally be valued at $25,000—the amount for which we are advised a stipulation has been filed in the limitation proceeding. If the five claimants were to succeed in obtaining judgments of $180,000 without exhausting all claims, there would be no bar to an additional $25,000 recovery from the shipowner and the charterer in the limitation proceeding by other claimants, or perhaps even by some of the respondents here. Yet in the absence of the direct action statute, the liability policies would be more than sufficient to cover any judgment that might be rendered in the limitation action. Under these circumstances, the extent to which the insured lose the benefits which Congress intended them to have is measured by the protective value of their insurance.[7] Without having bought any policies

[7] This is equally true whatever the vessel is valued at. Of course, we do not know now that the vessel will finally be valued at $25,000. The final valuation may be more or less. Certainly, on the record before us we cannot assume that the ship is valueless, and it may be that shipowner and charterer will need the full $180,000 face value of the policy to indemnify them for a judgment in the limitation action. The very reason that the present suit should not be allowed to proceed is that it is for the limitation proceeding to determine value.

they could only have been held for $25,000. If they buy the policies, and the Louisiana statute is applied to permit these suits, their liability is still $25,000.

Thus, to permit direct actions under the State statute would require that shipowners become self-insurers for liability risks in order to be sure of getting the full protection of the limitation legislation. In view of the fact that "substantially all maritime risks are insured," *Keen* v. *Overseas Tankship Corp.*, 194 F. 2d 515, 518 (L. Hand, J.), this sort of qualification would be completely inconsistent with the Limitation Act.

In 1886 the Court was called upon to decide whether the proceeds from a hull insurance policy are part of an owner's "interest" in a ship and as such must be turned into the limitation proceeding. In *The City of Norwich,* 118 U. S. 468, the Court held that insurance proceeds need not be turned in. In part, the decision was based on a narrow interpretation of "interest." But Mr. Justice Bradley, who had a commanding role in applying the Limitation Act, reviewed the history and policy of limited liability, and the language of that opinion is an illuminating guide here:

> "Now, to construe the law in such a manner as to prevent the merchant from contracting with an insurance company for indemnity against the loss of his investment is contrary to the spirit of commercial jurisprudence. Why should he not be allowed to purchase such an indemnity? Is it against public policy? That cannot be, for public policy would equally condemn all insurance by which a man provides indemnity for himself against the risks of fire, losses at sea, and other casualties. To hold that this cannot be done tends to discourage those who might otherwise be willing to invest their money in the shipping business." 118 U. S., at 504–505.

And the Court, in *The City of Norwich,* foreshadowed the consequences of permitting direct actions against liability insurers of shipowners: "No form of agreement could be framed by which [shipowners] could protect themselves. This is a result entirely foreign to the spirit of our legislation." 118 U. S., at 505.

Of course, wholly apart from the respect to be accorded State legislation, this Court should be slow to find that even where Congress has exercised its legislative power it has not left room for State action. *Kelly* v. *Washington,* 302 U. S. 1. But where, as in this case, the evident design of Congress can only be carried out by barring State action, it must be barred.

It is true that the record before us does not establish with certainty that the present suits would in fact operate to leave the shipowner and charterer to face liability in the limitation action without indemnification. Judgments in the present actions against the insurers might satisfy all claims or leave enough insurance money to indemnify the shipowner and charterer for liability in the limitation action. The salvaged vessel may finally be valued as worthless, exonerating the shipowner and charterer from any liability in the limitation action. Or the right of the shipowner and charterer to limit their liability might be successfully challenged on the grounds that the mishap did not happen without their "privity or knowledge." [8]

These elements of uncertainty provide a temptation to let the present actions proceed. Further support for this view may reasonably be found in the fact that it is the insurers rather than the shipowner and charterer who are

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[8] The allegation of "privity" and "knowledge" is not an assumption on the basis of which this case could be disposed of. The shipowner's and charterer's right to limitation must be determined, as provided by the Act and Rules of this Court, in the limitation proceeding itself, not in the present suits to which they are not parties.

here seeking to rely on the Limitation Act as a defense. But the crucial fact which requires that the conflict between State and federal law be faced now is that the present actions are brought completely independently of the limitation proceeding. If the Court keeps hands off the direct actions, the draining away of the insurance proceeds cannot be challenged at any time by anyone.

This is not a case where some future action remains to be taken by one of the parties to a suit before the critical issue is presented to the Court as clearly as may be. See *United Public Workers* v. *Mitchell,* 330 U. S. 75. Nor is this a case where we can postpone our review until a State court gives meaning to a challenged State statute. *Albertson* v. *Millard,* 345 U. S. 242. In the suits before us, the Court is at the point of no return. Once the respondents have recovered from the insurers the face amount of the insurance policies in the present actions, and they or other claimants are going after the shipowner and charterer in the limitation action, it will be too late to rely on the Limitation Act to preserve the insurance proceeds.

Thus, it is clear that if the present direct actions are permitted, they involve substantial hazard to rights granted by an Act of Congress, leaving no way for such impairment to be challenged. Respect for the Act precludes allowance of litigation, based on a State statute, which carries the potentiality of irreparable infringement upon federal law. The point of inadmissible conflict between State and federal legislation is reached as soon as suit is brought against the liability underwriters to get at proceeds of the policies. And if the federal legislation bars such a suit, it would be anomalous to say that the underwriters may not here contest the direct actions.

Of course, liability underwriters are not entitled to "limitation of liability" as that phrase is used as a term

of art in admiralty. To state the issue in these terms is to misconceive it. The question is whether the Court is to disregard the effect of a direct action on the federal proceedings. The Louisiana statute, as applied to authorize suits against the insurers of shipowners and charterers who have instituted limitation proceedings, is a disturbing intrusion by a State on the harmony and uniformity of one aspect of maritime law. It is accentuated by the fact that the federal law involved is not a more or less ill-defined area of maritime common law, incursion upon which need not be here considered, but an Act of Congress, well-defined and consciously designed, with detailed rules for its execution established by this Court.

> "If the courts having the execution of [the Limitation Act] administer it in a spirit of fairness, with the view of giving to ship owners the full benefit of the immunities intended to be secured by it, the encouragement it will afford to commercial operations (as before stated) will be of the last importance: but if it is administered with a tight and grudging hand, construing every clause most unfavorably against the ship owner, and allowing as little as possible to operate in his favor, the law will hardly be worth the trouble of its enactment. Its value and efficiency will also be greatly diminished, if not entirely destroyed, by allowing its administration to be hampered and interfered with by various and conflicting jurisdictions." *Providence & New York S. S. Co.* v. *Hill Co.*, 109 U. S. 578, 588–589.

Accordingly, MR. JUSTICE REED, MR. JUSTICE JACKSON, MR. JUSTICE BURTON and I would reverse the judgment of the Court of Appeals and reinstate that of the District Court dismissing the complaints. For the reasons stated in his opinion, MR. JUSTICE CLARK agrees that the direct

action suits should not be permitted to impair the shipowner's and charterer's right to indemnification, but he would allow the District Court to adjudicate the liability of the petitioners to the respondents after the limitation proceeding has run its course.

In order to break the deadlock resulting from the differences of opinion within the Court and to enable a majority to dispose of this litigation, we vacate the judgment of the Court of Appeals and order the case to be remanded to the District Court to be continued until after the completion of the limitation proceeding.

*It is so ordered.*

MR. JUSTICE CLARK, concurring.

I see no necessity for invalidating Louisiana's law by dismissing these direct actions. In administering the Limited Liability Act the Court can easily avoid a clear conflict between it and the direct action statute.

The Limited Liability Act admittedly was not designed for the benefit of insurance companies; nor does it deal with their liability. The purpose of the Congress in passing the Act in 1851 was to encourage investment in American ships by placing a limitation upon the personal liability of the shipowner in the event of an accident where there is no "privity or knowledge." Thereafter this Court in *The City of Norwich,* 118 U. S. 468 (1886), recognized the right of a shipowner to buy insurance coverage for damage to his hull in order to protect against the loss of his investment. The proceeds of such "hull insurance" were held, for purposes of a limitation proceeding, not a part of "the interest" of the owner in the vessel. The basis of the decision was that Congress intended the Act to protect the investment of shipowners, and if the latter were prevented from indemnify-

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ing themselves from loss of their investment in the ship it would be contrary to the purpose of Congress as well as to the spirit of commercial jurisprudence. Here, the damage claims which may be sustained in the limitation proceeding will be chargeable against the *Jane Smith* and the owner may lose the damaged hull or its value unless he can recoup through the insurance which is involved in these direct actions and which he purchased for his protection. If the insurance proceeds are exhausted in the direct actions, the owner's recoupment will be impossible. Though the holding in *The City of Norwich* does not control, I think that the reasoning of that case is pertinent; in other words, the owner of the ship has the same right to protect his investment in the ship by insurance against damage claims arising in its operation and which are chargeable to it [1] as he has to protect his investment from damage to the ship itself. Unless the owner is afforded an opportunity to provide for such protection, the purpose of Congress to encourage investment in American ships will be just as much thwarted as it would have been had the owner's right to buy insurance protection in *The City of Norwich* not been recognized.

To say that this view benefits the shipowner "at the expense of the families of the deceased seamen" is to ignore the realities of the case. Had the owner not purchased liability insurance the claimants could not, under any condition, recover more than the value of the damaged hull if there is no "privity or knowledge." The owner's liability insurance is the sole source of the claimants' hope for a recovery beyond the value of the

[1] The business practice of purchasing marine protection and indemnity insurance, the type primarily involved here, to protect the shipowner against this contingency has long been recognized. See testimony of Ira A. Campbell for American Steamship Owners' Association, at Hearings before House Committee on Merchant Marine and Fisheries on H. R. 4550, 74th Cong., 1st Sess. 91, 125, 131.

damaged hull. The owner's motive in purchasing insurance certainly was not to protect his seamen or the public, but to protect himself against damage claims. And in so doing he has aided the widows and orphans of the deceased seamen by creating the possibility of an additional recovery against the insurance companies. Nor can the owner "profit" from the accident. The amount he may recover from the insurers under the liability policies could never exceed the amount he is obligated to pay to the claimants in the limitation proceedings. He "profits" only in the sense that he is permitted to receive the protection for which he paid.

This is not to say that the insurance companies in a direct action are liable to damage claimants. That would be a question of Louisiana law. Our only interest is to make certain that such actions do not interfere with the Federal Limitation proceeding. To do this we need only require that the limitation proceeding be concluded first and the owner's liability settled under it. The petitioners could then discharge this liability, to the extent their policies covered it, by paying into the limitation proceeding the proper sum.[2] The door would then be left open for prosecution of the direct actions against the insurance companies on the remaining coverage of the policies. Thus, whatever the insurers' liability may be under Louisiana law in the subsequent direct actions, the owner's purse cannot be touched.

MR. JUSTICE FRANKFURTER'S opinion states that the cases might be held for the limitation proceeding were it not that Congress intended that proceeding to be, in addition to a concursus of all claims against the owner

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[2] Of course, if the ship is a total loss, and assuming no privity or knowledge, the owner's liability would be nothing under the federal Act. All the insurance would then be available to claimants in the direct actions, if liability is present under Louisiana law.

and charterer, the exclusive forum for litigating all liability resulting from the accident. This is certainly not an unreasonable position. To be sure, some of the arguments for a concursus of claims against the owner or charterer would be applicable to claims against the insurer. But I do not think the arguments for such a holding are so persuasive, and the case for an opposite conclusion so feeble, that we should proceed at this juncture to invalidate a state law. It is also reasonable to read the Limited Liability Act as aimed at protecting only owners and charterers. The statute does not speak of suits against insurers. And when the Admiralty Rules were adopted we were concerned solely with the problems of the owner and charterer. For example, the limitation court is empowered to enjoin suits in other courts arising out of the accident only if the suits are against the owner, charterer or vessel; no mention was made of enjoining suits against any other party, *e. g.,* insurance companies. See Rule 51. In sum, we must read between the lines in interpreting the Act regardless of how we hold. When the issue is so close, I would resolve it in favor of upholding rather than invalidating a state statute. We are not here confronted with a picture of lawsuits in twenty-odd states under twenty different state laws; if this be a valid argument against upholding the statute in another situation, it has no application in this case. The towboat *Jane Smith*, owned by a Louisiana resident, plied only Louisiana waters of the Atchafalaya River; the accident which befell the vessel occurred in Louisiana; all the parties save one resided in the state and both the limitation proceeding and the damage suits are pending in the same court before the same judge. Moreover, the damage claimants, perhaps secondary beneficiaries of the Limited Liability Act, are also the beneficiaries of a holding that the Limited Liability Act does

not foreclose the possibility of direct actions by them subsequent to the limitation proceeding.

For these reasons, I would direct the District Court to first conclude the limitation proceeding, after which the liability, if any, of the petitioners on their policies in the direct actions could be determined.

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

The towboat *Jane Smith* hit a railroad bridge and sank in Louisiana waters of the Atchafalaya River. Five crew members were drowned. Petitioners, Maryland Casualty Company and Home Insurance Company, had previously sold insurance policies to the boat's owner and its charterer agreeing to repay them for any money they had to pay on account of injury or death caused by the boat. These policies were issued and delivered in Louisiana. A Louisiana statute authorizes injured persons or their heirs to sue insurance companies directly on such policies. Under this law the widows of the drowned crewmen brought these diversity actions in federal court against petitioners. A majority of the Court hold that permitting these suits to go forward to judgments against the insurance companies prior to completion of limitation of liability proceedings under an 1851 Act of Congress would bring this state statute into conflict with that Act. But the 1851 Act was passed to help shipowners by limiting the damages they must pay on account of wrongs inflicted by their agents. I see no possible reason for making insurance companies the beneficiaries of this shipowners' relief Act. Neither can I understand why this Court should feel called on to relieve shipowners from even the light financial burden that the 1851 Act left them to bear. Nor do I think the Louisiana Act is subject to any of the

constitutional objections the insurance companies urge against it. I agree with the Court of Appeals for the Fifth Circuit that the insurance companies' contentions "over-inflate a relatively simple proposition with apparent, but unreal, technical problems." 198 F. 2d 536, 539. For that reason without more I would affirm this judgment. But because of the confused state in which this case goes back to the District Court I think it desirable that all questions be discussed. I shall first take up the constitutional objections.

I.

(a) The insurance companies argue that the Louisiana law impairs the obligation of "maritime contracts." The implication is that maritime contracts have more constitutional protection than other kinds of contracts. But Art. I, § 10 of the United States Constitution, which forbids states to impair the obligations of contracts, draws no such distinction. And while in general this provision protects valid contracts from impairment by subsequent legislation of states, it does not forbid states to pass laws regulating contracts thereafter to be made. *Munday* v. *Wisconsin Trust Co.*, 252 U. S. 499, 503. Cf. *Home Building & Loan Assn.* v. *Blaisdell*, 290 U. S. 398. Hence the Louisiana law, passed before these insurance policies were issued, does not violate the impairment of contract clause and, unless invalid for some other reason, the state's "direct action" statute became a part of the contract when it was made just as though written into each policy by the companies. *New York Life Ins. Co.* v. *Cravens*, 178 U. S. 389, 395–400. Cf. *Farmers and Merchants Bank* v. *Federal Reserve Bank*, 262 U. S. 649, 660.

(b) Article III, § 2 of the Constitution provides that "The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction . . . ." It is con-

tended that this provision not only gives the Federal Government supreme power over maritime affairs but that it also denies any power in states to legislate in this field. This complete denial of state power is said to have been established by *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205, and *Knickerbocker Ice Co.* v. *Stewart,* 253 U. S. 149. The opinions in those cases did lend some support to a constitutional doctrine that the Admiralty Clause requires rigid national uniformity in maritime legislation. But this Court rejected that doctrine in *Red Cross Line* v. *Atlantic Fruit Co.,* 264 U. S. 109. Mr. Justice Brandeis speaking for the Court in that case made it absolutely clear that the Admiralty Clause does not deprive states of power to make different regulations in regard to maritime affairs unless a state attempts to modify or displace essential features of the substantive maritime law or to modify the remedial law of admiralty courts. See also *Standard Dredging Corp.* v. *Murphy,* 319 U. S. 306. These cases but reaffirmed a power that states have always exercised. When the Constitution was adopted the Government found state regulatory systems governing local maritime affairs throughout the country. *Gibbons* v. *Ogden,* 9 Wheat. 1, 207. Congress has never attempted to supplant all local maritime regulations but has left many in effect as useful aids in carrying out national maritime policies. See *Cooley* v. *Board of Wardens,* 12 How. 299; *The Hamilton,* 207 U. S. 398; *Kelly* v. *Washington,* 302 U. S. 1, 14–16. For example, states can even create liens on vessels which may be enforced either in state courts or in courts of admiralty, despite the lack of uniformity brought about by "intricate and conflicting State laws creating such liens . . . ." *The Lottawanna,* 21 Wall. 558, 581. In declining to invalidate these state lien laws this Court there pointed out that Congress could terminate the effectiveness of such state legislation at any time it desired to assume control.

The uniformity which the Admiralty Clause of the Constitution requires is limited to one indefinitely defined area—that involving "the essential features of an exclusive federal jurisdiction." *Just* v. *Chambers,* 312 U. S. 383, 391. Except in instances falling clearly within this area states are free to make laws relating to maritime affairs. Thus, in *Just* v. *Chambers,* Florida was permitted to provide a remedy for death due to maritime torts in Florida waters, even though such a remedy was not permissible under maritime law and not available in other states. Here Louisiana has provided a remedy for death due to maritime torts in Louisiana waters and it is therefore difficult for me to see how the present case can be distinguished from *Just* v. *Chambers.* Neither Congress nor this Court has provided or forbidden suits against insurance companies in cases like these, or attempted to establish uniform rules for the regulation of maritime insurance to the exclusion of the states. Indeed, it was not until 1870 that this Court finally decided that the regulation of marine insurance was within the jurisdiction of admiralty at all. *Insurance Co.* v. *Dunham,* 11 Wall. 1. Prior to that time, there was strong support for the belief that the states alone could regulate marine insurance. No Act of Congress and nothing this Court has said since the *Dunham* decision in 1871 has taken away the concurrent jurisdiction of states over maritime insurance policies.[1] No reason has been advanced why marine insurance, long the province of the states, so imperatively requires uniformity that we should now hold that Con-

[1] In the Merchant Marine Act of 1920 Congress recognized that "marine insurance companies" were operating under state laws. Section 29 of the Act defines that term to include companies "authorized to write marine insurance or reinsurance under the laws of the United States or of a State . . . ." 41 Stat. 988, 1000, 46 U. S. C. § 885 (a)(2).

gress alone can regulate it.[2] Consequently, to enforce the Louisiana law would not impair the uniformity of maritime law, but would once again "illustrate the alacrity with which admiralty courts adopt statutes granting the right to relief where otherwise it could not be administered by a maritime court . . . ." *Workman* v. *New York City,* 179 U. S. 552, 563. See also *The Hamilton,* 207 U. S. 398.

Louisiana's statute, as sought to be applied here, would further the equitable aims of admiralty by providing relief not otherwise available for maritime wrongs. For behind this "direct action" statute lies a long history of state attempts to protect the public interest by ensuring that liability policies furnish adequate protection to persons injured. At one time insurance companies were commonly able to avoid payment of a single dollar on their policies whenever the insured was insolvent and therefore judgment-proof. The insurance, although bought and paid for, would remain untouched while valid claims went entirely unsatisfied. To prevent this injustice many states passed laws of one kind or another which required insurance companies to pay injured persons even though the insured had paid out no money. The Massachusetts Supreme Judicial Court took the lead in sustaining a law of this type, Chief Justice Rugg suggesting its need to prevent liability insurance from becoming a "snare to the insured and a barren hope to the injured." *Lorando* v. *Gethro,* 228 Mass. 181, 189, 117 N. E. 185, 189. And,

[2] In 1935 when Congress was considering amendments to the Limited Liability Act, counsel for the American Steamship Owners' Association strongly contended for continued regulation of marine insurance by the states and against a federal regulation system that would have been uniform in all the states. Hearings before House Committee on Merchant Marine and Fisheries on H. R. 4550, 74th Cong., 1st Sess. 91, 124.

despite the fact that these state statutes wrote compulsory terms and obligations into all insurance contracts, this Court sustained such a statute applying to automobile insurance. Chief Justice Taft said that ". . . it would seem to be a reasonable provision by the State in the interest of the public, whose lives and limbs are exposed, to require that the owner in the contract indemnifying him against any recovery from him should stipulate with the insurance company that the indemnity by which he saves himself should certainly inure to the benefit of the person who thereafter is injured." *Merchants Mutual Automobile Liability Ins. Co.* v. *Smart,* 267 U. S. 126, 129–130. The Louisiana statute is an application of this same principle. It expresses the public policy of Louisiana that liability insurance exists for the protection and benefit of the injured as well as the insured. *Davies* v. *Consolidated Underwriters,* 199 La. 459, 475–476, 6 So. 2d 351, 356–357. Under Louisiana's law an individual purchases liability insurance not for himself alone but also for those whom he may injure. This bargain is advantageous to the purchaser because claims against him can be satisfied in suits against the insurer.

There can be no constitutional barrier to this Louisiana law passed to protect persons injured within its borders. Consequently, unless Congress has specifically forbidden states to protect seamen this way, Louisiana's statute is valid and should be enforced.

## II.

The majority hold that the Limited Liability Act of 1851, as amended, bestows on the shipowner a right to collect all or part of the insurance money for his profit despite Louisiana's statute requiring insurance companies to make their payments directly to the families of persons injured or killed. I think this construction gives shipowners far more than Congress intended.

The Limited Liability Act provides that "The liability of the *owner of any vessel* . . . for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not . . . exceed the amount or value of the interest of such owner in such vessel, and her freight then pending." [3] (Emphasis supplied.) This Act relieves shipowners from a large part of the liability normally imposed on employers for torts of their employees. Under the Act, a shipowner need pay nothing to tort claimants if the ship is a total loss. If it is not wholly destroyed, the shipowner can simply turn a fund equal to the value of his interest in the damaged ship over to a court in a limitation proceeding. All claims against the shipowner must then be satisfied out of that fund, no matter how large the claims or how small the fund. The purpose of Congress in limiting the liability of shipowners was to encourage investment in American ships. But neither the Act nor its history indicates a purpose to encourage investment in insurance companies by limiting their liabilities. The insurance companies contend, however, that requiring them to pay their policy obligations to these claimants will somehow compel shipowners to pay out money in excess of the liability provided by the Act. For the reasons that follow I think this contention is without merit.

(a) The majority appear to hold that if the insurance companies pay out the full amount of their policies in these actions and some recovery is also had against the shipowner in limitation proceedings the shipowner will be unable to get reimbursement for that recovery from the insurers and to that extent will be "deprived of his insurance." It was conceded at the bar, however, that the

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[3] R. S. § 4283, as amended, 49 Stat. 960, 49 Stat. 1479, 46 U. S. C. § 183 (a).

ship here is without value—a total loss. If this is true, there would be no fund in the limitation proceedings and no possibility of any recovery at all against the shipowner. Under these circumstances, the shipowner does not stand to lose a dime if the insurance companies are held liable for the full amount of their policies, and there is no reason for deferring trial of these lawsuits.

(b) Even if the ship has some value and there should be recoveries from the limitation fund, Louisiana's statute would not deprive the shipowner of any right given by the Limited Liability Act. That Act was passed to help shipowners by permitting them to escape full liability for wrongs of their agents. But not a word in it suggests that Congress also intended to give shipowners additional special privileges with respect to liability insurance or to interfere with state regulation of any type of insurance. Nor was any such expanded construction of the Act made by this Court in *The City of Norwich,* 118 U. S. 468. That case rested entirely on a holding that money from hull insurance was no part of an owner's "interest" in his ship which the Limited Liability Act required him to turn over to damage claimants. The Court was concerned only with what made up the limitation fund. The claimants here make no contention that liability insurance is part of the limitation fund. They concede that the shipowner can be made to pay out only the value of his "interest" in the damaged ship. But they insist that the shipowner should not be allowed to escape loss from even the limited liability which Congress put on him, if the result is to deprive injured persons of insurance bought to protect them. There is a vital difference between liability insurance and hull insurance with which *The City of Norwich* dealt. The latter provides recovery for loss of the shipowner's property. But liability insurance is not bought to guarantee reimbursement for loss of a shipowner's property. Its purpose is to pay for damage done

to others by the shipowner or his agents. The shipowner has an insurable "interest" in his ship; if it is lost or damaged any insurance money collected is his own. I cannot believe he has an insurable "interest" in his seamen which could possibly entitle him to reduce the already limited financial obligations the Act imposes by taking for himself insurance money which otherwise would go to compensate seamen or their families for injuries he inflicts. The result of holding that the Act gives the shipowner this insurance benefit is, at least in some circumstances, to leave him with more money after a wreck if he injures people than if he does not. It is a far cry from the decision in *The City of Norwich* that a shipowner is entitled to keep the insurance collected for loss of his own ship to today's holding that states cannot assure seamen that they instead of the shipowner can get the full benefit of liability policies bought in order to pay their just claims for injuries caused by the ship.

(c) It is said, however, that other shipowners might have to pay higher premiums and also buy more insurance if recoveries are allowed here, and that this would discourage investment in ships. How the Limited Liability Act may be read to impose a ceiling on premiums, over which the states normally have full power, is difficult for me to understand. I have searched the Act's history in vain for any support for this interpretation. Yet 103 years after the Act's passage it is discovered that Congress intended to help shipowners by preventing states from making regulations that might raise the cost of marine insurance. But Congress decided to help shipowners by reducing their obligations due to wrecks, not by reducing the prices they had to pay for carrying on their business either before or after a wreck. Construing the Act to protect shipowners from having to pay higher prices for oil or coal would be no less farfetched than construing it to keep down insurance premiums. This Court often

protests its desire to indulge every presumption in favor of the validity of state legislation. It is hard to reconcile this commendable judicial philosophy with use of attenuated inferences about increased premiums as an excuse for impairing this Louisiana law.

(d) Despite the insistence of petitioner insurance companies that these suits must be wholly barred to save shipowners from injury, it seems plain that the only real beneficiaries of such a holding would be the companies themselves. They, rather than the shipowner, would enjoy the protection sought to be written into the Limited Liability Act. But even the most generous reading of the Act gives no ground for believing that it was intended to help insurance companies, directly or indirectly. And nothing in the records of the congressional debates or reports supports such a strained interpretation. Shipowners, not insurance companies, were the group Congress wanted to help.

(e) For the above reasons I think the Limited Liability Act does not require deferring the present suits so that the shipowner can be the direct beneficiary of these insurance policies at the expense of the families of the deceased seamen. But quite apart from these reasons, the same conclusion is required by specific instructions from Congress. The McCarran Act provides that "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance . . . ." 15 U. S. C. § 1012 (b). It is unquestionably true that the McCarran Act was passed in response to this Court's decision that insurance was subject to the federal commerce power.[4] But that is no reason for giving the law an

[4] *United States* v. *South-Eastern Underwriters Assn.*, 322 U. S. 533.

unnaturally narrow construction squarely in the teeth of the plain, normal, everyday meaning of the language used. The Act rather shows the strong purpose of Congress to permit states to continue regulating insurance as they always had. Courts are pointedly told to leave states free to regulate "the business of insurance" in the absence of some congressional act that "specifically relates" to the same subject. The "business of insurance" includes marine insurance and by no stretch of imagination can it be said that the 1851 Act "specifically relates" to insurance. Thus the unambiguous language of the McCarran Act forbids courts to construe federal statutes such as the Limited Liability Act so as to impair a state law like Louisiana's. No legislative history can justify judicial emasculation of this language. I would not disregard its mandate.

III.

Judicial expansion of the Limited Liability Act at this date seems especially inappropriate. Many of the conditions in the shipping industry which induced the 1851 Congress to pass the Act no longer prevail. And later Congresses, when they wished to aid shipping, provided subsidies paid out of the public treasury rather than subsidies paid by injured persons.[5] If shipowners really need an additional subsidy, Congress can give it to them without making injured seamen bear the cost. It is significant that no shipowner has argued here against direct recoveries from the insurance companies.

Today's decision creates unnecessary delay and doubt as to recovery by the families of the *Jane Smith's* victims. The loss of their breadwinners is not to be shared by

[5] See Springer, Amendments to the Federal Law Limiting the Liability of Shipowners, 11 St. John's L. Rev. 14; Note, 35 Col. L. Rev. 246.

the shipping industry the seamen served. It was such results that led to efforts to spread the cost of industrial accidents and disasters through insurance and workmen's compensation laws. Acting consistently with this broad trend in the law, Louisiana has tried to make certain that all liability insurance will get to those for whose protection it was purchased. And application of Louisiana's statute under the circumstances here is also in harmony with the humane policy of the maritime law. Seamen have traditionally been the wards of admiralty, and admiralty has been increasingly solicitous to provide compensation for accidents occurring in their dangerous work. Thus both the general trend of the law and the specific bent of admiralty support the policy of the people of Louisiana which permits recovery here. No language in the Limited Liability Act forbids it; the language of the McCarran Act should compel it.

## LINEHAN ET AL. *v.* WATERFRONT COMMISSION OF NEW YORK HARBOR ET AL.

NO. 557. APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.*

Decided April 12, 1954.

The motions to affirm are granted and the judgments are affirmed. 116 F. Supp. 683 and 117 F. Supp. 308, affirmed.

*George A. Brenner* for appellants.

*Nathaniel L. Goldstein,* Attorney General of New York, *Lawrence E. Walsh* and *Wendell P. Brown* for appellees. *Whitman Knapp* was also for appellees in No. 558.

PER CURIAM.

The motions to affirm are granted and the judgments are affirmed.

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

This case illustrates what I fear is a growing practice of the Court of diluting the Act of Congress which gives us jurisdiction of appeals. 28 U. S. C. § 1253 *et al.* The Congress carved out a group of cases, of which this is one, that comes here as of right and is not dependent, as are petitions for certiorari, on a vote of four Justices out of nine for an adjudication by the Court on the merits of the controversy. In recent years the Court has more and more dismissed or affirmed appeals, with no opportunity

*Together with No. 558, *Staten Island Loaders, Inc. et al.* v. *Waterfront Commission of New York Harbor et al.,* also on appeal from the same court.

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of counsel to make oral argument and without any opinion by the Court.

These appeals should not be added to that growing list.

New York and New Jersey made a Compact, approved by Congress, for the regulation of employment on the waterfront of New York.* The agency through which the plan is effected is the Waterfront Commission, composed of one representative of New York and one of New Jersey. It has charge of the employment of all longshoremen. A longshoremen's register is established; and no one can be employed unless he is on the register. The Commission "may in its discretion" deny an applicant the right to register

> —if he has been convicted of treason, murder, manslaughter, illegal possession of firearms, possessing burglar's instruments, receiving stolen property, unlawful entry of a building, aiding an escape from prison, unlawfully possessing or distributing habit-forming drugs, or
>
> —if he is a Communist or teaches the Communist creed, or
>
> —if in the judgment of the Commission, his presence on the waterfront would constitute "a danger to the public peace or safety."

Two main questions are at once suggested.

*First,* are the standards by which men are deprived of the right to work constitutional? This is a new question on which the Court has never ruled. May a state prescribe standards for employment that have no relevancy to the competency of the men to perform the work? Under this Compact a man who, in a reckless moment, runs over a person in his car and kills him and is convicted

*See McKinney's N. Y. Unconsolidated Laws (Cum. Pamph. Jan. 1954), § 6700–aa *et seq.;* N. J. Stat. Ann. § 32:23; 67 Stat. 541.

of manslaughter, apparently stands disqualified for employment. So does a Communist, whether he be of the cloak-and-dagger variety or a paler type. Are those criteria constitutional? An individual who is deprived of employment for such a reason could raise the question. But if the standard itself has no relevancy to the competency of men to do the work, why may not the Compact be tested at the very threshold?

This is a substantial question which our cases do not answer. We write here on a slate that is fairly clean, except for remote analogies.

*Second,* are these provisions of the Compact which disqualify men from employment unconstitutional as a bill of attainder? A few years ago Congress struck certain federal employees from the payroll because Congress thought they were "subversives." We held that that disqualification for employment without a judicial trial was a bill of attainder and therefore unconstitutional. *United States* v. *Lovett,* 328 U. S. 303. Here the state legislatures, with the approval of Congress, have not done precisely that. But they have come close to it by defining a proscribed class and barring them from employment—again without a judicial trial. Cf. *Garner* v. *Los Angeles Board,* 341 U. S. 716.

Perhaps a way could be found to sustain all the challenged provisions of the Compact. Perhaps they could be so construed as to save any and all individual rights. But the motion to dismiss or affirm (26 pages long) and the reply to it (51 pages long) in No. 557 only stir these profound questions and do not put them at rest.

The right to work—which goes to the very heart of our way of life—is at stake in these appeals. If we conclude that the Compact is constitutional, we should give our reasons so that all interests will be protected. Congress expected as much in all but frivolous cases coming here by appeal.

# BARSKY *v.* BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 69. Argued January 4, 1954.—Decided April 26, 1954.

Pursuant to §§ 6514 and 6515 of the New York State Education Law, authorizing disciplinary action against any physician "convicted in a court of competent jurisdiction, either within or without this state, of a crime," appellant's license to practice as a physician was suspended for six months, because he had been convicted in the United States District Court for the District of Columbia, under 2 U. S. C. § 192, of failing to produce before a Congressional Committee certain papers subpoenaed by that Committee. *Held:* The New York law, on its face or as so construed and applied, does not violate the Due Process Clause of the Fourteenth Amendment. Pp. 443–456.

(a) The decision of the highest state court that a violation of 2 U. S. C. § 192, though not a crime under New York law, was a "crime" within the meaning of § 6514–2 (b) of the State Education Law, is conclusive here. P. 448.

(b) Section 6514–2 (b) is not unconstitutionally vague. P. 448.

(c) The subsequent designation of certain other contempts of Congress as federal "crimes" (18 U. S. C. § 402) does not prevent a violation of 2 U. S. C. § 192 from being a "crime" within the meaning of the New York law. P. 449, n. 8.

(d) The establishment and enforcement of standards of conduct within its borders relative to the health of its people is a vital part of a state's police power. P. 449.

(e) The practice of medicine is a privilege granted by the State under its substantially plenary power to fix the terms of admission. P. 451.

(f) A state's legitimate concern for maintaining high standards of professional conduct extends beyond initial licensing. P. 451.

(g) The suspension of appellant's license because of his conviction in a foreign jurisdiction, for an offense not involving moral turpitude and not criminal under New York law, does not so far transcend the State's legitimate concern in professional standards as to violate the Fourteenth Amendment. Pp. 451–452.

(h) The provisions of § 6515 of the State Education Law prescribing the procedure for disciplinary action are, on their face, reasonable and satisfy the requirements of due process. Pp. 452–453.

(i) The record in this case does not support a conclusion that the Board of Regents, in fixing the measure of discipline at a six months' suspension of appellant's license as a physician, made an arbitrary or capricious decision or relied upon irrelevant evidence. Pp. 453–456.

305 N. Y. 89, 691, 111 N. E. 2d 222, 112 N. E. 2d 773, affirmed.

*Abraham Fishbein* argued the cause and filed a brief for appellant.

*Henry S. Manley,* Assistant Attorney General of New York, argued the cause for appellee. With him on the brief were *Nathaniel L. Goldstein,* Attorney General, and *Wendell P. Brown,* Solicitor General.

MR. JUSTICE BURTON delivered the opinion of the Court.

The principal question here presented is whether the New York State Education Law,[1] on its face or as here construed and applied, violates the Constitution of the United States by authorizing the suspension from practice, for six months, of a physician because he has been convicted, in the United States District Court for the District of Columbia, of failing to produce, before a Committee of the United States House of Representatives, certain papers subpoenaed by that Committee.[2] For the reasons hereafter stated, we hold that it does not.

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[1] McKinney's N. Y. Laws, Education Law, §§ 6514, 6515.

[2] The conviction was for violating R. S. § 102, as amended, 52 Stat. 942, 2 U. S. C. § 192:

"SEC. 102. Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House

In 1945, the Committee of the United States House of Representatives, known as the Committee on Un-American Activities, was authorized to make investigations of "the extent, character, and objects of un-American propaganda activities in the United States." [3] In 1946, in the course of that investigation, the Committee subpoenaed Dr. Edward K. Barsky, appellant herein, who was then the national chairman and a member of the executive board of the Joint Anti-Fascist Refugee Committee, to produce "all books, ledgers, records and papers relating to the receipt and disbursement of money by or on account of the Joint Anti-Fascist Refugee Committee or any subsidiary or any subcommittee thereof, together with all correspondence and memoranda of communications by any means whatsoever with persons in foreign countries for the period from January 1, 1945, to March 29, 1946." [4] Similar subpoenas were served on the executive secretary and the other members of the executive board of the Refugee Committee. Appellant appeared before the Congressional Committee but, pursuant to advice of counsel and the action of his executive

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of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months."

[3] "The Committee on Un-American Activities, as a whole or by subcommittee, is authorized to make from time to time investigations of (1) the extent, character, and objects of un-American propaganda activities in the United States, (2) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (3) all other questions in relation thereto that would aid Congress in any necessary remedial legislation." 91 Cong. Rec. 10, 15. This was carried into the Rules of the House as Rule XI (q)(2), 60 Stat. 823, 828.

[4] *United States* v. *Bryan*, 72 F. Supp. 58, 60.

board, he and the other officers of the Refugee Committee failed and refused to produce the subpoenaed papers.

In 1947, appellant, the executive secretary and several members of the executive board of the Refugee Committee were convicted by a jury, in the United States District Court for the District of Columbia, of violating R. S. § 102, as amended, 2 U. S. C. § 192, by failing to produce the subpoenaed papers. Appellant was sentenced to serve six months in jail and pay $500. See *United States* v. *Bryan,* 72 F. Supp. 58; *United States* v. *Barsky,* 72 F. Supp. 165. In 1948, this judgment was affirmed by the Court of Appeals, *Barsky* v. *United States,* 83 U. S. App. D. C. 127, 167 F. 2d 241, and certiorari was denied, 334 U. S. 843. In 1950, a rehearing was denied. Two Justices noted their dissents, and two did not participate. 339 U. S. 971. Appellant served his sentence, being actually confined five months.[5]

Appellant was a physician who practiced his profession in New York under a license issued in 1919. However, in 1948, following the affirmance of his above-mentioned conviction, charges were filed against him with the Department of Education of the State of New York by an inspector of that department. This was done under § 6515 of the Education Law, seeking disciplinary action pursuant to subdivision 2 (b) of § 6514 of that law:

> "2. The license or registration of a practitioner of medicine, osteopathy or physiotherapy may be revoked, suspended or annulled or such practitioner reprimanded or disciplined in accordance with the provisions and procedure of this article upon decision after due hearing in any of the following cases:
>
> . . . . .

[5] For related litigation, see *United States* v. *Bryan,* 339 U. S. 323; *United States* v. *Fleischman,* 339 U. S. 349; *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U. S. 123.

"(b) That a physician, osteopath or physiotherapist has been convicted in a court of competent jurisdiction, either within or without this state, of a crime; or . . . ."

In 1951, after filing an amended answer, appellant was given an extended hearing before a subcommittee of the Department's Medical Committee on Grievances. The three doctors constituting the subcommittee made a written report of their findings, determination and recommendation, expressly taking into consideration the five months during which appellant had been separated from his practice while confined in jail, and also the testimony and letters submitted in support of his character. They recommended finding him guilty as charged and suspending him from practice for three months. The ten doctors constituting the full Grievance Committee unanimously found appellant guilty as charged. They also adopted the findings, determination and recommendation of their subcommittee, except that, by a vote of six to four, they fixed appellant's suspension at six months. Promptly thereafter, the Committee on Discipline of the Board of Regents of the University of the State of New York held a further hearing at which appellant appeared in person and by counsel. This committee consisted of two lawyers and one doctor. After reviewing the facts and issues, it filed a detailed report recommending that, while appellant was guilty as charged, his license be not suspended and that he merely be censured and reprimanded.[6] The Board of Regents, however, returned to and sustained the

[6] The committee said:

"Since violation of the Federal statute which Respondent has been convicted of violating involves inherently no moral turpitude, and since there has been no impeachment by evidence of Respondent's explanation (sufficient if unimpeached) of his failure to produce the subpoenaed documents, we find in the record no valid basis for discipline beyond the statutory minimum of censure and reprimand;

determination of the Medical Committee on Grievances, and suspended appellant's license for six months.[7]

Appellant sought a review of this determination, under § 6515 of the Education Law, *supra,* and Article 78 of the New York Civil Practice Act, Gilbert-Bliss' N. Y. Civ. Prac., Vol. 6B, 1944, §§ 1283–1306. The proceeding was instituted in the Supreme Court for the County of Albany and transferred to the Appellate Division, Third Department. That court confirmed the order of the Board of Regents. *In re Barsky,* 279 App. Div. 1117, 112 N. Y. S. 2d 778, and see 279 App. Div. 447, 111 N. Y. S. 2d 393, and 279 App. Div. 1101, 112 N. Y. S. 2d 780, 781. The Court of Appeals, with one judge dissenting, affirmed. 305 N. Y. 89, 111 N. E. 2d 222. That court allowed an appeal to this Court and amended its remittitur by adding the following:

> "Upon the appeals herein there were presented and necessarily passed upon questions under the Federal Constitution, viz., whether sections 6514 and 6515 of the Education Law, as construed and applied here,

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and we therefore recommend that Respondent's license be not suspended, as the Medical Committee on Grievances has recommended, but that he be censured and reprimanded."

[7] The order suspending appellant's license was issued by the Commissioner of Education in 1951, but its effect was stayed by the New York Court of Appeals, pending an appeal to this Court. 305 N. Y. 691, 112 N. E. 2d 773.

At about the same time, the board fixed at three months the suspension of the license of another doctor who was a member of the executive board of the Refugee Committee and who had been convicted with appellant. It also directed that a third doctor, who was a member of the same board, be censured and reprimanded. Each such determination was confirmed by the New York courts simultaneously with the confirmations relating to appellant. See 279 App. Div. 447, 111 N. Y. S. 2d 393; 279 App. Div. 1101, 112 N. Y. S. 2d 780, 781; 279 App. Div. 1117, 112 N. Y. S. 2d 778; and 305 N. Y. 89, 111 N. E. 2d 222.

are violative of the due process clause of the Fourteenth Amendment. The Court of Appeals held that the rights of the petitioners under the Fourteenth Amendment of the Constitution of the United States had not been violated or denied." 305 N. Y. 691, 112 N. E. 2d 773.

We noted probable jurisdiction, THE CHIEF JUSTICE not participating at that time. 346 U. S. 807, 801.

That appellant was convicted of a violation of R. S. § 102, as amended, 2 U. S. C. § 192, in a court of competent jurisdiction is settled. In the New York courts, appellant argued that a violation of that section of the federal statutes was not a crime under the law of New York and that, accordingly, it was not a "crime" within the meaning of § 6514–2 (b) of the New York Education Law. He argued that his conviction, therefore, did not afford the New York Board of Regents the required basis for suspending his license. That issue was settled adversely to him by the Court of Appeals of New York and that court's interpretation of the state statute is conclusive here.

He argues that § 6514–2 (b) is unconstitutionally vague. As interpreted by the New York courts, the provision is extremely broad in that it includes convictions for any crime in any court of competent jurisdiction within or without New York State. This may be stringent and harsh but it is not vague. The professional standard is clear. The discretion left to enforcing officers is not one of defining the offense. It is merely that of matching the measure of the discipline to the specific case.

A violation of R. S. § 102, as amended, 2 U. S. C. § 192, is expressly declared by Congress to be a misdemeanor. It is punishable by a fine of not more than $1,000 nor less than $100 and imprisonment for not less than one month nor more than twelve months. See note 2, *supra.*

For its violation appellant received a sentence of one-half the maximum and served five months in jail. There can be no doubt that appellant was convicted in a court of competent jurisdiction of a crime within the meaning of the New York statute.[8]

It is elemental that a state has broad power to establish and enforce standards of conduct within its borders relative to the health of everyone there. It is a vital part of a state's police power. The state's discretion in that field extends naturally to the regulation of all professions concerned with health. In Title VIII of its Education Law, the State of New York regulates many fields of professional practice, including medicine, osteopathy, physiotherapy, dentistry, veterinary medicine, pharmacy, nursing, podiatry and optometry. New York has had long experience with the supervision of standards of medical practice by representatives of that profession exercising wide discretion as to the discipline to be applied. It has established detailed procedures for investigations, hearings and reviews with ample opportunity for the accused practitioner to have his case thoroughly considered and reviewed.

Section 6514, as a whole,[9] demonstrates the broad field of professional conduct supervised by the Medical Committee on Grievances of the Department of Education

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[8] The subsequent designation of certain other contempts of Congress as federal "crimes" (18 U. S. C. § 402) does not prevent this misdemeanor from being a crime within the meaning of the New York statute.

[9] "§ 6514. Revocation of certificates; annulment of registrations

"1. Whenever any practitioner of medicine, osteopathy or physiotherapy shall be convicted of a felony, as defined in section sixty-five hundred two of this article, the registration of the person so convicted may be annulled and his license revoked by the department. It shall be the duty of the clerk of the court wherein such conviction takes place to transmit a certificate of such conviction to the department. Upon reversal of such judgment by a court having jurisdic-

and the Board of Regents of the University of the State of New York. In the present instance, the violation of § 6514–2 (b) is obvious. The real problem for the state agencies is that of the appropriate disciplinary action to be applied.

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tion, the department, upon receipt of a certified copy of such judgment or order of reversal, shall vacate its order of revocation or annulment.

"2. The license or registration of a practitioner of medicine, osteopathy or physiotherapy may be revoked, suspended or annulled or such practitioner reprimanded or disciplined in accordance with the provisions and procedure of this article upon decision after due hearing in any of the following cases:

"(a) That a physician, osteopath or physiotherapist is guilty of fraud or deceit in the practice of medicine, osteopathy or physiotherapy or in his admission to the practice of medicine, osteopathy or physiotherapy; or

"(b) That a physician, osteopath or physiotherapist has been convicted in a court of competent jurisdiction, either within or without this state, of a crime; or

"(c) That a physician, osteopath or physiotherapist is an habitual drunkard, or is or has been addicted to the use of morphine, cocaine or other drugs having similar effect, or has become insane; or

"(d) That a physician, osteopath or physiotherapist offered, undertook or agreed to cure or treat disease by a secret method, procedure, treatment or medicine or that he can treat, operate and prescribe for any human condition by a method, means or procedure which he refuses to divulge upon demand to the committee on grievances; or that he has advertised for patronage by means of handbills, posters, circulars, letters, stereopticon slides, motion pictures, radio, or magazines; or

"(e) That a physician, osteopath or physiotherapist did undertake or engage in any manner or by any ways or means whatsoever to perform any criminal abortion or to procure the performance of the same by another or to violate section eleven hundred forty-two of the penal law, or did give information as to where or by whom such a criminal abortion might be performed or procured.

"(f) That a physician, osteopath or physiotherapist has directly or indirectly requested, received or participated in the division, transference, assignment, rebate, splitting or refunding of a fee for, or has directly or indirectly requested, received or profited by means of a credit or other valuable consideration as a commission, discount

The practice of medicine in New York is lawfully prohibited by the State except upon the conditions it imposes. Such practice is a privilege granted by the State under its substantially plenary power to fix the terms of admission. The issue is not before us but it has not been questioned that the State could make it a condition of admission to practice that applicants shall not have been convicted of a crime in a court of competent jurisdiction either within or without the State of New York. It could at least require a disclosure of such convictions as a condition of admission and leave it to a competent board to determine, after opportunity for a fair hearing, whether the convictions, if any, were of such a date and nature as to justify denial of admission to practice in the light of all material circumstances before the board.

It is equally clear that a state's legitimate concern for maintaining high standards of professional conduct extends beyond initial licensing. Without continuing supervision, initial examinations afford little protection. Appellant contends, however, that the standard which New York has adopted exceeds reasonable supervision and deprives him of property rights in his license and

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or gratuity in connection with the furnishing of medical, surgical or dental care, diagnosis or treatment or service, including x-ray examination and treatment, or for or in connection with the sale, rental, supplying or furnishing of clinical laboratory services or supplies, x-ray laboratory services or supplies, inhalation therapy service or equipment, ambulance service, hospital or medical supplies, physiotherapy or other therapeutic service or equipment, artificial limbs, teeth or eyes, orthopedic or surgical appliances or supplies, optical appliances, supplies or equipment, devices for aid of hearing, drugs, medication or medical supplies or any other goods, services or supplies prescribed for medical diagnosis, care or treatment under this chapter, except payment, not to exceed thirty-three and one-third per centum of any fee received for x-ray examination, diagnosis or treatment, to any hospital furnishing facilities for such examination, diagnosis or treatment. . . ."

his established practice, without due process of law in violation of the Fourteenth Amendment.

He argues that New York's suspension of his license because of his conviction in a foreign jurisdiction, for an offense not involving moral turpitude [10] and not criminal under the law of New York, so far transcends that State's legitimate concern in professional standards as to violate the Fourteenth Amendment. We disagree and hold that New York's governmental discretion is not so restricted.

This statute is readily distinguishable from one which would require the automatic termination of a professional license because of some criminal conviction of its holder.[11] Realizing the importance of high standards of character and law observance on the part of practicing physicians, the State has adopted a flexible procedure to protect the public against the practice of medicine by those convicted of many more kinds and degrees of crime than it can well list specifically. It accordingly has sought to attain its justifiable end by making the conviction of any crime a violation of its professional medical standards, and then leaving it to a qualified board of doctors to determine initially the measure of discipline to be applied to the offending practitioner.

Section 6515 of the New York Education Law thus meets the charge of unreasonableness. All charges are passed upon by a Committee on Grievances of the department. That committee consists of ten licensed physicians, appointed by the Board of Regents. The term of each member is five years. They serve without compensation. Three are "members of conspicuous profes-

[10] See *Sinclair* v. *United States*, 279 U. S. 263, 299.

[11] A conviction for a crime which, under the law of New York, would amount to a felony has been given such an automatic effect in some instances. See McKinney's N. Y. Laws, Education Law, § 6613–12, as to dentists; and McKinney's N. Y. Laws, Judiciary Law, § 90–4, as to attorneys. Cf. § 6514–1, note 9, *supra*, as to physicians. See *In re Raab*, 156 Ohio St. 158, 101 N. E. 2d 294.

sional standing" appointed upon the board's own nomination. § 6515–2. The others are appointed from lists of nominees submitted respectively by the New York State Medical, Homeopathic and Osteopathic Societies. Charges must be filed in writing and a subcommittee of three or more members hears and reports on them. At least ten days' notice of a hearing is required and opportunity is afforded the accused to appear personally, or by counsel, with the right to produce witnesses and evidence on his own behalf, to cross-examine witnesses, to examine evidence produced against him and to have subpoenas issued by the committee. The subcommittee transmits its report, findings and recommendation, together with a transcript of evidence, to the Committee on Grievances. That committee may take further testimony. It determines the merit of the charges and, if the practitioner is found guilty by a unanimous verdict, the record, together with the findings and determination of the committee, is transmitted to the Board of Regents. That board, "after due hearing," may accept or modify the committee's recommendation, or find the practitioner not guilty and dismiss the charges. § 6515–7. "The committee on grievances shall not be bound by the laws of evidence in the conduct of its proceedings, but the determination shall be founded upon sufficient legal evidence to sustain the same." § 6515–5. If the accused is found guilty, he may institute proceedings for review under Article 78 of the Civil Practice Act, returnable before the Appellate Division of the Third Judicial Department.

The above provisions, on their face, are well within the degree of reasonableness required to constitute due process of law in a field so permeated with public responsibility as that of health.

The statutory procedure as above outlined has been meticulously followed in this case and no objection is

made on that score. Appellant, nevertheless, complains that, as construed and applied by the Medical Committee on Grievances and its subcommittee, his hearing violated the due process of law required by the Fourteenth Amendment. He contends that evidence was introduced which was immaterial and prejudicial and that the committee based its determination upon that evidence. He contends, in effect, that the committee reached its determination without "sufficient legal evidence to sustain the same," thus exceeding its statutory authority. He claims further that the committee acted capriciously and arbitrarily upon immaterial and prejudicial evidence, thus not only exceeding its statutory authority but depriving him of his property without due process of law.

The state courts have determined that the hearing did not violate the statute and, accordingly, we are concerned only with the constitutional question. The claim is that immaterial and prejudicial evidence of the alleged subversive activities of the Refugee Committee was introduced and relied upon. Emphasis is given to evidence that the Refugee Committee had been placed on the Attorney General's list of subversive or Communistic organizations. To emphasize the prejudicial character of this testimony, appellant refers to the fact that, at the time of the subcommittee hearing, litigation involving such list was pending in the courts and had resulted in a decision adverse to appellant, whereas that decision subsequently was set aside by this Court.[12] The State's answer to these claims is that such testimony was invited by appellant's own testimony as to the activities of the Refugee Committee.[13] The State shows also that while such evidence was not necessary to establish appellant's

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[12] *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123.

[13] The character of the activities of the Joint Anti-Fascist Refugee Committee was placed in issue by appellant's amended answer. He volunteered much testimony as to the benevolent and charitable pro-

violation of the federal statute as to the subpoenaed papers, it was material and admissible to assist the Committee on Grievances and the other agencies in determining the appropriate disciplinary measures to be applied to appellant under the state law. Appellant recognized this materiality by endeavoring to use evidence as to the Refugee Committee's charitable activities to justify and excuse his failure to produce the subpoenaed papers.

We find nothing sufficient to sustain a conclusion that the Board of Regents or the recommending committees made an arbitrary or capricious decision or relied upon irrelevant evidence. The report made by the original subcommittee of three that heard the evidence indicates that it was not influenced by the character of the Refugee Committee. It said:

> "We do not feel that we are now concerned, nor would we be able to determine, whether the books and records of that Committee would disclose whether the Committee was completely philanthropic in character, or whether it was engaged in subversive activities."

The painstaking complete review of the evidence and the issues by the Committee on Discipline of the Board of Regents demonstrates a high degree of unbiased objectivity. Before the final action of the Board of Regents, the Committee on Discipline in its report to that board noted that—

> "After the hearing below and the determination of the Medical Committee on Grievances, the Supreme Court of the United States reversed an order of the District Court dismissing a complaint by the Refugee Committee in an action by it for declaratory and

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grams in which the committee participated and he introduced many exhibits on the same subject. Reference to the Attorney General's list of subversives developed naturally during the resulting cross-examination of appellant.

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> injunctive relief (*Joint Anti-Fascist Refugee Committee* v. *McGrath, Attorney General,* 341 U. S. 123), some of the majority justices going on the ground that a determination of this kind could not constitutionally be made without a hearing and opportunity to offer proof and disproof. In view of this decision, no evidentiary weight can be given in the present proceeding to the listing by the Attorney General."

That committee thus recognized the existence of a valid basis for disciplinary action but found "no valid basis for discipline beyond the statutory minimum of censure and reprimand." With this recommendation before the Board of Regents, we see no reason to conclude that the board disregarded it or acted arbitrarily, capriciously or through prejudice and deprived appellant of due process of law. The board made no specific findings. It accepted and sustained the unanimous determination of the Medical Committee on Grievances, which was that appellant was guilty. Then, in compliance with the recommendation of that committee, it fixed the measure of discipline at a six months' suspension of appellant's registration as a physician.

The Court has considered the other points raised by appellant but finds no substantial federal constitutional objection in them, even assuming that they are before us as having been considered by the Court of Appeals, although not mentioned in its opinion or the amendment to its remittitur.

The judgment of the Court of Appeals of the State of New York, accordingly, is

*Affirmed.*

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

Dr. Barsky has been a practicing physician and surgeon since his graduation from the medical college of Columbia

University in 1919, except for time spent doing postgraduate work in Europe. Beginning with his internship he has been almost continuously on the staff of Beth Israel Hospital in New York, the city of his birth. During the Spanish Civil War Dr. Barsky and others became actively concerned with the medical needs of Loyalist soldiers. The doctor went over to Spain to head an American hospital for the Loyalist wounded. Following his return to practice in New York Dr. Barsky became chairman of the Joint Anti-Fascist Refugee Committee, an organization founded in 1942 to help with problems of Spanish refugees from the Franco government. In 1945 the House Committee on Un-American Activities began an investigation of the Refugee Committee to see if it was spreading political propaganda. Dr. Barsky and other members of the organization's executive board were summoned before the congressional Committee and asked to produce the records of contributions and disbursements of the Refugee Committee. Dr. Barsky and the others refused, explaining that many contributors had relatives in Spain whose lives might be endangered if the contributors' names were given out publicly. Instead, the organization was willing to give the required information to the President's War Relief Control Board. In making his refusal, Dr. Barsky had the advice of attorneys that his action was justified because the congressional Committee's subpoena transcended its constitutional powers. Concededly this advice was reasonable and in accord with the legal opinion of many lawyers and jurists throughout the country.[1] Moreover, the Refugee Committee was advised that the only way to raise its constitutional claim and test the

[1] And certainly since our recent holding in *United States* v. *Rumely*, 345 U. S. 41, it cannot be said that it is "fanciful or factitious" to claim that the First Amendment bars congressional committees from seeking the names of contributors to an organization alleged to be engaged in "political propaganda."

subpoena's validity was for its executives to risk jail by refusing to produce the requested papers. Dr. Barsky was sentenced to six months in jail as punishment for his disobedience of the order to produce, and the Court of Appeals affirmed his sentence, overruling his constitutional arguments. This Court denied certiorari without approving or disapproving the constitutional contentions. 334 U. S. 843.

When Dr. Barsky was released from jail and ready to resume his practice, an agent of the Board of Regents of the University of the State of New York [2] served him with a complaint demanding that his license to practice medicine be revoked. This action was not based on any alleged failing of Dr. Barsky in his abilities or conduct as a physician or surgeon. The sole allegation was that he had been convicted of a crime—refusal to produce papers before Congress. New York law authorizes revocation or suspension of a physician's license if he is convicted of a crime. Hearings were held before a Grievance Committee of physicians appointed by the Regents, and there was much testimony to the effect that Dr. Barsky was both a skillful surgeon and a good citizen. No witness testified to any conduct of Dr. Barsky which in any way reflected on his personal or professional character. Nothing was proven against him except that he had refused to produce papers. In reviewing the findings of fact, pursuant to § 211 of the State's Education Law, the Regents' Discipline Committee reported that Dr. Barsky's refusal to produce the Refugee Committee's papers was shown to be due to a desire to preserve the constitutional rights of his organization, that his offense involved no

[2] The University of the State of New York is the historic name of the corporate body which the Regents make up. It has no faculty or students of its own. See McKinney's N. Y. Laws, Education Law, § 201 *et seq.*

moral turpitude whatever,[3] and that he had already been punished. The right to test the constitutional power of a Committee is itself a constitutionally protected right in this country.[4] But despite all these things the Regents suspended Dr. Barsky's medical license for six months, giving no reason for their action.

I have no doubt that New York has broad power to regulate the practice of medicine. But the right to practice is, as MR. JUSTICE DOUGLAS shows, a very precious part of the liberty of an individual physician or surgeon. It may mean more than any property. Such a right is protected from arbitrary infringement by our Constitution, which forbids any state to deprive a person of liberty or property without due process of law. Accordingly, we brought this case here to determine if New York's action against Dr. Barsky violates the requirements of the Federal Constitution.

This record reveals, in my opinion, that New York has contravened the Constitution in at least one, and possibly two respects. First, it has used in place of probative evidence against Dr. Barsky an attainder published by the Attorney General of the United States in violation of the Constitution. Second, it has permitted Dr. Barsky to be tried by an agency vested with intermingled legislative-executive-judicial powers so broad and so devoid of legislative standards or guides that it is in effect not a tribunal operating within the ordinary safeguards of law but an agency with arbitrary power to decide, conceivably on the basis of suspicion, whim or caprice, whether or not physicians shall lose their licenses.

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[3] This Court has authoritatively construed the federal offense of refusing to comply with a congressional subpoena as involving no moral turpitude. *Sinclair* v. *United States*, 279 U. S. 263, 299.

[4] See *Ex parte Young*, 209 U. S. 123, 148, and *Oklahoma Operating Co.* v. *Love*, 252 U. S. 331, 335–338.

*First.* At the hearing before a subcommittee of the Medical Grievance Committee, appointed by the Regents, the lawyer for the Regents introduced evidence that the Refugee Committee headed by Dr. Barsky had been listed by the Attorney General of the United States as subversive. Pages and pages of the record are devoted to this listing, to arguments about its meaning and to other innuendoes of suspected Communistic associations of Dr. Barsky without a single word of legal or credible proof. Excerpts from the record are printed in the Appendix to this opinion. The Grievance Committee made a formal finding of fact that the Refugee Committee had been listed as subversive. This Court, however, has held that the Attorney General's list was unlawful, *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U. S. 123. My view was and is that the list was the equivalent of a bill of attainder which the Constitution expressly forbids. The Regents' own reviewing Committee on Discipline recognized the illegality of the list and advised the Regents that no weight should be given to it. This reviewing committee also recommended that the Regents not accept the Grievance Committee's recommendation of a six months' suspension but instead give no suspension at all. The Regents, however, accepted and sustained the determination of the Grievance Committee. Dr. Barsky sought review in the Court of Appeals, but New York's highest court said it was without power to review the use of the Attorney General's list. Our responsibility is, however, broader. We must protect those who come before us from unconstitutional deprivation of their rights, whether the state court is empowered to do so or not. The record shows that the Grievance Committee made a finding of fact that "Ever since 1947, the [Refugee] Committee has been listed as subversive by the Attorney General of the United

States." It seems perfectly natural for the Grievance Committee to rely on this list, for the Regents are charged with the duty of making up their own list of "subversive" organizations for the purpose of dismissing teachers, and New York law authorizes the Regents to make use of the Attorney General's list.[5] Dr. Barsky had a constitutional right to be free of any imputations on account of this illegal list. That reason alone should in my judgment require reversal of this case.

*Second.* Even if the evidence considered by the Regents and the Grievance Committee had been proper, I would still have grave doubts that Dr. Barsky was tried by procedures meeting constitutional requirements. The Regents who tried and suspended him exercise executive, legislative and judicial powers.[6] The Regents have broad supervisory and disciplinary controls over schools, school boards and teachers. They also have powers over libraries and library books, and they censor movies.[7] Doctors, dentists, veterinarians. accountants,

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[5] Education Law, § 3022. See *Adler* v. *Board of Education of the City of New York*, 342 U. S. 485.

[6] The New York Constitution, Art. V, § 4, makes the Regents head of the Department of Education with power to appoint and remove at pleasure a Commissioner of Education who is the Department's chief administrative officer. These nonsalaried Regents are almost entirely independent of the Governor, being elected on joint ballot of the two houses of the Legislature for thirteen-year terms. Education Law, § 202. Executive power over the State's educational system is vested in the Regents by § 101 of the Education Law. Section 207 provides that "the regents shall exercise legislative functions concerning the educational system of the state, determine its educational policies, and, except, as to the judicial functions of the commissioner of education, establish rules for carrying into effect the laws and policies of the state . . . ."

[7] See Education Law, §§ 120 *et seq.*, 214, 215, 216, 219, 224, 245 *et seq.*, 704, 801 *et seq.* On motion picture censorship by the Regents see *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495.

surveyors, and other occupational groups are also subject to discipline by the Regents and must obey their rules.[8] For example the Department of Education, headed by the Regents, has its own investigators, detectives and lawyers to get evidence and develop cases against doctors.[9] Persons appointed by the Department prefer charges and testify against an accused before a committee of doctors appointed by the Regents. This committee after hearing evidence presented by departmental prosecutors makes findings and recommendations which are reviewed by another Regents' committee with power to make its own findings and recommendations. Then the Regents themselves, apparently bound in no way by the recommendations of either of their committees, make the final decision as to doctors' professional fate.

A doctor is subject to discipline by the Regents whenever he is convicted of a "crime" within or without the State. Whether his "crime" is the most debasing or the most trivial, the Regents have complete discretion to impose any measure of discipline from mere reprimand to full revocation of the doctor's license.[10] No legislative standards fetter the Regents in this respect. And no court in New York can review the exercise of their "discretion," if it is shown that the Regents had authority to

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[8] Education Law, §§ 211, 6501–7506. The professions of pharmacy, optometry, podiatry, nursing, shorthand reporting, architecture and engineering are also under the Regents' jurisdiction.

[9] For examples of entrapment of doctors by the Regents' investigators and the narrowness of judicial review afforded accused doctors see *Weinstein* v. *Board of Regents*, 267 App. Div. 4, 44 N. Y. S. 2d 917, reversed, 292 N. Y. 682, 56 N. E. 2d 104; *Epstein* v. *Board of Regents*, 267 App. Div. 27, 44 N. Y. S. 2d 921, reversed, 295 N. Y. 154, 65 N. E. 2d 756.

[10] *Barsky* v. *Board of Regents*, 305 N. Y. 89, 99, 111 N. E. 2d 222, 226.

impose any discipline at all.[11] Should they see fit to let a doctor repeatedly guilty of selling narcotics to his patients continue to practice, they could do so and at the same time bar for life a doctor guilty of a single minor infraction having no bearing whatever on his moral or professional character. They need give no reasons. Indeed the Regents might discipline a doctor for wholly indefensible reasons, such as his race, religion or suspected political beliefs, without any effective checks on their decisions.

In this case one can only guess why the Regents overruled their Discipline Committee and suspended Dr. Barsky. Of course it may be possible that the Regents thought that *every* doctor who refuses to testify before a congressional committee should be suspended from practice.[12] But so far as we know the suspension may rest on the Board's unproven suspicions that Dr. Barsky had associated with Communists. This latter ground, if the basis of the Regents' action, would indicate that in New York a doctor's right to practice rests on no more than the will of the Regents. This Court, however, said many years ago that "the nature and the theory of our institutions of government . . . do not mean to leave room for the play and action of purely personal and arbitrary power. . . . For, the very idea that one man may be compelled to hold his life, or the means of living, or

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[11] The Regents, with their many law-enforcement duties, are plainly not a judicial body in the ordinary sense, yet court review is virtually precluded. Whether due process of law can be satisfied in this type of case by procedures from which effective review by the regular judicial branch of the government is barred is certainly not wholly clear. Compare *Ohio Valley Water Co.* v. *Ben Avon Borough*, 253 U. S. 287, *Ng Fung Ho* v. *White*, 259 U. S. 276 and *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38, with *Yakus* v. *United States*, 321 U. S. 414.

[12] But see note 7 of the Court's opinion.

any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails . . . ." *Yick Wo* v. *Hopkins,* 118 U. S. 356, 369–370.[13]

## APPENDIX TO OPINION OF MR. JUSTICE BLACK.

At the hearing before the Subcommittee of the Medical Grievance Committee there was a great deal of testimony as to the nature and purposes of the Joint Anti-Fascist Refugee Committee. Mr. Tartikoff, Assistant Attorney General of New York, representing the Department of Education, repeatedly attempted to show that the Committee had engaged in "subversive" or "Un-American"

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[13] See *Davis* v. *Schnell,* 81 F. Supp. 872, where in an opinion by Mullins, D. J., a three-judge district court, following *Yick Wo* v. *Hopkins,* struck down a state constitutional provision limiting voters to those who could "understand and explain" the Constitution. County Boards of Registrars were by statute given discretion to determine whether persons seeking to vote had satisfied the constitutional provision. Judge Mullins said:

"The words 'understand and explain' do not provide a reasonable standard. A simple test may be given one applicant; a long, tedious, complex one to another; one applicant may be examined on one article of the Constitution; another may be called upon to 'understand and explain' every article and provision of the entire instrument.

"To state it plainly, the sole test is: Has the applicant by oral examination or otherwise understood and explained the Constitution to the satisfaction of the particular board? To state it more plainly, the board has a right to reject one applicant and accept another, depending solely upon whether it likes or dislikes the understanding and explanation offered. To state it even more plainly, the board, by the use of the words 'understand and explain,' is given the arbitrary power to accept or reject any prospective elector that may apply . . . . Such arbitrary power amounts to a denial of equal protection of the law within the meaning of the Fourteenth Amendment . . . ." 81 F. Supp., at 878. This Court affirmed without writing an opinion of its own: 336 U. S. 933.

activities. However, he presented no probative evidence tending to prove this allegation. Finally, Mr. Tartikoff sought to bring out that the Committee had been listed by the Attorney General of the United States as "subversive." Excerpts from the record of his questioning of Dr. Barsky on this point are quoted below.

> "MR. TARTIKOFF: resuming—
>
> "Q. Doctor, is it not a fact that on or about November 24, 1947, the Attorney General of the United States, in pursuance of a directive contained in an executive order of the President of the United States listed and published a classification of organizations deemed to be subversive and Un-American, and that included amongst those organizations at that time by the Attorney General deemed to be subversive and Un-American was the Joint Anti-Fascist Refugee Committee?"

At this point Mr. Fishbein, Dr. Barsky's attorney, objected to the question. After a brief colloquy between counsel the record continues:

> "MR. TARTIKOFF: I think this committee is entitled to know whether this organization is listed by the Attorney General of the United States as being subversive and Un-American, particularly in light of Dr. Barsky's testimony that the activity of the organization since its inception in 1942 down to and including all through 1950 has been substantially the same during that period of time."

After further discussion:

> "MR. TARTIKOFF: You have introduced document after document to show this is one of the finest organizations in the world. I think I am entitled to counter that with evidence that the Attorney General of the United States reviewed the activities

of this organization in whatever fashion he is supposed to review it and has come to an opposite conclusion."

Shortly after, Dr. Shearer, the subcommittee chairman, overruled Mr. Fishbein's objection, and the hearing proceeded as follows:

"MR. TARTIKOFF: resuming—

"Q. Was it so listed, Dr. Barsky?

"A. Mr. Tartikoff, the attorney—

"Q. Question: Was it so listed? That can take a 'yes' or 'no' answer.

"A. I just would like to bring up—

"MR. TARTIKOFF:

"I ask the committee to direct him to answer that question 'yes' or 'no.'

"CHAIRMAN SHEARER: 'Yes' or 'no,' Doctor Barsky.

"A. If I may for a moment,—off the record—

"Q. Doctor, will you please answer the question?

"A. The answer to the question is 'yes.'

"Q. And was it not again so listed by the Attorney General of the United States in a release made on May 27, 1948?

"A. The answer is I really don't know. You have the statement.

"Q. If I tell you that the statement so indicates, would you dispute it?

"A. I certainly would not, Mr. Tartikoff.

"Q. And isn't it a fact that it was again so listed on April 21, 1949, July 20, 1949, September 26, 1949, August 24, 1950, and September 5, 1950?

"A. I think you brought out the same list, Mr. Tartikoff.

"Q. Well, there may have been additional ones added, for your information.

"A. I really don't remember.

"Q. And doctor, didn't you as chairman of the Joint Anti-Fascist Refugee bring a proceeding against the Attorney General in the United States courts?

"A. Yes, sir.

"Q. To restrain him from listing your organization as subversive?

"A. Yes, sir.

"Q. And isn't it a fact that the Circuit Court ruled against you on that on August 11, 1949?

"A. Yes, sir."

Later, after Dr. Barsky had asked the subcommittee not to "lay too much stress on the fact that this list was made," Mr. Tartikoff asked him these questions:

"Q. Wasn't there also an investigation in California by a Committee on Un-American Activities?

"A. The House Committee?

"Q. The Legislative Committee in California. A Legislative Committee of the State of California, and didn't they likewise list your organization as Communistic?

"A. What do you mean?

"Q. The California Committee on Un-American Activities, that's the Tenney Committee, did they list your organization as Communistic?

"A. I really don't know. If you have the record—"

MR. JUSTICE FRANKFURTER, dissenting.

While in substantial agreement with what is said in the Court's opinion, I am constrained to dissent because of what is left unsaid.

Appellant's suspension from the practice of medicine grew out of his conviction for refusing to turn over to the House Un-American Activities Committee documents of the Joint Anti-Fascist Refugee Committee, an organization of which appellant was Chairman. The Medical Subcommittee on Grievances of the New York Board of Regents, which held the original hearing in the disciplinary proceeding now before us, allowed counsel for the Regents to introduce evidence that this Joint Anti-Fascist Refugee Committee was in 1947 listed by the Attorney General of the United States as a subversive organization, and the Subcommittee accordingly made a specific finding to this effect in its report. This evidence was obviously irrelevant to the issue before the Committee—whether appellant had been convicted of a crime—and was also obviously extremely prejudicial to appellant. The Regents' Committee on Discipline, reviewing the Grievance Committee, commented as follows on this matter:

> "There is, it should be noted, evidence in the record, and reliance on that evidence in the findings of the Medical Committee on Grievances, that the Refugee Committee had been listed as Communist in the list furnished by the Attorney General of the United States . . . . In view of [the decision in *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U. S. 123], no evidentiary weight can be given in the present proceeding to the listing by the Attorney General."

The Committee on Discipline concluded that appellant should not be suspended for six months, as the Grievance Committee had recommended, but should only be reprimanded. In face of this recommendation, the Board of Regents, without stating any reasons, accepted the deci-

sion of the Grievance Committee and ordered appellant suspended for a period of six months from his right to practice medicine.

When this question came before the New York Court of Appeals, that Court disposed of the issue as follows:

> "As to the assertions, by appellants . . . that the Regents, in deciding on punishment, ignored weighty considerations and acted on matters not proper for consideration, it is enough to say that we are wholly without jurisdiction to review such questions . . . ." 305 N. Y. 89, 99, 111 N. E. 2d 222, 226.

Thus the highest court of the State of New York tells us, in effect, "Yes, it may be that the Regents arbitrarily deprived a doctor of his license to practice medicine, but the courts of New York can do nothing about it." Such a rule of law, by denying all relief from arbitrary action, implicitly sanctions it; and deprivation of interests that are part of a man's liberty and property, when based on such arbitrary grounds, contravenes the Due Process Clause of the Fourteenth Amendment.

Of course a State must have the widest leeway in dealing with an interest so basic to its well-being as the health of its people. This includes the setting of standards, no matter how high, for medical practitioners, and the laying down of procedures for enforcement, no matter how strict. The granting of licenses to practice medicine and the curtailment or revocation of such licenses may naturally be entrusted to the sound discretion of an administrative agency. And while ordinary considerations of fairness and good sense may make it desirable for a State to require that the revocation or temporary suspension of a medical license be justified by stated reasons, the Due Process Clause of the Fourteenth Amendment does not lay upon the States the duty

of explaining presumably conscientious action by appropriate State authorities. *Douglas* v. *Noble*, 261 U. S. 165, 169–170. Reliance on the good faith of a State agency entrusted with the enforcement of appropriate standards for the practice of medicine is not in itself an investiture of arbitrary power offensive to due process. Likewise there is nothing in the United States Constitution which requires a State to provide for judicial review of the action of such agencies. Finally, when a State does establish some sort of judicial review, it can certainly provide that there be no review of an agency's discretion, so long as that discretion was exercised within the gamut of choices, however extensive, relevant to the purpose of the power given the administrative agency. So far as concerns the power to grant or revoke a medical license, that means that the exercise of the authority must have some rational relation to the qualifications required of a practitioner in that profession.

It is one thing thus to recognize the freedom which the Constitution wisely leaves to the States in regulating the professions. It is quite another thing, however, to sanction a State's deprivation or partial destruction of a man's professional life on grounds having no possible relation to fitness, intellectual or moral, to pursue his profession. Implicit in the grant of discretion to a State's medical board is the qualification that it must not exercise its supervisory powers on arbitrary, whimsical or irrational considerations. A license cannot be revoked because a man is redheaded or because he was divorced, except for a calling, if such there be, for which redheadedness or an unbroken marriage may have some rational bearing. If a State licensing agency lays bare its arbitrary action, or if the State law explicitly allows it to act arbitrarily, that is precisely the kind of State action which the Due Process Clause forbids. See *Per-*

*kins* v. *Elg,* 307 U. S. 325, 349–350; also *Rex* v. *Northumberland Compensation Appeal Tribunal,* [1951] 1 K. B. 711. The limitation against arbitrary action restricts the power of a State "no matter by what organ it acts." *Missouri* v. *Dockery,* 191 U. S. 165, 171.

If the Regents had explicitly stated that they suspended appellant's license or lengthened the time of the suspension because he was a member of an organization on the so-called Attorney General's list, and the New York Court of Appeals had declared that New York law allows such action, it is not too much to believe that this Court would have felt compelled to hold that the Due Process Clause disallows it. See *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U. S. 123, 104 F. Supp. 567. Yet that is precisely what we may have here. It bears repeating that the Court of Appeals, the ultimate voice of New York law, found itself impotent to give relief on appellant's claim that the Regents "in deciding on punishment, ignored weighty considerations and acted on matters not proper for consideration." 305 N. Y. 89, 99, 111 N. E. 2d 222, 226. At the very least, for all that appears, the Court of Appeals assumed that the Regents relied "on matters not proper for consideration." Thus the appellant may have been deprived of the liberty to practice his profession and of his property interests in his profession in contravention of due process. This is not a merely abstract possibility. The "punishment"—the Court of Appeals so characterized it—recommended by the Grievance Committee rested certainly in part on arbitrary considerations, and the Board of Regents appears to have adopted this tainted "determination." Since the decision below may rest on a constitutionally inadmissible ground, the judgment should not stand. *Stromberg* v. *California,*

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283 U. S. 359, 368; *Williams* v. *North Carolina,* 317 U. S. 287, 292.

I would return this case to the New York authorities for reconsideration in light of the views here expressed.

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

Mr. Justice Holmes, while a member of the Supreme Judicial Court of Massachusetts, coined a dictum that has pernicious implications. "The petitioner may have a constitutional right to talk politics," he said, "but he has no constitutional right to be a policeman." See *McAuliffe* v. *New Bedford,* 155 Mass. 216, 220, 29 N. E. 517. By the same reasoning a man has no constitutional right to teach, to work in a filling station, to be a grocery clerk, to mine coal, to tend a furnace, or to be on the assembly line. By that reasoning a man has no constitutional right to work.

The right to work, I had assumed, was the most precious liberty that man possesses. Man has indeed as much right to work as he has to live, to be free, to own property. The American ideal was stated by Emerson in his essay on *Politics,* "A man has a right to be employed, to be trusted, to be loved, to be revered." It does many men little good to stay alive and free and propertied, if they cannot work. To work means to eat. It also means to live. For many it would be better to work in jail, than to sit idle on the curb. The great values of freedom are in the opportunities afforded man to press to new horizons, to pit his strength against the forces of nature, to match skills with his fellow man.

The dictum of Holmes gives a distortion to the Bill of Rights. It is not an instrument of dispensation but one of deterrents. Certainly a man has no affirmative right to any particular job or skill or occupation. The Bill of Rights does not say who shall be doctors or lawyers

or policemen. But it does say that certain rights are protected, that certain things shall not be done. And so the question here is not what government must give, but rather what it may not take away.

The Bill of Rights prevents a person from being denied employment as a teacher who though a member of a "subversive" organization is wholly innocent of any unlawful purpose or activity. *Wieman* v. *Updegraff,* 344 U. S. 183. It prevents a teacher from being put in a lower salary scale than white teachers solely because he is a Negro. *Alston* v. *School Board,* 112 F. 2d 992. Those cases illustrate the real significance of our Bill of Rights.[1]

So far as we can tell on the present record, Dr. Barsky's license to practice medicine has been suspended, not because he was a criminal, not because he was a Communist, not because he was a "subversive," but because he had certain unpopular ideas and belonged to and was an officer of the Joint Anti-Fascist Refugee Committee, which was included in the Attorney General's "list." If, for the same reason, New York had attempted to put Dr. Barsky to death or to put him in jail or to take his property, there would be a flagrant violation of due process. I do not understand the reasoning which holds that the State may not do these things, but may nevertheless suspend Dr. Barsky's power to practice his profession. I repeat, it does a man little good to stay alive and free and propertied, if he cannot work.

The distinction between the State's power to license doctors and to license street vendors is one of degree. The fact that a doctor needs a good knowledge of biology is no excuse for suspending his license because he has

[1] As to the right to work, see also *Cummings* v. *Missouri,* 4 Wall. 277; *Ex parte Garland,* 4 Wall. 333; *Yick Wo* v. *Hopkins,* 118 U. S. 356; *Truax* v. *Raich,* 239 U. S. 33; *Takahashi* v. *Fish and Game Commission,* 334 U. S. 410.

little or no knowledge of constitutional law. In this case it is admitted that Dr. Barsky's "crime" consisted of no more than a justifiable mistake concerning his constitutional rights.[2] Such conduct is no constitutional ground for taking away a man's right to work. The error is compounded where, as here, the suspension of the right to practice has been based on Dr. Barsky's unpopular beliefs and associations. As Judge Fuld, dissenting in the New York Court of Appeals, makes clear, this record is "barren of evidence reflecting upon appellant as a man or a citizen, much less on his professional capacity or his past or anticipated conduct toward his patients." 305 N. Y. 89, at 102, 111 N. E. 2d 222, at 228–229.

Neither the security of the State nor the well-being of her citizens justifies this infringement of fundamental rights. So far as I know, nothing in a man's political beliefs disables him from setting broken bones or removing ruptured appendixes, safely and efficiently. A practicing surgeon is unlikely to uncover many state secrets in the course of his professional activities. When a doctor cannot save lives in America because he is opposed to Franco in Spain, it is time to call a halt and look critically at the neurosis that has possessed us.

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[2] Dr. Barsky was convicted for failure to produce certain documents subpoenaed by a congressional committee. At a hearing before the Regents' Committee on Discipline, the Assistant Attorney General representing the State conceded that Dr. Barsky had acted on the advice of counsel. He conceded that "the advice given to Dr. Barsky by the attorney, Mr. Wolf, was not an opinion which he held alone; nor was it at that time an unreasonable construction of law on his part." The advice given was that the subpoenas were unconstitutionally issued and that Dr. Barsky was not legally required to respond. The Assistant Attorney General admitted that this opinion was held by many lawyers and by some judges. The Committee on Discipline pointed out that refusal to produce the subpoenaed records was "the only method by which the legal objections to the Congressional Committee's course could be judicially determined."

Syllabus.

## HERNANDEZ *v.* TEXAS.

CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS.

No. 406. Argued January 11, 1954.—Decided May 3, 1954.

The systematic exclusion of persons of Mexican descent from service as jury commissioners, grand jurors, and petit jurors in the Texas county in which petitioner was indicted and tried for murder, although there were a substantial number of such persons in the county fully qualified to serve, deprived petitioner, a person of Mexican descent, of the equal protection of the laws guaranteed by the Fourteenth Amendment, and his conviction in a state court is reversed. Pp. 476–482.

(a) The constitutional guarantee of equal protection of the laws is not directed solely against discrimination between whites and Negroes. Pp. 477–478.

(b) When the existence of a distinct class is demonstrated, and it is shown that the laws, as written or as applied, single out that class for different treatment not based on some reasonable classification, the guarantees of the Constitution have been violated. P. 478.

(c) The exclusion of otherwise eligible persons from jury service solely because of their ancestry or national origin is discrimination prohibited by the Fourteenth Amendment. Pp. 478–479.

(d) The evidence in this case was sufficient to prove that, in the county in question, persons of Mexican descent constitute a separate class, distinct from "whites." Pp. 479–480.

(e) A prima facie case of denial of the equal protection of the laws was established in this case by evidence that there were in the county a substantial number of persons of Mexican descent with the qualifications required for jury service but that none of them had served on a jury commission, grand jury or petit jury for 25 years. Pp. 480–481.

(f) The testimony of five jury commissioners that they had not discriminated against persons of Mexican descent in selecting jurors, and that their only objective had been to select those whom they thought best qualified, was not enough to overcome petitioner's prima facie case of denial of the equal protection of the laws. Pp. 481–482.

(g) Petitioner had the constitutional right to be indicted and tried by juries from which all members of his class were not systematically excluded. P. 482.

—— Tex. Cr. R. ——, 251 S. W. 2d 531, reversed.

*Carlos C. Cadena* and *Gus C. Garcia* argued the cause for petitioner. With them on the brief were *Maury Maverick, Sr.* and *John J. Herrera.*

*Horace Wimberly,* Assistant Attorney General of Texas, argued the cause for respondent. With him on the brief were *John Ben Shepperd,* Attorney General, and *Rudy G. Rice, Milton Richardson* and *Wayne L. Hartman,* Assistant Attorneys General, for respondent.

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

The petitioner, Pete Hernandez, was indicted for the murder of one Joe Espinosa by a grand jury in Jackson County, Texas. He was convicted and sentenced to life imprisonment. The Texas Court of Criminal Appeals affirmed the judgment of the trial court. —— Tex. Cr. R. ——, 251 S. W. 2d 531. Prior to the trial, the petitioner, by his counsel, offered timely motions to quash the indictment and the jury panel. He alleged that persons of Mexican descent were systematically excluded from service as jury commissioners,[1] grand jurors, and petit jurors, although there were such persons fully

[1] Texas law provides that at each term of court, the judge shall appoint three to five jury commissioners. The judge instructs these commissioners as to their duties. After taking an oath that they will not knowingly select a grand juror they believe unfit or unqualified, the commissioners retire to a room in the courthouse where they select from the county assessment roll the names of 16 grand jurors from different parts of the county. These names are placed in a sealed envelope and delivered to the clerk. Thirty days before court meets, the clerk delivers a copy of the list to the sheriff who summons the jurors. Vernon's Tex. Code Crim. Proc., 1948, Arts. 333–350.

The general jury panel is also selected by the jury commission. Vernon's Tex. Rev. Civ. Stat., 1948, Art. 2107. In capital cases, a special venire may be selected from the list furnished by the commissioners. Vernon's Tex. Code Crim. Proc., 1948, Art. 592.

qualified to serve residing in Jackson County. The petitioner asserted that exclusion of this class deprived him, as a member of the class, of the equal protection of the laws guaranteed by the Fourteenth Amendment of the Constitution. After a hearing, the trial court denied the motions. At the trial, the motions were renewed, further evidence taken, and the motions again denied. An allegation that the trial court erred in denying the motions was the sole basis of petitioner's appeal. In affirming the judgment of the trial court, the Texas Court of Criminal Appeals considered and passed upon the substantial federal question raised by the petitioner. We granted a writ of certiorari to review that decision. 346 U. S. 811.

In numerous decisions, this Court has held that it is a denial of the equal protection of the laws to try a defendant of a particular race or color under an indictment issued by a grand jury, or before a petit jury, from which all persons of his race or color have, solely because of that race or color, been excluded by the State, whether acting through its legislature, its courts, or its executive or administrative officers.[2] Although the Court has had little occasion to rule on the question directly, it has been recognized since *Strauder* v. *West Virginia,* 100 U. S. 303, that the exclusion of a class of persons from jury service on grounds other than race or color may also deprive a defendant who is a member of that class of the constitutional guarantee of equal protection of the laws.[3] The State of Texas would have us hold that there are only two classes—white and Negro—within the contemplation of the Fourteenth Amendment. The decisions of this Court

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[2] See *Carter* v. *Texas,* 177 U. S. 442, 447.

[3] "Nor if a law should be passed excluding all naturalized Celtic Irishmen [from jury service], would there be any doubt of its inconsistency with the spirit of the amendment." 100 U. S., at 308. Cf. *American Sugar Refining Co.* v. *Louisiana,* 179 U. S. 89, 92.

do not support that view.[4] And, except where the question presented involves the exclusion of persons of Mexican descent from juries,[5] Texas courts have taken a broader view of the scope of the equal protection clause.[6]

Throughout our history differences in race and color have defined easily identifiable groups which have at times required the aid of the courts in securing equal treatment under the laws. But community prejudices are not static, and from time to time other differences from the community norm may define other groups which need the same protection. Whether such a group exists within a community is a question of fact. When the existence of a distinct class is demonstrated, and it is further shown that the laws, as written or as applied, single out that class for different treatment not based on some reasonable classification, the guarantees of the Constitution have been violated. The Fourteenth Amendment is not directed solely against discrimination due to a "two-class theory"—that is, based upon differences between "white" and Negro.

As the petitioner acknowledges, the Texas system of selecting grand and petit jurors by the use of jury commissions is fair on its face and capable of being utilized

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[4] See *Truax* v. *Raich*, 239 U. S. 33; *Takahashi* v. *Fish & Game Commission*, 334 U. S. 410. Cf. *Hirabayashi* v. *United States*, 320 U. S. 81, 100: "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality."

[5] *Sanchez* v. *State*, 147 Tex. Cr. R. 436, 181 S. W. 2d 87; *Salazar* v. *State*, 149 Tex. Cr. R. 260, 193 S. W. 2d 211; *Sanchez* v. *State*, 243 S. W. 2d 700.

[6] In *Juarez* v. *State*, 102 Tex. Cr. R. 297, 277 S. W. 1091, the Texas court held that the systematic exclusion of Roman Catholics from juries was barred by the Fourteenth Amendment. In *Clifton* v. *Puente*, 218 S. W. 2d 272, the Texas court ruled that restrictive covenants prohibiting the sale of land to persons of Mexican descent were unenforceable.

without discrimination.[7] But as this Court has held, the system is susceptible to abuse and can be employed in a discriminatory manner.[8] The exclusion of otherwise eligible persons from jury service solely because of their ancestry or national origin is discrimination prohibited by the Fourteenth Amendment. The Texas statute makes no such discrimination, but the petitioner alleges that those administering the law do.

The petitioner's initial burden in substantiating his charge of group discrimination was to prove that persons of Mexican descent constitute a separate class in Jackson County, distinct from "whites." [9] One method by which this may be demonstrated is by showing the attitude of the community. Here the testimony of responsible officials and citizens contained the admission that residents of the community distinguished between "white" and "Mexican." The participation of persons of Mexican descent in business and community groups was shown to be slight. Until very recent times, children of Mexican descent were required to attend a segregated school for the first four grades.[10] At least one restaurant in town prominently displayed a sign announcing "No Mexicans Served." On the courthouse grounds at the time of the

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[7] *Smith* v. *Texas,* 311 U. S. 128, 130.

[8] *Smith* v. *Texas, supra,* note 7; *Hill* v. *Texas,* 316 U. S. 400; *Cassell* v. *Texas,* 339 U. S. 282; *Ross* v. *Texas,* 341 U. S. 918.

[9] We do not have before us the question whether or not the Court might take judicial notice that persons of Mexican descent are there considered as a separate class. See Marden, Minorities in American Society; McDonagh & Richards, Ethnic Relations in the United States.

[10] The reason given by the school superintendent for this segregation was that these children needed special help in learning English. In this special school, however, each teacher taught two grades, while in the regular school each taught only one in most instances. Most of the children of Mexican descent left school by the fifth or sixth grade.

hearing, there were two men's toilets, one unmarked, and the other marked "Colored Men" and "Hombres Aqui" ("Men Here"). No substantial evidence was offered to rebut the logical inference to be drawn from these facts, and it must be concluded that petitioner succeeded in his proof.

Having established the existence of a class, petitioner was then charged with the burden of proving discrimination. To do so, he relied on the pattern of proof established by *Norris* v. *Alabama,* 294 U. S. 587. In that case, proof that Negroes constituted a substantial segment of the population of the jurisdiction, that some Negroes were qualified to serve as jurors, and that none had been called for jury service over an extended period of time, was held to constitute prima facie proof of the systematic exclusion of Negroes from jury service. This holding, sometimes called the "rule of exclusion," has been applied in other cases,[11] and it is available in supplying proof of discrimination against any delineated class.

The petitioner established that 14% of the population of Jackson County were persons with Mexican or Latin-American surnames, and that 11% of the males over 21 bore such names.[12] The County Tax Assessor testified

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[11] See note 8, *supra.*

[12] The 1950 census report shows that of the 12,916 residents of Jackson County, 1,865, or about 14%, had Mexican or Latin-American surnames. U. S. Census of Population, 1950, Vol. II, pt. 43, p. 180; *id.,* Vol. IV, pt. 3, c. C, p. 45. Of these 1,865, 1,738 were native-born American citizens and 65 were naturalized citizens. *Id.,* Vol. IV, pt. 3, c. C, p. 45. Of the 3,754 males over 21 years of age in the County, 408, or about 11%, had Spanish surnames. *Id.,* Vol. II, pt. 43, p. 180; *id.,* Vol. IV, pt. 3, c. C, p. 67. The State challenges any reliance on names as showing the descent of persons in the County. However, just as persons of a different race are distinguished by color, these Spanish names provide ready identification of the members of this class. In selecting jurors, the jury commissioners work from a list of names.

that 6 or 7 percent of the freeholders on the tax rolls of the County were persons of Mexican descent. The State of Texas stipulated that "for the last twenty-five years there is no record of any person with a Mexican or Latin American name having served on a jury commission, grand jury or petit jury in Jackson County." [13] The parties also stipulated that "there are some male persons of Mexican or Latin American descent in Jackson County who, by virtue of being citizens, householders, or freeholders, and having all other legal prerequisites to jury service, are eligible to serve as members of a jury commission, grand jury and/or petit jury." [14]

The petitioner met the burden of proof imposed in *Norris* v. *Alabama, supra.* To rebut the strong prima facie case of the denial of the equal protection of the laws guaranteed by the Constitution thus established, the State offered the testimony of five jury commissioners that they had not discriminated against persons of Mexican or Latin-American descent in selecting jurors. They stated that their only objective had been to select those whom they thought were best qualified. This testimony is not enough to overcome the petitioner's case. As the Court said in *Norris* v. *Alabama:*

> "That showing as to the long-continued exclusion of negroes from jury service, and as to the many negroes qualified for that service, could not be met by mere generalities. If, in the presence of such testimony as defendant adduced, the mere general assertions by officials of their performance of duty were to be accepted as an adequate justification for

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[13] R. 34.

[14] R. 55. The parties also stipulated that there were no persons of Mexican or Latin-American descent on the list of talesmen. R. 83. Each item of each stipulation was amply supported by the testimony adduced at the hearing.

> the complete exclusion of negroes from jury service, the constitutional provision . . . would be but a vain and illusory requirement." [15]

The same reasoning is applicable to these facts.

Circumstances or chance may well dictate that no persons in a certain class will serve on a particular jury or during some particular period. But it taxes our credulity to say that mere chance resulted in there being no members of this class among the over six thousand jurors called in the past 25 years. The result bespeaks discrimination, whether or not it was a conscious decision on the part of any individual jury commissioner. The judgment of conviction must be reversed.

To say that this decision revives the rejected contention that the Fourteenth Amendment requires proportional representation of all the component ethnic groups of the community on every jury [16] ignores the facts. The petitioner did not seek proportional representation, nor did he claim a right to have persons of Mexican descent sit on the particular juries which he faced.[17] His only claim is the right to be indicted and tried by juries from which all members of his class are not systematically excluded—juries selected from among all qualified persons regardless of national origin or descent. To this much, he is entitled by the Constitution.

*Reversed.*

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[15] 294 U. S., at 598.

[16] See *Akins* v. *Texas,* 325 U. S. 398, 403; *Cassell* v. *Texas,* 339 U. S. 282, 286–287.

[17] See *Akins* v. *Texas, supra,* note 16, at 403.

# BROWN ET AL. *v.* BOARD OF EDUCATION OF TOPEKA ET AL.

NO. 1. APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS.*

Argued December 9, 1952.—Reargued December 8, 1953.—Decided May 17, 1954.

Segregation of white and Negro children in the public schools of a State solely on the basis of race, pursuant to state laws permitting or requiring such segregation, denies to Negro children the equal protection of the laws guaranteed by the Fourteenth Amendment—even though the physical facilities and other "tangible" factors of white and Negro schools may be equal. Pp. 486–496.

(a) The history of the Fourteenth Amendment is inconclusive as to its intended effect on public education. Pp. 489–490.

(b) The question presented in these cases must be determined, not on the basis of conditions existing when the Fourteenth Amendment was adopted, but in the light of the full development of public education and its present place in American life throughout the Nation. Pp. 492–493.

(c) Where a State has undertaken to provide an opportunity for an education in its public schools, such an opportunity is a right which must be made available to all on equal terms. P. 493.

(d) Segregation of children in public schools solely on the basis of race deprives children of the minority group of equal educational opportunities, even though the physical facilities and other "tangible" factors may be equal. Pp. 493–494.

(e) The "separate but equal" doctrine adopted in *Plessy* v. *Ferguson,* 163 U. S. 537, has no place in the field of public education. P. 495.

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*Together with No. 2, *Briggs et al.* v. *Elliott et al.*, on appeal from the United States District Court for the Eastern District of South Carolina, argued December 9–10, 1952, reargued December 7–8, 1953; No. 4, *Davis et al.* v. *County School Board of Prince Edward County, Virginia, et al.*, on appeal from the United States District Court for the Eastern District of Virginia, argued December 10, 1952, reargued December 7–8, 1953; and No. 10, *Gebhart et al.* v. *Belton et al.*, on certiorari to the Supreme Court of Delaware, argued December 11, 1952, reargued December 9, 1953.

(f) The cases are restored to the docket for further argument on specified questions relating to the forms of the decrees. Pp. 495–496.

*Robert L. Carter* argued the cause for appellants in No. 1 on the original argument and on the reargument. *Thurgood Marshall* argued the cause for appellants in No. 2 on the original argument and *Spottswood W. Robinson, III,* for appellants in No. 4 on the original argument, and both argued the causes for appellants in Nos. 2 and 4 on the reargument. *Louis L. Redding* and *Jack Greenberg* argued the cause for respondents in No. 10 on the original argument and *Jack Greenberg* and *Thurgood Marshall* on the reargument.

On the briefs were *Robert L. Carter, Thurgood Marshall, Spottswood W. Robinson, III, Louis L. Redding, Jack Greenberg, George E. C. Hayes, William R. Ming, Jr., Constance Baker Motley, James M. Nabrit, Jr., Charles S. Scott, Frank D. Reeves, Harold R. Boulware* and *Oliver W. Hill* for appellants in Nos. 1, 2 and 4 and respondents in No. 10; *George M. Johnson* for appellants in Nos. 1, 2 and 4; and *Loren Miller* for appellants in Nos. 2 and 4. *Arthur D. Shores* and *A. T. Walden* were on the Statement as to Jurisdiction and a brief opposing a Motion to Dismiss or Affirm in No. 2.

*Paul E. Wilson,* Assistant Attorney General of Kansas, argued the cause for appellees in No. 1 on the original argument and on the reargument. With him on the briefs was *Harold R. Fatzer,* Attorney General.

*John W. Davis* argued the cause for appellees in No. 2 on the original argument and for appellees in Nos. 2 and 4 on the reargument. With him on the briefs in No. 2 were *T. C. Callison,* Attorney General of South Carolina, *Robert McC. Figg, Jr., S. E. Rogers, William R. Meagher* and *Taggart Whipple.*

*J. Lindsay Almond, Jr.*, Attorney General of Virginia, and *T. Justin Moore* argued the cause for appellees in No. 4 on the original argument and for appellees in Nos. 2 and 4 on the reargument. On the briefs in No. 4 were *J. Lindsay Almond, Jr.*, Attorney General, and *Henry T. Wickham*, Special Assistant Attorney General, for the State of Virginia, and *T. Justin Moore, Archibald G. Robertson, John W. Riely* and *T. Justin Moore, Jr.* for the Prince Edward County School Authorities, appellees.

*H. Albert Young*, Attorney General of Delaware, argued the cause for petitioners in No. 10 on the original argument and on the reargument. With him on the briefs was *Louis J. Finger*, Special Deputy Attorney General.

By special leave of Court, *Assistant Attorney General Rankin* argued the cause for the United States on the reargument, as *amicus curiae*, urging reversal in Nos. 1, 2 and 4 and affirmance in No. 10. With him on the brief were *Attorney General Brownell, Philip Elman, Leon Ulman, William J. Lamont* and *M. Magdelena Schoch. James P. McGranery*, then Attorney General, and *Philip Elman* filed a brief for the United States on the original argument, as *amicus curiae*, urging reversal in Nos. 1, 2 and 4 and affirmance in No. 10.

Briefs of *amici curiae* supporting appellants in No. 1 were filed by *Shad Polier, Will Maslow* and *Joseph B. Robison* for the American Jewish Congress; by *Edwin J. Lukas, Arnold Forster, Arthur Garfield Hays, Frank E. Karelsen, Leonard Haas, Saburo Kido* and *Theodore Leskes* for the American Civil Liberties Union et al.; and by *John Ligtenberg* and *Selma M. Borchardt* for the American Federation of Teachers. Briefs of *amici curiae* supporting appellants in No. 1 and respondents in No. 10 were filed by *Arthur J. Goldberg* and *Thomas E. Harris*

for the Congress of Industrial Organizations and by *Phineas Indritz* for the American Veterans Committee, Inc.

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

These cases come to us from the States of Kansas, South Carolina, Virginia, and Delaware. They are premised on different facts and different local conditions, but a common legal question justifies their consideration together in this consolidated opinion.[1]

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[1] In the Kansas case, *Brown* v. *Board of Education*, the plaintiffs are Negro children of elementary school age residing in Topeka. They brought this action in the United States District Court for the District of Kansas to enjoin enforcement of a Kansas statute which permits, but does not require, cities of more than 15,000 population to maintain separate school facilities for Negro and white students. Kan. Gen. Stat. § 72–1724 (1949). Pursuant to that authority, the Topeka Board of Education elected to establish segregated elementary schools. Other public schools in the community, however, are operated on a nonsegregated basis. The three-judge District Court, convened under 28 U. S. C. §§ 2281 and 2284, found that segregation in public education has a detrimental effect upon Negro children, but denied relief on the ground that the Negro and white schools were substantially equal with respect to buildings, transportation, curricula, and educational qualifications of teachers. 98 F. Supp. 797. The case is here on direct appeal under 28 U. S. C. § 1253.

In the South Carolina case, *Briggs* v. *Elliott*, the plaintiffs are Negro children of both elementary and high school age residing in Clarendon County. They brought this action in the United States District Court for the Eastern District of South Carolina to enjoin enforcement of provisions in the state constitution and statutory code which require the segregation of Negroes and whites in public schools. S. C. Const., Art. XI, § 7; S. C. Code § 5377 (1942). The three-judge District Court, convened under 28 U. S. C. §§ 2281 and 2284, denied the requested relief. The court found that the Negro schools were inferior to the white schools and ordered the defendants to begin immediately to equalize the facilities. But the court sustained the validity of the contested provisions and denied the plaintiffs admis-

In each of the cases, minors of the Negro race, through their legal representatives, seek the aid of the courts in obtaining admission to the public schools of their community on a nonsegregated basis. In each instance,

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sion to the white schools during the equalization program. 98 F. Supp. 529. This Court vacated the District Court's judgment and remanded the case for the purpose of obtaining the court's views on a report filed by the defendants concerning the progress made in the equalization program. 342 U. S. 350. On remand, the District Court found that substantial equality had been achieved except for buildings and that the defendants were proceeding to rectify this inequality as well. 103 F. Supp. 920. The case is again here on direct appeal under 28 U. S. C. § 1253.

In the Virginia case, *Davis* v. *County School Board*, the plaintiffs are Negro children of high school age residing in Prince Edward County. They brought this action in the United States District Court for the Eastern District of Virginia to enjoin enforcement of provisions in the state constitution and statutory code which require the segregation of Negroes and whites in public schools. Va. Const., § 140; Va. Code § 22–221 (1950). The three-judge District Court, convened under 28 U. S. C. §§ 2281 and 2284, denied the requested relief. The court found the Negro school inferior in physical plant, curricula, and transportation, and ordered the defendants forthwith to provide substantially equal curricula and transportation and to "proceed with all reasonable diligence and dispatch to remove" the inequality in physical plant. But, as in the South Carolina case, the court sustained the validity of the contested provisions and denied the plaintiffs admission to the white schools during the equalization program. 103 F. Supp. 337. The case is here on direct appeal under 28 U. S. C. § 1253.

In the Delaware case, *Gebhart* v. *Belton*, the plaintiffs are Negro children of both elementary and high school age residing in New Castle County. They brought this action in the Delaware Court of Chancery to enjoin enforcement of provisions in the state constitution and statutory code which require the segregation of Negroes and whites in public schools. Del. Const., Art. X, § 2; Del. Rev. Code § 2631 (1935). The Chancellor gave judgment for the plaintiffs and ordered their immediate admission to schools previously attended only by white children, on the ground that the Negro schools were inferior with respect to teacher training, pupil-teacher ratio, extracurricular activities, physical plant, and time and distance in-

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they had been denied admission to schools attended by white children under laws requiring or permitting segregation according to race. This segregation was alleged to deprive the plaintiffs of the equal protection of the laws under the Fourteenth Amendment. In each of the cases other than the Delaware case, a three-judge federal district court denied relief to the plaintiffs on the so-called "separate but equal" doctrine announced by this Court in *Plessy* v. *Ferguson*, 163 U. S. 537. Under that doctrine, equality of treatment is accorded when the races are provided substantially equal facilities, even though these facilities be separate. In the Delaware case, the Supreme Court of Delaware adhered to that doctrine, but ordered that the plaintiffs be admitted to the white schools because of their superiority to the Negro schools.

The plaintiffs contend that segregated public schools are not "equal" and cannot be made "equal," and that hence they are deprived of the equal protection of the laws. Because of the obvious importance of the question presented, the Court took jurisdiction.[2] Argument was heard in the 1952 Term, and reargument was heard this Term on certain questions propounded by the Court.[3]

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volved in travel. 87 A. 2d 862. The Chancellor also found that segregation itself results in an inferior education for Negro children (see note 10, *infra*), but did not rest his decision on that ground. *Id.*, at 865. The Chancellor's decree was affirmed by the Supreme Court of Delaware, which intimated, however, that the defendants might be able to obtain a modification of the decree after equalization of the Negro and white schools had been accomplished. 91 A. 2d 137, 152. The defendants, contending only that the Delaware courts had erred in ordering the immediate admission of the Negro plaintiffs to the white schools, applied to this Court for certiorari. The writ was granted, 344 U. S. 891. The plaintiffs, who were successful below, did not submit a cross-petition.

[2] 344 U. S. 1, 141, 891.

[3] 345 U. S. 972. The Attorney General of the United States participated both Terms as *amicus curiae*.

Reargument was largely devoted to the circumstances surrounding the adoption of the Fourteenth Amendment in 1868. It covered exhaustively consideration of the Amendment in Congress, ratification by the states, then existing practices in racial segregation, and the views of proponents and opponents of the Amendment. This discussion and our own investigation convince us that, although these sources cast some light, it is not enough to resolve the problem with which we are faced. At best, they are inconclusive. The most avid proponents of the post-War Amendments undoubtedly intended them to remove all legal distinctions among "all persons born or naturalized in the United States." Their opponents, just as certainly, were antagonistic to both the letter and the spirit of the Amendments and wished them to have the most limited effect. What others in Congress and the state legislatures had in mind cannot be determined with any degree of certainty.

An additional reason for the inconclusive nature of the Amendment's history, with respect to segregated schools, is the status of public education at that time.[4] In the South, the movement toward free common schools, sup-

[4] For a general study of the development of public education prior to the Amendment, see Butts and Cremin, A History of Education in American Culture (1953), Pts. I, II; Cubberley, Public Education in the United States (1934 ed.), cc. II–XII. School practices current at the time of the adoption of the Fourteenth Amendment are described in Butts and Cremin, *supra*, at 269–275; Cubberley, *supra*, at 288–339, 408–431; Knight, Public Education in the South (1922), cc. VIII, IX. See also H. Ex. Doc. No. 315, 41st Cong., 2d Sess. (1871). Although the demand for free public schools followed substantially the same pattern in both the North and the South, the development in the South did not begin to gain momentum until about 1850, some twenty years after that in the North. The reasons for the somewhat slower development in the South (*e. g.*, the rural character of the South and the different regional attitudes toward state assistance) are well explained in Cubberley, *supra*, at 408–423. In the country as a whole, but particularly in the South, the War

ported by general taxation, had not yet taken hold. Education of white children was largely in the hands of private groups. Education of Negroes was almost nonexistent, and practically all of the race were illiterate. In fact, any education of Negroes was forbidden by law in some states. Today, in contrast, many Negroes have achieved outstanding success in the arts and sciences as well as in the business and professional world. It is true that public school education at the time of the Amendment had advanced further in the North, but the effect of the Amendment on Northern States was generally ignored in the congressional debates. Even in the North, the conditions of public education did not approximate those existing today. The curriculum was usually rudimentary; ungraded schools were common in rural areas; the school term was but three months a year in many states; and compulsory school attendance was virtually unknown. As a consequence, it is not surprising that there should be so little in the history of the Fourteenth Amendment relating to its intended effect on public education.

In the first cases in this Court construing the Fourteenth Amendment, decided shortly after its adoption, the Court interpreted it as proscribing all state-imposed discriminations against the Negro race.[5] The doctrine of

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virtually stopped all progress in public education. *Id.*, at 427–428. The low status of Negro education in all sections of the country, both before and immediately after the War, is described in Beale, A History of Freedom of Teaching in American Schools (1941), 112–132, 175–195. Compulsory school attendance laws were not generally adopted until after the ratification of the Fourteenth Amendment, and it was not until 1918 that such laws were in force in all the states. Cubberley, *supra*, at 563–565.

[5] *Slaughter-House Cases*, 16 Wall. 36, 67–72 (1873); *Strauder* v. *West Virginia*, 100 U. S. 303, 307–308 (1880):

"It ordains that no State shall deprive any person of life, liberty, or property, without due process of law, or deny to any person within its jurisdiction the equal protection of the laws. What is this but

"separate but equal" did not make its appearance in this Court until 1896 in the case of *Plessy* v. *Ferguson, supra,* involving not education but transportation.[6] American courts have since labored with the doctrine for over half a century. In this Court, there have been six cases involving the "separate but equal" doctrine in the field of public education.[7] In *Cumming* v. *County Board of Education,* 175 U. S. 528, and *Gong Lum* v. *Rice,* 275 U. S. 78, the validity of the doctrine itself was not challenged.[8] In more recent cases, all on the graduate school

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declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color? The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race,—the right to exemption from unfriendly legislation against them distinctively as colored,—exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race."
See also *Virginia* v. *Rives,* 100 U. S. 313, 318 (1880); *Ex parte Virginia,* 100 U. S. 339, 344–345 (1880).

[6] The doctrine apparently originated in *Roberts* v. *City of Boston,* 59 Mass. 198, 206 (1850), upholding school segregation against attack as being violative of a state constitutional guarantee of equality. Segregation in Boston public schools was eliminated in 1855. Mass. Acts 1855, c. 256. But elsewhere in the North segregation in public education has persisted in some communities until recent years. It is apparent that such segregation has long been a nationwide problem, not merely one of sectional concern.

[7] See also *Berea College* v. *Kentucky,* 211 U. S. 45 (1908).

[8] In the *Cumming* case, Negro taxpayers sought an injunction requiring the defendant school board to discontinue the operation of a high school for white children until the board resumed operation of a high school for Negro children. Similarly, in the *Gong Lum* case, the plaintiff, a child of Chinese descent, contended only that state authorities had misapplied the doctrine by classifying him with Negro children and requiring him to attend a Negro school.

level, inequality was found in that specific benefits enjoyed by white students were denied to Negro students of the same educational qualifications. *Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337; *Sipuel* v. *Oklahoma,* 332 U. S. 631; *Sweatt* v. *Painter,* 339 U. S. 629; *McLaurin* v. *Oklahoma State Regents,* 339 U. S. 637. In none of these cases was it necessary to re-examine the doctrine to grant relief to the Negro plaintiff. And in *Sweatt* v. *Painter, supra,* the Court expressly reserved decision on the question whether *Plessy* v. *Ferguson* should be held inapplicable to public education.

In the instant cases, that question is directly presented. Here, unlike *Sweatt* v. *Painter,* there are findings below that the Negro and white schools involved have been equalized, or are being equalized, with respect to buildings, curricula, qualifications and salaries of teachers, and other "tangible" factors.[9] Our decision, therefore, cannot turn on merely a comparison of these tangible factors in the Negro and white schools involved in each of the cases. We must look instead to the effect of segregation itself on public education.

In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy* v. *Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout

[9] In the Kansas case, the court below found substantial equality as to all such factors. 98 F. Supp. 797, 798. In the South Carolina case, the court below found that the defendants were proceeding "promptly and in good faith to comply with the court's decree." 103 F. Supp. 920, 921. In the Virginia case, the court below noted that the equalization program was already "afoot and progressing" (103 F. Supp. 337, 341); since then, we have been advised, in the Virginia Attorney General's brief on reargument, that the program has now been completed. In the Delaware case, the court below similarly noted that the state's equalization program was well under way. 91 A. 2d 137, 149.

the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does.

In *Sweatt* v. *Painter, supra,* in finding that a segregated law school for Negroes could not provide them equal educational opportunities, this Court relied in large part on "those qualities which are incapable of objective measurement but which make for greatness in a law school." In *McLaurin* v. *Oklahoma State Regents, supra,* the Court, in requiring that a Negro admitted to a white graduate school be treated like all other students, again resorted to intangible considerations: ". . . his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession."

Such considerations apply with added force to children in grade and high schools. To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. The effect of this separation on their educational opportunities was well stated by a finding in the Kansas case by a court which nevertheless felt compelled to rule against the Negro plaintiffs:

> "Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system." [10]

Whatever may have been the extent of psychological knowledge at the time of *Plessy* v. *Ferguson,* this finding is amply supported by modern authority.[11] Any lan-

[10] A similar finding was made in the Delaware case: "I conclude from the testimony that in our Delaware society, State-imposed segregation in education itself results in the Negro children, as a class, receiving educational opportunities which are substantially inferior to those available to white children otherwise similarly situated." 87 A. 2d 862, 865.

[11] K. B. Clark, Effect of Prejudice and Discrimination on Personality Development (Midcentury White House Conference on Children and Youth, 1950); Witmer and Kotinsky, Personality in the Making (1952), c. VI; Deutscher and Chein, The Psychological Effects of Enforced Segregation: A Survey of Social Science Opinion, 26 J. Psychol. 259 (1948); Chein, What are the Psychological Effects of

guage in *Plessy* v. *Ferguson* contrary to this finding is rejected.

We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment. This disposition makes unnecessary any discussion whether such segregation also violates the Due Process Clause of the Fourteenth Amendment.[12]

Because these are class actions, because of the wide applicability of this decision, and because of the great variety of local conditions, the formulation of decrees in these cases presents problems of considerable complexity. On reargument, the consideration of appropriate relief was necessarily subordinated to the primary question—the constitutionality of segregation in public education. We have now announced that such segregation is a denial of the equal protection of the laws. In order that we may have the full assistance of the parties in formulating decrees, the cases will be restored to the docket, and the parties are requested to present further argument on Questions 4 and 5 previously propounded by the Court for the reargument this Term.[13] The Attorney General

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Segregation Under Conditions of Equal Facilities?, 3 Int. J. Opinion and Attitude Res. 229 (1949); Brameld, Educational Costs, in Discrimination and National Welfare (MacIver, ed., 1949), 44–48; Frazier, The Negro in the United States (1949), 674–681. And see generally Myrdal, An American Dilemma (1944).

[12] See *Bolling* v. *Sharpe*, *post*, p. 497, concerning the Due Process Clause of the Fifth Amendment.

[13] "4. Assuming it is decided that segregation in public schools violates the Fourteenth Amendment

"(*a*) would a decree necessarily follow providing that, within the

of the United States is again invited to participate. The Attorneys General of the states requiring or permitting segregation in public education will also be permitted to appear as *amici curiae* upon request to do so by September 15, 1954, and submission of briefs by October 1, 1954.[14]

*It is so ordered.*

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limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice, or

"(*b*) may this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions?

"5. On the assumption on which questions 4 (*a*) and (*b*) are based, and assuming further that this Court will exercise its equity powers to the end described in question 4 (*b*),

"(*a*) should this Court formulate detailed decrees in these cases;

"(*b*) if so, what specific issues should the decrees reach;

"(*c*) should this Court appoint a special master to hear evidence with a view to recommending specific terms for such decrees;

"(*d*) should this Court remand to the courts of first instance with directions to frame decrees in these cases, and if so what general directions should the decrees of this Court include and what procedures should the courts of first instance follow in arriving at the specific terms of more detailed decrees?"

[14] See Rule 42, Revised Rules of this Court (effective July 1, 1954).

## BOLLING ET AL. *v.* SHARPE ET AL.

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

No. 8. Argued December 10–11, 1952.—Reargued December 8–9, 1953.—Decided May 17, 1954.

Racial segregation in the public schools of the District of Columbia is a denial to Negro children of the due process of law guaranteed by the Fifth Amendment. Pp. 498–500.

(a) Though the Fifth Amendment does not contain an equal protection clause, as does the Fourteenth Amendment which applies only to the States, the concepts of equal protection and due process are not mutually exclusive. P. 499.

(b) Discrimination may be so unjustifiable as to be violative of due process. P. 499.

(c) Segregation in public education is not reasonably related to any proper governmental objective, and thus it imposes on Negro children of the District of Columbia a burden that constitutes an arbitrary deprivation of their liberty in violation of the Due Process Clause. Pp. 499–500.

(d) In view of this Court's decision in *Brown* v. *Board of Education, ante,* p. 483, that the Constitution prohibits the States from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government. P. 500.

(e) The case is restored to the docket for further argument on specified questions relating to the form of the decree. P. 500.

*George E. C. Hayes* and *James M. Nabrit, Jr.* argued the cause for petitioners on the original argument and on the reargument. With them on the briefs were *George M. Johnson* and *Herbert O. Reid, Jr. Charles W. Quick* was also on the brief on the reargument.

*Milton D. Korman* argued the cause for respondents on the original argument and on the reargument. With him on the briefs were *Vernon E. West, Chester H. Gray* and *Lyman J. Umstead.*

By special leave of Court, *Assistant Attorney General Rankin* argued the cause on the reargument for the United States, as *amicus curiae,* urging reversal. With him on the brief were *Attorney General Brownell, Philip Elman, Leon Ulman, William J. Lamont* and *M. Magdelena Schoch. James P. McGranery,* then Attorney General, and *Philip Elman* filed a brief on the original argument for the United States, as *amicus curiae,* urging reversal.

Briefs of *amici curiae* supporting petitioners were filed by *S. Walter Shine, Sanford H. Bolz* and *Samuel B. Groner* for the American Council on Human Rights et al.; by *John Ligtenberg* and *Selma M. Borchardt* for the American Federation of Teachers; and by *Phineas Indritz* for the American Veterans Committee, Inc.

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

This case challenges the validity of segregation in the public schools of the District of Columbia. The petitioners, minors of the Negro race, allege that such segregation deprives them of due process of law under the Fifth Amendment. They were refused admission to a public school attended by white children solely because of their race. They sought the aid of the District Court for the District of Columbia in obtaining admission. That court dismissed their complaint. The Court granted a writ of certiorari before judgment in the Court of Appeals because of the importance of the constitutional question presented. 344 U. S. 873.

We have this day held that the Equal Protection Clause of the Fourteenth Amendment prohibits the states from maintaining racially segregated public schools.[1] The legal problem in the District of Columbia is somewhat

[1] *Brown* v. *Board of Education, ante,* p. 483.

different, however. The Fifth Amendment, which is applicable in the District of Columbia, does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The "equal protection of the laws" is a more explicit safeguard of prohibited unfairness than "due process of law," and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process.[2]

Classifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect.[3] As long ago as 1896, this Court declared the principle "that the Constitution of the United States, in its present form, forbids, so far as civil and political rights are concerned, discrimination by the General Government, or by the States, against any citizen because of his race." [4] And in *Buchanan* v. *Warley,* 245 U. S. 60, the Court held that a statute which limited the right of a property owner to convey his property to a person of another race was, as an unreasonable discrimination, a denial of due process of law.

Although the Court has not assumed to define "liberty" with any great precision, that term is not confined to mere freedom from bodily restraint. Liberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a

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[2] *Detroit Bank* v. *United States,* 317 U. S. 329; *Currin* v. *Wallace,* 306 U. S. 1, 13–14; *Steward Machine Co.* v. *Davis,* 301 U. S. 548, 585.

[3] *Korematsu* v. *United States,* 323 U. S. 214, 216; *Hirabayashi* v. *United States,* 320 U. S. 81, 100.

[4] *Gibson* v. *Mississippi,* 162 U. S. 565, 591. Cf. *Steele* v. *Louisville & Nashville R. Co.,* 323 U. S. 192, 198–199.

proper governmental objective. Segregation in public education is not reasonably related to any proper governmental objective, and thus it imposes on Negro children of the District of Columbia a burden that constitutes an arbitrary deprivation of their liberty in violation of the Due Process Clause.

In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government.[5] We hold that racial segregation in the public schools of the District of Columbia is a denial of the due process of law guaranteed by the Fifth Amendment to the Constitution.

For the reasons set out in *Brown* v. *Board of Education,* this case will be restored to the docket for reargument on Questions 4 and 5 previously propounded by the Court. 345 U. S. 972.

*It is so ordered.*

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[5] Cf. *Hurd* v. *Hodge,* 334 U. S. 24.

# CAPITAL SERVICE, INC. ET AL. *v.* NATIONAL LABOR RELATIONS BOARD.

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

No. 398. Argued April 6, 1954.—Decided May 17, 1954.

Petitioner, a manufacturer and distributor of bakery products, obtained a state court injunction against a union's picketing of retail stores that handled petitioner's products. Subsequently an unfair labor practice complaint based on the same conduct of the union was issued under the National Labor Relations Act, as amended, and the Regional Director of the Board petitioned a Federal District Court under § 10 (l) of the Act for an injunction restraining the picketing by the union pending final adjudication by the Board. The Board sued in the same court to enjoin petitioner from enforcing the state court injunction. *Held:*

1. Under 28 U. S. C. § 1337, the District Court had jurisdiction of the subject matter of the Board's suit as a "civil action or proceeding" arising under an Act of Congress "regulating commerce." P. 504.

2. The District Court's injunction against enforcement of the state court injunction was "necessary in aid of its jurisdiction," within the meaning of 28 U. S. C. § 2283, and was authorized by a specific exception to the prohibition of that section against federal courts staying state court proceedings. Pp. 504–506.

204 F. 2d 848, affirmed.

*Carl M. Gould* argued the cause and filed a brief for petitioners.

*Philip Elman* argued the cause for respondent. With him on the brief were *Solicitor General Sobeloff, George J. Bott, David P. Findling, Dominick L. Manoli* and *Norton J. Come.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Petitioner manufactures and distributes bakery products in California. A union sought unsuccessfully to

organize its employees. Thereupon, the union sought to enlist the aid of purchasers and consumers of petitioner's products. Agents of the union requested retail stores not to handle petitioner's products and stated that if they continued to do so, a picket line would be set up. Some stores acquiesced; others did not. The union placed pickets at the entrances of the latter stores, with the result that many deliveries were interrupted and some employees of other employers refused to cross the picket lines.

Petitioner made two counter moves. First, it filed suit for an injunction against the union in the California courts. A few days later, it filed a charge of an unfair labor practice against the union with respondent. Each had as a basis the same conduct of the union.

On April 7, 1952, the California court issued a preliminary injunction against the union, banning all picketing of retail stores. On May 14, 1952, the Regional Director of respondent concluded, after investigation, that insofar as the conduct of the union involved merely an appeal to customers and to the public in general, it was lawful under the National Labor Relations Act, as amended, 49 Stat. 449, 61 Stat. 136, 29 U. S. C. § 151 *et seq.;* but that it was unlawful, insofar as it induced or encouraged employees of employers other than petitioner to refuse to perform services at the picketed places. The Regional Director, acting on behalf of the General Counsel, issued an unfair labor practice complaint against the union on that limited basis. On the same day, he petitioned the Federal District Court for an injunction restraining such conduct of the union, pending final adjudication by the Board, as required by § 10 (l) of the Act.[1]

[1] Section 10 (l) reads as follows:

"Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(A), (B), or (C)

Simultaneously with the filing of the § 10 (l) petition against the union, the Board filed suit in the same District Court, asking that petitioner be enjoined from enforcing the state court injunction. The District Court concluded that the conduct of the union, in the respects stated, was

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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: *Provided further,* That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period. Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: *Provided further,* That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organization a party to the suit. In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 8 (b) (4) (D)." 61 Stat. 149, 29 U. S. C. § 160 (*l*).

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subject to the exclusive jurisdiction of the Board and that the action of the state court invaded the exclusive jurisdiction of the Board and the District Court. It accordingly granted the relief prayed for. The Court of Appeals affirmed. 204 F. 2d 848. The case is here on a petition for a writ of certiorari limited to the following question:

> "In view of the fact that exclusive jurisdiction over the subject matter was in the National Labor Relations Board (*Garner* v. *Teamsters Union,* 346 U. S. 485), could the Federal District Court, on application of the Board, enjoin Petitioners from enforcing an injunction already obtained from the State Court?" 346 U. S. 936.

I. The District Court had jurisdiction of the subject matter, because this is a "civil action or proceeding" arising under an Act of Congress "regulating commerce." 28 U. S. C. § 1337. The National Labor Relations Act is a law "regulating commerce" (*Labor Board* v. *Jones & Laughlin Steel Corp.,* 301 U. S. 1); and here, as in *American Federation of Labor* v. *Watson,* 327 U. S. 582, 591, the rights asserted arise under that law.

II. In absence of a command of the Congress to the contrary, the power of the District Court to issue the injunction is clear. Federal courts seek to avoid needless conflict with state agencies and withhold relief by way of injunction where state remedies are available and adequate. See *Alabama Commission* v. *Southern R. Co.,* 341 U. S. 341. But where Congress, acting within its constitutional authority, has vested a federal agency with exclusive jurisdiction over a subject matter and the intrusion of a state would result in conflict of functions, the federal court may enjoin the state proceeding in order to preserve the federal right. See *Public Utilities*

*Commission* v. *Gas Co.*, 317 U. S. 456, 468–470; *Bowles* v. *Willingham*, 321 U. S. 503, 510–511. Cf. *American Federation of Labor* v. *Watson, supra*, at 593–595. Congress, however, has provided that "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U. S. C. § 2283.

We do not stop to consider the many questions which have been propounded under this newly worded provision of the Code.[2] One alone suffices for this case. For we conclude that the injunction issued by the District Court was "necessary in aid of its jurisdiction" and thus permitted under the exceptions specifically allowed by Congress.

The state court injunction restrains conduct which the District Court was asked to enjoin in the § 10 (l) proceeding brought in the District Court by the Board's Regional Director against the union. In order to make the § 10 (l) power effective the Board must have authority to take all steps necessary to preserve its case. If the state court decree were to stand, the Federal District Court would be limited in the action it might take. If the Federal District Court were to have unfettered power to decide for or against the union, and to write such decree

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[2] Section 2283 took the place of former § 265 of the Judicial Code which provided:

"The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

In view of our ruling, we find it unnecessary to consider whether, apart from the specific exceptions contained in § 2283, the District Court was justified in enjoining this intrusion on an exclusive federal jurisdiction. Cf. *Bowles* v. *Willingham*, 321 U. S. 503, 510–511.

as it deemed necessary in order to effectuate the policies of the Act, it must be freed of all restraints from the other tribunal. To exercise its jurisdiction freely and fully it must first remove the state decree. When it did so, it acted "where necessary in aid of its jurisdiction."

*Affirmed.*

MR. JUSTICE BLACK dissents.

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

# UNITED STATES *v.* GILMAN.

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

No. 449. Argued March 10–11, 1954.—Decided May 17, 1954.

The United States is not entitled to recover indemnity from one of its employees for whose negligence it has been held liable under the Federal Tort Claims Act. Pp. 507–513.
206 F. 2d 846, affirmed.

*Paul A. Sweeney* argued the cause for the United States. With him on the brief were *Robert L. Stern,* then Acting Solicitor General, and *Assistant Attorney General Burger.*

*William C. Wetherbee* argued the cause for respondent. With him on the brief was *Paul J. Sedgwick.*

*Richard W. Galiher* and *Richard L. Williams* filed a brief for Harrison, as *amicus curiae,* supporting respondent.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The single question in the case is whether the United States may recover indemnity from one of its employees after it has been held liable under the Federal Tort Claims Act,[1] 60 Stat. 842, 28 U. S. C. §§ 1346, 2671 *et seq.*, for the negligence of the employee.

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[1] The Act provides in pertinent part as follows:

SEC. 1346. (b) "Subject to the provisions of chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by

Respondent, an employee of the United States, had a collision with the car of one Darnell, while respondent was driving a government automobile. Darnell sued the United States under the Tort Claims Act. The United States filed a third-party complaint against respondent, asking that if it should be held liable to Darnell, it have indemnity from respondent. The District Court found that Darnell's injuries were caused solely by the negligence of respondent, acting within the scope of his employment. It entered judgment against the United States for $5,500 and judgment over for the United States in the same amount. The Court of Appeals reversed the judgment against respondent by a divided vote. 206 F. 2d 846. The case is here on writ of certiorari. 346 U. S. 914.

Petitioner's argument is that the right of indemnity, though not expressly granted by the Tort Claims Act, is to be implied. A private employer, it is said, has a common-law right of indemnity against an employee whose negligence has made the employer liable. The Tort Claims Act, by imposing liability on the United States for the negligent acts of its employees, has placed it in the general position of a private employer. Therefore, it should have the comparable right of indemnity against

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the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

Sec. 2674. "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages. . . ."

Sec. 2676. "The judgment in an action under section 1346 (b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim."

the negligent employee which private employers have. *United States* v. *Yellow Cab Co.*, 340 U. S. 543, is said to show the way. For there we held that the United States could be sued as a third-party defendant for contributions claimed by a joint tort-feasor, though no specific provision of the Tort Claims Act provided for such suits.

In that case, however, we were dealing with an established type of liability, which was within the broad sweep of the claims for which the United States had agreed to stand liable. Since the claim was within the class covered by the waiver of sovereign immunity, the Court refused to restrict its enforcement to separate actions for contribution.

The present case is quite different. We deal not with the liability of the United States, but with the liability of its employees. The Tort Claims Act does not touch the liability of the employees except in one respect: by 28 U. S. C. § 2676 it makes the judgment against the United States "a complete bar" to any action by the claimant against the employee. And see § 2672.

The relations between the United States and its employees have presented a myriad of problems with which the Congress over the years has dealt. Tenure, retirement, discharge, veterans' preferences, the responsibility of the United States to some employees for negligent acts of other employees—these are a few of the aspects of the problem on which Congress has legislated. Government employment gives rise to policy questions of great import, both to the employees and to the Executive and Legislative Branches. On the employee side are questions of considerable import. Discipline of the employee, the exactions which may be made of him, the merits or demerits he may suffer, the rate of his promotion are of great consequence to those who make government service their career. The right of the employer to sue

the employee is a form of discipline. Perhaps the suits which would be instituted under the rule which petitioner asks would mostly be brought only when the employee carried insurance. But the decision we could fashion could have no such limitations, since we deal only with a rule of indemnity which is utterly independent of any underwriting of the liability. Moreover, the suits that would be brought would haul the employee to court and require him to find a lawyer, to face his employer's charge, and to submit to the ordeal of a trial. The time out for the trial and its preparation, plus the out-of-pocket expenses, might well impose on the employee a heavier financial burden than the loss of his seniority or a demotion in rank. When the United States sues an employee and takes him to court, it lays the heavy hand of discipline on him, as onerous to the employee perhaps as any measure the employer might take, except discharge itself.

On the government side are questions of employee morale and fiscal policy. We have no way of knowing what the impact of the rule of indemnity we are asked to create might be. But we do know the question has serious aspects—considerations that pertain to the financial ability of employees, to their efficiency, to their morale. These are all important to the Executive Branch. The financial burden placed on the United States by the Tort Claims Act also raises important questions of fiscal policy. A part of that fiscal problem is the question of reimbursement of the United States for the losses it suffers as a result of the waiver of its sovereign immunity. Perhaps the losses suffered are so great that government employees should be required to carry part of the burden. Perhaps the cost in the morale and efficiency of employees would be too high a price to pay for the rule of indemnity the petitioner now asks us to write into the Tort Claims Act.

We had an analogous problem before us in *United States* v. *Standard Oil Co.*, 332 U. S. 301, where the United States sued the owner and driver of a truck for the negligent injury of a soldier in the Army of the United States, claiming damages for loss of the soldier's service during the period of his disability. We were asked to extend the common-law action of *per quod servitium amisit* to the government-soldier relation. We declined, stating that the problem involved federal fiscal affairs over which Congress, not the Court, should formulate the policy.

The reasons for following that course in the present case are even more compelling. Here a complex of relations between federal agencies and their staffs is involved. Moreover, the claim now asserted, though the product of a law Congress passed, is a matter on which Congress has not taken a position. It presents questions of policy on which Congress has not spoken.[2] The selection of that

[2] Though the legislative history of the Act is not too helpful on this issue, such indications as there are point toward the result we reach. The Court recently made an extensive review of the history of the Tort Claims Act in *Dalehite* v. *United States*, 346 U. S. 15, 24–30. As there explained, much of its relevant history appears in the Seventy-seventh Congress, rather than in the Seventy-ninth Congress, which enacted it. In the Seventy-seventh Congress the bill took substantially the form in which it was finally enacted by the Seventy-ninth Congress.

At the hearings before the House Judiciary Committee of the Seventy-seventh Congress, the question of the liability of government employees arose. Mr. Francis M. Shea, then Assistant Attorney General, explained the Government's position. In discussing the provision for administrative settlement of small claims (which is now 28 U. S. C. § 2672), Mr. Shea was questioned concerning the clause under which acceptance of an award by the claimant constitutes a release of all claims against the employee, as well as against the United States. The present § 2672 has much the same effect as § 2676, which makes a judgment against the United States a bar to action against the employee. See note 1, *supra*. Mr. Shea's state-

policy which is most advantageous to the whole involves a host of considerations that must be weighed and ap-

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ments concerning the administrative settlement provision therefore have some relevance to the issue in the present case.

"Mr. SPRINGER. I would like to direct your attention, Mr. Shea, to line 19. Why do you provide this acceptance of the award as constituting a bar to the claim against the employee? Is that the intention of the provision, and what is the ultimate purpose of it?

"Mr. SHEA. . . . It has been found that the Government, through the Department of Justice, is constantly being called on by the heads of the various agencies to go in and defend, we will say, a person who is driving a mail truck when suit is brought against him for damages or injuries caused while he was operating the truck within the scope of his duties. Allegations of negligence are usually made. It has been found, over long years of experience, that unless the Government is willing to go in and defend such persons the consequence is a very real attack upon the morale of the services. Most of these persons are not in a position to stand or defend large damage suits, and they are of course not generally in a position to secure the kind of insurance which one would if one were driving for himself.

"If the Government has satisfied a claim which is made on account of a collision between a truck carrying mail and a private car, that should, in our judgment, be the end of it. After the claimant has obtained satisfaction of his claim from the Government, either by a judgment or by an administrative award, he should not be able to turn around and sue the driver of the truck. If he could sue the driver of the truck, we would have to go in and defend the driver in the suit brought against him, and there will thus be continued a very substantial burden which the Government has had to bear in conducting the defense of post-office drivers and other Government employees.

"Mr. MCLAUGHLIN. Have you considered the practice followed by large corporations and railway companies with respect to defense of employees who are joined as defendants in negligence actions?

"Mr. SHEA. I should think that what ordinarily happens in the case of an accident caused by a driver for a big corporation is that suit is brought jointly against the two, and usually it is satisfied by the corporation, and then ordinarily the corporation's remedy against the driver is to fire him if he is negligent too often. Ordinarily

praised. That function is more appropriately for those who write the laws, rather than for those who interpret them.

*Affirmed.*

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the corporations cover such risks by insurance, which is paid for by the employer, I think.

"The CHAIRMAN. Mr. Shea, you are discussing and directing your remarks to the matter where, if a person is injured and files a claim against the Government and the Government satisfies that claim, that is the end of the claim against anybody?

"Mr. SHEA. That is right.

"The CHAIRMAN. What is the arrangement when the government has an employee who is guilty of gross negligence and injury results? Is there any requirement that that employee should in any way respond to the Government if it has to pay for the injury, in the event of gross negligence?

"Mr. SHEA. Not if he is a Government employee. Under those circumstances, the remedy is to fire the employee.

"Mr. MCLAUGHLIN. No right of subrogation is set up?

"Mr. SHEA. Not against the employee."

See Hearings before the House Committee on the Judiciary on H. R. 5373 and H. R. 6463, 77th Cong., 2d Sess., pp. 9–10. See also S. Rep. No. 1196, 77th Cong., 2d Sess., p. 5.

# UNITED STATES *v.* BORDEN COMPANY ET AL.

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

No. 464. Argued April 27, 1954.—Decided May 17, 1954.

In a civil proceeding brought by the United States against several Chicago dairies, the complaint charged a conspiracy to restrain and monopolize the sale of fluid milk in the Chicago area, in violation of the Sherman Act, and price discrimination in violation of the Clayton Act. The District Court dismissed the complaint, holding that, as to the alleged Sherman Act violations, the evidence failed to establish the existence of a conspiracy; and that, though there was proof of price discrimination violative of the Clayton Act by certain of the defendants, a prior decree of that court in a private antitrust suit by a competitor enjoined the conduct in question and made it "useless" to award the Government an injunction. *Held:*

1. Rulings by the district judge that certain evidence offered by the Government was inadmissible did not affect the substantial rights of the parties within the meaning of 28 U. S. C. § 2111, since it does not appear that admission of the evidence in question would have been sufficient to change the conclusion that the Government had not established a case under the Sherman Act; and on that basis the judgment of dismissal as to the Sherman Act allegations is affirmed. Pp. 516–517.

2. In view of the difference in the respective interests sought to be vindicated by the Government and by private litigants in Clayton Act proceedings, the district judge abused his discretion in refusing the Government injunctive relief against price discrimination violative of the Clayton Act solely because of the existence of a prior decree entered in a private action. Pp. 517–520.

111 F. Supp. 562, affirmed in part and remanded.

*Assistant Attorney General Barnes* argued the cause for the United States. With him on the brief were *Solicitor General Sobeloff, John F. Davis* and *Daniel M. Friedman.*

*Stuart S. Ball* argued the cause for the Borden Company et al., appellees. On the brief were *Mr. Ball* for

the Borden Company et al., and *L. Edward Hart, Jr.* and *John Paul Stevens* for the Bowman Dairy Company et al., appellees.

*Leo F. Tierney* argued the cause for the Beloit Dairy Co., appellee. With him on the brief was *Charles L. Stewart, Jr.*

MR. JUSTICE CLARK delivered the opinion of the Court.

The United States instituted this civil proceeding against ten Chicago dairies,[1] charging conspiracy to restrain and monopolize the sale of fluid milk to wholesale customers and others in the Chicago area, in violation of the Sherman Act, and price discrimination in violation of the Clayton Act. Prior to trial a consent decree was entered against five of the smaller defendant companies, enjoining continuation of the conduct charged in the complaint. At the close of the Government's case against the remaining five defendants,[2] the District Court dismissed the complaint in its entirety. It held that, as to the alleged violations of §§ 1 and 2 of the Sherman Act, the evidence failed to establish the existence of a conspiracy or combination; and that, though there was proof of price discrimination violative of § 2 (a) of the Clayton Act by four of the defendants,[3] a prior decree in a private antitrust action brought by a competitor dairy company enjoined the conduct in question and made it "useless" to award the Government an injunction. 111 F. Supp. 562. The Government then appealed directly to this

[1] The Borden Company, Bowman Dairy Company, Belmont Dairy Company, Ridgeview Farms Dairy, Beloit Dairy Company, Capitol Dairy Company, American Processing and Sales Company, Hunding Dairy Company, Meadowmoor Dairies and Western United Dairy Company.

[2] Borden, Bowman, Belmont, Ridgeview and Beloit.

[3] Borden, Bowman, Belmont and Ridgeview.

Court under 15 U. S. C. § 29, and we noted probable jurisdiction, 346 U. S. 914.

Three of the four questions presented on this appeal deal with rulings by the district judge that certain evidence was inadmissible.[4] The Government does not challenge the court's conclusion that on the record conspiracy was not shown, but it insists that error in these rulings precluded establishment of the conspiracy. After hearing argument and considering as much of the record as is before us, including the Government's offers of proof, we are of the opinion that, even assuming error in each of the challenged rulings, it does not appear that admission of the evidence in question would have been sufficient to change the conclusion that the Government had not established a case under the Sherman Act; hence the rulings cannot be said to have affected substantial rights of the parties within the meaning of 28 U. S. C. § 2111.[5] Since on this basis we affirm the judgment of dismissal

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[4] The trial court refused to allow the Government to use for impeachment of a hostile witness a deposition taken in another case; to introduce in evidence certain tape recordings made for use in the prior case; and to introduce testimony as to a conversation with a deceased agent of one of the defendants.

[5] "On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

Fed. Rules Civ. Proc., 61: "Harmless Error. No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

as to the Sherman Act allegations, it is unnecessary to discuss the propriety or impropriety of the several rulings.

The fourth question challenges the basis of the District Court's refusal to grant the Government injunctive relief against price discrimination by four of the defendants.[6] The district judge found that government evidence tended to prove that these defendant companies have sold at prices which discriminate between purchasers of milk of like grade and quality. This, he said, would give defendants the burden of establishing that the discriminations fall within statutory exceptions, were it not that under a consent decree entered against defendants in a private suit in 1952 by another judge of the same court,[7] they already are enjoined from performing all acts specified by the Government in its prayer for relief. In the opinion of the district judge,

> "A decree of this court entered at the instance of a private litigant is as binding upon a defendant as a decree entered at the instance of the government; and a consent decree, entered by any judge of this court without hearing evidence, is as binding as a decree entered by another judge after a protracted trial. I conclude, therefore, that each of the remaining defendants is now effectively enjoined by this court from performing any of the acts set forth in the government's prayer for injunctive relief, insofar as the Clayton Act is concerned.
>
> "As a court of equity, I will not perform a useless task. The violations of the Clayton Act described in the complaint and shown at the trial are, for the

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[6] See note 3, *supra*. Since the Government does not question the correctness of the judgment of dismissal of its claim under § 2 (a) of the Clayton Act against Beloit, the fifth defendant, it is not before us.

[7] *Dean Milk Co.* v. *American Processing & Sales Co.*, U. S. D. C. N. D. Ill. E. D., No. 49 C 1159, Dec. 3, 1952.

> most part, old violations. And to this court, the Dean decree assures, as completely as any decree can assure, that there will be no new violations." 111 F. Supp., at 581.

Accordingly the court dismissed that part of the complaint which alleged violations of § 2 (a) of the Clayton Act. Thus it appears that the Government was refused an injunction solely because of the existence of the prior decree entered against defendants in the course of a private action. We think that refusal on this basis constituted an abuse of discretion.

Section 15 of the Clayton Act, 15 U. S. C. § 25, charges the United States district attorneys, under supervision of the Attorney General, with the duty of instituting equity proceedings to prevent and restrain violations of certain of the antitrust laws, including price discrimination. Under § 16 of the Act, 15 U. S. C. § 26, a private plaintiff may obtain injunctive relief against such violations only on a showing of "threatened loss or damage"; and this must be of a sort personal to the plaintiff, *Beegle* v. *Thomson,* 138 F. 2d 875, 881 (1943). The private-injunction action, like the treble-damage action under § 4 of the Act, supplements government enforcement of the antitrust laws; but it is the Attorney General and the United States district attorneys who are primarily charged by Congress with the duty of protecting the public interest under these laws. The Government seeks its injunctive remedies on behalf of the general public; the private plaintiff, though his remedy is made available pursuant to public policy as determined by Congress, may be expected to exercise it only when his personal interest will be served. These private and public actions were designed to be cumulative, not mutually exclusive. S. Rep. No. 698, 63d Cong., 2d Sess. 42; cf. *Federal Trade Comm'n* v. *Cement Institute,* 333 U. S. 683, 694–695 (1948). ". . . [T]he scheme of the statute is sharply

to distinguish between Government suits, either criminal or civil, and private suits for injunctive relief or for treble damages. Different policy considerations govern each of these. They may proceed simultaneously or in disregard of each other." *United States* v. *Bendix Home Appliances,* 10 F. R. D. 73, 77 (S. D. N. Y. 1949). In short, the Government's right and duty to seek an injunction to protect the public interest exist without regard to any private suit or decree.

To hold that a private decree renders unnecessary an injunction to which the Government is otherwise entitled is to ignore the prime object of civil decrees secured by the Government—the continuing protection of the public, by means of contempt proceedings, against a recurrence of antitrust violations. Should a private decree be violated, the Government would have no right to bring contempt proceedings to enforce compliance; it might succeed in intervening in the private action but only at the court's discretion. The private plaintiff might find it to his advantage to refrain from seeking enforcement of a violated decree; for example, where the defendant's violation operated primarily against plaintiff's competitors. Or the plaintiff might agree to modification of the decree, again looking only to his own interest. In any of these events it is likely that the public interest would not be adequately protected by the mere existence of the private decree. It is also clear that Congress did not intend that the efforts of a private litigant should supersede the duties of the Department of Justice in policing an industry. Yet the effect of the decision below is to place on a private litigant the burden of policing a major part of the milk industry in Chicago, a task beyond its ability, even assuming it to be consistently so inclined.

We agree with appellees that the statute confers on the Government no absolute right to an injunction upon a showing of past violation of the antitrust laws by

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defendants. As we said in *United States* v. *W. T. Grant Co.*, 345 U. S. 629, 633 (1953):

> ". . . the moving party must satisfy the court that relief is needed. The necessary determination is that there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive. The chancellor's decision is based on all the circumstances; his discretion is necessarily broad and a strong showing of abuse must be made to reverse it."

The Government contends that it has "an independent right to relief against violations of the Clayton Act, without regard to whether such violations previously have been enjoined by a decree in a private antitrust suit." But we cannot say that the existence of the private decree warrants *no* consideration by the chancellor in assessing the likelihood of recurring illegal activity. We hold only that, in view of the difference in the respective interests sought to be vindicated by the Government and the private litigant, the district judge abused his discretion in refusing the Government an injunction solely because of the existence of the private decree.

The judgment of dismissal as to the Sherman Act allegations is affirmed; as to the Clayton Act allegations the case is remanded to the District Court for further consideration, and such further proceedings as may be necessary, in accordance with this opinion.

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

# UNITED SHOE MACHINERY CORP. *v.* UNITED STATES.

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

No. 394. Argued April 26–27, 1954.—Decided May 17, 1954.

The case having been fully argued and the Court being satisfied that the findings of the District Court are justified by the evidence and support the decree, the judgment is affirmed.
110 F. Supp. 295, affirmed.

*John L. Hall, Robert Proctor* and *Claude R. Branch* argued the cause for appellant. With them on the brief were *Walter Powers, John B. Reigeluth* and *Conrad W. Oberdorfer.*

*Ralph S. Spritzer* argued the cause for the United States. With him on the brief were *Solicitor General Sobeloff, Assistant Attorney General Barnes, Marvin E. Frankel, Margaret H. Brass* and *C. Worth Rowley.*

PER CURIAM.

The case having been fully argued and the Court being satisfied that the findings are justified by the evidence and support the decree, the judgment is affirmed.

MR. JUSTICE JACKSON and MR. JUSTICE CLARK did not participate in the consideration or decision of this case.

# GALVAN *v.* PRESS, OFFICER IN CHARGE, IMMIGRATION AND NATURALIZATION SERVICE.

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

No. 407. Argued January 11–12, 1954.—Decided May 24, 1954.

1. Section 22 of the Internal Security Act of 1950, providing for the deportation of any alien who has been a member of the Communist Party at any time after entry, is constitutional—as here applied to a resident alien shown to have been willingly a member of the Communist Party from 1944 to 1946 although not shown to have been aware of its advocacy of violent overthrow of the Government. Pp. 523–532.

   (a) In the light of the broad power of Congress over the admission and deportation of aliens, it cannot be said that the classification by Congress contained in § 22 is so baseless as to be violative of due process and therefore beyond the power of Congress. Pp. 529–532.

   (b) The *ex post facto* clause of the Constitution has no application to deportation. P. 531.

2. On the record in this case, the evidence adduced at the administrative hearings was sufficient to support a finding that petitioner, a resident alien, had been a "member" of the Communist Party from 1944 to 1946 and, therefore, was deportable under § 22 of the Internal Security Act of 1950, even though he may not have known the full purposes or program of the Communist Party. Pp. 523–529.

   (a) The word "member" in § 22 cannot be construed as applying only to aliens who joined the Communist Party fully conscious of its advocacy of violence. Pp. 525–529.

   (b) It is enough that the alien joined the Party, aware that he was joining an organization known as the Communist Party which operates as a distinct and active political organization, and that he did so of his own free will. P. 528.

   (c) The record in this case does not show a relationship to the Party so nominal as not to make petitioner a "member" within the terms of the Act. Pp. 528–529.

201 F. 2d 302, affirmed.

*Harry Wolpin* and *A. L. Wirin* argued the cause for petitioner. With them on the brief were *Morris L. Ernst* and *Osmond K. Fraenkel.*

*Oscar H. Davis* argued the cause for respondent. With him on the brief were *Robert L. Stern,* then Acting Solicitor General, *Assistant Attorney General Olney* and *Beatrice Rosenberg.*

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

Petitioner, an alien of Mexican birth, first entered the United States in 1918 and has since resided here with only occasional brief visits to his native country. In the course of two questionings, in March 1948, by the Immigration and Naturalization Service, he indicated that he had been a member of the Communist Party from 1944 to 1946. In March of 1949, the petitioner was served with a deportation warrant, and on the same day a preliminary deportation hearing was held to acquaint him with the charges against him—that after entry he had become a member of an organization which advocated the violent overthrow of the United States Government, and of an organization which distributed material so advocating. In December 1950, petitioner had a *de novo* hearing at which the transcripts of all earlier proceedings were, by agreement, made part of the record. Shortly after the hearing commenced, the Examining Officer lodged the additional charge against the petitioner that after entry he had been a member of the Communist Party, membership in which had been made a specific ground for deportation by the Internal Security Act of 1950, 64 Stat. 987, 1006, 1008.

At this final hearing the evidence against the petitioner was derived from two principal sources. The first was

his own testimony during the two interrogations by immigration authorities in 1948. During those interrogations, he had testified as to the time and place he had joined the Communist Party, talked freely about his membership in the Party, and indicated generally that the distinction between the Party and other groups was clear in his mind; he had explained that the reason he had not applied for naturalization was that he feared his former Party membership might be revealed, and had offered to make amends by rejoining the Party as an undercover agent for the Government. At the hearing in December of 1950, petitioner denied that in his prior hearing he had admitted joining the Party, insisting that at the time he thought the question related to labor union activities. In response to a question whether he had ever attended meetings of the Spanish Speaking Club, an alleged Communist Party unit, he replied: "The only meetings I attended were relating to the Fair Employment Practices Committee."

The second source of information was the testimony of a Mrs. Meza to the effect that she had been present when petitioner was elected an officer of the Spanish Speaking Club. Petitioner denied the truth of this and other statements of Mrs. Meza calculated to establish his active participation in the Communist Party and said: "She must have been under great strain to imagine all those things."

The Hearing Officer found that petitioner had been a member of the Communist Party from 1944 to 1946 and ordered him deported on that specific ground. He did not deem it necessary to make findings on the more general charges contained in the original warrant. The Hearing Officer's decision was adopted by the Assistant Commissioner and an appeal was dismissed by the Board of Immigration Appeals. A petition for a writ of habeas corpus was denied by the District Court, and the dismissal

was affirmed by the Court of Appeals for the Ninth Circuit. 201 F. 2d 302.

On certiorari, petitioner challenged the sufficiency of the evidence to sustain deportation under § 22 of the Internal Security Act of 1950 and attacked the validity of the Act as applied to him.[1] These are issues that raise the constitutionality and construction of the 1950 Act for the first time and so we granted certiorari. 346 U. S. 812.

Petitioner's contention that there was not sufficient evidence to support the deportation order brings into question the scope of the word "member" as used by Congress in the enactment of 1950, whereby it required deportation of any alien who at the time of entering the United States, or at any time thereafter, was a "member" of the Communist Party.[2] We are urged to construe the Act as providing for the deportation only of those aliens who joined the Communist Party fully conscious of its advocacy

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[1] In his petition, petitioner also contended that the procedure used against him was unfair because of the new charge lodged by the Examining Officer in the December 1950 hearing. Apart from the fact that this claim was not pressed in the argument or petitioner's brief, it is sufficient to note that there was no element of surprise in the additional charge, since it was simply in more specific terms the same ground for deportation that petitioner already knew he had to defend against, namely, membership in the Communist Party. Furthermore, petitioner declined the Hearing Officer's offer of a continuance to meet the new charge.

[2] Section 22 of the Internal Security Act of 1950 provides that the Attorney General shall take into custody and deport any alien "who was at the time of entering the United States, or has been at any time thereafter, . . . a member of any one of the classes of aliens enumerated in section 1 (2) of this Act . . . ."

Subparagraph (C) of § 1 (2) lists "Aliens who are members of or affiliated with (i) the Communist Party of the United States . . . ." The substance of this provision was incorporated in the Immigration and Nationality Act of 1952, 66 Stat. 163, 205, 8 U. S. C. § 1251 (a)(6)(C).

of violence, and who, by so joining, thereby committed themselves to this violent purpose.

But the Act itself appears to preclude an interpretation which would require proof that an alien had joined the Communist Party with full appreciation of its purposes and program. In the same section under which the petitioner's deportation is sought here as a former Communist Party member, there is another provision, subsection (2)(E), which requires the exclusion or deportation of aliens who are "members of or affiliated with" an organization required to register under the Internal Security Act of 1950,[3] "unless such aliens establish that they did not know or have reason to believe at the time they became members of or affiliated with such an organization . . . that such organization was a Communist organization." 64 Stat. 1007. In describing the purpose of this clause, Senator McCarran, the Act's sponsor, said: "Aliens who were innocent dupes when they joined a Communist-front organization, as distinguished from a Communist political organization [such as the Communist Party], would likewise not ipso facto be excluded or deported." 96 Cong. Rec. 14180. In view of this specific escape provision for members of other organizations, it seems clear that Congress did not exempt "innocent" members of the Communist Party.

While the legislative history of the 1950 Act is not illuminating on the scope of "member," considerable light was shed by authoritative comment in the debates on the statute which Congress enacted in 1951 to correct what it regarded as the unduly expanded interpretation by the Attorney General of "member" under the 1950 Act. 65

[3] Under § 7 of the Internal Security Act of 1950, "Communist-action" and "Communist-front" organizations are required to register as such with the Attorney General. Section 13 provides that where such an organization fails to register the Attorney General may institute proceedings requiring such registration.

Stat. 28. The amendatory statute dealt with certain specific situations which had been brought to the attention of Congress and provided that where aliens had joined a proscribed organization (1) when they were children, (2) by operation of law, or (3) to obtain the necessities of life, they were not to be deemed to have been "members." In explaining the measure, its sponsor, Senator McCarran, stated repeatedly and emphatically that "member" was intended to have the same meaning in the 1950 Act as had been given it by the courts and administrative agencies since 1918, 97 Cong. Rec. 2368–2374. See S. Rep. No. 111, 82d Cong., 1st Sess. 2; H. R. Rep. No. 118, 82d Cong., 1st Sess. 2. To illustrate what "member" did not cover he inserted in the Record a memorandum containing the following language quoted from *Colyer* v. *Skeffington,* 265 F. 17, 72: "Congress could not have intended to authorize the wholesale deportation of aliens who, accidentally, artificially, or unconsciously in appearance only, are found to be members of or affiliated with an organization of whose platform and purposes they have no real knowledge." 97 Cong. Rec. 2373.

This memorandum, as a weighty gloss on what Congress wrote, indicates that Congress did not provide that the three types of situations it enumerated in the 1951 corrective statute should be the only instances where membership is so nominal as to keep an alien out of the deportable class. For example, the circumstances under which the finding of membership was rejected in *Colyer* v. *Skeffington, supra,* would not have been covered by the specific language in the 1951 Act. In that case, the aliens passed "from one organization into another, supposing the change to be a mere change of name, and that by assenting to membership in the new organization they had not really changed their affiliations or political or economic activities." 265 F., at 72.

On the other hand, the repeated statements that "member" was to have the same meaning under the 1950 Act as previously, preclude an interpretation limited to those who were fully cognizant of the Party's advocacy of violence. For the judicial and administrative decisions prior to 1950 do not exempt aliens who joined an organization unaware of its program and purposes. See *Kjar* v. *Doak,* 61 F. 2d 566; *Greco* v. *Haff,* 63 F. 2d 863; *In the Matter of O—,* 3 I. & N. Dec. 736.

It must be concluded, therefore, that support, or even demonstrated knowledge, of the Communist Party's advocacy of violence was not intended to be a prerequisite to deportation. It is enough that the alien joined the Party, aware that he was joining an organization known as the Communist Party which operates as a distinct and active political organization, and that he did so of his own free will. A fair reading of the legislation requires that this scope be given to what Congress enacted in 1950, however severe the consequences and whatever view one may have of the wisdom of the means which Congress employed to meet its desired end.

On this basis, the Hearing Officer's finding that petitioner here was a "member" of the Communist Party must be sustained. Petitioner does not claim that he joined the Party "accidentally, artificially, or unconsciously in appearance only," to use the words in Senator McCarran's memorandum. The two points on which he bases his defense against the deportation order are, first, that he did not join the Party at all, and that if he did join, he was unaware of the Party's true purposes and program. The evidence which must have been believed and relied upon for the Hearing Officer's finding that petitioner was a "member" is that petitioner was asked to join the Party by a man he assumed to be an organizer, that he attended a number of meetings and that he did not apply for citizenship because he feared his Party

membership would become known to the authorities. In addition, on the basis of Mrs. Meza's testimony, the Hearing Officer was entitled to conclude that petitioner had been active in the Spanish Speaking Club, and, indeed, one of its officers. Certainly there was sufficient evidence to support a finding of membership. And even if petitioner was unaware of the Party's advocacy of violence, as he attempted to prove, the record does not show a relationship to the Party so nominal as not to make him a "member" within the terms of the Act.

This brings us to petitioner's constitutional attack on the statute. *Harisiades* v. *Shaughnessy,* 342 U. S. 580, sustained the constitutionality of the Alien Registration Act of 1940. 54 Stat. 670. That Act made membership in an organization which advocates the overthrow of the Government of the United States by force or violence a ground for deportation, notwithstanding that membership in such organization had terminated before enactment of the statute. Under the 1940 Act, it was necessary to prove in each case, where membership in the Communist Party was made the basis of deportation, that the Party did, in fact, advocate the violent overthrow of the Government. The Internal Security Act of 1950 dispensed with the need for such proof. On the basis of extensive investigation Congress made many findings, including that in § 2 (1) of the Act that the "Communist movement . . . is a world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship," and made present or former membership in the Communist Party, in and of itself, a ground for deportation. Certainly, we cannot say that this classification by Congress is so baseless as to be violative of due process and therefore beyond the power of Congress.

In this respect—the dispensation with proof of the character of the Communist Party—the present case goes beyond *Harisiades*. But insofar as petitioner's constitutional claim is based on his ignorance that the Party was committed to violence, the same issue was before the Court with respect to at least one of the aliens in *Harisiades*.

The power of Congress over the admission of aliens and their right to remain is necessarily very broad, touching as it does basic aspects of national sovereignty, more particularly our foreign relations and the national security. Nevertheless, considering what it means to deport an alien who legally became part of the American community, and the extent to which, since he is a "person," an alien has the same protection for his life, liberty and property under the Due Process Clause as is afforded to a citizen, deportation without permitting the alien to prove that he was unaware of the Communist Party's advocacy of violence strikes one with a sense of harsh incongruity. If due process bars Congress from enactments that shock the sense of fair play—which is the essence of due process—one is entitled to ask whether it is not beyond the power of Congress to deport an alien who was duped into joining the Communist Party, particularly when his conduct antedated the enactment of the legislation under which his deportation is sought. And this because deportation may, as this Court has said in *Ng Fung Ho* v. *White*, 259 U. S. 276, 284, deprive a man "of all that makes life worth living"; and, as it has said in *Fong Haw Tan* v. *Phelan*, 333 U. S. 6, 10, "deportation is a drastic measure and at times the equivalent of banishment or exile."

In light of the expansion of the concept of substantive due process as a limitation upon all powers of Congress, even the war power, see *Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146, 155, much could be said for the view, were we writing on a clean slate, that the Due Process

Clause qualifies the scope of political discretion heretofore recognized as belonging to Congress in regulating the entry and deportation of aliens. And since the intrinsic consequences of deportation are so close to punishment for crime, it might fairly be said also that the *ex post facto* Clause, even though applicable only to punitive legislation,[4] should be applied to deportation.

But the slate is not clean. As to the extent of the power of Congress under review, there is not merely "a page of history," *New York Trust Co.* v. *Eisner,* 256 U. S. 345, 349, but a whole volume. Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government. In the enforcement of these policies, the Executive Branch of the Government must respect the procedural safeguards of due process. *The Japanese Immigrant Case,* 189 U. S. 86, 101; *Wong Yang Sung* v. *McGrath,* 339 U. S. 33, 49. But that the formulation of these policies is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government. And whatever might have been said at an earlier date for applying the *ex post facto* Clause, it has been the unbroken rule of this Court that it has no application to deportation.

We are not prepared to deem ourselves wiser or more sensitive to human rights than our predecessors, especially those who have been most zealous in protecting civil

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[4] First in *Ogden* v. *Saunders,* 12 Wheat. 213, 271, and again in *Satterlee* v. *Matthewson,* 2 Pet. 380, 681 (appendix), a characteristically persuasive attack was made by Mr. Justice Johnson on the view that the *ex post facto* Clause applies only to prosecutions for crime. The Court, however, has undeviatingly enforced the contrary position, first expressed in *Calder* v. *Bull,* 3 Dall. 386. It would be an unjustifiable reversal to overturn a view of the Constitution so deeply rooted and so consistently adhered to.

liberties under the Constitution, and must therefore under our constitutional system recognize congressional power in dealing with aliens, on the basis of which we are unable to find the Act of 1950 unconstitutional. See *Bugajewitz* v. *Adams,* 228 U. S. 585, and *Ng Fung Ho* v. *White,* 259 U. S. 276, 280.

*Judgment affirmed.*

MR. JUSTICE REED concurs in the judgment of the Court and in the opinion as written, except as to the deductions drawn from Senator McCarran's citation of *Colyer* v. *Skeffington,* 265 F. 17, 72.

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

Petitioner has lived in this country thirty-six years, having come here from Mexico in 1918 when only seven years of age. He has an American wife to whom he has been married for twenty years, four children all born here, and a stepson who served this country as a paratrooper. Since 1940 petitioner has been a laborer at the Van Camp Sea Food Company in San Diego, California. In 1944 petitioner became a member of the Communist Party. Deciding that he no longer wanted to belong to that party, he got out sometime around 1946 or 1947. As pointed out in the Court's opinion, during the period of his membership the Communist Party functioned "as a distinct and active political organization." See *Communist Party* v. *Peek,* 20 Cal. 2d 536, 127 P. 2d 889. Party candidates appeared on California election ballots, and no federal law then frowned on Communist Party political activities. Now in 1954, however, petitioner is to be deported from this country solely because of his past lawful membership in that party. And this is to be done without proof or finding that petitioner knew that the party had any evil purposes or that he agreed

with any such purposes that it might have had. On the contrary, there is strong evidence that he was a good, law-abiding man, a steady worker and a devoted husband and father loyal to this country and its form of government.

For joining a lawful political group years ago—an act which he had no possible reason to believe would subject him to the slightest penalty—petitioner now loses his job, his friends, his home, and maybe even his children, who must choose between their father and their native country. Perhaps a legislative act penalizing political activities legal when engaged in is not a bill of attainder. But see *United States* v. *Lovett,* 328 U. S. 303, 315–316. Conceivably an Act prescribing exile for prior innocent conduct does not violate the constitutional prohibition of *ex post facto* laws. Cf. *American Communications Assn.* v. *Douds,* 339 U. S. 382, 412–415. It may be possible that this deportation order for engaging in political activities does not violate the First Amendment's clear ban against abridgment of political speech and assembly. Maybe it is not even a denial of due process and equal protection of the laws. But see dissenting opinions in *Carlson* v. *Landon,* 342 U. S. 524, and *Harisiades* v. *Shaughnessy,* 342 U. S. 580. I am unwilling to say, however, that despite these constitutional safeguards this man may be driven from our land because he joined a political party that California and the Nation then recognized as perfectly legal.

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

AS MR. JUSTICE BLACK states in his dissent, the only charge against this alien is an act that was lawful when done. I agree that there is, therefore, no constitutional basis for deportation, if aliens, as well as citizens, are to be the beneficiaries of due process of law.

The case might, of course, be different if the past affiliation with Communism now seized upon as the basis for deportation had continued down to this date. But so far as this record shows, the alien Galvan quit the Communist Party at least six years ago. There is not a word in the present record to show that he continued his affiliations with it *sub rosa* or espoused its causes or joined in any of its activities since he ceased to be a member of it.

I cannot agree that because a man was once a Communist, he always must carry the curse. Experience teaches otherwise. It is common knowledge that though some of the leading Socialists of Asia once were Communists, they repudiated the Marxist creed when they experienced its ugly operations, and today are the most effective opponents the Communists know. So far as the present record shows, Galvan may be such a man. Or he may be merely one who transgressed and then returned to a more orthodox political faith. The record is wholly silent about Galvan's present political activities. Only one thing is clear: Galvan is not being punished for what he presently is, nor for an unlawful act, nor for espionage or conspiracy or intrigue against this country. He is being punished for what he once was, for a political faith he briefly expressed over six years ago and then rejected.

This action is hostile to our constitutional standards, as I pointed out in *Harisiades* v. *Shaughessy,* 342 U. S. 580, 598. Aliens who live here in peace, who do not abuse our hospitality, who are law-abiding members of our communities, have the right to due process of law. They too are "persons" within the meaning of the Fifth Amendment. They can be molested by the Government in times of peace only when their presence here is hostile to the safety or welfare of the Nation. If they are to be deported, it must be for what they are and do, not for what they once believed.

Syllabus.

# ALLEN, CHAIRMAN, TWELFTH REGION WAGE STABILIZATION BOARD, ET AL. *v.* GRAND CENTRAL AIRCRAFT CO.

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

No. 450. Argued March 11–12, 1954.—Decided May 24, 1954.

A complaint filed November 4, 1952, by the Wage Stabilization Board with the National Enforcement Commission alleged in substance that, between January 26, 1951 and January 1, 1952, appellee had paid wage increases in violation of an order freezing wages at the levels of January 25, 1951, under the Defense Production Act of 1950, the substantive provisions of which expired April 30, 1953. On January 14, 1953, the National Enforcement Commission appointed an Enforcement Commissioner to hear the evidence and recommend to the Commission a determination of the issues in the proceeding. The Commissioner set the case for hearing on February 24, 1953, but, in a suit filed by appellee, the District Court enjoined further action. *Held:* The pending administrative proceeding is valid, and the judgment of the District Court enjoining that proceeding is reversed. Pp. 536–555.

1. Once the right of the Government to hold these administrative hearings is established, appellee is not entitled to enjoin them merely because they might jeopardize its bank credit or otherwise be inconvenient or embarrassing. Pp. 539–540.

2. The Defense Production Act of 1950 authorized the President to apply administrative action to the enforcement of its wage stabilization provisions. Pp. 541–552.

(a) The Defense Production Act of 1950 is to be read with reference to the Stabilization Act of 1942, which was a model for the 1950 Act. P. 541.

(b) The history of administrative enforcement under the 1942 Act supports the conclusion that the President had authority under the 1950 Act to apply administrative action to the enforcement of wage stabilization. Pp. 541–550.

(c) Section 706 of the 1950 Act did not vest enforcement of the Act exclusively in the District Courts and leave to the President only authority to promulgate general regulations. Pp. 550–552.

(d) The specific language of § 405 (b) of the 1950 Act should receive the same construction that was placed on similar language

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in the 1942 Act. The "general provisions" of § 706 do not restrict the specific provisions of § 405 (b) now reenacted. Pp. 550–552.

(e) It would be premature for this Court to rule upon other questions submitted by appellee concerning the interpretation and constitutionality of the statute until after the required administrative procedures have been exhausted. P. 553.

3. Such administrative enforcement may be applied even after the restrictions placed on wages under Title IV of the Act have expired, provided the enforcement is limited to violations antedating such expiration. Pp. 553–555.

(a) There is no express or implied provision in the 1950 Act contrary to the policy of 1 U. S. C. (1952 ed.) § 109, the general savings statute. Pp. 553–554.

(b) The precise object of the general savings statute is to prevent the expiration of a temporary statute from cutting off appropriate measures to enforce the expired statute in relation to violations of it, or of regulations issued under it, occurring before its expiration. Pp. 554–555.

(c) The authority of the President to delegate his powers with respect to wage stabilization enforcement to the Director of the Office of Defense Mobilization derives from §§ 703 and 705, and, under § 717 (a), such authority remains effective until June 30, 1955. P. 555.

114 F. Supp. 389, reversed.

*Robert L. Stern* argued the cause for appellants. With him on the brief were *Solicitor General Sobeloff, Assistant Attorney General Burger, Samuel D. Slade, Herman Marcuse* and *Charles H. Kendall.*

*Richard W. Lund* argued the cause for appellee. With him on the brief were *Dana Latham* and *Paul R. Watkins.*

MR. JUSTICE BURTON delivered the opinion of the Court.

The principal question for decision is whether the Defense Production Act of 1950 [1] authorized the President

[1] 64 Stat. 798, as amended, 65 Stat. 131, 66 Stat. 296, 67 Stat. 129, 50 U. S. C. App. (1946 ed., Supp. V) § 2061 *et seq.*

to apply administrative action to the enforcement of its wage stabilization provisions. For the reasons hereafter stated, we decide that it did.

There is here also the question whether such administrative enforcement may be applied even after the restrictions placed on wages under Title IV of the Act [2] have expired, provided the enforcement is limited to violations antedating such expiration. Our answer is in the affirmative.

Appellee further claims that the pending administrative proceeding should be enjoined because the mere conduct of that proceeding might cause it irreparable damage. For the reasons given below, we find that argument untenable.

Appellee, Grand Central Aircraft Company, is a California corporation which was engaged, in 1951, in the production and repair of aircraft equipment in Glendale, California, and Tucson, Arizona. November 4, 1952, the Wage Stabilization Board [3] filed a complaint with the National Enforcement Commission [4] alleging in substance that appellee, between January 26, 1951, and January 1, 1952, had paid wage increases in violation of an order freezing wages at the levels of January 25, 1951.[5] Those payments consisted of wages totaling about $5,500,000, including about $750,000 alleged to have been in excess

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[2] "TITLE IV—PRICE AND WAGE STABILIZATION" containing §§ 401–412, 64 Stat. 803–812, 66 Stat. 304, and see 50 U. S. C. App. (1946 ed., Supp. V) §§ 2101–2110.

[3] Created, within the Economic Stabilization Agency, by § 403 (b) of the Defense Production Act, June 30, 1952, 66 Stat. 300–301. See also, Exec. Order No. 10377, 17 Fed. Reg. 6891; ESA Gen. Order No. 16, 17 Fed. Reg. 6925.

[4] ESA Gen. Order No. 18, effective July 30, 1952, 17 Fed. Reg. 6925, as amended at 9977, established NEC within the ESA and defined the functions of NEC.

[5] Gen. Wage Stabilization Regulation 1, issued by Economic Stabilization Administrator, January 26, 1951, 16 Fed. Reg. 816.

of the wage ceilings. January 14, 1953, the National Enforcement Commission appointed Phil C. Neal to hear the evidence as an Enforcement Commissioner and to recommend to the Commission a determination of the issues in the proceeding. He set the case for hearing on February 24 at Los Angeles, California, but further action was enjoined, as stated below, so that the proceeding is still pending at that stage.[6]

February 13, 1953, appellee filed the instant suit in the United States District Court for the Northern District of California, Southern Division. Appellee asked the court to restrain the defendant members of the Wage Stabilization Board, the National Enforcement Commission, officials of the Twelfth Region Wage Stabilization Board, and the Enforcement Commissioner, from proceeding with the administrative hearing. Only the regional officials and the Enforcement Commissioner were served. In its complaint, appellee denied that it had violated the Defense Production Act or any regulation or order under it. Appellee claimed also that the administrative procedure then being followed was unauthorized by the Constitution or any statute and that, even if originally authorized, that authorization had now expired. Finally, appellee claimed the hearing should be enjoined because the mere conduct of the proceeding would inflict irreparable damage upon it. A three-judge District Court, convened under 28 U. S. C. (1952 ed.) § 2282, granted the restraining order and interlocutory injunction sought by appellee against further conduct of the administrative proceeding. After hearing and trial, the injunction was made permanent. 114 F. Supp. 389. The

[6] The Government states that Neal, who is one of the appellants, is now on the staff of the Office of Defense Mobilization and is authorized and ready to conduct the hearing if the injunction is lifted.

order was then appealed to this Court under 28 U. S. C. (1952 ed.) § 1253. Stay of the injunction was denied, two Justices dissenting and one not participating. 345 U. S. 988. Probable jurisdiction of the appeal was noted. 346 U. S. 920.

A somewhat comparable case was decided by a three-judge United States District Court for the Northern District of Texas in favor of an employer June 14, 1953, in *Jonco Aircraft Corp.* v. *Franklin,* 114 F. Supp. 392, with Chief Circuit Judge Hutcheson dissenting. That judgment was reversed by this Court, *per curiam,* for failure of appellee to exhaust its administrative remedy. 346 U. S. 868.

I.

We consider first the claim to injunctive relief which appellee made on the ground that the conduct of the proposed administrative hearings would cause it irreparable damage by weakening its bank credit and depriving it of essential working capital. On that basis, interlocutory relief was granted pending the court's determination of the ultimate issue of the validity of the administrative procedure. That injunction has been made permanent but the Government, on behalf of appellants, contends that appellee is acting prematurely in seeking such relief before carrying the prescribed administrative procedure at least to the point where it faces some immediate compulsion and greater probability of damage than it has established.

The proposed hearings are to be held before an Enforcement Commissioner with authority merely to recommend findings to a Regional Enforcement Commission subject to review by the National Enforcement Commission. Those findings may show no violation of wage ceilings. At most, they will be concerned with appellee's

alleged payment of wages in excess of wage ceilings to an extent of about $750,000. If such a violation of the ceilings is found by the National Enforcement Commission, it may then, under § 405 (b) of the Defense Production Act of 1950 and the President's delegated authority, certify to governmental agencies, including the Bureau of Internal Revenue for income-tax purposes, the disallowance of all or part of appellee's illegal wage payments. Appellee argues that such proceedings carry the possibility of the disallowance as a business expense, for income-tax purposes, of $750,000, more or less, up to the total wages paid, exceeding $5,500,000. Appellee contends also that the mere threat of such action would jeopardize the bank credit upon which it depends for essential working capital. There is grave doubt of the right of appellee thus to test the validity of administrative procedure before exhausting it or bringing the issues closer to a focus than it has done. However, it is clear that once the right of the Government to hold administrative hearings is established, a litigant cannot enjoin them merely because they might jeopardize his bank credit or otherwise be inconvenient or embarrassing. *Aircraft & Diesel Corp.* v. *Hirsch,* 331 U. S. 752, 777–779. "[T]he expense and annoyance of litigation is 'part of the social burden of living under government.'" *Petroleum Exploration, Inc.* v. *Public Service Commission,* 304 U. S. 209, 222. See also, *Myers* v. *Bethlehem Corp.,* 303 U. S. 41, 47; *Chicago & Southern Air Lines* v. *Waterman Corp.,* 333 U. S. 103, 112–113; *Franklin* v. *Jonco Aircraft Corp., per curiam,* 346 U. S. 868.

It is appellee's principal claim that there is no properly authorized administrative procedure for it to exhaust and that the administrative authorities who seek to determine its case have no lawful right to do so. We, therefore, go directly to the heart of this controversy, which is the

question whether the administrative enforcement of the 1950 wage stabilization program has been validly authorized.

II.

The procedure in question is prescribed by General Procedural Regulation 1, Revised, issued by the Economic Stabilization Administrator, August 21, 1952, 17 Fed. Reg. 7737. The hearings are to be conducted regionally by an Enforcement Commissioner and provision is made for appeal to the National Enforcement Commission. That Commission (NEC) is authorized to issue a certificate of disallowance prescribing the amount of wages to be disregarded by the executive departments and other governmental agencies in determining the costs and expenses of appellee for the purposes of any other law or regulation. ESA Gen. Order No. 18, July 28, 1952, 17 Fed. Reg. 6925. Standards of action are prescribed by the Economic Stabilization Administrator in his General Order No. 15, April 3, 1952, 17 Fed. Reg. 2994. Appellee does not complain of noncompliance with these regulations. It complains rather that they are not authorized by statute or that, if purporting to be so authorized, the statute violates the Federal Constitution.

The Government finds authority for the creation of this administrative machinery in § 405 (b) of the Defense Production Act of 1950, when read in connection with the entire Act. That section is derived from § 5 (a) of the Stabilization Act of 1942, 56 Stat. 767, 50 U. S. C. App. (1946 ed.) § 965 (a). To read the Defense Production Act of 1950 without reference to this model is to read it out of the context in which Congress enacted it.

The Stabilization Act of 1942 was a vital wartime measure, adopted October 2, 1942, directing the President "on or before November 1, 1942, to issue a general order stabilizing prices, wages, and salaries, affecting the cost

of living." [7] In it, Congress relied upon presidential action geared to the critical necessity for speedy compliance. Its purpose was to check inflation. It subordinated individual convenience to nationwide standards. Its sanctions were entrusted to administrative agencies capable of prompt action. Section 5 (a) provided that—

> "No employer shall pay, and no employee shall receive, wages or salaries in contravention of the regulations promulgated by the President under this Act. The President shall also prescribe the extent to which any wage or salary payment made in contravention of such regulations shall be disregarded by the executive departments and other governmental agencies in determining the costs or expenses of any employer for the purposes of any other law or regulation." 56 Stat. 767, 50 U. S. C. App. (1946 ed.) § 965 (a).

The Act granted the President broad powers to promulgate regulations.[8] October 3, 1942, he issued Executive Order No. 9250, 7 Fed. Reg. 7871, "to control so far as possible the inflationary tendencies and the vast dis-

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[7] 56 Stat. 765, 50 U. S. C. App. (1946 ed.) § 961 *et seq.* The Stabilization Act itself was an amendment to the Emergency Price Control Act of 1942, approved January 30, 1942, 56 Stat. 23, 50 U. S. C. App. (1946 ed.) § 901 *et seq.* For its title, see 58 Stat. 643. It was temporary legislation. Its termination date was June 30, 1944, or "such earlier date as the Congress by concurrent resolution, or the President by proclamation, may prescribe." 56 Stat. 767. That date was postponed, one year at a time, to June 30, 1947. 58 Stat. 643, 59 Stat. 306, 60 Stat. 664, 50 U. S. C. App. (1946 ed.) § 966.

[8] "SEC. 2. The President may, from time to time, promulgate such regulations as may be necessary and proper to carry out any of the provisions of this Act; and may exercise any power or authority conferred upon him by this Act through such department, agency, or officer as he shall direct. . . ." 56 Stat. 765, 50 U. S. C. App. (1946 ed.) § 962.

locations attendant thereon which threaten our military effort and our domestic economic structure, and for the more effective prosecution of the war." That order established an Office of Economic Stabilization, headed by an Economic Stabilization Director. In Title II it established a national "Wage and Salary Stabilization Policy." This placed wage rates under the control of the National War Labor Board and froze them generally at the levels prevailing September 15, 1942. In Title III it authorized the National War Labor Board to issue rules and regulations "for the speedy determination of the propriety of any wage increases or decreases in accordance with this Order." It thus established administrative processes for making specific determinations of wages paid in contravention of the Act. The same processes also enabled the Government, through other agencies, to disregard such illegal payments when computing taxes, compensation under cost-plus contracts and other governmental transactions.

October 27, 1942, James F. Byrnes, the Economic Stabilization Director, with the personal approval of the President, issued the regulations which later were to serve as the model for the regulations now before us.[9] They delegated to the National War Labor Board authority to certify, to all executive departments and other agencies of the Government, disallowances of payments of wages based upon the Board's determination of their violation of the Act.[10]

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[9] Office of Economic Stabilization—Pt. 4001—Wages and Salaries, 7 Fed. Reg. 8748 *et seq.* Subsequent amendments did not change the provisions for making tax disallowances based upon specific administrative determinations.

[10] "§ 4001.2 *Authority of National War Labor Board.* The Board shall . . . have authority to determine whether any

"(a) Wage payments . . .

. . . . . .

"are made in contravention of the Act, or any rulings, orders or regulations promulgated thereunder. Any such determination by the

July 30, 1943, the Board adopted rules to govern its procedures and those of Regional War Labor Boards in dealing with violation of the wage stabilization program. Those regulations likewise are comparable to the ones involved in this case. 9 Fed. Reg. 4681 *et seq.*

Nearly 100,000 proceedings were thus held and disallowances of nearly $30,000,000 were made up to February 24, 1947.[11] Those proceedings were matters of general public knowledge and were well known to Congress.[12]

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Board, made under rulings and orders issued by it, that a payment is in contravention of the Act, or any rulings, orders, or regulations promulgated thereunder, shall be conclusive upon all Executive Departments and agencies of the Government in determining the costs or expenses of any employer for the purpose of any law or regulation, either heretofore or hereafter enacted or promulgated, including the Emergency Price Control Act of 1942 or any maximum price regulation thereof, or for the purpose of calculating deductions under the revenue laws of the United States, or for the purpose of determining costs or expenses under any contract made by or on behalf of the United States. Any determination of the Board made pursuant to the authority conferred on it shall be final and shall not be subject to review by The Tax Court of the United States or by any court in any civil proceedings." 7 Fed. Reg., at 8749.

[11] From October 3, 1942, to December 29, 1945, 68,233 cases, resulting in disallowances of $19,018,820.19, were handled by the National War Labor Board. 1 Termination Report, National War Labor Board, 428–441. From January 1, 1946, to January 30, 1947, 30,071 cases, resulting in disallowances of $11,822,609, were handled by the National Wage Stabilization Board. National Wage Stabilization Board (1946–1947) 223–235. While many cases resulted in findings of no violation or were closed without penalty or disallowance, many others were terminated with disallowances, either by consent or after hearings. There were 282 appeal cases processed by the National Boards, and although the controls were terminated in November 1946 by Executive Order No. 9801, 11 Fed. Reg. 13435, the enforcement activities, based on earlier violations, were carried on by the Department of the Treasury until 1949. See Ann. Reps. of the Commissioner of Internal Revenue 62–63 (1947); 33–34 (1948); 26–27 (1949).

[12] Not only was the life of the Act extended three times (see note 7, *supra*) but its administration was reviewed during annual appropria-

They support the natural presumption that Congress, in its subsequent actions, accepted them as legitimate interpretations of the Stabilization Act. *Shapiro* v. *United States,* 335 U. S. 1, 16; *Helvering* v. *Winmill,* 305 U. S. 79, 82–83; *Norwegian Nitrogen Co.* v. *United States,* 288 U. S. 294, 310–315; *Hecht* v. *Malley,* 265 U. S. 144, 153.

Under the Act of 1942, the President thus determined, through his administrative agencies, many specific violations of the prescribed wage ceilings. It was the practice of those administrative agencies to certify to other departments and agencies specific disallowances of the wages paid in violation of such ceilings. See *Troy Laundry Co.* v. *Wirtz,* 155 F. 2d 53; *Woodworth Co.* v. *Kavanagh,* 102 F. Supp. 9, aff'd, 202 F. 2d 154.

A comparison of the terms of the Act of 1942 with those of the Defense Production Act of September 8, 1950, and a comparison of the regulations and practice under those Acts is impressive.

Section 405 (b) of the later Act is as follows:

> "No employer shall pay, and no employee shall receive, any wage, salary, or other compensation in contravention of any regulation or order promulgated by the President under this title. The President shall also prescribe the extent to which any wage, salary, or compensation payment made in contravention of any such regulation or order shall be disregarded by the executive departments and other governmental agencies in determining the costs or expenses of any employer for the purposes of any other law or regulation." 64 Stat. 807, 50 U. S. C. App. (1946 ed., Supp. V) § 2105 (b).

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tion hearings. See Hearings before the House Subcommittee on Appropriations on National War Agencies Appropriation Bills for 1944, Pt. 2, 78th Cong., 1st Sess. 667–668; for 1945, Pt. 1, 78th Cong., 2d Sess. 240–241, 303–304; for 1946, 79th Cong., 1st Sess. 12–13.

It follows, almost word for word, the language of § 5 (a) of the earlier Act, *supra*, at p. 542. While it substitutes the phrase "any wage, salary, or other compensation" in place of "wages or salaries," and the phrase "any regulation or order" in place of "the regulations," the substance of the two sections is inescapably the same.

The Act of 1950 granted the President broad powers to make regulations under it and to delegate the authority conferred upon him by it.[13] His orders and regulations

[13] "SEC. 403. (a) At such time as the President determines that it is necessary to impose price and wage controls generally over a substantial portion of the national economy, he shall administer such controls . . . through a new independent agency created for such purpose: . . . . Such agency may utilize the services, information, and facilities of other agencies and departments of the Government, but such agency shall not delegate enforcement of any of the controls to be administered by it under this section to any other agency or department." 64 Stat. 807, as amended, 65 Stat. 137, 66 Stat. 300. See 50 U. S. C. App. (1946 ed., Supp. V) § 2103. (Delegations as to the enforcement of controls, accordingly, were made only to officials within the new independent agency known as the Economic Stabilization Agency.)

"SEC. 703. (a) Except as otherwise specifically provided, the President may delegate any power or authority conferred upon him by this Act to any officer or agency of the Government, including any new agency or agencies (and the President is hereby authorized to create such new agencies, other than corporate agencies, as he deems necessary), and he may authorize such redelegations by that officer or agency as the President may deem appropriate. . . ." 64 Stat. 816, 50 U. S. C. App. (1946 ed., Supp. V) § 2153 (a).

"SEC. 704. The President may make such rules, regulations, and orders as he deems necessary or appropriate to carry out the provisions of this Act. Any regulation or order under this Act may be established in such form and manner, may contain such classifications and differentiations, and may provide for such adjustments and reasonable exceptions as in the judgment of the President are necessary or proper to effectuate the purposes of this Act, or to prevent circumvention or evasion, or to facilitate enforcement of this Act, or any rule, regulation, or order issued under this Act." 64 Stat. 816, see 50 U. S. C. App. (1946 ed., Supp. V) § 2154.

follow the pattern of the earlier ones. September 9, 1950, he issued Executive Order No. 10161, 15 Fed. Reg. 6105, 6106, Part IV of which created a new agency known as the Economic Stabilization Agency, headed by an Economic Stabilization Administrator. To him the President delegated responsibility for wage stabilization. He established, within such agency, a Wage Stabilization Board with functions to be determined by the Administrator. January 24, 1951, Eric Johnston, then the Administrator, delegated to that Board his functions of wage stabilization. ESA Gen. Order No. 3, 16 Fed. Reg. 739. January 26, he froze wages generally at the levels prevailing January 25. Gen. Wage Stabilization Regulation No. 1, 16 Fed. Reg. 816.

Enforcement under the Act of 1950 thus closely resembled enforcement under the Act of 1942. June 13, the Wage Stabilization Board established a National Enforcement Commission and authorized the establishment of Regional Enforcement Commissions. Such Commissions were authorized to make determinations of wage violations and the disallowances of specific wage payments under § 405 (b). Those determinations were to be "conclusive for the purpose therein stated. The executive departments and other agencies of the government which receive certifications of such determinations shall disregard and disallow the amount thus certified." WSB Enforcement Resolution No. 1, § 1 (c), 16 Fed. Reg. 6028, 6029. June 28, this procedure was further described in a resolution of the War Stabilization Board. 16 Fed. Reg. 7284.

April 3, 1952, the Economic Stabilization Administrator, in General Order No. 15, 17 Fed. Reg. 2994, prescribed the standards to be followed in making disallowances, including a recognition of extenuating and mitigating circumstances.

Effective July 30, 1952, § 403 (b) of the Act was amended to establish a new Wage Stabilization Board. 66 Stat. 300-301. Its functions were defined by the Economic Stabilization Administrator in ESA General Order No. 16, 17 Fed. Reg. 6925. On the same day, he issued ESA General Order No. 18, 17 Fed. Reg. 6925, defining the functions of the National Enforcement Commission. The order covered the Commission's authority to determine and certify specific disallowances in accordance with the standards prescribed in General Order No. 15, *supra*. The language and substance is obviously reminiscent of that under the Act of 1942.[14]

The legislative history confirms the parallel nature of the two programs. The occasion for the Act of 1950

[14] "SEC. 4. *Functions of the National Enforcement Commission.* (a) The functions of the National Enforcement Commission (hereinafter referred to as the Commission) shall be, with respect to persons within the jurisdiction of the Wage Stabilization Board, the Salary Stabilization Board and the Office of Salary Stabilization, and the Railroad and Airline Wage Board, to determine whether any wage, salary, or other compensation has been paid or accrued, at any time, in violation or contravention of any provision of the Defense Production Act of 1950, as amended, or any regulation or order or directive heretofore or hereafter promulgated under the act. Such determination shall be made by the Commission after any of the foregoing named constituent organizations of this Agency have instituted an enforcement proceeding before it or after any such organization has submitted a settlement proposal to the Commission for its approval. Such determination shall be final within the Economic Stabilization Agency.

"(b) The Commission is further authorized to certify and transmit such determinations in accordance with the policy and procedure set forth in Economic Stabilization Agency General Order No. 15, and other orders, directives, general policies or general regulations of the Economic Stabilization Administrator.

"SEC. 5. *Redelegation of authority.* (a) The authority delegated to the Economic Stabilization Administrator with respect to the imposition of disallowance sanctions under section 405 (b) of the Defense Production Act, as amended, for the violation or contraven-

was the recurring need to check inflation. The military demands in Korea and elsewhere in 1950 made it necessary to maintain a large production of military goods while seeking also to meet the long-denied and increasing needs of the Nation's civil economy. The 1950 Act expressly declared its purpose.[15] Congress reenacted, on a temporary basis, the emergency powers of the President which had been effective during World War II.[16]

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tion of any provisions of, or any orders or any regulations issued under said act, as amended, relating to the payment of wages, salaries, or other compensation, is hereby redelegated to the Commission, in accordance with the functions described above." 17 Fed. Reg., at 6926.

[15] "SEC. 2. . . . The United States is determined to develop and maintain whatever military and economic strength is found to be necessary to carry out this purpose. Under present circumstances, this task requires diversion of certain materials and facilities from civilian use to military and related purposes. It requires expansion of productive facilities beyond the levels needed to meet the civilian demand. In order that this diversion and expansion may proceed at once, and that the national economy may be maintained with the maximum effectiveness and the least hardship, normal civilian production and purchases must be curtailed and redirected.

"It is the objective of this Act to provide the President with authority to accomplish these adjustments in the operation of the economy. It is the intention of the Congress that the President shall use the powers conferred by this Act to promote the national defense, by meeting, promptly and effectively, the requirements of military programs in support of our national security and foreign policy objectives, and by preventing undue strains and dislocations upon wages, prices, and production or distribution of materials for civilian use, within the framework, as far as practicable, of the American system of competitive enterprise." 64 Stat. 798, 799, 50 U. S. C. App. (1946 ed., Supp. V) § 2062.

See S. Rep. No. 2250, 81st Cong., 2d Sess. 4–5, 20–40.

[16] The 1950 Act, generally, was to terminate June 30, 1952. Title IV, as to price and wage stabilization, was to expire June 30, 1951. 64 Stat. 822. The latter date was extended to April 30, 1953. 66 Stat. 306, 67 Stat. 131. The survival of enforcement procedure in relation to prior violations is discussed in Section III of this opinion.

The Senate Report on the 1950 bill expressly said:

> "This subsection [405 (b)] adopts the language of the Stabilization Act of October 2, 1942, respecting the penalties to be applied for violations of the wage and salary stabilization program. The committee finds that the disallowance of illegal wage payments as a cost of doing business, for purposes of computing taxes, Government contract payments, and for purposes of establishing price ceilings, was an effective deterrent." S. Rep. No. 2250, 81st Cong., 2d Sess. 39.

The regulations, procedures and practices comparable to those under the Act of 1942 were fully reported to Congress.[17]

Despite this history of administrative enforcement under the 1942 Act, appellee claims that, under the 1950 Act, the President had no authority to apply administrative action to the enforcement of wage stabilization. Appellee argues that § 706 of the later Act,[18] as set forth

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[17] First Ann. Rep. of the Joint Committee on Defense Production, S. Rep. No. 1040, 82d Cong., 1st Sess. 98–103 (1951); Second Ann. Rep. of the same Committee, S. Rep. No. 3, 83d Cong., 1st Sess. 108–119 (1952).

[18] "SEC. 706. (a) Whenever in the judgment of the President any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of this Act, he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the President that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order, with or without such injunction or restraining order, shall be granted without bond.

"(b) The district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have jurisdiction of violations of this Act or any rule, regulation, order, or subpena thereunder, and of all civil actions under this Act to enforce any liability or duty created

in the margin, vested enforcement of the Act in the District Courts and thus left to the President only authority to promulgate general regulations. We do not agree. Section 706 appears in Title VII containing the so-called "general provisions" of the Act. Appellee reads the section as sharply restricting the administrative procedure which we have just described. Such an interpretation, however, cannot be given to it in the face of § 405 (b). Instead of sharply restricting the revival of administrative enforcement of wage ceilings under § 405 (b), we read § 706 as primarily applicable to other activities under the Act. It applies naturally enough to price controls, credit controls and allocations of material. We hold that the specific language of § 405 (b) should receive the same construction now that was placed on similar language in the Act of 1942. The "general provisions" of § 706 do

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by, or to enjoin any violation of, this Act or any rule, regulation, order, or subpena thereunder. Any criminal proceeding on account of any such violation may be brought in any district in which any act, failure to act, or transaction constituting the violation occurred. Any such civil action may be brought in any such district or in the district in which the defendant resides or transacts business. Process in such cases, criminal or civil, may be served in any district wherein the defendant resides or transacts business or wherever the defendant may be found; the subpena for witnesses who are required to attend a court in any district in such case may run into any other district. The termination of the authority granted in any title or section of this Act, or of any rule, regulation, or order issued thereunder, shall not operate to defeat any suit, action, or prosecution, whether theretofore or thereafter commenced, with respect to any right, liability, or offense incurred or committed prior to the termination date of such title or of such rule, regulation, or order. No costs shall be assessed against the United States in any proceeding under this Act. All litigation arising under this Act or the regulations promulgated thereunder shall be under the supervision and control of the Attorney General." 64 Stat. 817–818, as amended, 65 Stat. 139, 50 U. S. C. App. (1946 ed., Supp. V) § 2156.

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not restrict the specific provisions of § 405 (b) now reenacted.[19]

The correctness of the above interpretation was underscored July 31, 1951, when Congress inserted a new § 405 (a).[20] In language strikingly similar to § 405 (b), that new section introduced administrative enforcement for price controls. Obviously it was not to be substantially eliminated by the existing provisions of § 706. As the specific language of § 405 (a) is thus controlling over the general provisions of § 706, so the same specific language in § 405 (b) is controlling over those same provisions.[21]

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[19] That this is a logical interpretation of § 706 is emphasized by the fact that the bills which became the Act of 1950 contained, when introduced, provisions for credit and commodity controls but no provisions for wage stabilization. Thus the section that was to become § 706 originally had no reference to wage stabilization. Title IV, including § 405 (b) as to wage stabilization, was inserted in Committee. The separate origins of §§ 405 (b) and 706 point to the separate effect which should be given to them. See S. Rep. No. 2250, 81st Cong., 2d Sess. 5.

[20] ". . . The President shall also prescribe the extent to which any payment made, either in money or property, by any person in violation of any such regulation, order, or requirement [as to price control] shall be disregarded by the executive departments and other governmental agencies in determining the costs or expenses of any such person for the purposes of any other law or regulation, including bases in determining gain for tax purposes." 65 Stat. 136, 50 U. S. C. App. (1946 ed., Supp. V) § 2105 (a).

[21] This interpretation of § 405 (a) and (b) is consistent, likewise, with the interpretation given to § 5 of the Stabilization Act of 1942. The Stabilization Act of 1942 was superimposed on the Emergency Price Control Act of 1942, 56 Stat. 23, which already contained general provisions for judicial enforcement. The solution reached was to apply those general provisions (§ 205 (a) (b) and (c)) without restricting the administrative procedure prescribed in § 5 for wage control. 56 Stat. 33, 50 U. S. C. App. (1946 ed.) § 925 (a) (b) (c).

Finally, the text of § 403 uses the word "enforcement" in referring to the powers of the administrative agencies in connection with wage

We have noted the other arguments submitted by appellee concerning the interpretation and constitutionality of the statute but it would be premature action on our part to rule upon these until after the required administrative procedures have been exhausted.[22]

## III.

Finally, appellee contends that, by the termination of the substantive provisions of the Defense Production Act of 1950, all authority has now expired for determining or disallowing past, as well as future, payments made in violation of wage ceilings.

As the Act is a temporary statute, the effect of its expiration is governed by the following general savings statute:

> "The expiration of a *temporary statute* shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute,

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controls. In referring to the new agency to be created, it provides that "such agency shall not delegate *enforcement* of any of the controls to be administered by it under this section to any other agency or department." (Emphasis supplied.) 64 Stat. 807, 50 U. S. C. App. (1946 ed., Supp. V) § 2103.

See also, the Conference Report on the Defense Production Act Amendments of 1952 which said: "The conference substitute is not intended to preclude the [Wage Stabilization] Board from, *as at present, enforcing* wage stabilization regulations and policies." (Emphasis supplied.) H. R. Rep. No. 2352, 82d Cong., 2d Sess. 24.

[22] The constitutional objections suggested are that the Act and proceedings which have been taken and are proposed under it violate (1) the Fifth Amendment by depriving appellee of property without due process of law; (2) the Sixth or Seventh Amendment by depriving appellee of the right to a jury trial; (3) the Eighth Amendment in authorizing excessive fines; (4) Article I, § 9, by authorizing an unapportioned direct tax; (5) Article I, § 1, by improper delegation of legislative power to the Executive; and (6) the Tenth Amendment by attempting to legislate on matters reserved to the States.

> *unless* the temporary statute shall so *expressly* provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability." (Emphasis supplied.) 1 U. S. C. (1952 ed.) § 109.

We find no express, or even implied, provision in the Act contrary to the policy of the general savings statute. All of the alleged violations here involved occurred in 1951. The substantive provisions of Title IV relating to wage stabilization and the supporting orders fixing the wage ceilings here at issue did not expire until April 30, 1953. Neither that expiration date nor the six-month extension of it for liquidation purposes restricts the general provision of § 109 as to the survival of enforcement proceedings.[23]

The precise object of the general savings statute is to prevent the expiration of a temporary statute from cutting off appropriate measures to enforce the expired statute in relation to violations of it, or of regulations issued under

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[23] "SEC. 717. (a) Title I [priorities and allocations] . . . title III [expansion of productive capacity and supply], and title VII [general provisions] . . . of this Act, and all authority conferred thereunder, shall terminate at the close of June 30, 1955. . . . Titles IV [price and wage stabilization] and V [settlement of labor disputes] of this Act, and all authority conferred thereunder, shall terminate at the close of April 30, 1953.

"(b) Notwithstanding the foregoing—

. . . . . .

"(3) Any agency created under this Act may be continued in existence for purposes of liquidation for not to exceed six months after the termination of the provision authorizing the creation of such agency." 64 Stat. 822, as amended, 65 Stat. 144, 66 Stat. 306, 67 Stat. 131.

Executive Order No. 10434, February 6, 1953, 18 Fed. Reg. 809, suspended the wage stabilization program but provided that "This order shall not operate to defeat any suit, action, prosecution, or administrative enforcement proceeding, whether heretofore or here-

it, occurring before its expiration. *United States* v. *Allied Oil Corp.*, 341 U. S. 1, 5; *Fleming* v. *Mohawk Co.*, 331 U. S. 111.

A similar situation followed the expiration, in 1946, of the substantive provisions of the Stabilization Act of 1942,[24] and we have seen that the enforcement proceedings continued under it until 1949. See note 11, *supra*. On that occasion the authority to make disallowances was transferred to the Department of the Treasury. Exec. Order No. 9809, ¶10 (b), 11 Fed. Reg. 14281, 14283. In the present instance, wage stabilization enforcement has been transferred to the Director of the Office of Defense Mobilization. Exec. Order No. 10494, October 14, 1953, 18 Fed. Reg. 6585. The authority of the President to make such a delegation of his powers appears in §§ 703 and 705, and such authority remains effective until June 30, 1955, § 717 (a), note 23, *supra*.

The validity of the pending administrative proceeding being thus upheld, the judgment of the District Court enjoining that proceeding is

*Reversed.*

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after commenced, with respect to any right, liability, or offense possessed, incurred, or committed, prior to this date."

See also, Hearings before the House Subcommittees on Appropriations, Pt. 1, 83d Cong., 1st Sess. 439–441, on The Supplemental Appropriation Bill, 1954, introduced in the House as H. R. 6200, and those on the same bill before the Senate Committee on Appropriations, 83d Cong., 1st Sess. 423–431.

[24] ". . . Though most of the controls have been lifted, the Act is still in effect. Liabilities incurred prior to the lifting of controls are not thereby washed out. *United States* v. *Hark*, 320 U. S. 531, 536; *Utah Junk Co.* v. *Porter*, 328 U. S. 39, 44; *Collins* v. *Porter*, 328 U. S. 46, 49. And Congress has explicitly provided that accrued rights and liabilities under the Emergency Price Control Act are preserved whether or not suit is started prior to the termination date of the Act. If investigation were foreclosed at this stage, such rights as may exist would be defeated, contrary to the policy of the Act." *Fleming* v. *Mohawk Co.*, 331 U. S. 111, 119.

# LEYRA *v.* DENNO, WARDEN.

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

No. 635. Argued April 28, 1954.—Decided June 1, 1954.

After petitioner had been subjected to many hours of day-and-night questioning by police officers as a murder suspect, a state-employed psychiatrist with considerable knowledge of hypnosis was introduced to him as a "doctor" brought to give him medical relief from a painful sinus. By skillful and suggestive questioning, threats and promises, the psychiatrist obtained a confession. At petitioner's first trial in a New York state court, that confession was admitted in evidence and he was convicted; but the State Court of Appeals reversed on the ground that the confession was coerced. At petitioner's second trial, that confession was not used to convict him; but other confessions made the same evening were used. The issue as to the "voluntariness" of these later confessions was submitted to the jury and petitioner was again convicted. *Held:* The use of confessions extracted in such a manner from a lone defendant unprotected by counsel is not consistent with the due process of law required by the Constitution, and a Federal District Court's denial of a writ of habeas corpus is reversed. Pp. 556–562.

208 F. 2d 605, reversed.

*Osmond K. Fraenkel* argued the cause for petitioner. With him on the brief was *Frederick W. Scholem.*

*William I. Siegel* argued the cause for respondent. With him on the brief were *Nathaniel L. Goldstein,* Attorney General of New York, *Wendell P. Brown,* Solicitor General, *Samuel A. Hirshowitz,* Assistant Attorney General, and *Edward S. Silver.*

MR. JUSTICE BLACK delivered the opinion of the Court.

Camilo Leyra, age 75, and his wife, age 80, were found dead in their Brooklyn apartment. Several days later petitioner, their son, age 50, was indicted in a state court

charged with having murdered them with a hammer. He was convicted and sentenced to death, chiefly on several alleged confessions of guilt. The New York Court of Appeals reversed on the ground that one of the confessions, made to a state-employed psychiatrist, had been extorted from petitioner by coercion and promises of leniency in violation of the Due Process Clause of the Fourteenth Amendment.[1] 302 N. Y. 353, 98 N. E. 2d 553. Petitioner was then tried again. This time the invalidated confession was not used to convict him but several other confessions that followed it the same day were used. Petitioner objected to the admission of these other confessions on the ground that they were also coerced, but the trial court submitted to the jury the question of their "voluntariness." The jury convicted and the death sentence now before us was imposed.[2] The New York Court of Appeals, holding that there was evidence to support a finding that the confessions used were free from the coercive influences of the one previously given the psychiatrist, affirmed, Judge Fuld and the late Chief Judge Loughran dissenting. 304 N. Y. 468, 108 N. E. 2d 673. We denied certiorari. 345 U. S. 918. Petitioner then filed this habeas corpus proceeding in a United States District Court, charging that the confessions used against him had been coerced, depriving him of due process of law. The District Court properly gave consideration to the petition, *Brown* v. *Allen,* 344 U. S. 443, but denied it. 113 F. Supp. 556. The Court of Appeals for the Second Circuit affirmed, Judge Frank dissenting. 208 F. 2d 605. Petitioner then sought re-

[1] The confession was also held to have been in violation of state law and the state's due process clause.

[2] The death sentence was imposed under a conviction for first degree murder of the father. As to the death of his mother the jury found petitioner guilty of second degree murder which does not carry the death sentence. This second degree conviction is not before us.

view in this Court, again urging that he was denied due process on the ground that his confessions to a police captain and to two assistant state prosecutors were forced. We granted certiorari because the constitutional question appeared substantial. 347 U. S. 926.

The use in a state criminal trial of a defendant's confession obtained by coercion—whether physical or mental—is forbidden by the Fourteenth Amendment.[3] The question for our decision is therefore whether the present confessions were so coerced. This question can only be answered by reviewing the circumstances surrounding the confessions. We therefore examine the circumstances as shown by the undisputed facts of this case.

When the father failed to appear at his place of business on Tuesday, January 10, 1950, petitioner, his business partner, and others went to the father's apartment about 3 p. m. and found the bodies of the aged parents. Police were called. Although they first suspected a prowling intruder, the presence on the couple's disarranged breakfast table of a third teacup led them to think that the killer was a welcome guest. This and other circumstances drew suspicion toward petitioner. He and others were questioned by the police until about 11 p. m. on the evening of the day the bodies were discovered. On Wednesday, police again questioned petitioner from about 10 in the morning to midnight. Once more, be-

[3] See, *e. g.*, *Brown* v. *Mississippi*, 297 U. S. 278; *Chambers* v. *Florida*, 309 U. S. 227; *Lisenba* v. *California*, 314 U. S. 219; *Ashcraft* v. *Tennessee*, 322 U. S. 143; *Malinski* v. *New York*, 324 U. S. 401; *Haley* v. *Ohio*, 332 U. S. 596; *Watts* v. *Indiana*, 338 U. S. 49; *Stroble* v. *California*, 343 U. S. 181; *Stein* v. *New York*, 346 U. S. 156. The above cases illustrate the settled view of this Court that coerced confessions cannot be admitted as evidence in criminal trials. Some members of the Court reach this conclusion because of their belief that the Fourteenth Amendment makes applicable to the states the Fifth Amendment's ban against compulsory self-incrimination.

ginning about 9 Thursday morning petitioner was subjected to almost constant police questioning throughout the day and much of the night until about 8:30 Friday morning. At that time petitioner was taken by police to his parents' funeral. While petitioner was at the funeral and until he returned in the late afternoon, Captain Meenahan, his chief police questioner, went home to get some "rest." After the funeral petitioner himself was permitted to go to a hotel and sleep an hour and a half. He was returned to the police station about 5 p. m. on this Friday afternoon. During his absence a concealed microphone had been installed with wire connections to another room in which the state prosecutor, the police, and possibly some others were stationed to overhear what petitioner might say. Up to this time he had not confessed to the crime.

The petitioner had been suffering from an acutely painful attack of sinus and Captain Meenahan had promised to get a physician to help him. When petitioner returned to the questioning room after the funeral, Captain Meenahan introduced him to "Dr. Helfand," supposedly to give petitioner medical relief. Dr. Helfand, however, was not a general practitioner but a psychiatrist with considerable knowledge of hypnosis. Petitioner was left with Dr. Helfand while Captain Meenahan joined the state District Attorney in the nearby listening room. Instead of giving petitioner the medical advice and treatment he expected, the psychiatrist by subtle and suggestive questions simply continued the police effort of the past days and nights to induce petitioner to admit his guilt. For an hour and a half or more the techniques of a highly trained psychiatrist were used to break petitioner's will in order to get him to say he had murdered his parents. Time and time and time again the psychiatrist told petitioner how much he wanted to and could help him, how bad it would be for petitioner if he did not

confess, and how much better he would feel, and how much lighter and easier it would be on him if he would just unbosom himself to the doctor. Yet the doctor was at that very time the paid representative of the state whose prosecuting officials were listening in on every threat made and every promise of leniency given.

A tape recording of the psychiatric examination was made and a transcription of the tape was read into the record of this case. To show exactly what transpired we attach rather lengthy excerpts from that transcription as an appendix, *post*, p. 562. The petitioner's answers indicate a mind dazed and bewildered. Time after time the petitioner complained about how tired and how sleepy he was and how he could not think. On occasion after occasion the doctor told petitioner either to open his eyes or to shut his eyes. Apparently many of petitioner's answers were barely audible. On occasions the doctor informed petitioner that his lips were moving but no sound could be heard. Many times petitioner was asked to speak louder. As time went on, the record indicates that petitioner began to accept suggestions of the psychiatrist. For instance, Dr. Helfand suggested that petitioner had hit his parents with a hammer and after some minutes petitioner agreed that must have been the weapon.

Finally, after an hour and a half or longer, petitioner, encouraged by the doctor's assurances that he had done no moral wrong and would be let off easily, called for Captain Meenahan. The captain immediately appeared. It was then that the confession was given to him which was admitted against petitioner in this trial. Immediately following this confession to Captain Meenahan, petitioner's business partner was called from an adjoining room. The police had apparently brought the business partner there to have him talk to petitioner at an opportune moment. Petitioner repeated to his partner in a very brief way some of the things he had told the psychia-

trist and the captain. Following this, petitioner was questioned by the two assistant state prosecutors. What purports to be his formal confession was taken down by their stenographer, with a notation that it was given at 10 p. m., several hours after the psychiatrist took petitioner in charge.

On the first appeal the New York Court of Appeals held that the admissions petitioner made to the psychiatrist were so clearly the product of "mental coercion" that their use as evidence was inconsistent with due process of law. On the second appeal, however, that court held that the subsequent confessions here challenged were properly admitted. The Court of Appeals for the Second Circuit held the same thing. With this holding we cannot agree. Unlike the circumstances in *Lyons* v. *Oklahoma,* 322 U. S. 596, 602, 603, the undisputed facts in this case are irreconcilable with petitioner's mental freedom "to confess to or deny a suspected participation in a crime," and the relation of the confessions made to the psychiatrist, the police captain and the state prosecutors is "so close that one must say the facts of one control the character of the other . . . ." All were simply parts of one continuous process. All were extracted in the same place within a period of about five hours as the climax of days and nights of intermittent, intensive police questioning. First, an already physically and emotionally exhausted suspect's ability to resist interrogation was broken to almost trance-like submission by use of the arts of a highly skilled psychiatrist. Then the confession petitioner began making to the psychiatrist was filled in and perfected by additional statements given in rapid succession to a police officer, a trusted friend, and two state prosecutors. We hold that use of confessions extracted in such a manner from a lone defendant unprotected by counsel is not consistent with due process of law as required by our Constitution.

It was error for the court below to affirm the District Court's denial of petitioner's application for habeas corpus.

*Reversed.*

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

[For dissenting opinion, see *post*, p. 584.]

## APPENDIX TO OPINION OF THE COURT.

*Excerpts from the transcript of the questioning of petitioner by Dr. Max Helfand, a psychiatrist, at the 88th precinct on January 13, 1950.*

"Q. What do they call you for short? A. Buddy."

"Q. How old are you about? A. Fifty."

"Q. Are you married? A. Yes, sir."

"Q. Buddy, will you tell me something about yourself. I'll tell you what the purpose of my talk to you is. I want to see if I can help you. A. Yes, Doctor."

"Q. I know you are in a little trouble. We do sometimes things that are not right, but in a fit of temper or anger we sometimes do things that we aren't really responsible for. I want to see whether or not you did something but which you've done in a fit of temper or anger. Do you understand me? A. Yes."

"Q. Will you tell me something about yourself. What kind of a boy are you? Do you have a lot of friends? A. Yes, I have."

"Q. I can't hear you. A. Yes, I have; and I am very tired. I had two hours sleep. Just now they woke me up. That's since Tuesday. Well, there were questions, after questions, after questions, by the thousands."

"Q. Aren't you rested now after two hours sleep. You feel pretty good and you look good. A. Well I went to

the barber and I feel clean and everything else. The only thing is I am very tired. I didn't feel as tired before I went to bed as I do now. You know—(interruption)

"Q. Do you know we sometimes feel tired if we have something on our mind. It's what we call mental tension."

"Q. Do you know we sometimes feel tired if we have something on our mind. It's what we call mental tension. If you talk to me and open up, you're going to feel relieved. Speak up and tell me. Do you have a lot of friends? A. Yes, I have a lot of friends."

"Q. Do you sometimes get into arguments with them? A. No, not as a rule. The first time I was surprised. I always considered myself an even tempered fellow—sociable. It's my sinus. It's bothering me something terrible. It got so in the last year or so. It got worse and worse and worse."

"Q. That made you nervous, didn't it? A. I didn't particularly notice it. For the past two years, my average of work has been about over a hundred hours each week of work for two years. No vacation or anything like that. The first time was anybody noticed it was about—let's see—it's about two weeks ago I went to the doctor with my father."

"Q. I see. A. My sinus was bothering me so bad I use to have to stop work during the day."

"Q. What was the matter with your father? A. Dad had a heart attack a couple of years ago, but I went for myself."

"Q. Your father was a nervous man too, wasn't he? A. Yes, but I went for myself. I didn't think I ever was high strung. I thought I was the opposite. I thought I was pretty calm."

"Q. Your father was high strung? A. Yes."

"Q. Fly off the handle quickly? A. Yes. So I went to the doctor and he examined my sinus. He took the

blood pressure. So he said to me, "When did you go to your doctor?" That was—today is Friday—one week back. The Tuesday of that week. It's ten or 11 days."

"Q. You went with your father? A. With my father."

"Q. Did he give you any treatments? A. Yeah, he examined my sinus."

"Q. Did he tell you to come back? A. No, he sent me down to have X-rays taken. When he examined me, he put the lights up here."

"Q. You didn't have any appointment with the doctor after your visit? Did he tell you to come back? A. Oh, yes. He sent me down to have a set of X-rays made. We had the X-rays made. Then I called the doctor and he said it was a very bad case of sinus. It wasn't something new. It was for many years back, and he said there was a lot of scar tissue there, and he asked me could I come right out. That was last Saturday. So Saturday night, I worked. That was my busiest night of the week. So I told him I wouldn't like to come on Saturday, so he said he doesn't have any patients on Sunday, could I come Monday. Monday, unfortunately, I had to work all alone, so I told him I'd make it Tuesday night. So he said, "You come over Tuesday. I'll be able to do something to stop those pains." So we made the appointment for Tuesday night at six o'clock."

"Q. For you? A. Yes, and he was going to open those—"

"Q. Not for your father? A. No, for myself. My father was with me. He was to go with me on this Tuesday also."

"Q. Why? Did your doctor tell you to bring your father? A. No, he didn't tell me to bring him."

"Q. Why was your father going with you? A. He wanted to go with me. He wanted to see if something couldn't be done to stop those pains. He said, "Lie down

and close my eyes and see if I could stop the beating up there."

"Q. When the pain got so bad, didn't you get nervous?" "A. Yes, I guess I did. That was the first time anyone ever told me that I was ill. When the doctor took my blood pressure, he said, "You're very irritable." And I said, "I didn't think so." He told me, he said, "You're going to have to—you can't work day and night. It's too much." He said, "You got to slow down."

"Q. I want you to recollect and tell me everything. I am—"

"Q. —(continued)—going to make you remember and recollect back and bring back thoughts—thoughts which you think you might have forgotten. I can make you recollect them. It's entirely to your benefit to recollect them because, you see, you're a nervous boy. You got irritable and you might have got in a fit of temper. Tell me, I am here to help you. A. I wish you could, Doctor."

"Q. I am going to put my hand on your forehead, and as I put my hand on your forehead, you are going to bring back all these thoughts that are coming to your mind. I am going to keep my hand on your forehead and I am going to ask you questions, and now you will be able to tell me. What happened Monday night? Where did you sleep? A. Last Monday night?"

"Q. That's right. A. I worked Monday night."

"Q. After you worked, where did you sleep? Where did you go to sleep? A. To the apartment on 10th Street."

"Q. What time did you sleep to, or get up in the morning? A. She got up about 6:30."

"Q. Well, after she left the house, then you couldn't sleep. Then you got dressed? Your thoughts are coming back to you. Answer me. Come on, you can answer

me. You couldn't go back to bed. You didn't go back to bed. After she left, you got dressed, didn't you? A. Yes, I got dressed."

"Q. What did you do after you got dressed? Come on, now. Your thoughts are coming back to you. Come on. Come on, answer me. A. I went to Brooklyn."

"Q. You went to Brooklyn. Where did you go to Brooklyn? A. To my mother's house."

"Q. To your mother's house. When you came to your mother—now, all your thoughts are beginning to clear up. Now, everything is clear in your mind. You came to your mother. Who opened the door? A. My mother."

"Q. What did you say? A. I said, "Hello, Teddy."

. . . . .

"Q. All right. Now, you are in your house. Your thoughts are coming back to you right away. A. Doctor, can I have a drink of water, my mouth is very dry."

"Q. A drink of water? I'll get you a drink of water. A. (Pause)."

"Q. All right. O.K. now? A. My mouth is dry. I'm not thirsty. Just my mouth is dry. I'm not thirsty."

"Q. Concentrate and look at me. Now you came home. Your mother met you at the door. You said, 'Hello, Teddy,' right? A. That's right."

"Q. What did she say to you? A. She said take off my coat, it's all wet."

"Q. What did you do? A. I took the coat off."

"Q. Now, you are back in your apartment, see. Your thoughts are clear now. What did you do after you took off your raincoat? A. She told me, "Come and have some tea."

"Q. She told you what? A. 'Come and have a cup of tea. It will warm you up.' "

"Q. What did you do? A. Dad was having breakfast."

"Q. Where was Dad sitting? A. At the end of the table."

"Q. Where did you sit down? A. Between them."

"Q. Between whom? A. Mom and Pop."

"Q. Between Mom and Pop? A. That's right."

"Q. Where was Mom sitting? A. Next to the kitchen sink."

"Q. You were sitting between Mom and Pop, right? A. That's right."

"Q. What did you do then? A. I sat down."

"Q. Yeah, what did you do? What did you do when you sat down. Come on, speak up. Don't be afraid now. We're with you? We're going to help you. You're going to feel lots better after you talk to me. A. Gee, I hope so."

"Q. I can't hear you? A. The argument started all over again."

"Q. The argument with your father? A. Yes."

"Q. Did your mother argue with you, too? A. No."

"Q. What was the argument about? A. The business—his business."

"Q. Whose business? A. Our business."

"Q. What did you father tell you—speak up. A. He told me both of us didn't care whether his business was good or bad. I told him our business was getting prosperous."

"Q. What did you say about that? A. He told me it wasn't so."

"Q. Was it a violent argument? Did your father lose his temper? A. Yes, it got more heated."

"Q. As it got more heated, what happened then? Don't be afraid, speak up. Come on, we'll help you. A. He argued more and more."

"Q. You argued more and more. Then what? A. I told him, 'Pop, why don't you stay home? Be satisfied.

Our business is getting good. You don't have to work this way.' "

"Q. Yes. A. He says, 'I'm going to work. I'm going to have my own business.' He says, "I'd rather make a stinking dollar than make it from somebody else.' So my mother started to get into the argument."

"Q. What did she say? A. She told him, 'Why don't you stay home. Why don't you do what your son says.' "

"Q. Go ahead, speak up. A. I'm trying to think, Doctor."

"Q. It's coming all clear to you now. I've got my hand on you. I'll make you think back. All your thoughts are coming back to you. Did your father hit you? A. No."

"Q. What happened next? Speak up. It's coming clear now. You will feel lots better after you tell me. It's all in a fit of argument. Speak up. Speak up. It's coming clear to you. I have my hand on your head. What did you do? Come on. A. I told him that we weren't going to let him work anymore."

. . . . .

"Q. Then? A. That he would be so much better off letting us take care of it. Twenty-five per cent we would give him from our business would be better than his own."

"Q. That's right. Go ahead. Come on, you're going to feel lots better. We're with you one hundred per cent. Then what happened? A. He said he wouldn't take it."

"Q. That's right. A. That we were traitors to him. He said my partner was a louse; that he took his hundred dollars a week and he didn't do anything for it."

"Q. Yes. A. It was like robbing him of a hundred a week."

"Q. That's right, speak up. A. My mother interfered and said, 'Bill was a nice fellow and a hard working fel-

low.' He said, 'I'm the boss.' He told my mother, 'You shut up.' He told my mother, 'Go sit down.' He pushed her in the chair."

"Q. He pushed her in the chair? A. Yes."

"Q. That's the time you lost your temper? A. No."

"Q. Go ahead, what happened? A. I told him 'Pop, think it over. We're silly to argue. It will do us no good.' He said, 'Finish your damn tea. I'm going out and get my paper.' "

"Q. Yes. A. He says, 'We'll go to the bank,' and he says, 'I'll go to Broadway and pick up the box tops and you'll go back and you'll all get out of this place;' and he says, 'If your mother agrees with you, she can go with you.' "

"Q. Yes. A. So he went out."

"Q. Did he put his coat on? A. Yes."

"Q. He went out? A. Yes."

"Q. So then what happened? A. Mom said, 'Don't get excited.' "

"Q. You were very excited? A. Yes."

"Q. Go ahead. Come on. Tell me what happened then. Come on, now, speak up. You're going to feel lots better. We're with you a hundred per cent. Come on. Come on, we'll help you. A. I can't Doc."

"Q. Yes, you can. All these thoughts are coming back to you. I have my hand on your head. When your father went out, your mother talked to you. Then what happened? What did you do to your mother. Come on. Speak up. Come on. All these thoughts are coming to you now. A. I can't think."

"Q. Sure you can. Look at me. Open your eyes. Now you know what happened. Look at me. I know you know what happened. A. I can't think."

"Q. Sure you can. Come on now. Don't be afraid. Your conscience will be clear. God will be with you, and everybody will help you if you tell the truth. Every-

body will help you, but nobody likes a liar, not even God. Come on now. Tell the truth. A. I can't think."

"Q. Your father went for the paper; then you hit your mother, didn't you? With what did you hit—with a hammer? Your thoughts are coming back to you. What did you use to hit your mother with? A. I loved my mother."

"Q. I know you did. You lost your temper. Don't be afraid. A lot of people do things that they are not responsible for while in a fit of temper. You see? A. My mother was the only thing in the world."

"Q. That's right. What did you hit her with? Come on, now. Speak up. A. I was so mad."

"Q. You were very mad. A. I said he's not going to treat my mother this way. He killed my brother."

"Q. Yes. He killed— A. My brother would have lived many years. The way my father made him work—"

"Q. That's right. A. I said he's not going to kill my mother and he's not going to kill me. The only way we can stop him. He's got to be stopped. He can't be the boss."

"Q. Go ahead. He's got to be stopped, you said. So? A. My mother always said she wanted to be with him."

"Q. Yes. A. Doc, I can't take it."

"Q. Come on, yes, you can. Speak up. So you thought it would be the right thing to do what? Come on. You started—"

"Q. (continued) now. Speak up. Everybody will help you. You're a nice fellow. You're a man now. You don't want to be a coward. Everybody will help you. You were excited. You did it in a fit of anger. A. I was never a coward."

"Q. I can't hear you. A. I was never a coward."

"Q. Come on, speak up. Your mother said she wanted to be with your father. So what did you do? A. I can't remember."

"Q. Sure you can. Speak up now. A. I can't."

"Q. Look at me. Look at me. A. Yes, Doc."

"Q. Your thoughts are coming into you. Don't be afraid Buddy. We're all with you one hundred per cent. We'll help you. We'll help you every way possible. I'm your doctor. I'm going to help you. A. I hope you can."

"Q. I know I can. If you will be honest with me, I'll help you. Everybody thinks a lot of you. You're a nice man. A. Doctor, can I have some water, please."

"Q. Sure have some water. A. Yes, sir."

"Q. Come on, take some more water. A. I'm not thirsty. It's just my mouth is dry."

"Q. That's because you're nervous, you see. Your conscience is bothering you. After you tell me and tell me the truth, then you will feel relieved. We're all with you one hundred per cent. Then you will be fine. Now, let me put my hand on your forehead again. A. It hurts so."

. . . . .

"Q. Sure you can think. Only cowards can't think. You aren't a coward. You can speak up. You know—you know what you did. Come on now. Come on. I have my hand on your forehead and your thoughts are coming back to you. Come on now. Now, your thoughts are coming back to you? A. No, Doc, they don't.

"Q. They're coming back to you. Concentrate on what I say. They're coming right in again. Your mother said—you said he had to be stopped. What did you do? A. I don't know, Doc."

"Q. You know you hit your mother first. You hit your mother on the head. Speak up. What did you do? A. I don't know, Doctor."

"Q. Yes, you do. Speak up, now. Speak up. See, I can make you talk very truly. I can give you an injec-

tion now. It's much better if you tell it to me this way. Come on, now, speak up. A. I can't think, Doctor."

"Q. Just relax and concentrate and listen to me. Speak up. What did you say? You had his what? You had his what? What about your hand back? A. It's all confused."

"Q. Sure it's confused because you don't want to think. You are fighting. You have a conscience. As soon as you talk to me your conscience will be relieved. See, you show tension now. You're pale; your mouth is dry. You have a conflict. As soon as you talk to me everything will be relieved. You are going to feel lots better. Come on. A. Doc, I'm trying to think."

"Q. I'm trying to help you if you tell me the truth. I am on your side. I am going to help you all I can. Come on, now, Buddy. Be a nice fellow. Put your hand here. All right. Tell me what happened. Come on. Tell me what happened. Your father went away, and you said he had to be stopped. What did you take. What did you take in your hand? Speak up, Buddy. I can't hear you. Don't be afraid now. A. I'm not afraid, Doc."

"Q. Don't be afraid. We're all with you. We want to help you. A. I'm not afraid."

"Q. I can't hear you. Speak up. A. I'm not afraid, Doc. I'm not afraid, Doc. I want you to help me."

"Q. Did you finish your tea? A. I finished the tea."

"Q. You finished the tea. So what happened then? What did you do to your mother? Concentrate—just close your eyes and concentrate. A. I can't.

"Q. All right, Buddy, you can think now. Your head is all clear now. Try and get it clear. A. It's not clear."

"Q. Just relax now and everything will come back to you. You know what happened. Everybody—I mean, these people know what happened. It's much better for you to come clean and play ball. Everybody thinks you

are trying to hide something." "A. I don't want to hide anything."

"Q. Then speak up and tell me. You told me so far—you know you did it—you were in there. Did your mother start a fight with you? A. No."

"Q. Did she continue the argument? A. No, my mother was in agreement with me."

"Q. But you had a little argument about going with your father, is that what you said? A. No."

"Q. What then? A. I said, "Mom, if he don't stop, I'll kill him."

"Q. I didn't hear that. What did you say? A. I told her, I said, "Mom, if he don't stop the arguments with me, I'll kill him."

"Q. What did she say? A. So she said, "Calm down. Here, take a drink of water." So I said, "Just wait until he comes back. We'll finish this once and for all."

"Q. So. A. So she said, "Here, take a drink of water."

"Q. Go ahead. I'm with you. Don't be afraid. So. Speak up. So, what did you do then. Now, you know what you did. You've got a story on your mind. Come on. You can speak now. Come on, Buddy, speak." "A. Doc, I'm trying so hard."

"Q. I know you're trying. I'm trying with you because you're a nice fellow. A. I just can't think."

"Q. All right, get to the part where you said, "I'll kill him." So then what happened. You waited until he came back. Come on. A. Doc, I can't."

"Q. Speak up, I can't hear you. All right, what did your mother say when you said, "When he comes back, I'll kill him." What did your mother say? Did you take a drink of water? I can't hear you. A. I don't remember."

"Q. I see. So what did you do then? A. I don't know."

"Q. Now, you think. All your thoughts will come back to you. Just think. Just relax. All your thoughts will come back to you. I have my hand on your head. Your thoughts are coming back to you. It's much better for you. You will get along much better and you will feel better. I can't hear you. What did you say? A. Will I ever feel better."

"Q. You will if you tell me the truth. You won't if you don't. You may as well tell us and we'll work with you. We'll play ball with you. We'll help you if we can. It will make you feel better. Come on, now, speak up. You told your mother, "Wait until he comes back. I'll kill him." "A. She said, 'Here take a drink of water.' Doc, I can't remember."

"Q. Sure you can. Open your eyes. Don't say you can't. Just look at me. A. I just don't remember."

"Q. Sure you can. A. No, I can't think, Doctor."

"Q. Buddy, it doesn't help you if you say you can't think when you know you did it, so you may as well tell us and get our help. If you don't tell us and get our help, I'll wash my hands of you. All right, close your eyes and think hard. Just close your eyes now and your thoughts will come back to you. All your thoughts are coming back to you. You're a nice fellow and you're excited; and in a fit of temper you said you were going to kill him when he comes back. What did your mother do? Did she try to hold you? A. No."

"Q. I can't hear you. Did she hold you? A. No."

"Q. What did she do? A. She wanted to give me a drink of water. She took the cup and started to run the water."

"Q. She started what? A. She started to run the water."

"Q. Yes. She was facing the sink? A. She was facing the sink.

"Q. I can't hear you? A. She was facing the sink."

"Q. So what did you do. Speak up. I'll positively help you if I can. I'm with you one hundred per cent. I'm going to help you. You're going to feel fine. Your conscience will be clear and everything will be fine. Don't hide anything. You did it in a fit of temper. Your mother went to the sink to give you some water. So you did what? You went up to her? A. I was standing there waiting for him to come back. I picked up the hammer."

"Q. You picked up the hammer? A. Yeah."

"Q. I didn't hear that. What did you say? A. I picked up the hammer."

"Q. Yes . . . say it. Say it. A. I said, 'He killed my brother, he'll kill my mother, and he'll kill me'."

"Q. Yes. You picked up the hammer. Where was the hammer? A. It was on the dish closet."

"Q. On the dish closet? A. Yeah."

"Q. In what room? A. In the kitchen."

"Q. What kind of hammer was it? A. A big hammer."

"Q. Was it a carpenter's hammer? A. It was a big hammer."

"Q. A big hammer. You picked it up and then what? Don't be afraid. Say it. A. I can't, Doc."

"Q. I know you can't. I know it's hard, but say it. We're working with you. You're pale and dry. You're nervous. Just let me put my hand on your head and your thoughts will come in. You picked up the hammer and your mother was standing near the sink—facing the sink—letting the water run; and you picked up the hammer and you said—you said, your father, he killed my son. You said he is going to kill us all. You remember that, don't you? Come on, say it. Speak up, come on. You move your lips. You know you want to say it. Say it a little louder. Come on, Buddy. We'll help you. Don't be afraid now. A. I can't help you."

"Q I'll help you, Buddy. I am with you one hundred per cent, but you got to play ball with me. You know she was standing by the sink. You got to tell me the truth. A. No, she wasn't standing."

"Q. What was she doing? A. She was sitting."

. . . . .

"Q. Your mother was sitting at the end of the table; Joe you will have to speak loudly, I can't hear you? A. I got up from the table."

"Q. And you took a drink of water and you held the hammer in your hand. What did you do then? A. I can't think any more what I did."

"Q. It will come back to you? A. Doc. can I see the results?"

"Q. I can't tell you how you think you killed her? A. I must have; who else could have."

"Q. I want you to recollect your thoughts; tell me all the details. I can make you talk? A. I tried for two days; this thing came last night. Everybody was asking me questions. It didn't do any good to ask me; I couldn't answer them."

"Q. That's right? A. Everybody was nice to me."

"Q. Everybody was nice to you? A. Yes."

"Q. Nobody hurt you, did they? A. No."

"Q. Nobody forced you to answer anything? A. No, I just can't remember."

. . . . .

"Q. Come I am holding my hand on your forehead; I am making your thoughts clear. You know exactly what happened? A. Doc. I can't think. I must have done it but how.

"Q. What did you say? A. I said I must have done it but how.

"Q. You just told me, you had your hand on your head? A. I don't remember. From then on, I can't think of anything.

"Q. Alright relax and think. You stay here until your thoughts come back to you. Did you start any argument with your Mother? When your Father went down for the paper, did you start an argument with your Mother, after she gave you the water? A. No, I always babied my mother. (Noise)

"Q. Did you have it in mind that your Mother would die with your Father because you always wanted it? A. She always said that.

"Q. She always said what? A. That she wanted to die with him.

"Q. You had it on your mind, didn't you? A. I don't know Doc.

"Q. Think and tell me; just think and tell me. A. She was just like a baby to me.

"Q. Just relax and your thoughts will come back to you because I have my hand on your forehead. Everything will be fine. If you tell us all the details we will know the whole story of what happened. You picked up the hammer and your Mother was sitting on the chair, you said, and you were standing at the sink? A. I was standing by the stove.

"Q. You were standing by the stove, excuse me I made a mistake. What did you do with the hammer, you swung it? A. I must have Doc. Nobody else could have done it.

"Q. Nobody else could have you say you must have swung it? A. I must have.

"Q. And your Mother fell down. How many times did you swing it. You must tell me that. How many times did you swing the hammer? A. I don't know Doctor.

"Q. Was it once or twice or three times? A. I don't know.

"Q. How many times? A. I was never angry with my Mother.

"Q. Were you angry with you Father? A. I was very angry with him.

"Q. And you felt that your Mother should die at the same time with your Father? A. I don't know.

"Q. What did you do then, when your Father came in. You heard him come up. What floor do you live on? A. Street floor; I was in the back.

"Q. And your Father opened the door to the apartment, when he came back with the paper? A. I don't know, Doctor.

"Q. Think, think. A. I don't know why, I can't think.

"Q. I am helping you to think; if you want to you can. There is only a question of wanting. A. I want to so bad.

"Q. If you want to you can because you know everything that happened. We know that you are a nice man and I am trying to help you. When your Father came back with the paper; now here you are, you are in the apartment and your Father came back with the paper? A. I can't remember, Doctor.

"Q. Sure you can. A. I don't remember, Doctor.

"Q. Sure you can; try hard. A. I thought sometimes last night. I told the Captain last night I can't remember. That I would have to remember.

"Q. Why do you have to remember? A. Because if I can't remember these things here, my own children may not be safe. I can't remember what happened; I don't know what happened. I can't think.

"Q. What do you think will happen to the children? A. I don't know; it worries me.

"Q. What do you think might happen to the children? A. I was there with a hammer in my hand I know it. I remember having a hammer in my hand.

"Q. Take your time and relax. Now open your eyes and look at me, just open your eyes—look at me your

thoughts will come back, look at me and concentrate. You said you were at the stove with the hammer in your right hand. You were very, very angry you said, right? A. I was never angry at my mother but my Father accused me.

"Q. Accuses you of what? A. That I was trying to put him out of business. The first day we went into the new business we gave him an equal share with us. (Noise) I knew for years that he killed my brother. My brother did the work of six men; he gave him a measly ten dollars a week. He'd sooner lose his son and stay in business so he could save the money and live with my mother.

"Q. Everybody is with you one hundred per cent. You were angry with your Father; you were never so angry like that in all your life? A. I can see what happened Doc but I can't remember.

"Q. Just concentrate and your memory will come back to you. You want to say something because I can see your lips moving. You are a nice fellow. Everybody likes you, everybody can make a mistake. Now speak up and tell us what happened. Alright, speak up; you know some things. What happened next? Your Father came back with the paper, what did you do? A. I can't think Doc. It doesn't come to me. (Noise)

"Q. I've got my hand on your forehead, your thoughts will come back to you, everything will be clear? A. Hold my temples Doc.

"Q. You say you want me to hold your temples. Now your thoughts are coming back, that's right. The pain was only a tension; it's nervousness. I'm trying to make you speak. I want you to speak up and I want you to tell me everything, now speak up. A. Do I have to?

"Q. Sure you have to; it will be much better for you, now speak up. A. I don't remember much. I promised the Captain I would speak up.

"Q. Was the Captain good to you? A. He was wonderful.

"Q. Was I good to you? A. Everybody was good to me.

"Q. We are all trying to help you, we are all trying to help you. Your thoughts are coming into you. Now what happened next. You think and you tell me; where were you standing?

. . . . . .

"Q. Just close your eyes and it will all come back to you. Just close your eyes and relax. A. I'm trying to Doc. I came back from the cemetery today. All the way down from the cemetery I tried to force myself to remember. I can't. (Noise) I'm trying to remember, how could I do this to my mother. I'm trying to remember.

"Q. I can understand that you loved your mother? A. My mother yes. I can't think. It's awful.

"Q. I can understand how you feel about your mother. A. They told me to rest. I took a good shower and I slept. I was very tired; I was tired, when I got up.

"Q. I can understand how you feel about your Mother. (Noise) You were never so angry in all your life as you were at that time. You told your Mother that you were waiting to kill him. You were waiting for him to come back with the paper. That is what you told me. I can understand that the anger was sufficient to kill your Father? A. Why my mother?

"Q. I don't know about your Mother but as far as your Father was concerned your thoughts were pretty clear, right? A. When he came back I said I was going to settle it once and for all.

"Q. When he came back you said to him you were going to settle this thing once and for all? A. I said I was going to settle this thing once and for all. I stood there standing with the Hammer waiting for him to come back.

"Q. Just take your time now. You were standing there with the hammer. Now your Father came back again? A. I don't remember.

"Q. Close your eyes and your thoughts will come back, relax. I am going to make your mind recollect everything. Your mind is getting clearer and clearer; all your thoughts are coming back now. Now they're coming back. Now your Father went for the paper; your Father came back. Now talk to me. Now your mind is clear. (Noise) Speak up and tell me. A. I can't remember him coming back.

"Q. Yes you can concentrate, just concentrate and you can see your Father come back now. How long did it take for him to get the paper? A. Oh, just a few minutes.

. . . . .

"Q. And in a few minutes, you heard him come in? A. I don't remember him coming in.

"Q. What did you do to your mother in the meantime? A. I don't know. If I could only think.

"Q. What do you think? Come, think, think. I want to tell you something. You are a smart fellow. I may as well be very frank with you. Everything does not alter the case for you. They are not going to work with you and I am not going to work with you if you don't help yourself. A. I want to help myself.

"Q. Now, you see all the details are there. You say yourself, you were the only one there. You say you must have done it? A. We talked this over for twelve hours.

"Q. But you didn't remember all the facts that you told me. Now your mind is clear. A. I can't remember how that happened.

"Q. The fact that you remember or don't remember don't help you, you know. If you remember and come across like a good man—A. Doc, I want to help myself. I can't remember.

"Q. If you tell us the details and come across like a good man, then we can help you. We know that morally you were just in anger. Morally, you are not to be condemned. Right? A. Right.

"Q. But you have to tell us the details, then we will know that you are above board and on the level. Otherwise, we just don't do nothing to you and you will get the worst of it. A. I can't remember. I must have done it. I don't deny that I did it.

"Q. You don't deny what? A. I don't deny that I did it. I must have done it.

"Q. You don't deny that you didn't do it, you mean? A. No, I don't say I didn't do it. I know I did it.

"Q. You know you did it? A. Here is the proof of it.

"Q. Do you know you did it? A. I can't remember doing it. I know it happened. Look at my mother, the woman that I love most in the world. Look. How did it happen? I can't even remember. I can't remember him. I can't remember him coming back. Doctor, can anybody be this crazy?

"Q. That is not crazy, my friend. That is not crazy. When you don't remember anything, that is not crazy. If I forget that I owe somebody ten dollars, that doesn't mean that I am crazy. If you forget the incidents of this thing, that does not mean you are crazy. A. I didn't say it that way.

"Q. You said, 'Can anybody be that crazy?' You are not crazy. A. I want to remember this thing. I have got to remember it.

"Q. This is what we call amnesia and in other words, a wish to forget because it is not pleasant. It does not mean that you are crazy. A. I didn't say that doctor. You misunderstood me.

"Q. I must have misunderstood you. A. I didn't say I was crazy.

"Q. You don't think you are crazy, do you? A. No, I hope not.

"Q. Do you think you might be crazy? A. No, I don't think so.

"Q. Of course not. You are not crazy. You are a nice fellow. I am willing to stay here with you and help you but you have got to help yourself. A. I have tried today for hours to recall from here on, from the time that my mother—I can recall everything. I did it last night. Here, it took hours to piece together things. I sat here. I was so confused that I didn't know whether I owned this suit. I didn't know whether I had a pair of shoes.

"Q. Everything is clear up to the point where you held the hammer in your hand? A. That's right but why can't I remember from there on?

"Q. If you will just stop for a minute, you will remember. And your thoughts will come into you. A. Doctor, I am exhausted, so please be patient.

"Q. I am patient. A. I appreciate that.

"Q. I will stay here with you all night, if you want to? A. The Captain and I last night, he was so patient. He waited for hours until these things came home.

"Q. For hours? A. I appreciate it.

"Q. Do you want me to wait? A. I told him that the last time. It's got to come back. I have been trying to remember all day.

"Q. Take your time. Just take your time. A. I am trying to remember.

"Q. You got a much better chance to play ball, (Then noise) than if you say you don't remember.

"Q. If you tell me that you were in a fit of anger, that you were angry, that you just swung the hammer, but if you tell me that you don't remember, then you will be working against yourself. Where will it get you? A. At that point there, I was so mad. I was like white hot

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metal. I was so mad. I was never mad at anyone in my life. (Then noise)

"Q. Do you feel better? (Then noise) Do you want coffee? A. I drank coffee all night long. (Then noise)

"Q. These people are going to throw the book at you unless you can show that in a fit of temper, you got so angry that you did it. Otherwise they toss premeditation in and it's premeditation. See?

"Q. Drink your coffee. Take your time. I got time. You got time. Just relax. Want some more coffee? A. I would like some hot coffee, doc. I would like to speak to the Captain.

"Q. To whom? A. To Captain Meenahan.

"Q. You would like to speak to him? You want me to call him? A. I wish you would.

"Q. Do you want me to come back? A. I don't know. He was awful good hunk last night.

"Q. Well, we were getting along very nicely. I am trying to straighten him out with his troubles. He seemed a little mixed-up. His mind is clear now. I made him concentrate. His mind is much clearer. You can take my seat, Captain. "Q. Can I speak to the Captain?"

MR. JUSTICE MINTON, with whom MR. JUSTICE REED and MR. JUSTICE BURTON join, dissenting.

This petitioner was charged with murdering his parents by beating the life out of them with a hammer. No one claims that he has a defense to the charge. It is contended, however, that his conviction was not obtained in accordance with due process of law.

He has already had two trials. His first conviction was appealed and reversed. The second one was appealed and affirmed, and this Court denied certiorari on a petition that set up the same constitutional questions now raised. Then habeas corpus proceedings were instituted

in the United States District Court for the Southern District of New York and relief was denied. That judgment was affirmed by the United States Court of Appeals for the Second Circuit and is the one now here on certiorari.

The New York Court of Appeals reversed the first conviction on the ground that a confession introduced in evidence at the trial was the result of mental coercion and hence involuntary. The threats, cajoling, and promises of leniency, utilized by Dr. Helfand, a psychiatrist called in by the District Attorney, to induce petitioner to confess were soundly condemned by that court. The confession thus obtained was held inadmissible for the purpose of proving petitioner's guilt. But petitioner's subsequent confessions to Captain Meenahan of the police, to the two assistant district attorneys, and to his business associate, Herrschaft, were not invalidated as a matter of law. The case was remanded to the trial court with directions to submit to a jury under proper instructions the question whether the subsequent confessions resulted from or were influenced by the mental coercion which produced the Helfand confession.

The case was tried a second time, and the question of the voluntariness of the subsequent confessions was submitted to the jury under clear and ample instructions as to which petitioner raises no objection here. The jury returned a verdict of guilty of first-degree murder of the father, and a sentence of death was imposed.

We are now asked to hold that the later confessions were involuntary as a matter of law and that petitioner was denied due process of law under the Fourteenth Amendment because the jury was allowed to consider the voluntariness of the subsequent confessions. It seems to me the very essence of due process to submit to a jury the question of whether these later confessions were tainted by the prior coercion and promises which led to the Helfand confession. I am familiar with no case in

which this Court has ever held that an invalid confession *ipso facto* invalidates all subsequent confessions as a matter of law. It does not seem to me a denial of due process for the State to allow the jury to say, under all the facts and circumstances in evidence and under proper instructions by the court, whether the subsequent confessions were tainted or were free and voluntary. This is precisely what New York did. In *Lyons* v. *Oklahoma,* 322 U. S. 596, 603, it was said:

> "The Fourteenth Amendment does not protect one who has admitted his guilt because of forbidden inducements against the use at trial of his subsequent confessions under all possible circumstances. The admissibility of the later confession depends upon the same test—is it voluntary."

The only question before us is whether the effects of the coercion practiced by Dr. Helfand so clearly continued to influence petitioner's mind as to make unreasonable any conclusion other than that the later confessions were also coerced. If there was evidence to support contrary inferences as to the continuing effect of the coercive practices, the conviction should not be disturbed. It is not our function to set aside state court convictions on the ground that the verdict is against the weight of the evidence. *Stein* v. *New York,* 346 U. S. 156, 180.

The evidence shows an involuntary confession to Dr. Helfand.* It was followed a few minutes later by a

*The record discloses that petitioner was questioned by Captain Meenahan on Tuesday, the day of the murder, from about 9 or 10 in the evening until 10:30 or 10:45 at his parents' apartment. On Wednesday at about 10 in the morning, he was met at his place of business by detectives who questioned him off and on until 1:20 p. m., when Captain Meenahan began an interrogation which was concluded at 11:30 or 12 that night. He was then allowed to go home. It was not until Thursday that he was taken in custody. That

confession to Captain Meenahan. Some half hour later petitioner confessed to a business associate, Herrschaft, saying, "Well, you know what it's all about; I did it." Herrschaft asked, "Do you mean that you killed your own mother and father?" and petitioner replied, "I did it." This confession was admitted in this Court to have been voluntarily made, and no complaint is made of its admission in evidence. Sandwiched in between the Meenahan confession and the confession to the assistant district attorneys some two and one-half hours later, the Herrschaft confession presents enough evidence in itself to go to the jury on whether these three confessions, one admitted to have been valid, were all given by petitioner voluntarily with the considered purpose of making a clean breast of the whole thing.

Nor was this the only evidence. Petitioner boldly examined Dr. Helfand, the State's witness, for the purpose, among others, of laying a foundation for the introduction of expert testimony by petitioner's psychiatrist that the effect of the coercion carried over to the later confessions. Petitioner's expert testified as expected. The State then placed on the stand another psychiatrist who gave the opposite opinion, based on evidence that petitioner in his later confessions gave details of the crime known only to him and gave them freely without urging. If this disagreement between experts did not under New York law

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morning he was taken out by detectives to check his alibi. Questioning by Captain Meenahan began again about 2 that afternoon. He was kept at the station until 8:30 o'clock Friday morning, but there was little questioning after 10 p. m. Thursday evening. On Friday morning, he was taken to his parents' funeral and then permitted to sleep for an hour and a half. He was returned to the police station, and about 5 o'clock Friday afternoon the interview with Dr. Helfand began. The coercion practiced by Dr. Helfand was forcefully condemned by the New York Court of Appeals and caused it to declare the confession to Dr. Helfand invalid as a matter of law. The validity of this confession is not involved.

constitute a conflict in the evidence sufficient standing alone to go to the jury, there was other evidence, such as the Herrschaft confession, to be considered, together with the testimony of the assistant district attorneys that petitioner seemed quite normal and relaxed, and relieved to talk to them. As I said before, it is not our function to weigh the evidence. Whether there was any evidence to go to a jury is the question. In my opinion, there was a question of fact presented by the evidence.

This Court concluded its opinion in the *Lyons* case in these words:

> "We cannot say that an inference of guilt based in part upon Lyons' [later] McAlester confession is so illogical and unreasonable as to deny the petitioner a fair trial." *Lyons* v. *Oklahoma, supra,* at 605.

I cannot say here that the subsequent confessions as a matter of law were so completely under the influence of the first confession that to let a jury pass upon that influence as it affected the voluntariness of the later confessions amounts to a denial of due process of law. To let the jury pass upon this question is not so unfair to petitioner as to violate the fundamental principles of justice.

It is contended that the promises of leniency made by Dr. Helfand stand on a different footing; that once a promise is made, its effect must be presumed to continue until the promise is clearly withdrawn. But such has never been the law. See *State* v. *Willis,* 71 Conn. 293, 313, 41 A. 820, 826. As in the case of other forms of coercion and inducement, once a promise of leniency is made a presumption arises that it continues to operate on the mind of the accused. But a showing of a variety of circumstances can overcome that presumption. The length of time elapsing between the promise and the confession, the apparent authority of the person making the promise, whether the confession is made to the same per-

son who offered leniency, and the explicitness and persuasiveness of the inducement are among the many factors to be weighed.

There are two parties to this case, the State and the petitioner, and on the State rests the heavy burden of proving guilt. As Mr. Justice Cardozo said in *Snyder* v. *Massachusetts,* 291 U. S. 97, 122:

> "But justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true."

New York must be mystified in its efforts to enforce its law against homicide to have us say it may not submit a disputed question of fact to a jury. The Court holds that to do so denies due process. The answer to that question, which did not seem substantial to us when certiorari was sought to review the decision of the New York Court of Appeals, now emerges crystal clear when we are reviewing the decision of a *federal* court dealing with it in a collateral habeas corpus proceeding. And yet the jury and a majority of the judges of every court, state and federal, that until now have considered the matter have found no such failure to observe constitutional standards. Mr. Justice Cardozo's words in the *Snyder* case, *supra,* at page 122, seem especially pertinent here:

> "There is danger that the criminal law will be brought into contempt—that discredit will even touch the great immunities assured by the Fourteenth Amendment—if gossamer possibilities of prejudice to a defendant are to nullify a sentence pronounced by a court of competent jurisdiction in obedience to local law, and set the guilty free."

The careful, considerate, fair trial accorded petitioner is in keeping with the fundamental essentials of justice which are due process, and I would affirm.

# BRANIFF AIRWAYS, INC. *v.* NEBRASKA STATE BOARD OF EQUALIZATION AND ASSESSMENT ET AL.

APPEAL FROM THE SUPREME COURT OF NEBRASKA.

No. 476. Argued March 12, 1954.—Decided June 1, 1954.

Pursuant to a Nebraska tax statute, an apportioned ad valorem tax was levied on the flight equipment of appellant, an interstate air carrier. Appellant is not incorporated in Nebraska and does not have its principal place of business or "home port" in that State, but its aircraft make eighteen stops per day regularly in Nebraska and approximately one-tenth of appellant's revenue is derived from the pickup and discharge of Nebraska freight and passengers. Appellant challenged the validity of the tax under the Federal Constitution, but it did not challenge the reasonableness of the apportionment prescribed by the taxing statute or the application of the apportionment to its property. *Held:* Appellant's flight equipment is not immune from taxation by Nebraska for want of situs there or because regulation of air navigation by the Federal Government precludes such state taxation. Pp. 591–602.

1. Federal statutes governing air commerce enacted under the commerce power do not preclude the challenged tax. Pp. 594–597.

2. Appellant has not demonstrated that the Commerce Clause otherwise bars this tax as a burden on interstate commerce. Pp. 597–598.

3. Whether an instrumentality of commerce has tax situs in a state for the purpose of subjection to a property tax is a question of due process; and that question was sufficiently presented by appellant in this case. Pp. 598–599.

4. Eighteen stops per day by appellant's aircraft was sufficient contact with Nebraska to sustain that State's power to levy an apportioned ad valorem tax on such aircraft, even though the same aircraft do not land every day, and even though none of the aircraft is continuously within the State. Pp. 599–601.

5. The power of Nebraska to levy this tax is not affected by the fact that the original plaintiff in this case was domiciled in Delaware, through which its planes did not fly, and that appellant (with which the original plaintiff was merged) is domiciled in Oklahoma, through which the aircraft in question make regular flights. P. 601.

6. *Northwest Airlines* v. *Minnesota,* 322 U. S. 292, does not preclude states other than those of the corporate domicile from taxing instrumentalities of interstate commerce on the apportionment basis in accordance with their use in the taxing state. Pp. 601–602.

157 Neb. 425, 59 N. W. 2d 746, affirmed.

*William J. Hotz, Sr.* argued the cause for appellant. With him on the brief were *William J. Hotz, Jr.* and *Roger J. Whiteford.*

*C. C. Sheldon,* Assistant Attorney General of Nebraska, argued the cause for appellees. With him on the brief was *Clarence S. Beck,* Attorney General.

MR. JUSTICE REED delivered the opinion of the Court.

The question presented by this appeal from the Supreme Court of Nebraska is whether the Constitution bars the State of Nebraska from levying an apportioned ad valorem tax on the flight equipment of appellant, an interstate air carrier. Appellant is not incorporated in Nebraska and does not have its principal place of business or home port registered under the Civil Aeronautics Act, 52 Stat. 973, 977, 49 U. S. C. §§ 401–705, in that state. Such flight equipment is employed as a part of a system of interstate air commerce operating over fixed routes and landing on and departing from airports within Nebraska on regular schedules. Appellant does not challenge the reasonableness of the apportionment prescribed by the taxing statute or the application of such apportionment to its property. It contends only that its flight equipment used in interstate commerce is immune from taxation by Nebraska because without situs in that state and because regulation of air navigation by the Federal Government precludes such state taxation.

This petition for a declaratory judgment of the invalidity of §§ 77–1244 to 77–1250 of the state tax statute [1]

[1] Neb. Rev. Stat., 1943, § 77–1244 *et seq.*

and an injunction against the collection of taxes assessed under such provisions for previous years was filed as an original action in the court below by Mid-Continent Airlines, Inc., and tried upon stipulated facts. Subsequent to filing, but before the decision, Mid-Continent and appellant were merged on August 1, 1952, and appellant was substituted as the party plaintiff. Mid-Continent had been incorporated in Delaware with its corporate place of business in Wilmington in that state, and Braniff is incorporated in Oklahoma and has its corporate place of business in Oklahoma City. Pursuant to the merger Mid-Continent's main executive offices were moved from Kansas City, Missouri, and merged with appellant's in Dallas, Texas. The number of regularly scheduled stops in Nebraska, fourteen per day at Omaha and four at Lincoln, was not affected by the merger.

The home port registered with the Civil Aeronautics Authority and the overhaul base for the aircraft in question is the Minneapolis-St. Paul Airport, Minnesota. All of the aircraft not undergoing overhaul fly regular schedules upon a circuit ranging from Minot, North Dakota, to New Orleans, Louisiana, with stops in fourteen states including Minnesota, Nebraska and Oklahoma. No stops were made in Delaware. The Nebraska stops are of short duration since utilized only for the discharge and loading of passengers, mail, express, and freight, and sometimes for refueling. Appellant neither owns nor maintains facilities for repairing, reconditioning, or storing its flight equipment in Nebraska, but rents depot space and hires other services as required. The Supreme Court of Nebraska made no distinction as to taxability between those years when no flights were made into the state of domicile (Delaware) and those when flights did enter the state of new domicile (Oklahoma).

It is stipulated that the tax in question is assessed only against regularly scheduled air carriers and is not applied

to carriers who operate only intermittently in the state. The statute defines "flight equipment" as "aircraft fully equipped for flight," [2] and provides that "any tax upon or measured by the value of flight equipment of air carriers incorporated or doing business in this state shall be assessed and collected by the Tax Commissioner." [3] A formula is prescribed for arriving at the proportion of a carrier's flight equipment to be allocated to the state.[4]

The statute uses the allocation formula of the "proposed uniform statute to provide for an equitable method of state taxation of air carriers" adopted by the Council of State Governments upon the recommendation of the National Association of Tax Administrators in 1947.[5] Use of a uniform allocation formula to apportion air-carrier taxes among the states follows the recommendation of the Civil Aeronautics Board in its report to Congress.[6]

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[2] *Id.*, § 77–1244 (3).

[3] *Id.*, § 77–1245.

[4] *Ibid.* This section provides that "The proportion of flight equipment allocated to this state for purposes of taxation shall be the arithmetical average of the following three ratios: (1) The ratio which the aircraft arrivals and departures within this state scheduled by such air carrier during the preceding calendar year bears to the total aircraft arrivals and departures within and without this state scheduled by such carrier during the same period; *Provided,* that in the case of nonscheduled operations all arrivals and departures shall be substituted for scheduled arrivals and departures; (2) the ratio which the revenue tons handled by such air carrier at airports within this state during the preceding calendar year bears to the total revenue tons handled by such carrier at airports within and without this state during the same period; and (3) the ratio which such air carrier's originating revenue within this state for the preceding calendar year bears to the total originating revenue of such carrier within and without this state for the same period."

[5] Resolutions, The Eighth General Assembly of the States, 20 State Government 95.

[6] Multiple Taxation of Air Commerce, H. R. Doc. No. 141, 79th Cong., 1st Sess. Recommendations by various interested groups as to the proper method of apportionment are included in that report

The Nebraska statute provides for reports, levy, and rate of tax by state average.[7]

Required reports filed by Mid-Continent for 1950 show that about 9% of its revenue and 11½% of the total system tonnage originated in Nebraska and about 9% of its total stops were made in that state. From these figures, using the statutory formula, the Tax Commissioner arrived at a valuation of $118,901 allocable to Nebraska, resulting in a tax of $4,280.44. Since Mid-Continent filed no return for 1951 the same valuation was used and an increased rate resulted in assessment of $4,518.29. The Supreme Court of Nebraska held the statute not violative of the Commerce Clause and dismissed appellant's petition.[8]

Appellant argues that federal statutes governing air commerce enacted under the commerce power pre-empt the field of regulation of such air commerce and preclude this tax. Congress, by the Civil Aeronautics Act of 1938, 52 Stat. 973, 977, 1028, § 1107 (i)(3), 49 U. S. C. § 176 (a), enacted:

> "The United States of America is declared to possess and exercise complete and exclusive national sovereignty in the air space above the United States, including the air space above all inland waters and the air space above those portions of the adjacent

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and its appendices. See also Arditto, State and Local Taxation of Scheduled Local Airlines, 16 J. Air L. & Com. 162; Kassell, Interstate Cooperation and Airlines, 25 Taxes 302. Mr. Bulwinkle introduced bills in accordance with the recommendation of the C. A. B. report that the National Government should prescribe the method of state taxation of air carriers. The bills adopted the Council formula utilized by Nebraska. Neither was enacted. H. R. 3446, 79th Cong., 1st Sess.; H. R. 1241, 80th Cong., 1st Sess.

[7] Neb. Rev. Stat., 1943, §§ 77–1247, 77–1249.

[8] *Mid-Continent Airlines, Inc.* v. *Nebraska State Board of Equalization and Assessment,* 157 Neb. 425, 59 N. W. 2d 746.

> marginal high seas, bays, and lakes, over which by international law or treaty or convention the United States exercises national jurisdiction."

This provision originated in the Air Commerce Act of 1926, 44 Stat. 568, 572, § 6. The 1938 Act also declares "a public right of freedom of transit" for air commerce in the navigable air space to exist for any citizen of the United States. 52 Stat. 980, § 3, 49 U. S. C. § 403.[9]

The provision pertinent to sovereignty over the navigable air space in the Air Commerce Act of 1926 was an assertion of exclusive national sovereignty. The convention between the United States and other nations respecting international civil aviation ratified August 6, 1946, 61 Stat. 1180, accords. The Act, however, did not expressly exclude the sovereign powers of the states. H. R. Rep. No. 572, 69th Cong., 1st Sess., p. 10. The Civil Aeronautics Act of 1938 gives no support to a different view.[10] After the enactment of the Air Commerce Act, more than twenty states adopted the Uniform Aeronautics Act. It had three provisions indicating that the states did not consider their sovereignty affected by the National Act except to the extent that the states had ceded that sovereignty by constitutional grant.[11] The

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[9] That space was defined in § 10 of the Air Commerce Act and freedom for its navigation declared. This was continued by the Civil Aeronautics Act, 49 U. S. C. § 180, in "airspace above the minimum safe altitudes of flight prescribed by the Civil Aeronautics Authority."

[10] S. Rep. No. 1661, 75th Cong., 3d Sess.; H. R. Rep. No. 2254, 75th Cong., 3d Sess.; H. R. Conf. Rep. No. 2635, 75th Cong., 3d Sess.

[11] 11 Uniform Laws Annotated 159, 160:

"§ 2. Sovereignty in Space.—Sovereignty in the space above the lands and waters of this State is declared to rest in the State, except where granted to and assumed by the United States pursuant to a constitutional grant from the people of this State.

"§ 3. Ownership of Space.—The ownership of the space above the lands and waters of this State is declared to be vested in the several

recommendation of the National Conference of Commissioners on Uniform State Laws to the states to enact this Act was withdrawn in 1943.[12] Where adopted, however, it continues in effect. See *United States* v. *Praylou*, 208 F. 2d 291. Recognizing this "exclusive national sovereignty" and right of freedom in air transit, this Court in *United States* v. *Causby*, 328 U. S. 256, 261, nevertheless held that the owner of land might recover for a taking by national use of navigable air space, resulting in destruction in whole or in part of the usefulness of the land property.

These Federal Acts regulating air commerce are bottomed on the commerce power of Congress, not on national ownership of the navigable air space, as distinguished from sovereignty. In reporting the bill which became the Air Commerce Act, it was said:

> "The declaration of what constitutes navigable air space is an exercise of the same source of power, the interstate commerce clause, as that under which Congress has long declared in many acts what constitutes navigable or nonnavigable waters. The public right of flight in the navigable air space owes

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owners of the surface beneath, subject to the right of flight described in Section 4.

"§ 4. Lawfulness of Flight.—Flight in aircraft over the lands and waters of this State is lawful, unless at such a low altitude as to interfere with the then existing use to which the land or water, or the space over the land or water, is put by the owner, or unless so conducted as to be imminently dangerous to persons or property lawfully on the land or water beneath. The landing of an aircraft on the lands or waters of another, without his consent, is unlawful, except in the case of a forced landing. For damages caused by a forced landing, however, the owner or lessee of the aircraft or the aeronaut shall be liable, as provided in Section 5."

[12] See Conference Handbook, 1943, pp. 66–67. Efforts continue to draft an acceptable State Uniform Aeronautical Code. See Conference Handbook, 1948, p. 147.

> its source to the same constitutional basis which, under decisions of the Supreme Court, has given rise to a public easement of navigation in the navigable waters of the United States, regardless of the ownership of the adjacent or subjacent soil." H. R. Rep. No. 572, 69th Cong., 1st Sess., p. 10.

The commerce power, since *Gibbons* v. *Ogden,* 9 Wheat. 1, 193, has comprehended navigation of streams. Its breadth covers all commercial intercourse. But the federal commerce power over navigable streams does not prevent state action consistent with that power. *Gilman* v. *Philadelphia,* 3 Wall. 713, 729. Since, over streams, Congress acts by virtue of the commerce power, the sovereignty of the state is not impaired. *Oklahoma* v. *Atkinson Co.,* 313 U. S. 508, 534. The title to the beds and the banks are in the states and the riparian owners, subject to the federal power over navigation.[13] Federal regulation of interstate land and water carriers under the commerce power has not been deemed to deny all state power to tax the property of such carriers. We conclude that existent federal air-carrier regulation does not preclude the Nebraska tax challenged here.

Nor has appellant demonstrated that the Commerce Clause otherwise bars this tax as a burden on interstate commerce.[14] We have frequently reiterated that the

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[13] *United States* v. *Chandler-Dunbar Water Power Co.,* 229 U. S. 53, 60; *United States* v. *Kansas City Ins. Co.,* 339 U. S. 799, 808; *Federal Power Comm'n* v. *Niagara Mohawk Power Corp.,* 347 U. S. 239, 246 *et seq.*

[14] In its original petition appellant also alleged that the Nebraska statute is invalid under § 9, cl. 6, and § 10, cl. 3 of Art. I of the Constitution. While noting that such contentions were apparently "abandoned in the brief and oral argument," the court below held such provisions of the Constitution not violated. Since appellant did not preserve such contentions in its Statement as to Jurisdiction, we do not consider such issues.

Commerce Clause does not immunize interstate instrumentalities from all state taxation, but that such commerce may be required to pay a nondiscriminatory share of the tax burden.[15] And appellant does not allege that this Nebraska statute discriminates against it nor, as noted above, does it challenge the reasonableness of the apportionment prescribed by the statute.[16]

The argument upon which appellant depends ultimately, however, is that its aircraft never "attained a taxable situs within Nebraska" from which it argues that the Nebraska tax imposes a burden on interstate commerce. In relying upon the Commerce Clause on this issue and in not specifically claiming protection under the Due Process Clause of the Fourteenth Amendment, appellant names the wrong constitutional clause to support its position. While the question of whether a commodity en route to market is sufficiently settled in a state for purpose of subjection to a property tax has been determined by this Court as a Commerce Clause question,[17]

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[15] *Western Live Stock* v. *Bureau*, 303 U. S. 250, 254; *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U. S. 157, 165.

[16] See *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18; *Ford Motor Co.* v. *Beauchamp*, 308 U. S. 331; *Nashville, C. & St. L. R. Co.* v. *Browning*, 310 U. S. 362; *Greyhound Lines* v. *Mealey*, 334 U. S. 653, 654, 662, 663; *Ott* v. *Mississippi Valley Barge Line Co.*, 336 U. S. 169, 174; *Canton R. Co.* v. *Rogan*, 340 U. S. 511, 514–516; Multiple Taxation of Air Commerce, H. R. Doc. No. 141, 79th Cong., 1st Sess.; Arditto, State and Local Taxation of Scheduled Local Airlines, 16 J. Air L. & Com. 162; Howard, State Taxation of Airplanes in Interstate Commerce, 10 Mo. L. Rev. 195; Welch, The Taxation of Air Carriers, 11 Law & Contemp. Prob. 584; Green, The War Against the States in Aviation, 31 Va. L. Rev. 835; Sutherland and Vinciguerra, The Octroi and the Airplane, 32 Cornell L. Q. 161; Saxe, Federal Control of the State Taxation of Airlines, 31 Cornell L. Q. 228; Ternes, Aviation Taxation, 25 Mich. S. B. J. 23; Note, 57 Harv. L. Rev. 1097.

[17] See, *e. g.*, *Independent Warehouses* v. *Scheele*, 331 U. S. 70, 72; *Carson Petroleum Co.* v. *Vial*, 279 U. S. 95; *Champlain Realty*

the bare question whether an instrumentality of commerce has tax situs in a state for the purpose of subjection to a property tax is one of due process.[18] However, appellant timely raised and preserved its contention that its property was not taxable because such property had attained no taxable situs in Nebraska. Though inexplicit, we consider the due process issue within the clear intendment of such contention and hold such issue sufficiently presented. See *New York ex rel. Bryant* v. *Zimmerman,* 278 U. S. 63, 67, and cases cited; Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States (Wolfson and Kurland ed.), 149 *et seq.*

Appellant relies upon cases involving ocean-going vessels to support its contention that its aircraft attained no tax situs in Nebraska. See, *e. g., Hays* v. *Pacific*

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*Co.* v. *Brattleboro,* 260 U. S. 366; *General Oil Co.* v. *Crain,* 209 U. S. 211; *Coe* v. *Errol,* 116 U. S. 517; *Brown* v. *Houston,* 114 U. S. 622; Powell, Taxation of Things in Transit, 7 Va. L. Rev. 167, 245, 429, 497.

[18] See, *e. g., Johnson Oil Rfg. Co.* v. *Oklahoma,* 290 U. S. 158; *Frick* v. *Pennsylvania,* 268 U. S. 473; *Union Refrigerator Transit Co.* v. *Kentucky,* 199 U. S. 194; *Delaware, L. & W. R. Co.* v. *Pennsylvania,* 198 U. S. 341; 1 Beale, Conflict of Laws, 533 *et seq.;* Moore, Taxation of Movables and the Fourteenth Amendment, 7 Col. L. Rev. 309; Page, Jurisdiction to Tax Tangible Movables, 1945 Wis. L. Rev. 125.

While the common-law concept of situs was recognized by this Court as a limitation on state power to tax tangible personalty prior to invocation of the Fourteenth Amendment as a defense to such taxation, the bases for such decisions varied and no consistent constitutional principle was applied. Compare the following cases: *Hays* v. *Pacific Mail S. S. Co.,* 17 How. 596; *Morgan* v. *Parham,* 16 Wall. 471; *St. Louis* v. *The Ferry Co.,* 11 Wall. 423; *Marye* v. *Baltimore & O. R. Co.,* 127 U. S. 117; *Pullman's Palace Car Co.* v. *Pennsylvania,* 141 U. S. 18; *Adams Express Co.* v. *Ohio State Auditor,* 165 U. S. 194. See also Hartman, State Taxation of Interstate Commerce, 13, 73 *et seq.*

A collection of this Court's decisions dealing with power to tax may be found in an Appendix to *Miller Bros. Co.* v. *Maryland,* 347 U. S. 340, notes 8–20.

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*Mail S. S. Co.*, 17 How. 596; *Morgan* v. *Parham*, 16 Wall. 471; *Southern Pacific Co.* v. *Kentucky*, 222 U. S. 63. The first two cases were efforts to tax the entire value of the ships as other local property, without apportionment, when they were used to plow the open seas. The last case holds the state of corporate domicile has power to tax vessels that are not taxable elsewhere. A closer analogy exists between planes flying interstate and boats that ply the inland waters. We perceive no logical basis for distinguishing the constitutional power to impose a tax on such aircraft from the power to impose taxes on river boats. *Ott* v. *Mississippi Valley Barge Line Co.*, 336 U. S. 169; *Standard Oil Co.* v. *Peck*, 342 U. S. 382. The limitation imposed by the Due Process Clause upon state power to impose taxes upon such instrumentalities was succinctly stated in the *Ott* case: "So far as due process is concerned the only question is whether the tax in practical operation has relation to opportunities, benefits, or protection conferred or afforded by the taxing State." 336 U. S., at 174. In *Curry* v. *McCanless*, 307 U. S. 357, the evolution of such restriction on state power was reviewed and the rule stated thusly:

> "When we speak of the jurisdiction to tax land or chattels as being exclusively in the state where they are physically located, we mean no more than that the benefit and protection of laws enabling the owner to enjoy the fruits of his ownership and the power to reach effectively the interests protected, for the purpose of subjecting them to payment of a tax, are so narrowly restricted to the state in whose territory the physical property is located as to set practical limits to taxation by others." *Id.*, at 364.

Thus the situs issue devolves into the question of whether eighteen stops per day by appellant's aircraft is sufficient contact with Nebraska to sustain that state's

power to levy an apportioned ad valorem tax on such aircraft. We think such regular contact is sufficient to establish Nebraska's power to tax even though the same aircraft do not land every day and even though none of the aircraft is continuously within the state. "The basis of the jurisdiction is the habitual employment of the property within the State." [19] Appellant rents its ground facilities and pays for fuel it purchases in Nebraska. This leaves it in the position of other carriers such as rails, boats and motors that pay for the use of local facilities so as to have the opportunity to exploit the commerce, traffic, and trade that originates in or reaches Nebraska. Approximately one-tenth of appellant's revenue is produced by the pickup and discharge of Nebraska freight and passengers. Nebraska certainly affords protection during such stops and these regular landings are clearly a benefit to appellant.

Nor do we think that Nebraska's power to levy this tax was affected by the merger of Mid-Continent with Braniff. Since "the rule which permits taxation by two or more states on an apportionment basis precludes taxation of all of the property by the state of the domicile," *Standard Oil Co.* v. *Peck, supra,* at 384, we deem it immaterial that before the merger Mid-Continent was domiciled in Delaware, a state through which its planes did not fly, and after the merger Braniff is domiciled in Oklahoma, a state through which these aircraft make regular flights.

Appellant urges that *Northwest Airlines* v. *Minnesota,* 322 U. S. 292, precludes this tax unless that case is to be overruled. In that case Minnesota, as the domicile of the air carrier and its "home port," was permitted to tax the entire value of the fleet ad valorem although it ranged

[19] *Johnson Oil Rfg. Co.* v. *Oklahoma, supra,* at 162. See also *Pullman's Palace Car Co.* v. *Pennsylvania, supra; Ott* v. *Mississippi Valley Barge Line Co., supra.*

by fixed routes through eight states.[20] While no one view mustered a majority of this Court, it seems fair to say that without the position stated in the Conclusion and Judgment which announced the decision of this Court, the result would have been the reverse. That position was that it was not shown "that a defined part of the domiciliary corpus has acquired a permanent location, *i. e.*, a taxing situs, elsewhere." P. 295. That opinion recognized the "doctrine of tax apportionment for instrumentalities engaged in interstate commerce," p. 297, but held it inapplicable because no "property (or a portion of fungible units) is permanently situated in a State other than the domiciliary State." P. 298. When *Standard Oil Co.* v. *Peck,* 342 U. S. 382, 384, was here, the Court interpreted the *Northwest Airlines* case to permit states other than those of the corporate domicile to tax boats in interstate commerce on the apportionment basis in accordance with their use in the taxing state. We adhere to that interpretation.

*Affirmed.*

MR. JUSTICE BLACK concurs in the result.

MR. JUSTICE JACKSON dissents for the reasons stated in his concurring opinion in *Northwest Airlines* v. *Minnesota,* 322 U. S. 292, 302.

MR. JUSTICE DOUGLAS, concurring.

Braniff Airways, in challenging the power of Nebraska to lay this ad valorem tax, claims only that its planes have no taxable situs in the State. It does not claim that no fraction of the aircraft, on an apportioned basis,

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[20] Subsequent to the *Northwest Airlines* case, Minnesota enacted a tax statute incorporating an apportionment formula for allocation of the valuation of property of air carriers to Minnesota. Minn. Stat., 1945, §§ 270.071–270.079, as amended, Minn. Laws 1953, c. 672, §§ 2–3.

is permanently in the State. Nor does it attack this apportionment formula.

My understanding of our decisions is that the power to lay an ad valorem tax turns on the permanency of the property in the State. All the property may be there or only a fraction of it. Property in transit, whether a plane discharging passengers or an automobile refueling, is not subject to an ad valorem tax. Property in transit may move so regularly and so continuously that part of it is always in the State. Then the fraction, but no more, may be taxed ad valorem.

I mention these elemental points to reserve explicitly the validity of the apportionment formula that serves as the basis of this ad valorem tax. The formula used presents substantial questions. What might be an adequate formula for a gross receipts tax might be inadequate for an ad valorem tax. Moreover, when we are faced with a due process question, we have a problem we may not delegate to Congress.

I do not think the Court takes a position contrary to what I have said. But there are passages in the opinion which blur the constitutional issues as they are blurred and confused in the interesting report of the Civil Aeronautics Board, H. R. Doc. No. 141, 79th Cong., 1st Sess., entitled Multiple Taxation of Air Commerce. Hence I have joined in the judgment of the Court but not in the opinion.

MR. JUSTICE FRANKFURTER, dissenting.

One of the most treacherous tendencies in legal reasoning is the transfer of generalizations developed for one set of situations to seemingly analogous, yet essentially very different, situations. The doctrines evolved in adjusting rights as between the States to tax property bearing some relation to a number of States, and the taxing power of the States as against the freedom from

State interferences secured by the Commerce Clause, bear, of course, a practical relation to what it is that is taxed. It took a considerable time to make this adjustment in regard to taxation of railroad property and railroad income—to decide when the States are wholly excluded from levying certain taxes, when an ad valorem tax may be levied on railroad property reasonably deemed to be permanently in a given State, and on what basis income from interstate railroad business may fairly be apportioned among different States. Even as to railroads, nice distinctions had to be made and the making of them has not been concluded.

It stands to reason that the drastic differences between slow-moving trains and the bird-like flight of airplanes would be reflected in the law's response to the claims of the different States and the limitations of the Commerce Clause upon those claims. The differences in result and the conflict even among those who agreed in result in *Northwest Airlines* v. *Minnesota,* 322 U. S. 292, demonstrate not the contrariness or caprice of different minds but the inherent perplexities of the law's adjustment to such novel problems as the exercise of the taxing power over commercial aviation in a federal system. The problems canvassed in that case were unprecedented, and perhaps the most important thing that was there decided was the refusal of the Court to apply to air transportation the doctrines that had been enunciated with regard to land and water transportation.

The plain intimation of the case—that these novel problems, affecting the taxing power of the States and the Nation, call for the comprehensive powers of legislation possessed by Congress—found response in a resolution of Congress directing the Civil Aeronautics Board to develop the "means for eliminating and avoiding, as far as practicable, multiple taxation of persons engaged in air commerce . . . which has the effect of unduly

burdening or unduly impeding the development of air commerce." 58 Stat. 723. The inquiry thus set afoot produced an illuminating report. See H. R. Doc. No. 141, 79th Cong., 1st Sess., which analyzed the difficulties and also made concrete proposals.[1] The gist of these proposals was that Congress make an apportionment of taxes among the States over which air carriers fly, based upon relevant factors and in appropriate ratios. The basis of taxation by Nebraska, here under review, substantially reflects the factors which the Civil Aeronautics Board recommended to the Congress. It is one thing, however, for the individual States to determine what factors should be taken into account and how they should be weighted. It is quite another for Congress to devise, as the Civil Aeronautics Board recommended it should, a scheme of apportionment binding on all the States. Until that time, Nebraska may rely on one scheme of apportionment; other States on other schemes. And each State may, from time to time, modify the relevant factors.[2]

The exercise of the taxing power by one of the States by means of a formula, based on such criteria as tonnage, revenue, and arrivals and departures, may, in isolation, impose no unfair burden on commerce. And the adoption by all the States of such a basis for taxation, which only congressional action could ensure, would not offend the Commerce Clause. It is the diverse and fluctuating

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[1] The proposal of this Report—that there be a uniform allocation formula to apportion taxes among the States—was adopted by the Council of State Governments. See 20 State Government 95. However no federal legislation has yet resulted.

[2] In addition to the problem of conflict between apportionment schemes of various States, it must be borne in mind that these schemes cannot be regarded as abstract mathematical formulas, and hence they must be closely scrutinized to ensure their fairness as applied to a given situation. See *Wallace* v. *Hines,* 253 U. S. 66.

exercise of power by the various States, even where based on concededly relevant factors, which imposes an undue burden on interstate commerce.[3]

The complexity of the proposals of the Board's Report—the items to be taken into account, the balance to be struck among them, the problem of giving the States their due without unfairly burdening an industry of vital national import—indicates how ill-adapted the judicial process is, as against the choices open to Congress, for dealing with these problems and how warily this Court should move within the limits of its own inescapable duty to act. The protection of interstate commerce against the burden of multiple taxation ought not to be left to litigation growing out of changes in the methods of taxation.

> "The immunities implicit in the Commerce Clause and the potential taxing power of a State can hardly be made to depend, in the world of practical affairs, on the shifting incidence of the varying tax laws of the various States at a particular moment. Courts are not possessed of instruments of determination so delicate as to enable them to weigh the various factors in a complicated economic setting which, as to an isolated application of a State tax, might mitigate the obvious burden generally created by a direct tax on commerce." *Freeman* v. *Hewit,* 329 U. S. 249, 256.

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[3] Lest it be thought one formula of apportionment is clearly the appropriate one, it should be noted that the Board's Report sets forth three formulas proposed by responsible groups, in addition to that recommended by the Board. And while Nebraska adopted the factors recommended by the Board, it did not give them the same weight which the Board's proposed formula did. See H. R. Doc. No. 141, 79th Cong., 1st Sess. 58.

This would not be the only instance in which a constructive adjustment of competing considerations requires congressional legislation and is beyond the scope of the judicial process. See, *Davis* v. *Department of Labor,* 317 U. S. 249, 259; *United States* v. *Standard Oil Co.,* 332 U. S. 301; *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.,* 342 U. S. 282; *United States* v. *Gilman,* 347 U. S. 507.

It was not too difficult in *Northwest Airlines* to allow Minnesota to levy a personal property tax on the entire fleet of airplanes owned by a corporation of its creation, the principal place of business of which was also Minnesota. The State of Minnesota, as we said, was the only State that had such a hold on the planes. In the case before us, Nebraska has no such relation with the airplanes on which it seeks to impose an ad valorem tax.

This Court has held that a State may levy an ad valorem tax on the basis of a showing that the total time spent in a State by different units of a carrier's property is such that a certain proportion of that property may be said to have a permanent location in that State. Such a doctrine of apportionment, as the basis of property taxation, was adopted by this Court in *Pullman's Car Co.* v. *Pennsylvania,* 141 U. S. 18, with relation to railroad cars; and in *Ott* v. *Mississippi Barge Line Co.,* 336 U. S. 169, with relation to barges. But boats and railroad cars which spend hours and days at a time in a State have a closeness and duration of relationship to that State obviously not true of planes which make brief stopovers for a few minutes.

The appealing phrase that "interstate business must pay its way" can be invoked only when we know what the "way" is for which interstate business must pay. Of course, the appellant must pay for the use of airports and other services it enjoys in Nebraska. It

must pay a tax on all its property permanently located in Nebraska. Like everyone else it must pay a gasoline tax. In fact it pays approximately $22,000 a year for the use of the airport, $14,000 a year in gasoline taxes, and appropriate property taxes on office equipment, trucks and other items permanently in Nebraska.

But only those who have a sufficiently substantial relation to Nebraska that they may fairly be said to partake of the benefits, though impalpable and unspecific, it gives as an ordered society, may be taxed because they partake of those benefits. And even then, of course, an undue burden must not be cast on commerce. Not unless Nebraska can show that appellant has airplanes that have a substantially permament presence in Nebraska can Nebraska exert its taxing power on their presence. I do not believe that planes which pause for a few moments can be made the basis for the exercise of such power.[4] If Nebraska can tax without such a tie, every other State through which the planes fly or in which they alight for a few minutes can tax. Surely this is an obvious inroad upon the Commerce Clause and as such barred by the Constitution.

It cannot be said that for airplanes, flying regularly scheduled flights, to alight, stop over for a short time and then take off is so tenuously related to Nebraska that it would deny due process for that State to seize on these short stopovers as the basis of an ad valorem tax. But the incidence of a tax may offend the Commerce Clause, even though it may satisfy the Due Process Clause.

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[4] With the exception of one plane which remains in Nebraska overnight, all of the Company's planes remain in Nebraska for periods of between five and twenty minutes each day. Considering this brief time spent on the ground by planes which stop in transit, more than a bare assertion that flight equipment is "permanently" in Nebraska is called for to establish the requisite permanence for taxing purposes.

I am not unaware that there is an air of imprecision about what I have written. Such is the intention. Until Congress acts, the vital thing for the Court in this new and subtle field is to focus on the process of interstate commerce and protect it from inroads of taxation by a State beyond "opportunities which it has given, . . . protection which it has afforded, . . . benefits which it has conferred by the fact of being an orderly, civilized society." *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435, 444.

# ALTON *v.* ALTON.

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

No. 531. Argued April 7, 1954.—Decided June 1, 1954.

An action for divorce in the District Court of the Virgin Islands by the wife of a Connecticut domiciliary was dismissed for want of jurisdiction. While a review of that decision was pending here, the husband obtained a final divorce in a Connecticut state court. *Held:* In the circumstances stated in the opinion, the judgment of the District Court of the Virgin Islands must be vacated and the cause dismissed as moot.

207 F. 2d 667, judgment vacated and cause remanded.

*Abe Fortas* and *George H. T. Dudley* argued the cause for petitioner. With them on the brief was *Milton V. Freeman.*

*Hyman Smollar* submitted the cause on brief for respondent.

PER CURIAM.

Petitioner brought this action for divorce in the Virgin Islands. Following argument and submission of the case in this Court, we were authoritatively advised that a final divorce decree had been entered on April 28, 1954, in the State of Connecticut on application of the respondent. The Superior Court of Connecticut found respondent to be a domiciliary of that State and petitioner here personally appeared in that action. Petitioner does not suggest that she repudiates her appearance in the Connecticut action, that the Connecticut decree is invalid in any way, or, in fact, that there is any colorable basis for challenging it. Nor does petitioner seek any ancillary relief in the instant divorce action that could not be obtained in an independent action in the Virgin Islands.

On the premises, this case appears to be moot. The judgment of the Court of Appeals is vacated and the cause is remanded to the District Court with directions to vacate its judgment and to dismiss the proceeding upon the ground that the cause is moot.

MR. JUSTICE BLACK dissents. He is of the opinion that petitioner is entitled to have her divorce case tried in the Virgin Islands since under the holding and opinion in *Williams* v. *North Carolina,* 325 U. S. 226, the Connecticut divorce decree does not necessarily protect petitioner from conviction for bigamy in the Virgin Islands or anywhere else.

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

# UNITED STATES *v.* HARRISS ET AL.

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

No. 32. Argued October 19, 1953.—Decided June 7, 1954.

1. As here construed, §§ 305, 307 and 308 of the Federal Regulation of Lobbying Act are not too vague and indefinite to meet the requirements of due process. Pp. 617–624.

(a) If the general class of offenses to which a statute is directed is plainly within its terms, the statute will not be struck down as vague, even though marginal cases could be put where doubts might arise. P. 618.

(b) If this general class of offenses can be made constitutionally definite by a reasonable construction of the statute, the Court is under a duty to give the statute that construction. P. 618.

(c) Section 307 limits the coverage of the Act to those "persons" (except specified political committees) who solicit, collect, or receive contributions of money or other thing of value, and then only if one of the main purposes of either the persons or the contributions is to aid in the accomplishment of the aims set forth in § 307 (a) and (b). Pp. 618–620, 621–623.

(d) The purposes set forth in § 307 (a) and (b) are here construed to refer only to "lobbying in its commonly accepted sense"—to direct communication with members of Congress on pending or proposed legislation. Pp. 620–621.

(e) The "principal purpose" requirement was adopted merely to exclude from the scope of § 307 those contributions and persons having only an "incidental" purpose of influencing legislation. It does not exclude a contribution which in substantial part is to be used to influence legislation through direct communication with Congress or a person whose activities in substantial part are directed to influencing legislation through direct communication with Congress. Pp. 621–623.

(f) There are three prerequisites to coverage under §§ 307, 305 and 308: (1) the "person" must have solicited, collected or received contributions; (2) one of the main purposes of such "person," or one of the main purposes of such contributions, must have been to influence the passage or defeat of legislation

by Congress; and (3) the intended method of accomplishing this purpose must have been through direct communication with members of Congress. P. 623.

2. As thus construed, §§ 305 and 308 do not violate the freedoms guaranteed by the First Amendment—freedom to speak, publish and petition the Government. Pp. 625–626.

3. In this case, it is unnecessary for the Court to pass on the contention that the penalty provision in § 310 (b) violates the First Amendment. Pp. 626–627.

(a) Section 310 (b) has not yet been applied to appellees, and it will never be so applied if appellees are found innocent of the charges against them. P. 627.

(b) The elimination of § 310 (b) would still leave a statute defining specific duties and providing a specific penalty for violation of any such duty, and the separability provision of the Act can be given effect if § 310 (b) should ultimately be found invalid. P. 627.

109 F. Supp. 641, reversed.

*Oscar H. Davis* argued the cause for the United States. With him on the brief were *Robert L. Stern,* then Acting Solicitor General, *Assistant Attorney General Olney, Beatrice Rosenberg* and *John R. Wilkins. Walter J. Cummings, Jr.,* then Solicitor General, filed the Statement as to Jurisdiction.

*Burton K. Wheeler* argued the cause for Harriss, appellee. With him on the brief was *Edward K. Wheeler.*

*Hugh Howell* argued the cause for Linder, Commissioner of Agriculture of Georgia, appellee. With him on the brief was *Victor Davidson.*

Ralph W. Moore, appellee, submitted on brief *pro se.*

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

The appellees were charged by information with violation of the Federal Regulation of Lobbying Act, 60 Stat. 812, 839, 2 U. S. C. §§ 261–270. Relying on its previous

decision in *National Association of Manufacturers* v. *McGrath,* 103 F. Supp. 510, vacated as moot, 344 U. S. 804, the District Court dismissed the information on the ground that the Act is unconstitutional. 109 F. Supp. 641. The case is here on direct appeal under the Criminal Appeals Act, 18 U. S. C. § 3731.

Seven counts of the information are laid under § 305, which requires designated reports to Congress from every person "receiving any contributions or expending any money" for the purpose of influencing the passage or defeat of any legislation by Congress.[1] One such count charges the National Farm Committee, a Texas corpora-

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[1] Section 305 provides:

"(a) Every person receiving any contributions or expending any money for the purposes designated in subparagraph (a) or (b) of section 307 shall file with the Clerk between the first and tenth day of each calendar quarter, a statement containing complete as of the day next preceding the date of filing—

"(1) the name and address of each person who has made a contribution of $500 or more not mentioned in the preceding report; except that the first report filed pursuant to this title shall contain the name and address of each person who has made any contribution of $500 or more to such person since the effective date of this title;

"(2) the total sum of the contributions made to or for such person during the calendar year and not stated under paragraph (1);

"(3) the total sum of all contributions made to or for such person during the calendar year;

"(4) the name and address of each person to whom an expenditure in one or more items of the aggregate amount or value, within the calendar year, of $10 or more has been made by or on behalf of such person, and the amount, date, and purpose of such expenditure;

"(5) the total sum of all expenditures made by or on behalf of such person during the calendar year and not stated under paragraph (4);

"(6) the total sum of expenditures made by or on behalf of such person during the calendar year.

"(b) The statements required to be filed by subsection (a) shall be cumulative during the calendar year to which they relate, but where

tion, with failure to report the solicitation and receipt of contributions to influence the passage of legislation which would cause a rise in the price of agricultural commodities and commodity futures and the defeat of legislation which would cause a decline in those prices. The remaining six counts under § 305 charge defendants Moore and Harriss with failure to report expenditures having the same single purpose. Some of the alleged expenditures consist of the payment of compensation to others to communicate face-to-face with members of Congress, at public functions and committee hearings, concerning legislation affecting agricultural prices; the other alleged expenditures relate largely to the costs of a campaign to induce various interested groups and individuals to communicate by letter with members of Congress on such legislation.

The other two counts in the information are laid under § 308, which requires any person "who shall engage himself for pay or for any consideration for the purpose of attempting to influence the passage or defeat of any legislation" to register with Congress and to make specified disclosures.[2] These two counts allege in considerable

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there has been no change in an item reported in a previous statement only the amount need be carried forward."

The following are "the purposes designated in subparagraph (a) or (b) of section 307":

"(a) The passage or defeat of any legislation by the Congress of the United States.

"(b) To influence, directly or indirectly, the passage or defeat of any legislation by the Congress of the United States."

[2] Section 308 provides:

"(a) Any person who shall engage himself for pay or for any consideration for the purpose of attempting to influence the passage or defeat of any legislation by the Congress of the United States shall, before doing anything in furtherance of such object, register with the Clerk of the House of Representatives and the Secretary of the Senate and shall give to those officers in writing and under

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detail that defendants Moore and Linder were hired to express certain views to Congress as to agricultural prices or to cause others to do so, for the purpose of attempting to influence the passage of legislation which would cause a rise in the price of agricultural commodities and commodity futures and a defeat of legislation which would cause a decline in such prices; and that pursuant to this undertaking, without having registered as required by

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oath, his name and business address, the name and address of the person by whom he is employed, and in whose interest he appears or works, the duration of such employment, how much he is paid and is to receive, by whom he is paid or is to be paid, how much he is to be paid for expenses, and what expenses are to be included. Each such person so registering shall, between the first and tenth day of each calendar quarter, so long as his activity continues, file with the Clerk and Secretary a detailed report under oath of all money received and expended by him during the preceding calendar quarter in carrying on his work; to whom paid; for what purposes; and the names of any papers, periodicals, magazines, or other publications in which he has caused to be published any articles or editorials; and the proposed legislation he is employed to support or oppose. The provisions of this section shall not apply to any person who merely appears before a committee of the Congress of the United States in support of or opposition to legislation; nor to any public official acting in his official capacity; nor in the case of any newspaper or other regularly published periodical (including any individual who owns, publishes, or is employed by any such newspaper or periodical) which in the ordinary course of business publishes news items, editorials, or other comments, or paid advertisements, which directly or indirectly urge the passage or defeat of legislation, if such newspaper, periodical, or individual, engages in no further or other activities in connection with the passage or defeat of such legislation, other than to appear before a committee of the Congress of the United States in support of or in opposition to such legislation.

"(b) All information required to be filed under the provisions of this section with the Clerk of the House of Representatives and the Secretary of the Senate shall be compiled by said Clerk and Secretary, acting jointly, as soon as practicable after the close of the calendar quarter with respect to which such information is filed and shall be printed in the Congressional Record."

§ 308, they arranged to have members of Congress contacted on behalf of these views, either directly by their own emissaries or through an artificially stimulated letter campaign.[3]

We are not concerned here with the sufficiency of the information as a criminal pleading. Our review under the Criminal Appeals Act is limited to a decision on the alleged "invalidity" of the statute on which the information is based.[4] In making this decision, we judge the statute on its face. See *United States* v. *Petrillo,* 332 U. S. 1, 6, 12. The "invalidity" of the Lobbying Act is asserted on three grounds: (1) that §§ 305, 307, and 308 are too vague and indefinite to meet the requirements of due process; (2) that §§ 305 and 308 violate the First Amendment guarantees of freedom of speech, freedom of the press, and the right to petition the Government; (3) that the penalty provision of § 310 (b) violates the right of the people under the First Amendment to petition the Government.

I.

The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.[5]

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[3] A third count under § 308 was abated on the death of the defendant against whom the charge was made.

[4] 18 U. S. C. § 3731. See *United States* v. *Petrillo,* 332 U. S. 1, 5. For "The Government's appeal does not open the whole case." *United States* v. *Borden Co.,* 308 U. S. 188, 193.

[5] See *Jordan* v. *De George,* 341 U. S. 223, 230–232; Quarles, Some Statutory Construction Problems and Approaches in Criminal Law, 3 Vand. L. Rev. 531, 539–543; Note, 62 Harv. L. Rev. 77.

On the other hand, if the general class of offenses to which the statute is directed is plainly within its terms, the statute will not be struck down as vague, even though marginal cases could be put where doubts might arise. *United States* v. *Petrillo,* 332 U. S. 1, 7. Cf. *Jordan* v. *De George,* 341 U. S. 223, 231. And if this general class of offenses can be made constitutionally definite by a reasonable construction of the statute, this Court is under a duty to give the statute that construction. This was the course adopted in *Screws* v. *United States,* 325 U. S. 91, upholding the definiteness of the Civil Rights Act.[6]

The same course is appropriate here. The key section of the Lobbying Act is § 307, entitled "Persons to Whom Applicable." Section 307 provides:

> "The provisions of this title shall apply to any person (except a political committee as defined in

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[6] Cf. *Fox* v. *Washington,* 236 U. S. 273; *Musser* v. *Utah,* 333 U. S. 95; *Winters* v. *New York,* 333 U. S. 507, 510.

This rule as to statutes charged with vagueness is but one aspect of the broader principle that this Court, if fairly possible, must construe congressional enactments so as to avoid a danger of unconstitutionality. *United States* v. *Delaware & Hudson Co.,* 213 U. S. 366, 407–408; *United States* v. *Congress of Industrial Organizations,* 335 U. S. 106, 120–121; *United States* v. *Rumely,* 345 U. S. 41, 47. Thus, in the *C. I. O.* case, *supra,* this Court held that expenditures by a labor organization for the publication of a weekly periodical urging support for a certain candidate in a forthcoming congressional election were not forbidden by the Federal Corrupt Practices Act, which makes it unlawful for ". . . any labor organization to make a contribution or expenditure in connection with any [congressional] election . . . ." Similarly, in the *Rumely* case, *supra,* this Court construed a House Resolution authorizing investigation of "all lobbying activities intended to influence, encourage, promote, or retard legislation" to cover only " 'lobbying in its commonly accepted sense,' that is, 'representations made directly to the Congress, its members, or its committees.' "

> the Federal Corrupt Practices Act, and duly organized State or local committees of a political party), who by himself, or through any agent or employee or other persons in any manner whatsoever, directly or indirectly, solicits, collects, or receives money or any other thing of value to be used principally to aid, or the principal purpose of which person is to aid, in the accomplishment of any of the following purposes:
>
> "(a) The passage or defeat of any legislation by the Congress of the United States.
>
> "(b) To influence, directly or indirectly, the passage or defeat of any legislation by the Congress of the United States."

This section modifies the substantive provisions of the Act, including § 305 and § 308. In other words, unless a "person" falls within the category established by § 307, the disclosure requirements of § 305 and § 308 are inapplicable.[7] Thus coverage under the Act is limited to those persons (except for the specified political committees) who solicit, collect, or receive contributions of money or other thing of value, and then only if "the principal purpose" of either the persons or the contributions is to aid in the accomplishment of the aims set forth in § 307 (a) and (b). In any event, the solicitation, collection, or receipt of money or other thing of value is a prerequisite to coverage under the Act.

The Government urges a much broader construction—namely, that under § 305 a person must report his expenditures to influence legislation even though he does not solicit, collect, or receive contributions as provided in

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[7] Section 302 (c) defines the term "person" as including "an individual, partnership, committee, association, corporation, and any other organization or group of persons."

§ 307.[8] Such a construction, we believe, would do violence to the title and language of § 307 as well as its legislative history.[9] If the construction urged by the Government is to become law, that is for Congress to accomplish by further legislation.

We now turn to the alleged vagueness of the purposes set forth in § 307 (a) and (b). As in *United States* v. *Rumely*, 345 U. S. 41, 47, which involved the interpretation of similar language, we believe this language should be construed to refer only to "lobbying in its commonly accepted sense"—to direct communication with members of Congress on pending or proposed federal legislation. The legislative history of the Act makes clear that, at the very least, Congress sought disclosure of such direct pressures, exerted by the lobbyists themselves or through their hirelings or through an artificially stimulated letter campaign.[10] It is likewise clear that Congress would have

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[8] The Government's view is based on a variance between the language of § 307 and the language of § 305. Section 307 refers to any person who "solicits, collects, or receives" contributions; § 305, however, refers not only to "receiving any contributions" but also to "expending any money." It is apparently the Government's contention that § 307—since it makes no reference to expenditures—is inapplicable to the expenditure provisions of § 305. Section 307, however, limits the application of § 305 as a whole, not merely a part of it.

[9] Both the Senate and House reports on the bill state that "This section [§ 307] defines the application of the title . . . ." S. Rep. No. 1400, 79th Cong., 2d Sess., p. 28; Committee Print, July 22, 1946, statement by Representative Monroney on Legislative Reorganization Act of 1946, 79th Cong., 2d Sess., p. 34. See also the remarks of Representative Dirksen in presenting the bill to the House: "The gist of the antilobbying provision is contained in section 307." 92 Cong. Rec. 10088.

[10] The Lobbying Act was enacted as Title III of the Legislative Reorganization Act of 1946, which was reported to Congress by the Joint Committee on the Organization of Congress. The Senate and House reports accompanying the bill were identical with respect to

intended the Act to operate on this narrower basis, even if a broader application to organizations seeking to propagandize the general public were not permissible.[11]

There remains for our consideration the meaning of "the principal purpose" and "to be used principally to

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Title III. Both declared that the Lobbying Act applies "chiefly to three distinct classes of so-called lobbyists:

"First. Those who do not visit the Capitol but initiate propaganda from all over the country in the form of letters and telegrams, many of which have been based entirely upon misinformation as to facts. This class of persons and organizations will be required under the title, not to cease or curtail their activities in any respect, but merely to disclose the sources of their collections and the methods in which they are disbursed.

"Second. The second class of lobbyists are those who are employed to come to the Capitol under the false impression that they exert some powerful influence over Members of Congress. These individuals spend their time in Washington presumably exerting some mysterious influence with respect to the legislation in which their employers are interested, but carefully conceal from Members of Congress whom they happen to contact the purpose of their presence. The title in no wise prohibits or curtails their activities. It merely requires that they shall register and disclose the sources and purposes of their employment and the amount of their compensation.

"Third. There is a third class of entirely honest and respectable representatives of business, professional, and philanthropic organizations who come to Washington openly and frankly to express their views for or against legislation, many of whom serve a useful and perfectly legitimate purpose in expressing the views and interpretations of their employers with respect to legislation which concerns them. They will likewise be required to register and state their compensation and the sources of their employment."

S. Rep. No. 1400, 79th Cong., 2d Sess., p. 27; Committee Print, July 22, 1946, statement by Representative Monroney on Legislative Reorganization Act of 1946, 79th Cong., 2d Sess., pp. 32–33. See also the statement in the Senate by Senator La Follette, who was Chairman of the Joint Committee, at 92 Cong. Rec. 6367–6368.

[11] See the Act's separability clause, note 18, *infra*, providing that the invalidity of any application of the Act should not affect the validity of its application "to other persons and circumstances."

aid." The legislative history of the Act indicates that the term "principal" was adopted merely to exclude from the scope of § 307 those contributions and persons having only an "incidental" purpose of influencing legislation.[12] Conversely, the "principal purpose" requirement does not exclude a contribution which in substantial part is to be used to influence legislation through direct communication with Congress or a person whose activities in substantial part are directed to influencing legislation through direct communication with Congress.[13] If it were otherwise—if an organization, for example, were exempted

[12] Both the Senate and House reports accompanying the bill state that the Act ". . . does not apply to organizations formed for other purposes whose efforts to influence legislation are merely incidental to the purposes for which formed." S. Rep. No. 1400, 79th Cong., 2d Sess., p. 27; Committee Print, July 22, 1946, statement by Representative Monroney on Legislative Reorganization Act of 1946, 79th Cong., 2d Sess., p. 32. In the Senate discussion preceding enactment, Senator Hawkes asked Senator La Follette, Chairman of the Joint Committee in charge of the bill, for an explanation of the "principal purpose" requirement. In particular, Senator Hawkes sought assurance that multi-purposed organizations like the United States Chamber of Commerce would not be subject to the Act. Senator La Follette refused to give such assurance, stating: "So far as any organizations or individuals are concerned, I will say to the Senator from New Jersey, it will depend on the type and character of activity which they undertake. . . . I cannot tell the Senator whether they will come under the act. It will depend on the type of activity in which they engage, so far as legislation is concerned. . . . *It* [the Act] *affects all individuals and organizations alike if they engage in a covered activity.*" (Italics added.) 92 Cong. Rec. 10151–10152. See also Representative Dirksen's remarks in the House, 92 Cong. Rec. 10088.

[13] Such a criterion is not novel in federal law. See Int. Rev. Code, § 23 (o) (2) (income tax), § 812 (d) (estate tax), and § 1004 (a) (2) (B) (gift tax), providing tax exemption for contributions to charitable and educational organizations "no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation." For illustrative cases applying this criterion, see

because lobbying was only one of its main activities—the Act would in large measure be reduced to a mere exhortation against abuse of the legislative process. In construing the Act narrowly to avoid constitutional doubts, we must also avoid a construction that would seriously impair the effectiveness of the Act in coping with the problem it was designed to alleviate.

To summarize, therefore, there are three prerequisites to coverage under § 307: (1) the "person" must have solicited, collected, or received contributions; (2) one of the main purposes of such "person," or one of the main purposes of such contributions, must have been to influence the passage or defeat of legislation by Congress; (3) the intended method of accomplishing this purpose must have been through direct communication with members of Congress. And since § 307 modifies the substantive provisions of the Act, our construction of § 307 will of necessity also narrow the scope of § 305 and § 308, the substantive provisions underlying the information in this case. Thus § 305 is limited to those persons who are covered by § 307; and when so covered, they must report all contributions and expenditures having the purpose of attempting to influence legislation through direct communication with Congress. Similarly, § 308 is limited to those persons (with the stated exceptions [14]) who are covered by § 307 and who, in addition, engage themselves

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*Sharpe's Estate* v. *Commissioner*, 148 F. 2d 179 (C. A. 3d Cir.); *Marshall* v. *Commissioner*, 147 F. 2d 75 (C. A. 2d Cir.); *Faulkner* v. *Commissioner*, 112 F. 2d 987 (C. A. 1st Cir.); *Huntington National Bank* v. *Commissioner*, 13 T. C. 760, 769. Cf. *Girard Trust Co.* v. *Commissioner*, 122 F. 2d 108 (C. A. 3d Cir.); *Leubuscher* v. *Commissioner*, 54 F. 2d 998 (C. A. 2d Cir.); *Weyl* v. *Commissioner*, 48 F. 2d 811 (C. A. 2d Cir.); *Slee* v. *Commissioner*, 42 F. 2d 184 (C. A. 2d Cir.). See also Annotation, 138 A. L. R. 456.

[14] For the three exceptions, see note 2, *supra*.

for pay or for any other valuable consideration for the purpose of attempting to influence legislation through direct communication with Congress. Construed in this way, the Lobbying Act meets the constitutional requirement of definiteness.[15]

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[15] Under this construction, the Act is at least as definite as many other criminal statutes which this Court has upheld against a charge of vagueness. *E. g., Boyce Motor Lines* v. *United States,* 342 U. S. 337 (regulation providing that drivers of motor vehicles carrying explosives "shall avoid, so far as practicable, and, where feasible, by prearrangement of routes, driving into or through congested thoroughfares, places where crowds are assembled, street car tracks, tunnels, viaducts, and dangerous crossings"); *Dennis* v. *United States,* 341 U. S. 494 (Smith Act making it unlawful for any person to conspire "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 . . . ."); *United States* v. *Petrillo,* 332 U. S. 1 (statute forbidding coercion of radio stations to employ persons "in excess of the number of employees needed . . . to perform actual services"); *Screws* v. *United States,* 325 U. S. 91, and *Williams* v. *United States,* 341 U. S. 97 (statute forbidding acts which would deprive a person of "any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States"); *United States* v. *Wurzbach,* 280 U. S. 396 (statute forbidding any candidate for Congress or any officer or employee of the United States to solicit or receive a "contribution for any political purpose whatever" from any other such officer or employee); *Omaechevarria* v. *Idaho,* 246 U. S. 343 (statute forbidding pasturing of sheep "on any cattle range previously occupied by cattle, or upon any range usually occupied by any cattle grower"); *Fox* v. *Washington,* 236 U. S. 273 (state statute imposing criminal sanctions on "Every person who shall wilfully print, publish, edit, issue, or knowingly circulate, sell, distribute or display any book, paper, document, or written or printed matter, in any form, advocating, encouraging or inciting, or having a tendency to encourage or incite the commission of any crime, breach of the peace or act of violence, or which shall tend to encourage or advocate disrespect for law or for any court or courts of justice . . . ."); *Nash* v. *United States,* 229 U. S. 373 (Sherman Act forbidding "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint

II.

Thus construed, §§ 305 and 308 also do not violate the freedoms guaranteed by the First Amendment—freedom to speak, publish, and petition the Government.

Present-day legislative complexities are such that individual members of Congress cannot be expected to explore the myriad pressures to which they are regularly subjected. Yet full realization of the American ideal of government by elected representatives depends to no small extent on their ability to properly evaluate such pressures. Otherwise the voice of the people may all too easily be drowned out by the voice of special interest groups seeking favored treatment while masquerading as proponents of the public weal. This is the evil which the Lobbying Act was designed to help prevent.[16]

Toward that end, Congress has not sought to prohibit these pressures. It has merely provided for a modicum of information from those who for hire attempt to influence legislation or who collect or spend funds for that purpose. It wants only to know who is being hired, who is putting up the money, and how much. It acted in the same spirit and for a similar purpose in passing the Federal Corrupt Practices Act—to maintain the integrity of a basic governmental process. See *Burroughs and Cannon* v. *United States,* 290 U. S. 534, 545.

Under these circumstances, we believe that Congress, at least within the bounds of the Act as we have construed it, is not constitutionally forbidden to require the disclosure of lobbying activities. To do so would be to deny Congress in large measure the power of self-protec-

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of trade or commerce among the several States, or with foreign nations"). Cf. *Jordan* v. *De George,* 341 U. S. 223 (statute providing for deportation of persons who have committed crimes involving "moral turpitude").

[16] Similar legislation has been enacted in over twenty states. See Notes, 56 Yale L. J. 304, 313–316, and 47 Col. L. Rev. 98, 99–103.

tion. And here Congress has used that power in a manner restricted to its appropriate end. We conclude that §§ 305 and 308, as applied to persons defined in § 307, do not offend the First Amendment.

It is suggested, however, that the Lobbying Act, with respect to persons other than those defined in § 307, may as a practical matter act as a deterrent to their exercise of First Amendment rights. Hypothetical borderline situations are conjured up in which such persons choose to remain silent because of fear of possible prosecution for failure to comply with the Act. Our narrow construction of the Act, precluding as it does reasonable fears, is calculated to avoid such restraint. But, even assuming some such deterrent effect, the restraint is at most an indirect one resulting from self-censorship, comparable in many ways to the restraint resulting from criminal libel laws.[17] The hazard of such restraint is too remote to require striking down a statute which on its face is otherwise plainly within the area of congressional power and is designed to safeguard a vital national interest.

## III.

The appellees further attack the statute on the ground that the penalty provided in § 310 (b) is unconstitutional. That section provides:

> "(b) In addition to the penalties provided for in subsection (a), any person convicted of the misdemeanor specified therein is prohibited, for a period of three years from the date of such conviction, from attempting to influence, directly or indirectly, the passage or defeat of any proposed legislation or from

[17] Similarly, the Hatch Act probably deters some federal employees from political activity permitted by that statute, but yet was sustained because of the national interest in a nonpolitical civil service. *United Public Workers* v. *Mitchell*, 330 U. S. 75.

> appearing before a committee of the Congress in support of or opposition to proposed legislation; and any person who violates any provision of this subsection shall, upon conviction thereof, be guilty of a felony, and shall be punished by a fine of not more than $10,000, or imprisonment for not more than five years, or by both such fine and imprisonment."

This section, the appellees argue, is a patent violation of the First Amendment guarantees of freedom of speech and the right to petition the Government.

We find it unnecessary to pass on this contention. Unlike §§ 305, 307, and 308 which we have judged on their face, § 310 (b) has not yet been applied to the appellees, and it will never be so applied if the appellees are found innocent of the charges against them. See *United States* v. *Wurzbach,* 280 U. S. 396, 399; *United States* v. *Petrillo,* 332 U. S. 1, 9–12.

Moreover, the Act provides for the separability of any provision found invalid.[18] If § 310 (b) should ultimately be declared unconstitutional, its elimination would still leave a statute defining specific duties and providing a specific penalty for violation of any such duty. The prohibition of § 310 (b) is expressly stated to be "In addition to the penalties provided for in subsection (a) . . ."; subsection (a) makes a violation of § 305 or § 308 a misdemeanor, punishable by fine or imprisonment or both. Consequently, there would seem to be no obstacle to giving effect to the separability clause as to § 310 (b), if this should ever prove necessary. Compare *Electric Bond & Share Co.* v. *Securities & Exchange Commission,* 303 U. S. 419, 433–437.

[18] 60 Stat. 812, 814:

"If any provision of this Act or the application thereof to any person or circumstances is held invalid, the validity of the remainder of the Act and of the application of such provision to other persons and circumstances shall not be affected thereby."

The judgment below is reversed and the cause is remanded to the District Court for further proceedings not inconsistent with this opinion.

*Reversed.*

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

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

I am in sympathy with the effort of the Court to save this statute from the charge that it is so vague and indefinite as to be unconstitutional. My inclinations were that way at the end of the oral argument. But further study changed my mind. I am now convinced that the formula adopted to save this Act is too dangerous for use. It can easily ensnare people who have done no more than exercise their constitutional rights of speech, assembly, and press.

We deal here with the validity of a criminal statute. To use the test of *Connally* v. *General Construction Co.*, 269 U. S. 385, 391, the question is whether this statute "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." If it is so vague, as I think this one is, then it fails to meet the standards required by due process of law. See *United States* v. *Petrillo*, 332 U. S. 1. In determining that question we consider the statute on its face. As stated in *Lanzetta* v. *New Jersey*, 306 U. S. 451, 453:

> "If on its face the challenged provision is repugnant to the due process clause, specification of details of the offense intended to be charged would not serve to validate it. . . . It is the statute, not the accusa-

> tion under it, that prescribes the rule to govern conduct and warns against transgression. . . . No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids."

And see *Winters* v. *New York,* 333 U. S. 507, 515.

The question therefore is not what the information charges nor what the proof might be. It is whether the statute itself is sufficiently narrow and precise as to give fair warning.

It is contended that the Act plainly applies

—to persons who pay others to present views to Congress either in committee hearings or by letters or other communications to Congress or Congressmen and

—to persons who spend money to induce others to communicate with Congress.

The Court adopts that view, with one minor limitation which the Court places on the Act—that only persons who solicit, collect, or receive money are included.

The difficulty is that the Act has to be rewritten and words actually added and subtracted to produce that result.

Section 307 makes the Act applicable to anyone who "directly or indirectly" solicits, collects, or receives contributions "to be used principally to aid, or the principal purpose of which person is to aid" in either

—the "passage or defeat of any legislation" by Congress, or

—"To influence, directly or indirectly, the passage or defeat of any legislation" by Congress.

We start with an all-inclusive definition of "legislation" contained in § 302 (e). It means "bills, resolutions, amendments, nominations, and other matters

pending or proposed in either House of Congress, and includes any other matter which may be the subject of action by either House." What is the scope of "any other matter which may be the subject of action" by Congress? It would seem to include not only pending or proposed legislation but any matter within the legitimate domain of Congress.

What contributions might be used "principally to aid" in influencing "directly or indirectly, the passage or defeat" of any such measure by Congress? When is one retained for the purpose of influencing the "passage or defeat of any legislation"?

(1) One who addresses a trade union for repeal of a labor law certainly hopes to influence legislation.

(2) So does a manufacturers' association which runs ads in newspapers for a sales tax.

(3) So does a farm group which undertakes to raise money for an educational program to be conducted in newspapers, magazines, and on radio and television, showing the need for revision of our attitude on world trade.

(4) So does a group of oil companies which puts agents in the Nation's capital to sound the alarm at hostile legislation, to exert influence on Congressmen to defeat it, to work on the Hill for the passage of laws favorable to the oil interests.

(5) So does a business, labor, farm, religious, social, racial, or other group which raises money to contact people with the request that they write their Congressman to get a law repealed or modified, to get a proposed law passed, or themselves to propose a law.

Are all of these activities covered by the Act? If one is included why are not the others? The Court apparently excludes the kind of activities listed in categories (1), (2), and (3) and includes part of the activities in (4) and (5)—those which entail contacts with the Congress.

There is, however, difficulty in that course, a difficulty which seems to me to be insuperable. I find no warrant in the Act for drawing the line, as the Court does, between "direct communication with Congress" and other pressures on Congress. The Act is as much concerned with one as with the other.

The words "direct communication with Congress" are not in the Act. Congress was concerned with the raising of money to aid in the passage or defeat of legislation, whatever tactics were used. But the Court not only strikes out one whole group of activities—to influence "indirectly"—but substitutes a new concept for the remaining group—to influence "directly." To influence "directly" the passage or defeat of legislation includes any number of methods—for example, nationwide radio, television or advertising programs promoting a particular measure, as well as the "buttonholing" of Congressmen. To include the latter while excluding the former is to rewrite the Act.

This is not a case where one or more distinct types of "lobbying" are specifically proscribed and another and different group defined in such loose, broad terms as to make its definition vague and uncertain. Here if we give the words of the Act their ordinary meaning, we do not know what the terminal points are. Judging from the words Congress used, one type of activity which I have enumerated is as much proscribed as another.

The importance of the problem is emphasized by reason of the fact that this legislation is in the domain of the First Amendment. That Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people . . . to petition the Government for a redress of grievances."

Can Congress require one to register before he writes an article, makes a speech, files an advertisement, appears

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on radio or television, or writes a letter seeking to influence existing, pending, or proposed legislation? That would pose a considerable question under the First Amendment, as *Thomas* v. *Collins,* 323 U. S. 516, indicates. I do not mean to intimate that Congress is without power to require disclosure of the real principals behind those who come to Congress (or get others to do so) and speak as though they represent the public interest, when in fact they are undisclosed agents of special groups. I mention the First Amendment to emphasize why statutes touching this field should be "narrowly drawn to prevent the supposed evil" (see *Cantwell* v. *Connecticut,* 310 U. S. 296, 307) and not be cast in such vague and indefinite terms as to cast a cloud on the exercise of constitutional rights. Cf. *Stromberg* v. *California,* 283 U. S. 359, 369; *Thornhill* v. *Alabama,* 310 U. S. 88, 97–98; *Winters* v. *New York,* 333 U. S. 507, 509; *Joseph Burstyn, Inc.* v. *Wilson,* 343 U. S. 495, 504–505.

If that rule were relaxed, if Congress could impose registration requirements on the exercise of First Amendment rights, saving to the courts the salvage of the good from the bad, and meanwhile causing all who might possibly be covered to act at their peril, the law would in practical effect be a deterrent to the exercise of First Amendment rights. The Court seeks to avoid that consequence by construing the law narrowly as applying only to those who are paid to "buttonhole" Congressmen or who collect and expend moneys to get others to do so. It may be appropriate in some cases to read a statute with the gloss a court has placed on it in order to save it from the charge of vagueness. See *Fox* v. *Washington,* 236 U. S. 273, 277. But I do not think that course is appropriate here.

The language of the Act is so broad that one who writes a letter or makes a speech or publishes an article

or distributes literature or does many of the other things with which appellees are charged has no fair notice when he is close to the prohibited line. No construction we give it today will make clear retroactively the vague standards that confronted appellees when they did the acts now charged against them as criminal. Cf. *Pierce* v. *United States,* 314 U. S. 306, 311. Since the Act touches on the exercise of First Amendment rights, and is not narrowly drawn to meet precise evils, its vagueness has some of the evils of a continuous and effective restraint.

MR. JUSTICE JACKSON, dissenting.

Several reasons lead me to withhold my assent from this decision.

The clearest feature of this case is that it begins with an Act so mischievously vague that the Government charged with its enforcement does not understand it, for some of its important assumptions are rejected by the Court's interpretation. The clearest feature of the Court's decision is that it leaves the country under an Act which is not much like any Act passed by Congress. Of course, when such a question is before us, it is easy to differ as to whether it is more appropriate to strike out or to strike down. But I recall few cases in which the Court has gone so far in rewriting an Act.

The Act passed by Congress would appear to apply to all persons who (1) solicit or receive funds for the purpose of lobbying, (2) receive and expend funds for the purpose of lobbying, or (3) merely expend funds for the purpose of lobbying. The Court at least eliminates this last category from coverage of the Act, though I should suppose that more serious evils affecting the public interest are to be found in the way lobbyists spend their money than in the ways they obtain it. In the present indictments, six counts relate exclusively to failures to

report expenditures while only one appears to rest exclusively on failure to report receipts.

Also, Congress enacted a statute to reach the raising and spending of funds for the purpose of influencing congressional action *directly or indirectly*. The Court entirely deletes "indirectly" and narrows "directly" to mean "direct communication with members of Congress." These two constructions leave the Act touching only a part of the practices Congress deemed sinister.

Finally, as if to compensate for its deletions from the Act, the Court expands the phrase "the principal purpose" so that it now refers to any contribution which "in substantial part" is used to influence legislation.

I agree, of course, that we should make liberal interpretations to save legislative Acts, including penal statutes which punish conduct traditionally recognized as morally "wrong." Whoever kidnaps, steals, kills, or commits similar acts of violence upon another is bound to know that he is inviting retribution by society, and many of the statutes which define these long-established crimes are traditionally and perhaps necessarily vague. But we are dealing with a novel offense that has no established bounds and no such moral basis. The criminality of the conduct dealt with here depends entirely upon a purpose to influence legislation. Though there may be many abuses in pursuit of this purpose, this Act does not deal with corruption. These defendants, for example, are indicted for failing to report their activities in raising and spending money to influence legislation in support of farm prices, with no charge of corruption, bribery, deception, or other improper action. This may be a selfish business and against the best interests of the nation as a whole, but it is in an area where legal penalties should be applied only by formulae as precise and clear as our language will permit.

The First Amendment forbids Congress to abridge the right of the people "to petition the Government for a redress of grievances." If this right is to have an interpretation consistent with that given to other First Amendment rights, it confers a large immunity upon activities of persons, organizations, groups and classes to obtain what they think is due them from government. Of course, their conflicting claims and propaganda are confusing, annoying and at times, no doubt, deceiving and corrupting. But we may not forget that our constitutional system is to allow the greatest freedom of access to Congress, so that the people may press for their selfish interests, with Congress acting as arbiter of their demands and conflicts.

In matters of this nature, it does not seem wise to leave the scope of a criminal Act, close to impinging on the right of petition, dependent upon judicial construction for its limitations. Judicial construction, constitutional or statutory, always is subject to hazards of judicial reconstruction. One may rely on today's narrow interpretation only at his peril, for some later Court may expand the Act to include, in accordance with its terms, what today the Court excludes. This recently happened with the antitrust laws, which the Court cites as being similarly vague. This Court, in a criminal case, sustained an indictment by admittedly changing repeated and long-established constitutional and statutory interpretations. *United States* v. *South-Eastern Underwriters Assn.*, 322 U. S. 533. The *ex post facto* provision of our Constitution has not been held to protect the citizen against a retroactive change in decisional law, but it does against such a prejudicial change in legislation. As long as this statute stands on the books, its vagueness will be a contingent threat to activities which the Court today rules out, the contingency being a change of views by the Court as hereafter constituted.

The Court's opinion presupposes, and I do not disagree, that Congress has power to regulate lobbying for hire as a business or profession and to require such agents to disclose their principals, their activities, and their receipts. However, to reach the real evils of lobbying without cutting into the constitutional right of petition is a difficult and delicate task for which the Court's action today gives little guidance. I am in doubt whether the Act as construed does not permit applications which would abridge the right of petition, for which clear, safe and workable channels must be maintained. I think we should point out the defects and limitations which condemn this Act so clearly that the Court cannot sustain it as written, and leave its rewriting to Congress. After all, it is Congress that should know from experience both the good in the right of petition and the evils of professional lobbying.

# BARBER, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE, *v.* GONZALES.

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

No. 431. Argued March 10, 1954.—Decided June 7, 1954.

Respondent was born a national of the United States in the Philippine Islands, came to the continental United States from the Philippine Islands as a national prior to the Philippine Independence Act of 1934, has remained within this country ever since his arrival, and was sentenced to imprisonment in 1941 and 1950 for terms of one year or more for crimes involving moral turpitude. *Held:* He may not now be deported under § 19 (a) of the Immigration Act of 1917 as an alien who had been so sentenced "after entry." Pp. 638–643.

(a) Respondent is not deportable under § 19 (a) of the Immigration Act of 1917 unless he made an "entry" within the meaning of that provision, notwithstanding § 8 (a) (1) of the Philippine Independence Act which provides that citizens of the Philippine Islands who are not citizens of the United States shall be considered aliens for immigration purposes. Pp. 639–640.

(b) When respondent came to the United States from the Philippine Islands as a national prior to enactment of the Philippine Independence Act of 1934, he did not make an "entry" into the United States within the meaning of § 19 (a) of the Immigration Act of 1917, since he did not come from some "foreign port or place." Pp. 640–643.

207 F. 2d 398, affirmed.

*Robert W. Ginnane* argued the cause for petitioner. With him on the brief were *Robert L. Stern,* then Acting Solicitor General, *Assistant Attorney General Olney* and *Beatrice Rosenberg.*

*Blanch Freedman* argued the cause for respondent. With her on the brief was *Lloyd E. McMurray.*

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

Respondent was born in the Philippine Islands in 1913 and came therefrom to the continental United States in 1930. He has lived here ever since. In 1941, he was convicted in the State of California of assault with a deadly weapon and was sentenced to imprisonment for one year in the Alameda County jail. In 1950, he was convicted in the State of Washington of second degree burglary and was sentenced under the indeterminate sentence law of that State to a minimum term of two years in the state penitentiary. In 1951, after an administrative hearing, he was ordered deported to the Philippine Islands under § 19 (a) of the Immigration Act of 1917 as an alien who "after entry" had been sentenced more than once to imprisonment for terms of one year or more for crimes involving moral turpitude. 39 Stat. 889, as amended, formerly 8 U. S. C. § 155 (a).

After respondent was taken into custody, he filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of California. The petition attacked the validity of the deportation order on the ground, among others, that he was not subject to deportation under § 19 (a) since he had not made an "entry" within the meaning of that section. The District Court dismissed the petition. On appeal, the Court of Appeals for the Ninth Circuit, with one judge dissenting, reversed the District Court's judgment and remanded the case with directions to order respondent's release from custody. 207 F. 2d 398. We granted certiorari. 346 U. S. 914.

The sole question presented is whether respondent—who was born a national of the United States in the Philippine Islands, who came to the continental United States as a national prior to the Philippine Independence Act of 1934, and who was sentenced to imprisonment in 1941

and 1950 for crimes involving moral turpitude—may now be deported under § 19 (a) of the Immigration Act of 1917.

It is conceded that respondent was born a national of the United States; that as such he owed permanent allegiance to the United States, including the obligation of military service; that he retained this status when he came to the continental United States in 1930 and hence was not then subject to the Immigration Act of 1917 or any other federal statute relating to the exclusion or deportation of aliens.[1] The Government, however, contends that respondent's status as a national was changed by the Philippine Independence Act of 1934, 48 Stat. 456, which provided for the eventual independence of the Philippines, subsequently achieved in 1946, 60 Stat. 1352. Section 8 (a)(1) of the 1934 Act provides:

> "For the purposes of the Immigration Act of 1917, . . . this section, and all other laws of the United States relating to the immigration, exclusion, or expulsion of aliens, citizens of the Philippine Islands who are not citizens of the United States shall be considered as if they were aliens. For such purposes the Philippine Islands shall be considered as a separate country and shall have for each fiscal year a quota of fifty."

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[1] From the Spanish cession in 1898 until final independence in 1946, the Philippine Islands were American territory subject to the jurisdiction of the United States. See *Hooven & Allison Co.* v. *Evatt*, 324 U. S. 652, 674–676. Persons born in the Philippines during this period were American nationals entitled to the protection of the United States and conversely owing permanent allegiance to the United States. They could not be excluded from this country under a general statute relating to the exclusion of "aliens." See *Gonzales* v. *Williams*, 192 U. S. 1, 12–13; *Toyota* v. *United States*, 268 U. S. 402, 411. But, until 1946, neither could they become United States citizens. See *Toyota* v. *United States, supra;* 60 Stat. 416.

The Government urges that the reference in § 8 (a)(1) to "citizens of the Philippine Islands" includes Filipinos then residing in the United States; that by virtue of this provision the respondent was assimilated to the status of an alien for purposes of "immigration, exclusion, or expulsion"; and that, having been twice convicted thereafter of crimes involving moral turpitude, he is deportable under § 19 (a) of the Immigration Act of 1917.

The Government's argument is premised on the assumption that respondent made an "entry" within the meaning of § 19 (a). If he did not make such an "entry," then he is not deportable under that section, even assuming that the Government is correct in its broad construction of the 1934 Philippine Independence Act. Section 19 (a) provides:

> ". . . except as hereinafter provided, any alien who is hereafter sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, committed within five years after the entry of the alien to the United States, or who is hereafter sentenced more than once to such a term of imprisonment 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. . . ." (Italics added.)

The Court of Appeals sustained respondent's contention that he had never made the requisite "entry." With this conclusion, we agree.

The Government would have us interpret "entry" in § 19 (a) in its "ordinary, everyday sense" of a "coming into the United States." Under this view, respondent's "coming into the United States" from the Philippine

Islands in 1930 would satisfy the "entry" requirement. While it is true that statutory language should be interpreted whenever possible according to common usage, some terms acquire a special technical meaning by a process of judicial construction. So it is with the word "entry" in § 19 (a). *E. g., Delgadillo* v. *Carmichael,* 332 U. S. 388; *United States ex rel. Claussen* v. *Day,* 279 U. S. 398; *Di Pasquale* v. *Karnuth,* 158 F. 2d 878; *Del Guercio* v. *Gabot,* 161 F. 2d 559. Cf. *United States ex rel. Volpe* v. *Smith,* 289 U. S. 422, 425.[2] In *United States ex rel. Claussen* v. *Day, supra,* at 401, this Court stated the applicable rule:

> "The word 'entry' [in § 19 (a)] by its own force implies a coming from outside. The context shows that in order that there be an entry within the meaning of the Act *there must be an arrival from some foreign port or place.* There is no such entry where one goes to sea on board an American vessel from a

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[2] In the *Volpe* case, the Court stated:

"We accept the view that *the word 'entry'* . . . [in § 19 (a)] . . . *includes any coming of an alien from a foreign country into the United States* whether such coming be the first or any subsequent one. And this requires affirmance of the challenged judgment. . . . That the second *coming of an alien from a foreign country into the United States* is an entry within the usual acceptation of that word is clear enough from *Lewis* v. *Frick,* 233 U. S. 291; *Claussen* v. *Day,* 279 U. S. 398. An examination of the Immigration Act of 1917, we think, reveals nothing sufficient to indicate that Congress did not intend the word 'entry' in § 19 should have its ordinary meaning." (Italics added.)

The context of the latter sentence makes it clear that the Court regarded the word's "ordinary meaning" as being "any coming of an alien from a foreign country." In the *Delgadillo* case, *supra,* the Court narrowed this definition even further by holding that a resident alien does not make an "entry" from a foreign country if his arrival in the foreign country was unintentional.

> port of the United States and returns to the same or another port of this country without having been in any foreign port or place." (Italics added.)

See also *United States ex rel. Stapf* v. *Corsi,* 287 U. S. 129, 132; *Carmichael* v. *Delaney,* 170 F. 2d 239, 242–243. This concept of "entry" was codified by Congress in the Immigration and Nationality Act of 1952.[3]

At the time respondent came to the continental United States, he was not arriving "from some foreign port or place." On the contrary, he was a United States national moving from one of our insular possessions to the mainland. It was not until the 1934 Philippine Independence Act that the Philippines could be regarded as "foreign" for immigration purposes. Having made no "entry," respondent is not deportable under § 19 (a) as an alien who "after entry" committed crimes involving moral turpitude. The Government warns that this conclusion is inconsistent with a broad congressional purpose to terminate the United States residence of alien criminals. But we believe a different conclusion would not be permissible in view of the well-settled meaning of "entry" in § 19 (a). Although not penal in character, deportation statutes as a practical matter may inflict "the equivalent of banishment or exile," *Fong Haw Tan* v. *Phelan,* 333 U. S. 6, 10,

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[3] Section 101 (a)(13) of the 1952 Act, 66 Stat. 167, 8 U. S. C. § 1101 (a)(13), provides in pertinent part:

"The term 'entry' means any coming of an alien into the United States, from a foreign port or place or from an outlying possession . . . ."

Section 101 (a)(29), 66 Stat. 170, 8 U. S. C. § 1101 (a)(29), defines "outlying possessions" as American Samoa and Swains Island. By a special provision in the 1952 Act, the exclusion process is made applicable to any alien coming to the continental United States from Hawaii, Alaska, Guam, Puerto Rico, or the Virgin Islands. 66 Stat. 188, 8 U. S. C. § 1182 (d)(7).

and should be strictly construed. See *Delgadillo* v. *Carmichael,* 332 U. S. 388, 391. In the absence of explicit language showing a contrary congressional intent, we must give technical words in deportation statutes their usual technical meaning.[4]

The judgment of the Court of Appeals is

*Affirmed.*

MR. JUSTICE MINTON, with whom MR. JUSTICE REED and MR. JUSTICE BURTON join, dissenting.

But for this Court's holding that § 19 (a) of the Immigration Act of 1917 must be construed strictly and the word "entry" given a special meaning, I would be content with the excellent dissent of Judge Bone in the court below. 207 F. 2d 398, 402.

The effect of the Court's opinion is to construe the Act strictly in favor of the convicted criminal sought to be deported for his criminal acts, rather than in favor of the United States in protection of its citizens. I know of no good reason why we should by strained construction of an Act compel the United States to cling onto alien criminals. It is not the public policy of this country to construe its statutes strictly in favor of alien criminals whose convictions have already been established of record. Why should we give a strained construction to the word "entry" in the instant case? The least we should do is to give the word "entry" its ordinary meaning.

[4] The respondent also attacks the validity of the deportation order on the grounds: (1) that he made no "entry" because he was not an alien when he came to this country; (2) that § 8 (a) (1) of the 1934 Philippine Independence Act did not apply to Filipinos already residing here and that hence he was not an alien in 1941 when he was sentenced for one of the two crimes involved in this proceeding; (3) that he is not an alien today because Congress lacked the power to deprive him of his status as a national. Our disposition of the case makes it unnecessary to consider these contentions.

In construing this very statute, this Court said in *United States ex rel. Volpe* v. *Smith,* 289 U. S. 422, 425:

> "An examination of the Immigration Act of 1917, we think, reveals nothing sufficient to indicate that Congress did not intend the word 'entry' in § 19 should have its ordinary meaning."

Cf. *Eichenlaub* v. *Shaughnessy,* 338 U. S. 521.

The case of *Delgadillo* v. *Carmichael,* 332 U. S. 388, lends no authority to this case. In that case, the alien had never voluntarily left the United States for foreign land. His ship was torpedoed. He was blown into the sea. He was rescued and taken to Cuba, from whence he came back to the United States by way of Miami, Florida. This Court said:

> "In this case petitioner, of course, chose to return to this country, knowing he was in a foreign place. But the exigencies of war, not his voluntary act, put him on foreign soil. It would indeed be harsh to read the statute so as to add the peril of deportation to such perils of the sea. We might as well hold that if he had been kidnapped and taken to Cuba, he made a statutory 'entry' on his voluntary return. Respect for law does not thrive on captious interpretations." P. 391.

There is nothing captious or fortuitous about this petitioner's "entry" into the United States. He came to this country from outside, as all aliens do. No case by this Court supports the special construction given by the Court to the word "entry."

Because of the Court's strict construction of this statute, which has the effect of putting a liberal construction on the statute in favor of the alien criminal, which I believe to be contrary to the public policy of this country, I dissent.

# SECRETARY OF AGRICULTURE *v.* UNITED STATES ET AL.

NO. 480. APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA.*

Argued April 27–28, 1954.—Decided June 7, 1954.

The Interstate Commerce Commission approved special charges, in addition to the existing line-haul rates, for unloading services performed by railroads transporting fruits and vegetables into New York and Philadelphia. Normally unloading is done by the consignees, but at these points, due to special conditions, the unloading is performed by the carriers at considerable expense. The produce is not accessible to the consignees until after it has been unloaded. Various protestants contended that since circumstances here make the unloading a part of the transportation service, the Commission could not allow these special charges without first examining the sufficiency of the line-haul rates to cover these unloading costs. On appeal from a judgment of the District Court upholding the order of the Commission, *held:* The judgment is vacated and the cases are remanded to the Commission because of the inadequacy of its findings to explain the legal basis of its decision. Pp. 646–655.

(a) In dealing with technical and complex matters, the Commission must necessarily have wide discretion in formulating appropriate solutions. But here the Commission has not adequately explained its departure from prior norms. A court must know clearly what a Commission decision, when challenged, means before it can say whether that decision can be sustained. Pp. 650–654.

(b) In respect of appellants' contention that to permit separate charges to be imposed for the unloading of fruits and vegetables, while not imposing similar charges on other commodities unloaded at these points, violates §§ 2 and 3 of the Interstate Commerce Act, the Commission on remand should also make more explicit findings as to the differences and similarities in the treatment accorded other commodities unloaded at these same points. Pp. 654–655.

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*Together with No. 481, *Florida Citrus Commission et al.* v. *United States et al.*, also on appeal from the same court.

(c) The Commission should also be more explicit in stating the reasons that led it to assimilate, so far as these unloading charges are concerned, the situation at Philadelphia to that at New York. P. 655.

114 F. Supp. 420, judgment vacated and cases remanded.

*Neil Brooks* argued the cause and filed a brief for appellant in No. 480.

*Maxwell W. Wells* argued the cause for appellants in No. 481. On the brief were *Mr. Wells* for the Florida Citrus Commission et al., *John F. Donelan* and *Preston B. Kavanagh* for the California Citrus League et al., *Sidney Goldstein, Francis A. Mulhern, Wilbur LaRoe, Jr., Arthur L. Winn, Jr.* and *Samuel H. Moerman* for the Port of New York Authority, *James J. Thornton* and *G. Gary Sousa* for the City of New York, *Earl J. Gratz* and *David B. Fitzgerald* for the Philadelphia Terminals Marketing Association et al., and *Wilmer A. Hill* for the United Fresh Fruit & Vegetable Association et al., appellants in No. 481.

*Edward M. Reidy* argued the cause for the Interstate Commerce Commission, appellee. With him on the brief was *Leo H. Pou.*

*Hugh B. Cox* argued the cause for the Baltimore & Ohio Railroad Co. et al., appellees. With him on the brief were *Francis L. Brown, A. P. Donadio, Joseph F. Eshelman* and *Charles A. Horsky.*

Mr. Justice Frankfurter delivered the opinion of the Court.

Five railroads which transport fruits and vegetables into New York and Philadelphia filed with the Interstate Commerce Commission schedules of charges for unloading services performed by them at these points. Various shippers and shipper organizations, State Commissions, and other interested parties, protested the proposed

charges. The Secretary of Agriculture, acting on behalf of the affected agricultural interests, intervened.[1] The Commission in due course approved the charges, 272 I. C. C. 648. On further consideration, the approved charges were cut roughly in half, 286 I. C. C. 119. Complaints against even these reduced charges were then filed with the Commission, but these were dismissed by it on the basis of its prior decision, and this litigation to enjoin and set aside the Commission's order followed. 28 U. S. C. §§ 1336, 2325. Numerous parties again intervened—the shipper and consumer interests on the side of the protestants, and the carriers involved on the side of the Commission. The three-judge district court, with Judge De Vane dissenting, upheld the Commission, 114 F. Supp. 420. Direct appeals under 28 U. S. C. § 1253 brought the cases here. 347 U. S. 902.

The general rule is that it is the responsibility of the carrier, as part of the transportation service covered by the line-haul rate, to "deliver" the goods by placing them in such a position as to make them accessible to the consignee. Normally unloading is not a part of the delivery and is performed by the consignee. In accordance with these principles, the railroad spots the car on the team track in its yards in the destination city, and the consignee is given appropriate free time in which to unload. In the case of private sidings, the railroad's job ends when it has placed the car on the consignee's siding.

These are not inflexible rules. The law recognizes and reflects the practicalities of transportation by rail and the diversities to which they give rise. Prior to 1925, the railroads, in order to meet the demands of competitive transportation industries, performed the unloading

[1] Under 7 U. S. C. § 1291, the Secretary of Agriculture is authorized to make complaint to the Commission as well as to intervene before the Commission and resort to original and appellate judicial remedies in cases affecting the transportation of farm products.

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without additional charge at specified points. In the case of *Loading and Unloading Carload Freight,* 101 I. C. C. 394, the Commission approved tariffs by the railroads abolishing free unloading at most of these points, and authorized the carriers to make an additional charge thereafter for performing the unloading at the consignee's request. By the time the present proceeding was instituted, Philadelphia and New York were the only points where the carriers were still performing unloading without any charge in addition to the line-haul rate.

The exception of these two cities was no aberration. It is the result of special conditions which exist in New York and Philadelphia. The significance of these special conditions is at the heart of this controversy.

No railroad carrying fruits or vegetables into New York, except the New York Central, has a direct line into Manhattan. The roads transporting the bulk of the produce into New York, the Pennsylvania and Erie Railroads, terminate their lines on the Jersey side of the Hudson River. There, the cars are put on barges and floated across the river, either to be switched onto the carriers' Manhattan team tracks or to be unloaded directly at the Duane Street piers.[2] These pier terminals are leased by the City of New York to the various carriers and are strategically located adjacent to Washington Market, New York's largest fruit and vegetable market. At the team tracks, according to the usual practice, the consignees do their own unloading. However, because of the inadequacy of these facilities and because of the more advantageous location of the pier terminals, approximately 75% of the fruits and vegetables coming into New York are directed to the pier stations.

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[2] The New York Central and the Baltimore & Ohio Railroads also perform such floatage.

The procedure at the pier stations is as follows. When the floats are docked at the appropriate pier—this usually happens at night—work crews of the railroad begin to unload the cars and place the contents on the pier floor.[3] The consignees are notified in advance of the arrival of their goods, and at specified times their trucks can come onto the pier floor to pick up their merchandise. Sales and auction facilities are also provided by the railroads, and some of the produce is immediately disposed of in this manner. In no event are the consignees allowed to unload the cars themselves; indeed the Commission has found that this would be "impracticable." [4]

At Philadelphia, the situation is somewhat different. Here there is no problem of water transportation, and the team track facilities where consignees can do their own unloading are not shown to be inadequate. However, in 1927, the Pennsylvania and the Baltimore & Ohio built competitive produce terminals,[5] and, because of the special facilities available there, 95% of the fruits and vegetables consigned to Philadelphia are now received at these stations. Each of these terminals has two platforms, one for produce intended for private sale, one for produce intended for auction sale. The unloading operations here are considerably simpler and cheaper than at the

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[3] The unloading practices vary somewhat from carrier to carrier. For example, the Erie has a special contractor do its unloading; the Pennsylvania uses automatic equipment instead of manual labor.

[4] 272 I. C. C., at 655. In its later report, the Commission also made the somewhat inconsistent finding that "at the original hearing the railroads offered to permit consignees to unload their freight from the car float." 286 I. C. C., at 125. But when the California Fruit Growers Exchange, after the Commission's initial decision, requested the railroads to "permit the consignees, as a whole, to perform the unloading at the piers" the railroads refused.

[5] The B. & O. terminal is used jointly by it and the Reading Railroad.

New York piers; but, as in New York, all the unloading here is performed by the carriers.[6]

It was in the light of this background that the carriers, faced by the sharply rising costs of the unloading operation, sought the Commission's approval for special unloading charges at these two cities. Such charges, the carriers urged, would serve to bring New York and Philadelphia into line with the generally prevailing practice—that consignees must either do their own unloading or, if they want the carrier to do it for them, they must be prepared to pay for it.

The protestants, appellants here, do not challenge these general principles. It is their contention rather that at these particular points the unloading is an essential part of delivery in that without it the goods are not accessible to the consignees; that therefore the line-haul rate encompasses the unloading; and, finally, that a service covered by the line-haul rate cannot be separately compensated unless the carriers show that the line-haul rate is inadequate to cover it.

These are claims that must be met, and the real question before us is whether the Commission has met them with an adequacy that satisfies the requirements of judicial review, limited though its scope may be. With respect to New York, the Commission's findings clearly show that since the consignees were not permitted to do

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[6] At Philadelphia, too, the consignees requested the carriers to be permitted to do their own unloading, or to let the auction company which was selling the fruit on their account do the unloading. The Pennsylvania refused, on the ground that the "terminal was a public facility and that the granting of such permission might give rise to a dual method of unloading, one to be conducted by the fruit and vegetable trade, and the other by the railroad for the general public." 286 I. C. C., at 137. In this connection, it should be noted that the Commission made no findings that it would be "impracticable" for the consignees to do the unloading at the Philadelphia produce terminals.

their own unloading, the goods were not accessible to them until unloaded by the carriers.[7] Cf. *United States* v. *United States Smelting Co.*, 339 U. S. 186. Moreover, prior cases of the Commission dealing with the New York terminal have indicated that the unloading cost there is an integral part of the through rate. See *Fruits and Vegetables to Duane St., N. Y.*, 66 I. C. C. 135, 139; *Erie R. Co.* v. *Alabama & V. R. Co.*, 98 I. C. C. 268, 272, 280–281. Yet the court below attributed to the Commission findings that "the line haul service terminated when the cars reached the pier station," and that "unloading is an additional service, wholly distinct from delivery." 114 F. Supp., at 424. But the findings of the Commission, taken as a whole, do not support these statements.

Prior cases where the Commission had sustained the imposition of unloading charges do not serve as useful precedents here. *E. g., Loading and Unloading Carload Freight, supra.* In those cases, there was an absence of circumstances to justify deviation from the normal rule that unloading is not part of delivery, and therefore the Commission was warranted in concluding that the carrier might impose a separate charge for the unloading where the consignee requested it. Here, however, because of the peculiar conditions prevailing at the New York piers,

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[7] 272 I. C. C. 648, 654–655: "Delivery to the consignee is not effected until after the cars are unloaded and the lading placed at a convenient location on the pier floor." 286 I. C. C. 119, 125: "The pier floor is the first place where, after the freight has been unloaded, delivery can be taken." 286 I. C. C. 119, 127: "After the vegetables are placed on the pier platform they are accessible to the consignee . . . ." 286 I. C. C. 119, 129: The proposed charge, in addition to the line-haul rate, is "for making delivery at New York piers."

The relation between the unloading charges and the line haul was also adverted to in the Commission's earlier report, 272 I. C. C., at 662, but not with sufficient clarity.

the unloading is an essential part of the delivery and hence is necessarily encompassed in the line haul. Instead of treating this situation on its own merits, the Commission appears to have relied too much on prior decisions dealing with the problem of unloading charges in different contexts.

While the normal course for the Commission in dealing with a situation like the present would have been to re-examine the sufficiency of the line-haul rate, or to initiate a new division of the existing line-haul rate,[8] the Commission was not precluded from following a procedure fairly adapted to the unique circumstances of this case. The Commission may not unnaturally have felt that it would be undesirable to revise the line-haul rate with its inevitable effect on the entire tariff structure, in order to deal appropriately with the special, localized situation presented at the New York piers. Or the Commission might well have thought that a redivision of the line-haul rate would not be appropriate for the substantial additional cost here involved.

It is not necessary now to consider the Commission's power, under appropriate findings, to approve such unloading charges without pursuing one of these courses. In dealing with technical and complex matters like these, the Commission must necessarily have wide discretion in formulating appropriate solutions. But we do say that while the Commission has adumbrated the reasons

[8] Under 49 U. S. C. § 15 (6), the Commission may authorize a new division of the rate among the participating carriers if it finds the present division "unjust, unreasonable, [or] inequitable." In such a proceeding special terminal costs can be taken into account prior to allocating the rate among the line-haul carriers. See *Erie R. Co.* v. *Alabama & V. R. Co.*, 98 I. C. C. 268, 280; *Atlantic Coast Line R. Co.* v. *Arcade & A. R. Corp.*, 194 I. C. C. 729, 745–747; *Official-Southern Divisions*, 287 I. C. C. 497, 538–543; *Official-Southwestern Divisions*, 287 I. C. C. 553, 584–593.

that commended these charges to its approval,[9] the Commission has not adequately explained its departure from prior norms and has not sufficiently spelled out the legal basis of its decision. We do not know whether the Commission has disregarded its own findings that the unloading here is a prerequisite to delivery of the goods; or whether, in order to meet an unusual situation, the Commission has modified the normal doctrine that delivery is the responsibility of the carrier, see *New Eng-*

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[9] As the Commission stated:

"An unusual situation, arising primarily from the topography of the area, exists on lower Manhattan as a result of which the present method of handling shipments through the pier stations is of benefit to both shippers (including consignees) and carriers. It is also helpful in the avoidance of traffic congestion. The acquisition of land in that area for additional track facilities would be impracticable if not impossible. . . . Physical conditions in and around New York which limit available space for the establishment and operation of railroad terminal facilities is a general community problem and obviously there should be some sharing between the carriers and their patrons of the burden of overcoming the existing difficulties if this congested area is to be served by railroad transportation." 286 I. C. C., at 139–140.

The Commission also made reference to figures introduced by the carriers showing the considerable disparity between the cost per car of making team track delivery and cost per car of making terminal delivery, including unloading (286 I. C. C., at 131):

NEW YORK

| | Manhattan Team Tracks | Pier Terminals |
|---|---|---|
| Erie | $45.44 | $83.87 |
| Pennsylvania | 73.57 | 122.73 |
| B. & O. | 70.46 | 119.86 |

PHILADELPHIA

| | Team Tracks | Produce Terminals |
|---|---|---|
| Pennsylvania | $39.64 | $109.36 |
| B. & O. | 27.66 | 75.94 |

*land Coal & Coke Co.* v. *Norfolk & W. R. Co.*, 33 I. C. C. 276; or whether the Commission, for a reason not made explicit, has here deemed irrelevant the prevailing rule of its prior cases that a service necessarily encompassed by the line-haul rate cannot be separately restated without examining the sufficiency of the line-haul rate to cover it. See, *e. g.*, *Terminal Charges at Pacific Coast Ports*, 255 I. C. C. 673; *Unloading Lumber to New York Harbor*, 256 I. C. C. 463. In short, the Commission has not explained its decision "with the simplicity and clearness through which a halting impression ripens into reasonable certitude. In the end we are left to spell out, to argue, to choose between conflicting inferences. Something more precise is requisite in the quasi-jurisdictional findings of an administrative agency. *Beaumont, S. L. & W. R. Co.* v. *United States*, 282 U. S. 74, 86; *Florida* v. *United States*, 282 U. S. 194, 215. We must know what a decision means before the duty becomes ours to say whether it is right or wrong." *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, 510–511.

Appellants also contend that to permit separate charges to be imposed for the unloading of fruits and vegetables, while not imposing similar charges on other commodities unloaded at these points, violates §§ 2 and 3 of the Interstate Commerce Act.[10] Since we have already concluded that the case should be remanded to the Commission, the Commission on remand should also make

[10] 49 U. S. C. § 2 prohibits a carrier from charging or receiving "a greater or less compensation for any service rendered . . . than it charges . . . any other person . . . [for] a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances . . . ."

Section 3 (1) makes it unlawful for any carrier to subject "any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever . . . ."

more explicit findings as to the differences and similarities in the treatment accorded other commodities unloaded at these same points. If such commodities are unloaded "under substantially similar circumstances," the Act requires that the charges imposed be the same. If, on the other hand, there are important differences in treatment justifying the imposition of different unloading charges or of no unloading charges at all, the Commission ought to find no difficulty in defining the differences.[11]

Similarly, we deem it desirable that upon reconsideration of this controversy, the Commission should also be more explicit in stating the reasons that led it to assimilate, so far as these unloading charges are concerned, the situation at Philadelphia to that at New York.

The judgment is vacated, and the cases are ordered to be remanded to the Commission for further proceedings not inconsistent with this opinion.

*It is so ordered.*

THE CHIEF JUSTICE, MR. JUSTICE BLACK, and MR. JUSTICE DOUGLAS would hold the Commission's order invalid and enjoin its enforcement on the ground that the Commission failed to determine the reasonableness of the railroads' line-haul rates on the basis of increased unloading rates allowed by the Commission.

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

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[11] In its latest report, the Commission stated that "as regards the movement of freight, other than fruits and vegetables . . . the operation is identical with the manner in which fruits and vegetables are car-floated and unloaded." 286 I. C. C., at 123. Without more, the Commission then concluded that "the record does not warrant a finding of undue preference and prejudice or unjust discrimination in violation of sections 2 or 3 of the act." 286 I. C. C., at 142.

# UNITED CONSTRUCTION WORKERS ET AL. *v.* LABURNUM CONSTRUCTION CORP.

CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA.

No. 188. Argued April 5, 1954.—Decided June 7, 1954.

Respondent construction corporation brought in a Virginia state court against three labor organizations a common-law tort action for damages, based upon tortious conduct which constituted also an unfair labor practice under § 8 (b)(1)(A) of the Labor Management Relations Act, 1947. *Held:* The Act did not give to the National Labor Relations Board such exclusive jurisdiction over the subject matter of the action as to preclude the state court from hearing and determining the issues. Pp. 657–669.

(a) To the extent that Congress prescribed preventive procedure against unfair labor practices, conflicting state procedure to the same end is excluded. But, to the extent that Congress has not prescribed procedure for dealing with the consequences of tortious conduct already committed, there is no ground for concluding that existing criminal penalties or liabilities for tortious conduct have been eliminated. *Garner* v. *Teamsters Union,* 346 U. S. 485, distinguished. Pp. 663–666.

(b) The fact that the 1947 Act prescribed new preventive procedure against unfair labor practices on the part of labor organizations was additional recognition of congressional disapproval of such practices, and is consistent with an increased insistence upon the liability of such organizations for tortious conduct and inconsistent with their immunization from liability for damages caused by their tortious practices. Pp. 666–668.

(c) The denial of jurisdiction to the state court in this case would mean that, where the federal preventive administrative procedures are impotent or inadequate, the offenders, by coercion of the type found here, may destroy property without liability for the damage done. P. 669.

(d) The fact that petitioners are labor organizations, with no contractual relationship with respondent or its employees, is no basis for depriving the State of jurisdiction of this action against them. P. 669.

194 Va. 872, 75 S. E. 2d 694, affirmed.

*M. E. Boiarsky* argued the cause for petitioners. With him on the brief were *Welly K. Hopkins, Harrison Combs* and *Willard P. Owens.*

*Archibald G. Robertson* and *George E. Allen* argued the cause for respondent. With them on the brief were *Francis V. Lowden, Jr.* and *T. Justin Moore, Jr.*

*Solicitor General Sobeloff* and *George J. Bott* filed a memorandum for the National Labor Relations Board in response to the invitation of the Court (346 U. S. 936).

MR. JUSTICE BURTON delivered the opinion of the Court.

The question before us is whether the Labor Management Relations Act, 1947,[1] has given the National Labor Relations Board such exclusive jurisdiction over the subject matter of a common-law tort action for damages as to preclude an appropriate state court from hearing and determining its issues where such conduct constitutes an unfair labor practice under that Act. For the reasons hereafter stated, we hold that it has not.

November 16, 1949, Laburnum Construction Corporation, a Virginia corporation, respondent herein, filed a notice of motion for judgment in the Circuit Court of the City of Richmond, Virginia, against petitioners United Construction Workers, affiliated with United Mine Workers of America; District 50, United Mine Workers of America; and United Mine Workers of America. The proceeding was a common-law tort action for compensatory and punitive damages totaling $500,000. The notice contained substantially the following allegations: While respondent was performing construction work in Breathitt County, Kentucky, under contracts with Pond Creek Pocahontas Company and others, July

[1] 61 Stat. 136 *et seq.*, 29 U. S. C. (1952 ed.) § 141 *et seq.*

26–August 4, 1949, agents of the respective petitioners came there. They demanded that respondent's employees join the United Construction Workers and that respondent recognize that organization as the sole bargaining agent for respondent's employees on the project. They added that, if respondent and its employees did not comply, respondent would not be allowed to continue its work. Upon respondent's refusal and that of many of its employees to yield to such demands, petitioners' agents threatened and intimidated respondent's officers and employees with violence to such a degree that respondent was compelled to abandon all its projects in that area. The notice further alleged that, as the result of this conduct of petitioners' agents, respondent was deprived of substantial profits it otherwise would have earned on those and other projects. After trial, a jury found petitioners jointly and severally liable to respondent for $175,437.19 as compensatory damages, and $100,000 as punitive damages, making a total of $275,437.19.

Petitioners moved for a new trial claiming numerous errors of law, and for a dismissal on the ground that the Labor Management Relations Act had deprived the court of its jurisdiction over the subject matter. Both motions were overruled and the Supreme Court of Appeals of Virginia granted a writ of error and supersedeas. After argument, it struck out $146,111.10 of the compensatory damages and affirmed the judgment for the remaining $129,326.09. 194 Va. 872, 75 S. E. 2d 694. Because of the importance of the jurisdictional issue to the enforcement of common-law rights and to the administration of the Labor Management Relations Act, we granted certiorari limited to the following question:

> " 'In view of the type of conduct found by the Supreme Court of Appeals of Virginia to have been carried out by Petitioners, does the National Labor

> Relations Board have exclusive jurisdiction over the subject matter so as to preclude the State Court from hearing and determining the issues in a common-law tort action based upon this conduct?' " 346 U. S. 936.[2]

We are concerned only with the above-stated jurisdictional question. We accept the view of the National Labor Relations Board that respondent's activities affect interstate commerce within the meaning of the Labor Management Relations Act.[3] The "type of conduct found by the Supreme Court of Appeals of Virginia" is

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[2] Our order also stated that—

"The Government is invited to submit a memorandum setting forth the policy of the National Labor Relations Board in regard to: (1) the proviso in § 10 (a), 61 Stat. 146, 29 U. S. C. (Supp. III) § 160 (a); and (2) other cases, apart from those in § 10 (a), in which the Board declines to exercise its statutory jurisdiction. The memorandum should indicate by what standards the Board declines to act and whether the standards are applied by rule or regulation or on a case-by-case method."

The Government filed a memorandum stating that it had found it "not feasible under the limitations prescribed by the Act to consummate agreements ceding jurisdiction" under the proviso in § 10 (a). It stated also that "Under the standards which the Board is currently continuing to apply, it would assert jurisdiction over an enterprise similar to [that of] respondent company herein." It found that respondent's enterprises came within at least the following categories of the Board's jurisdictional standards:

"4. Enterprises producing or handling goods destined for out-of-State shipment, or performing services outside the State in which the firm is located, valued at $25,000 a year.

"5. Enterprises furnishing goods or services of $50,000 a year or more to concerns in categories 1, 2, or 4 [*supra*]."

See also, 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"; *Labor Board* v. *Denver Building Council,* 341 U. S. 675, 684–685.

[3] See note 2, *supra.*

set out in the margin.[4] Although the notice for judgment does not mention the Labor Management Relations Act or unfair labor practices as such, we assume the conduct

[4] "During the period from September 6, 1947 to December 1, 1949, the plaintiff performed work in West Virginia and Kentucky for Pond Creek Pocahontas Company, Island Creek Coal Company, and their subsidiary companies, under twelve separate contracts amounting to more than $650,000, from which it derived an annual profit slightly over $25,000. . . .

. . . . . .

"In October, 1948, the two coal-producing companies determined to open a mine in Breathitt county, Kentucky, and Bryan [president of respondent] was asked to undertake the building of the preparation plant there. Because of the undeveloped condition of the roads and lack of living accommodations for the laborers, Bryan was told that if Laburnum would undertake the project it would be awarded additional work which would be required for the operation of another mine in Breathitt county, amounting to more than $600,000, on the basis of cost plus a fee of five per cent.

"On October 28, 1948, Pond Creek Pocahontas Company awarded the plaintiff a contract for construction of the preparation plant on the basis of cost plus a fee of five per cent, the total fee not to exceed the sum of $12,000. The estimated cost of the project was $200,000. Work on this project was commenced November 1, 1948, and was approximately ninety-five per cent completed when it was interrupted on July 26, 1949. Pursuant to their agreement the coal companies also awarded Laburnum several projects included in the additional work to which reference has been made.

"Upon commencing the work in Breathitt county, Laburnum, in compliance with its agreement with Richmond Building & Construction Trades Council, procured skilled laborers through the nearest local affiliates of the American Federation of Labor. With the knowledge and consent of these affiliates it employed local unskilled laborers who were not members of any labor organization.

"Laburnum proceeded with its work on these several projects without trouble until July 14, 1949, when William O. Hart, speaking from Pikeville, Kentucky, telephoned Bryan who was in Richmond. According to the testimony of Bryan, which was accepted by the jury, Hart identified himself as a 'field representative of the United Construction Workers and District 50 of the United Mine Workers of America,' working under David Hunter, 'Regional Director of Region 58 of United Construction Workers and District 50,' with head-

before us also constituted an unfair labor practice within the following provisions of that Act:

"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: . . . ."

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quarters in Pikeville. Hart told Bryan that he was familiar with the work which Laburnum was doing and about to do in Breathitt county, that the plaintiff was 'working in United Mine Workers territory,' and that he (Hart) would close down this work unless the plaintiff recognized the United Construction Workers in the employment of its workers. Bryan told Hart of Laburnum's agreement with the American Federation of Labor affiliate at Richmond, under which it was to employ members of that union, and that consequently it would not be able to comply with Hart's demand and make an agreement with the United Construction Workers. Hart replied that he was going 'to take over' the plaintiff's work, that he intended to 'organize' all of its workers, 'including the carpenters, electricians, pipefitters, ironworkers, millwrights, laborers, and everybody else,' and that if the plaintiff failed to make an agreement 'recognizing the United Construction Workers, he (Hart) would close down' all of the plaintiff's work in Breathitt county, as had been done in other instances within his (Hart's) territory.

. . . . . .

"On Monday, July 25, about 7:30 p. m., Delinger [in respondent's employ] telephoned Bryan that he had been informed that on the next day, at noon, the United Construction Workers were coming to the job site with a large group of men, that they would be armed, and would stop the plaintiff's employees from working on the projects.

. . . . . .

". . . When he [Bryan] arrived there [July 26] he found that all work on the several projects in which his men were engaged had stopped. It developed that about noon on that day Hart had arrived at the job site accompanied by a crowd variously estimated at from 40 to 150 men. There is evidence that this was 'a very rough, boisterous crowd,' that some of the men used abusive language, that some were drunk, and that some carried guns and knives.

. . . . . .

"Hart and his men went to the coal preparation plant and told the

61 Stat. 140, 141, 29 U. S. C. (1952 ed.) § 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

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Laburnum workers there that he was taking over the job and that the Laburnum workers would have to 'join up with the United Construction Workers.' He accosted other employees of the plaintiff at another site where he repeated his threats that he would 'take over' the job unless they joined the union which he represented. Some of the plaintiff's employees yielded to these threats and agreed to join Hart's labor organization, while others refused to do so.

. . . . . .

"Bryan talked with Hart again at the job site on August 1, and, as he says, Hart 'left no doubt in anybody's mind that he was going to have people to stop any men from working who tried.' 'He continually threatened to bring a large crowd of people there from Beaver Creek and other places to stop us from working if any of our people went to work. He said he would do that unless we signed a paper recognizing his organization as the representative of the laborers.' Bryan replied that he 'wouldn't do it and couldn't do it' because of his prior obligation to another labor organization. Moreover, Hart threatened that if the Laburnum men 'went back to work he was going to close down the mine operations by stopping the United Mine Workers from working for Pond Creek.'

". . . Consequently, on August 4, the coal companies, because of the dispute in which the plaintiff had become involved with representatives of these labor organizations, canceled the construction contracts with Laburnum which were then in progress.

. . . . . .

"After the violent events of July, 1949, Pond Creek Pocahontas Company and Island Creek Coal Company abandoned the award of the additional work upon a cost plus five per cent basis which they had promised the Laburnum company. The coal companies invited bids upon this proposed construction, but Laburnum was unsuccessful in all of its bids for such work. The officials of the coal companies expressed their high regard and sympathy for Bryan, but explained that they could not run the risk of having the defendant unions shut down the mining operations because of the unions' differences with Laburnum." 194 Va. 872, 880–881, 882, 883, 884–885, 75 S. E. 2d 694, 700–701, 702, 703.

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. (1952 ed.) § 157.

Petitioners contend that the Act of 1947 has occupied the labor relations field so completely that no regulatory agency other than the National Labor Relations Board and no court may assert jurisdiction over unfair labor practices as defined by it, unless expressly authorized by Congress to do so. They claim that state courts accordingly are excluded not only from enjoining future unfair labor practices and thus colliding with the Board, as occurred in *Garner* v. *Teamsters Union,* 346 U. S. 485, but that state courts are excluded also from entertaining common-law tort actions for the recovery of damages caused by such conduct. The latter exclusion is the issue here. In the *Garner* case, Congress had provided a federal administrative remedy, supplemented by judicial procedure for its enforcement, with which the state injunctive procedure conflicted.[5] Here Congress has neither provided nor suggested any substitute for the

[5] The cases relied upon to exclude state jurisdiction are those where a conflict with federal control has been made clear.

"[W]hen Congress does exercise its paramount authority, it is obvious that Congress may determine how far its regulation shall go. There is no constitutional rule which compels Congress to occupy the whole field. Congress may circumscribe its regulation and occupy only a limited field. When it does so, state regulation outside that limited field and otherwise admissible is not forbidden or displaced. The principle is thoroughly established that the exercise by the State of its police power, which would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together.'" *Kelly* v. *Washington,* 302 U. S. 1, 10. See also, *Amalgamated Assn.* v. *Wisconsin Board,* 340 U. S. 383;

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traditional state court procedure for collecting damages for injuries caused by tortious conduct. For us to cut off the injured respondent from this right of recovery will deprive it of its property without recourse or compensation. To do so will, in effect, grant petitioners immunity from liability for their tortious conduct. We see no substantial reason for reaching such a result. The contrary view is consistent with the language of the Act and there is positive support for it in our decisions and in the legislative history of the Act.

In the *Garner* case, we said:

> "The national Labor Management Relations Act, as we have before pointed out, leaves much to the states, though Congress has refrained from telling us how much. We must spell out from conflicting indications of congressional will the area in which state action is still permissible.
>
> "This is not an instance of injurious conduct which the National Labor Relations Board is without express power to prevent and which therefore either is 'governable by the State or it is entirely ungoverned.' In such cases we have declined to find an implied exclusion of state powers. *International Union* v. *Wisconsin Board,* 336 U. S. 245, 254. Nor is this a case of mass picketing, threatening of employees, obstructing streets and highways, or picketing homes. We have held that the state still may exercise 'its historic powers over such traditionally local matters as public safety and order and the use of streets and highways.' *Allen-Bradley Local* v. *Wisconsin Board,* 315 U. S. 740, 749." 346 U. S., at 488.

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*United Automobile Workers* v. *O'Brien,* 339 U. S. 454; *Plankinton Packing Co.* v. *Wisconsin Board,* 338 U. S. 953; *La Crosse Telephone Corp.* v. *Wisconsin Board,* 336 U. S. 18; *Bethlehem Steel Co.* v. *New York Board,* 330 U. S. 767; *Hill* v. *Florida,* 325 U. S. 538.

To the extent that Congress prescribed preventive procedure against unfair labor practices, that case recognized that the Act excluded conflicting state procedure to the same end. To the extent, however, that Congress has not prescribed procedure for dealing with the consequences of tortious conduct already committed, there is no ground for concluding that existing criminal penalties or liabilities for tortious conduct have been eliminated. The care we took in the *Garner* case to demonstrate the existing conflict between state and federal administrative remedies in that case was, itself, a recognition that if no conflict had existed, the state procedure would have survived. The primarily private nature of claims for damages under state law also distinguishes them in a measure from the public nature of the regulation of future labor relations under federal law.

The Labor Management Relations Act sets up no general compensatory procedure except in such minor supplementary ways as the reinstatement of wrongfully discharged employees with back pay. 61 Stat. 147, 29 U. S. C. (1952 ed.) § 160 (c). See also, *Labor Board* v. *Electrical Workers,* 346 U. S. 464.

One instance in which the Act prescribes judicial procedure for the recovery of damages caused by unfair labor practices is that with reference to the jurisdiction of federal and other courts to adjudicate claims for damages resulting from secondary boycotts. In that instance the Act expressly authorizes a recovery of damages in any Federal District Court and "in any other court having jurisdiction of the parties." [6] By this provision, the Act assures uniformity, otherwise lacking, in rights of

[6] "SEC. 303. . . .

"(b) Whoever shall be injured in his business or property by reason or [of] any violation of subsection (a) [boycotts and other unlawful combinations] may sue therefor in any district court of the United States subject to the limitations and provisions of section 301 hereof

recovery in the state courts and grants jurisdiction to the federal courts without respect to the amount in controversy. To recover damages under that section is consistent with the existence of jurisdiction in state courts to enforce criminal penalties and common-law liabilities generally. On the other hand, it is not consistent to say that Congress, in that section, authorizes court action for the recovery of damages caused by tortious conduct related to secondary boycotts and yet, without express mention of it, Congress abolishes all common-law rights to recover damages caused more directly and flagrantly through such conduct as is before us.

Considerable legislative history supports this interpretation. Under the National Labor Relations Act, 1935,[7] there were no prohibitions of unfair labor practices on the part of labor organizations. Yet there is no doubt that if agents of such organizations at that time had damaged property through their tortious conduct, the persons responsible would have been liable to a tort action in state courts for the damage done. See *Allen-Bradley Local* v. *Wisconsin Board,* 315 U. S. 740.

The 1947 Act has increased, rather than decreased, the legal responsibilities of labor organizations. Certainly that Act did not expressly relieve labor organizations from liability for unlawful conduct. It sought primarily to empower a federal regulatory body, through administrative procedure, to forestall unfair labor practices by anyone in circumstances affecting interstate commerce. The fact that it prescribed new preventive procedure against unfair labor practices on the part of labor organizations was an additional recognition of congressional

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without respect to the amount in controversy, or in any other court having jurisdicion 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. (1952 ed.) § 187 (b).

[7] 49 Stat. 449 *et seq.*, 29 U. S. C. (1946 ed.) § 151 *et seq.*

disapproval of such practices. Such an express recognition is consistent with an increased insistence upon the liability of such organizations for tortious conduct and inconsistent with their immunization from liabilty for damages caused by their tortious practices.[8]

The language declaring the congressional policy against such practices is phrased in terms of their prevention:

> "SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: . . . ." 61 Stat. 146, 29 U. S. C. (1952 ed.) § 160 (a).[9]

Section 10 (c) directs the Board to issue a cease-and-desist order after an appropriate finding of fact. There is no declaration that this procedure is to be exclusive.

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[8] ". . . 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. Policing of such conduct is left wholly to the states. In this case there was also evidence of considerable injury to property and intimidation of other employees by threats and no one questions the State's power to police coercion by those methods." *International Union* v. *Wisconsin Board,* 336 U. S. 245, 253. See also, pp. 255–258 distinguishing the conduct there complained of from that protected by § 7 of the Labor Management Relations Act.

[9] ". . . By retaining the language which provides the Board's powers under section 10 shall not be affected by other means of adjustment, the conference agreement makes clear that, when two remedies exist, one before the Board and one before the courts, the remedy before the Board shall be in addition to, and not in lieu of, other remedies." Conference Report on H. R. 3020, H. R. Rep. No. 510, 80th Cong., 1st Sess. 52.

The history of the enactment of § 8 (b)(1)(A) lends further support to this interpretation. Senate Report No. 105, 80th Cong., 1st Sess. 50, as to S. 1126, said in part:

> "Since this bill establishes the principle of unfair labor practices on the part of unions, we can see no reason whatever why they should not be subject to the same rules as the employers. The committee heard many instances of union coercion of employees such as that brought about by threats of reprisal against employees and their families in the course of organizing campaigns; also direct interference by mass picketing and other violence. *Some of these acts are illegal under State law, but we see no reason why they should not also constitute unfair labor practices to be investigated by the National Labor Relations Board, and at least deprive the violators of any protection furnished by the Wagner Act.*" (Emphasis added.)

Senator Taft, one of the sponsors of the bill, added later:

> "*But suppose there is duplication in extreme cases; suppose there is a threat of violence constituting violation of the law of the State.* Why should it not be an unfair labor practice? It is on the part of the employer. If an employer proceeds to use violence, as employers once did, if they use the kind of goon-squad tactics labor unions are permitted to use—and they once did—if they threaten men with physical violence if they join a union, they are subject to State law, and they are also subject to be proceeded against for violating the National Labor Relations Act. *There is no reason in the world why*

*there should not be two remedies for an act of that kind.*" (Emphasis added.) 93 Cong. Rec. 4024.[10]

If Virginia is denied jurisdiction in this case, it will mean that where the federal preventive administrative procedures are impotent or inadequate, the offenders, by coercion of the type found here, may destroy property without liability for the damage done. If petitioners were unorganized private persons, conducting themselves as petitioners did here, Virginia would have had undoubted jurisdiction of this action against them. The fact that petitioners are labor organizations, with no contractual relationship with respondent or its employees, provides no reasonable basis for a different conclusion.[11]

The jurisdiction of the Supreme Court of Appeals of Virginia is, therefore, sustained and its judgment

*Affirmed.*

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

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

If this labor organizer had committed murder on the picket line, he would, of course, be subject to prosecution

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[10] Similarly, H. R. Rep. No. 245, 80th Cong., 1st Sess. 8, said:

"EQUAL RESPONSIBILITY BEFORE THE LAW

"When employers violate rights that the Labor Act gives to employees or to unions, the Board can issue orders against them. *When employers violate rights of employees or of unions under other laws, they must answer in court for what they do.* Under the bill, when unions and their members violate rights given to employers and to employees, the new Board can issue orders protecting the employers and the employees." (Emphasis added.)

[11] See generally, Note, Labor Law—Federal and State Jurisdiction—Common Law Remedies, 27 N. Y. U. L. Rev. 468; Cox and Seidman, Federalism and Labor Relations, 64 Harv. L. Rev. 211, 236.

by Virginia. For the federal Act in no way deals with such conduct and there may be doubt if constitutionally it could do so, at least in such a way as to supersede local law.

The present case is different. The labor organizer's conduct that has led to this judgment for damages is conduct with which the federal Act specifically deals. On the facts found by the state court, the labor organizer and the union have committed an unfair labor practice under § 8 (b)(1)(A), by using threats and the force of a picket line to make employees join a union, contrary to their desires. A state court or a state labor board could not enjoin that conduct, as *Garner* v. *Teamsters Union,* 346 U. S. 485, teaches. And I think like reasons preclude a State from applying other sanctions to it.

This conduct is the stuff out of which labor-management strife has been made, ever since trade unionism began its growth. For years the law of the jungle applied, victory going to the strongest. The emergence of more civilized methods of settling these disputes is familiar history. At first, the law was mostly on the side of management. The courts, as well as the legislatures, shaped the rules against the interests of labor. Gradually the human rights in industry were recognized until they finally received more generous recognition under the Wagner Act.

That Act subjected these industrial disputes to settlement and adjudication in administrative proceedings. For example, the administrative agency was granted power to forbid employers from interfering with trade-union activities. May a union not only institute proceedings before the National Labor Relations Board but sue the employer as well? Or may it have a choice of remedies? I would think not. But if the union may not sue the employer for the tortious conduct, why may the employer sue the union?

I think that for each wrong which the federal Act recognizes the parties have only the remedy supplied by that Act—and for a simple reason. The federal Act was designed to decide labor-management controversies, to bring them to a peaceful, orderly settlement, to put the parties on the basis of equality which the rules designed by Congress envisaged.* If the parties not only have the remedy Congress provided but the right to sue for damages as well, the controversy is not settled by what the federal agency does. It drags on and on in the courts, keeping old wounds open, and robbing the administrative remedy of the healing effects it was intended to have.

*Section 1(b) of the Labor Management Relations Act of 1947, 61 Stat. 136, 29 U. S. C. § 141 (b), provides that:

"It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce."

# PHILLIPS PETROLEUM CO. *v.* WISCONSIN ET AL.

NO. 280. CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.*

Argued April 6–7, 1954.—Decided June 7, 1954.

The Company here involved engages in the production, gathering, processing and sale of natural gas. It does not engage in the interstate transmission of gas from the producing fields to consumer markets and is not affiliated with any company that does so; but it sells natural gas to five interstate pipeline companies which transport and resell the gas to consumers and local distributing companies in 14 states. The gas flows from producing wells through a network of converging pipelines to one of 12 processing plants, where extractable products and impurities are removed. Thence it flows a short distance to a delivery point where it is sold and delivered to an interstate pipeline company. It then continues its flow through an interstate pipeline system until delivered in other states. *Held:* This Company is a "natural-gas company" within the meaning of the Natural Gas Act, and its sales in interstate commerce of natural gas for resale are subject to the jurisdiction of, and rate regulation by, the Federal Power Commission. Pp. 674–685.

(a) The Company admittedly is engaged in "the sale in interstate commerce of natural gas for resale" within the meaning of the Act. P. 677.

(b) The sales by this Company are not a part of the "production or gathering of natural gas," which are excluded from the Commission's jurisdiction under § 1 (b), since the production and gathering end before the sales occur. *Interstate Natural Gas Co.* v. *Federal Power Comm'n*, 331 U. S. 682. Pp. 677–681.

(c) Congress did not intend to regulate only interstate pipeline companies. Rather the legislative history indicates a congressional intent to give the Commission jurisdiction over the rates of all wholesales of natural gas in interstate commerce, whether by a pipeline company or not and whether occurring before, during, or after transmission by an interstate pipeline company. Pp. 681–684.

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*Together with No. 281, *Texas et al.* v. *Wisconsin et al.;* and No. 418, *Federal Power Commission* v. *Wisconsin et al.*, also on certiorari to the same court.

(d) *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.*, 340 U. S. 179, and *Phillips Petroleum Co.* v. *Oklahoma*, 340 U. S. 190, do not require a different result. Pp. 684–685.

(e) Regulation of sales in interstate commerce for resale made by a so-called independent natural-gas producer is not essentially different from regulation of such sales when made by an affiliate of an interstate pipeline company. P. 685.

92 U. S. App. D. C. 284, 205 F. 2d 706, affirmed.

*Hugh B. Cox* argued the cause for petitioner in No. 280. With him on the brief were *Rayburn L. Foster, Harry D. Turner* and *Stanley L. Temko.*

*Dan Moody* argued the cause for petitioners in No. 281. On the brief were *John Ben Shepperd,* Attorney General, *Charles E. Crenshaw,* Special Assistant Attorney General, and *Mr. Moody* for the State of Texas et al., *Mac Q. Williamson,* Attorney General of Oklahoma, for the Corporation Commission of Oklahoma, and *Richard H. Robinson,* Attorney General, and *George A. Graham,* Special Assistant Attorney General, for the State of New Mexico et al., petitioners. *J. Paull Marshall* was also of counsel.

*Solicitor General Sobeloff* argued the cause for the Federal Power Commission, petitioner in No. 418. With him on the brief were *Assistant Attorney General Burger, Melvin Richter, Willard W. Gatchell, William J. Grove* and *Louis C. Kaplan.*

*Stewart G. Honeck,* Deputy Attorney General of Wisconsin, *William E. Torkelson, Charles S. Rhyne, James H. Lee* and *Harry G. Slater* argued the causes for respondents. On a joint brief were *Vernon W. Thomson,* Attorney General, and *Mr. Honeck,* for the State of Wisconsin, *Mr. Torkelson* for the Public Service Commission of Wisconsin, *Mr. Lee* for the City of Detroit, Michigan, *David M. Proctor* and *Mr. Rhyne* for Kansas City, Missouri, and *Walter J. Mattison* and *Mr. Slater* for the City of Milwaukee, Wisconsin, respondents.

A brief of *amici curiae* urging reversal was filed by *Fred S. LeBlanc,* Attorney General, for the State of Louisiana, *J. P. Coleman,* Attorney General, for the State of Mississippi, *E. T. Christianson,* Attorney General, for the State of North Dakota, *Howard B. Black,* Attorney General, for the State of Wyoming, and *Jay Kyle* for the State Corporation Commission of Kansas. *J. Paull Marshall* was also of counsel.

Briefs of *amici curiae* urging affirmance were filed by *J. A. A. Burnquist,* Attorney General, and *George B. Sjoselius* for the State of Minnesota, *John F. Bonner* for the City of Minneapolis, Minnesota, *Leo A. Hoegh,* Attorney General, for the State of Iowa, and *Clarence S. Beck,* Attorney General, for the State of Nebraska; and by *J. W. Anderson, John J. Mortimer, Dale H. Fillmore, John C. Banks, Henry B. Curtis, Abraham L. Freedman, Alexander G. Brown, Dion R. Holm* and *Charles S. Rhyne* for the National Institute of Municipal Law Officers.

Mr. Justice Minton delivered the opinion of the Court.

These cases present a common question concerning the jurisdiction of the Federal Power Commission over the rates charged by a natural-gas producer and gatherer in the sale in interstate commerce of such gas for resale. All three cases are an outgrowth of the same proceeding before the Power Commission and involve the same facts and issues.

The Phillips Petroleum Company [1] is a large integrated oil company which also engages in the production, gathering, processing, and sale of natural gas. We are here concerned only with the natural-gas operations. Phillips is

[1] Hereinafter referred to as Phillips.

known as an "independent" natural-gas producer in that it does not engage in the interstate transmission of gas from the producing fields to consumer markets and is not affiliated with any interstate natural-gas pipeline company. As revealed by the record before us, however, Phillips does sell natural gas to five interstate pipeline transmission companies which transport and resell the gas to consumers and local distributing companies in fourteen states.

Approximately 50% of this gas is produced by Phillips, and the remainder is purchased from other producers. A substantial part is casinghead gas—*i. e.*, produced in connection with the production of oil. The gas flows from the producing wells, in most instances at well pressure, through a network of converging pipelines of progressively larger size to one of twelve processing plants, where extractable products and impurities are removed. Of the nine such networks of pipelines involved in these cases, five are located entirely in Texas, one in Oklahoma, one in New Mexico, and two extend into both Texas and Oklahoma. After processing is completed, the gas flows from the processing plant through an outlet pipe, of varying lengths up to a few hundred feet, to a delivery point where the gas is sold and delivered to an interstate pipeline company. The gas then continues its flow through the interstate pipeline system until delivered in other states.

The Federal Power Commission, on October 28, 1948, instituted an investigation to determine whether Phillips is a natural-gas company within the jurisdiction of the Commission, and, if so, whether its natural-gas rates are unjust or unreasonable. In extensive hearings before an examiner, the facts described above were developed, as well as much additional information. An intermediate decision having been dispensed with, the Commission

issued an opinion and order in which it held that Phillips is not a "natural-gas company" within the meaning of that term as used in the Natural Gas Act,[2] and therefore is not within the Commission's jurisdiction over rates.[3] Consequently, the Commission did not proceed to investigate the reasonableness of the rates charged by Phillips. On appeals, the decision of the Commission was reversed by the United States Court of Appeals for the District of Columbia Circuit, one judge dissenting. 92 U. S. App. D. C. 284, 205 F. 2d 706. We granted certiorari. 346 U. S. 934, 935.

The Power Commission is authorized by § 4 of the Natural Gas Act to regulate the "rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission . . . ." "Natural-gas company" is defined by § 2 (6) of the Act to mean "a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale." The jurisdiction of the Commission is set forth in § 1 (b) 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."

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[2] 52 Stat. 821, as amended, 15 U. S. C. § 717 *et seq.*

[3] 10 F. P. C. 246. One Commissioner concurred in the decision and one dissented.

Petitioners admit that Phillips engages in "the sale in interstate commerce of natural gas for resale," as, of course, they must. *Interstate Natural Gas Co.* v. *Federal Power Commission,* 331 U. S. 682, 687–689; cf. *Michigan-Wisconsin Pipe Line Co.* v. *Calvert,* 347 U. S. 157, 166–168. They contend, however, that the affirmative grant of jurisdiction over such sales in the first clause of § 1 (b) is limited by the negative second clause of the section. In particular, the contention is made that the sales by Phillips are a part of the "production or gathering of natural gas" to which the Commission's jurisdiction expressly does not extend.

We do not agree. In our view, the statutory language, the pertinent legislative history, and the past decisions of this Court all support the conclusion of the Court of Appeals that Phillips is a "natural-gas company" within the meaning of that term as defined in the Natural Gas Act, and that its sales in interstate commerce of natural gas for resale are subject to the jurisdiction of and regulation by the Federal Power Commission.

The Commission found that Phillips' sales are part of the production and gathering process, or are "at least an exempt incident thereof." [4] This determination appears to have been based primarily on the Commission's reading of legislative history and its interpretation of certain decisions of this Court. Also, there is some testimony in the record to the effect that the meaning of "gathering" commonly accepted in the natural-gas industry comprehends the sales incident to the physical activity of collecting and processing the gas. Petitioners contend that the Commission's finding has a reasonable basis in law and is supported by substantial evidence of record and therefore should be accepted by the courts, particularly since the Commission has "consistently" interpreted the Act

[4] 10 F. P. C. 246, 278.

as not conferring jurisdiction over companies such as Phillips.[5] See *Gray* v. *Powell,* 314 U. S. 402; *Labor Board* v. *Hearst Publications, Inc.,* 322 U. S. 111. We are of the opinion, however, that the finding is without adequate basis in law, and that production and gathering, in the sense that those terms are used in § 1 (b), end before the sales by Phillips occur.

In *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.,* 337 U. S. 498, 505, we observed that the "natural and clear meaning" of the phrase "production or gathering of natural gas" is that it encompasses "the producing properties and gathering facilities of a natural-gas company." Similarly, in *Colorado Interstate Gas Co.* v. *Federal Power Commission,* 324 U. S. 581, 598, we stated that "[t]ransportation and sale do not include production or gathering," and indicated that the "production or gathering" exemption applies to the physical activities, facilities, and properties used in the production and gathering of natural gas. *Id.,* at 602–603. See also *Federal Power Commission* v. *Hope Natural Gas Co.,* 320 U. S. 591, 612–615; *Peoples Natural Gas Co.* v. *Federal Power Commission,* 75 U. S. App. D. C. 235, 127 F. 2d 153; cf. *United States* v. *Public Utilities Commission,* 345 U. S. 295, 307–311.[6]

[5] The consistency of the Commission in this regard may be questioned. Compare: *Columbian Fuel Corp.,* 2 F. P. C. 200, with *Interstate Natural Gas Co.,* 3 F. P. C. 416; Brief for Federal Power Commission, *Interstate Natural Gas Co.* v. *Federal Power Commission,* 156 F. 2d 949, with Brief for Federal Power Commission, *Interstate Natural Gas Co.* v. *Federal Power Commission,* 331 U. S. 682; Federal Power Commission Order No. 139, 12 Fed. Reg. 5585, with Federal Power Commission Order No. 154, 15 Fed. Reg. 4633. See Scanlan, Administrative Abnegation in the Face of Congressional Coercion: The Interstate Natural Gas Company Affair, 23 Notre Dame Law. 173; Note, 59 Yale L. J. 1468, 1479–1484. And, for that matter, even consistent error is still error.

[6] Referring to the taking of natural gas by purchasing interstate pipeline companies at the outlet of processing plants, we recently

Even more directly in point is our decision in *Interstate Natural Gas Co.* v. *Federal Power Commission*, 331 U. S. 682. The Interstate Company produced or purchased natural gas which it in turn sold and delivered to three interstate pipeline companies, all the activities occurring within the same state. We noted that "[e]xceptions to the primary grant of jurisdiction in the section [1 (b)] are to be strictly construed,"[7] *id.*, at 690–691, and held that § 1 (b) conferred jurisdiction over such sales on the Federal Power Commission, stating:

> "Petitioner asserts . . . that the sales to the three pipe-line companies are a part of the gathering process and consequently not within the Commission's power of regulation. This basic contention has given rise to a great many subsidiary questions such as whether the sales were made from petitioner's 'gathering' lines or from petitioner's 'transmission' lines and whether the gathering process continued to the

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observed that the pipeline companies obviously "are not engaged in 'gathering gas' within the meaning of that term in its ordinary usage . . . ." *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U. S. 157, 164.

[7] The committee reports on the bill enacted as the Natural Gas Act, H. R. 6586, 75th Cong., 1st Sess., reveal that a construction of the "production or gathering" exemption which would substantially limit the affirmative grant of jurisdiction to the Commission was not contemplated. After quoting the exemptive clause of § 1 (b), the House Report states that:

"The quoted words are not actually necessary, as the matters specified therein could not be said fairly to be covered by the language affirmatively stating the jurisdiction of the Commission, but similar language was in previous bills, and, rather than invite the contention, however unfounded, that the elimination of the negative language would broaden the scope of the act, the committee has included it in this bill." H. R. Rep. No. 709, 75th Cong., 1st Sess. 3.

The Senate Report adopted and reprinted the House Report on the bill. S. Rep. No. 1162, 75th Cong., 1st Sess.

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points of sale or was, as the Commission found, completed at some point prior to surrender of custody and passage of title. We have found it unnecessary to resolve those issues. The gas moved by petitioner to the points of sale consisted of gas produced from petitioner's wells commingled with that produced and gathered by other companies and introduced into petitioner's pipe-line system during the course of the movement. By the time the sales are consummated, nothing further in the gathering process remains to be done. We have held that these sales are in interstate commerce. It cannot be doubted that their regulation is predominantly a matter of national, as contrasted to local concern. All the gas sold in these transactions is destined for consumption in States other than Louisiana. Unreasonable charges exacted at this stage of the interstate movement become perpetuated in large part in fixed items of costs which must be covered by rates charged subsequent purchasers of the gas, including the ultimate consumer. It was to avoid such situations that the Natural Gas Act was passed." *Id.*, at 692–693.

Petitioners attempt to distinguish the *Interstate* case on the grounds that the Interstate Company transported the gas in its pipelines after completion of gathering and before sale, and that the Interstate Company was affiliated with an interstate pipeline company and therefore subject to Commission jurisdiction in any event. This Court, however, refused to rely on such refinements [8] and instead based its decision in *Interstate* on the broader ground that sales in interstate commerce for resale by

[8] Despite the fact that they were urged by the Commission as a basis for decision. Brief for Federal Power Commission, *Interstate Natural Gas Co.* v. *Federal Power Commission,* 331 U. S. 682.

producers to interstate pipeline companies do not come within the "production or gathering" exemption.

The *Interstate* case is also said to be distinguishable in that it did not involve an asserted conflict with state regulation, and federal control was not opposed by the state authorities, while in the instant cases there are said to be conflicting state regulations, and federal jurisdiction is vigorously opposed by the producing states. The short answer to this contention is that the jurisdiction of the Federal Power Commission was not intended to vary from state to state, depending upon the degree of state regulation and of state opposition to federal control. We expressly rejected any implication to the contrary, in the *Interstate* case. 331 U. S., at 691–692. See *Federal Power Commission* v. *Hope Natural Gas Co., supra,* at 607–615.

The cases discussed above supply a ready answer to the determination of the Commission and also to petitioners' suggestion that "production or gathering" should be construed to mean the "business" of production and gathering, with the sale of the product considered as an integral part of such "business." We see no reason to depart from our previous decisions, especially since they are consistent with the language and legislative history of the Natural Gas Act.

In general, petitioners contend that Congress intended to regulate only the interstate pipeline companies since certain alleged excesses of those companies were the evil which brought about the legislation. If such were the case, we have difficulty in perceiving why the Commission's jurisdiction over the transportation *or* sale for resale in interstate commerce of natural gas is granted in the disjunctive. It would have sufficed to give the Commission jurisdiction over only those natural-gas companies that engage in "transportation" or "transportation *and* sale for resale" in interstate commerce, if only interstate

pipeline companies were intended to be covered.[9] See *Federal Power Commission* v. *East Ohio Gas Co.*, 338 U. S. 464, 468.

Rather, we believe that the legislative history indicates a congressional intent to give the Commission jurisdiction over the rates of all wholesales of natural gas in interstate commerce, whether by a pipeline company or not and whether occurring before, during, or after transmission by an interstate pipeline company.[10] There can be no dispute that the overriding congressional purpose was to plug the "gap" in regulation of natural-gas companies resulting from judicial decisions prohibiting, on

[9] Just such wording was suggested to and rejected by the House Committee considering enactment of the Natural Gas Act, by the Chairman of the State of New York Department of Public Service, Public Service Commission. Hearings before House Committee on Interstate and Foreign Commerce on H. R. 4008, 75th Cong., 1st Sess. 146–147.

An earlier bill, H. R. 11662, 74th Cong., 2d Sess., would have limited the jurisdiction of the Power Commission to "the transportation of natural gas in high-pressure mains in interstate commerce and to natural-gas companies engaged in such transportation . . . ." Much of the legislative history advanced in support of petitioners' position was developed in connection with this bill, including the testimony of Dozier A. DeVane, Solicitor of the Federal Power Commission. Because of the much different jurisdictional provision of H. R. 11662, such testimony has little relevance here.

[10] The bill on which were held the hearings leading to the passage of the Natural Gas Act, H. R. 4008, 75th Cong., 1st Sess., as introduced provided, in § 1 (b), for Commission jurisdiction over the sale of natural gas in interstate commerce "for resale to the public." Similarly, "natural-gas company" was defined, in § 2 (5), as including a person engaged in the sale of natural gas in interstate commerce "for resale to the public." The General Solicitor of the National Association of Railroad and Utilities Commissioners suggested that the language be changed in a manner almost identical to that contained in the Natural Gas Act. Referring to the proposed changes, he commented that:

"Another is designed to make certain that the bill will apply to all intercompany sales of natural gas at wholesale, even though the sale

federal constitutional grounds, state regulation of many of the interstate commerce aspects of the natural-gas business.[11] A significant part of this gap was created by cases [12] holding that "the regulation of wholesale rates of gas and electrical energy moving in interstate commerce is beyond the constitutional powers of the States." *Interstate Natural Gas Co.* v. *Federal Power Commission, supra,* at 689. The committee reports on the bill that became the Natural Gas Act specifically referred to two of these cases and to the necessity of federal regulation to occupy the hiatus created by them.[13] Thus, we are

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be from one company to another company which will resell to another corporation before the gas is finally sold to the public." Hearings before House Committee on Interstate and Foreign Commerce on H. R. 4008, 75th Cong., 1st Sess. 22.
See also *id.,* at 141–143.

[11] *Federal Power Commission* v. *East Ohio Gas Co.,* 338 U. S. 464, 472–473; *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.,* 337 U. S. 498, 502–504; *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission,* 332 U. S. 507, 514–521; *Interstate Natural Gas Co.* v. *Federal Power Commission,* 331 U. S. 682, 689–693; *Colorado Interstate Gas Co.* v. *Federal Power Commission,* 324 U. S. 581, 599–600; *Federal Power Commission* v. *Hope Natural Gas Co.,* 320 U. S. 591, 609–610; *Illinois Natural Gas Co.* v. *Central Illinois Public Service Co.,* 314 U. S. 498, 506–508.

[12] *Missouri* v. *Kansas Natural Gas Co.,* 265 U. S. 298; *Public Utilities Commission* v. *Attleboro Steam & Electric Co.,* 273 U. S. 83; *State Corporation Commission* v. *Wichita Gas Co.,* 290 U. S. 561. Cf. *Dahnke-Walker Milling Co.* v. *Bondurant,* 257 U. S. 282; *Lemke* v. *Farmers Grain Co.,* 258 U. S. 50; *Shafer* v. *Farmers Grain Co.,* 268 U. S. 189. And see *Jersey Central Power & Light Co.* v. *Federal Power Commission,* 319 U. S. 61, 69.

[13] "The States have, of course, for many years regulated sales of natural gas to consumers in intrastate transactions. The States have also been able to regulate sales to consumers even though such sales are in interstate commerce, such sales being considered local in character and in the absence of congressional prohibition subject to State regulation. . . . There is no intention in enacting the present legislation to disturb the States in their exercise of such jurisdiction. However, in the case of sales for resale, or so-called wholesale sales,

satisfied that Congress sought to regulate wholesales of natural gas occurring at both ends of the interstate transmission systems.

Petitioners cite our recent decisions in *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.*, 340 U. S. 179, and *Phillips Petroleum Co.* v. *Oklahoma*, 340 U. S. 190, as authority for the proposition that the states may regulate the sales in question here and, hence, that such sales are not within the gap which the Natural Gas Act was intended to fill. Those cases upheld as constitutional state *minimum* price orders, justified as conservation measures, applying to sales of natural gas in interstate commerce. But it is well settled that the gap referred to is that thought to exist at the time the Natural Gas Act was passed, and the jurisdiction of the Commission is not affected by subsequent decisions of this Court which have somewhat loosened the constitutional restrictions on state activities affecting interstate commerce, in the absence of conflicting federal regulation. *Illinois Natural Gas Co.* v. *Central Illinois Public Service Co.*, 314 U. S. 498, 508; *Federal Power Commission* v. *East Ohio Gas Co., supra*, at 472. The Federal Power Commission did not participate in the *Cities Service* and *Phillips Petroleum* cases, the appellants there did not assert a possible conflict with federal authority under the Natural Gas Act, and consequently we expressly refused to consider at that time "[w]hether the Gas Act authorizes

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in interstate commerce (for example, sales by producing companies to distributing companies) the legal situation is different. Such transactions have been considered to be not local in character and, even in the absence of Congressional action, not subject to State regulation. (See *Missouri* v. *Kansas Gas Co.* (1924), 265 U. S. 298, and *Public Service Commission* v. *Attleboro Steam & Electric Co.* (1927) 273 U. S. 83.) The basic purpose of the present legislation is to occupy this field in which the Supreme Court has held that the States may not act." H. R. Rep. No. 709, 75th Cong., 1st Sess. 1–2; S. Rep. No. 1162, 75th Cong., 1st Sess. 1–2.

the Power Commission to set field prices on sales by independent producers, or leaves that function to the states . . . ." 340 U. S., at 188–189.

Regulation of the sales in interstate commerce for resale made by a so-called independent natural-gas producer is not essentially different from regulation of such sales when made by an affiliate of an interstate pipeline company. In both cases, the rates charged may have a direct and substantial effect on the price paid by the ultimate consumers. Protection of consumers against exploitation at the hands of natural-gas companies was the primary aim of the Natural Gas Act. *Federal Power Commission* v. *Hope Natural Gas Co., supra,* at 610. Attempts to weaken this protection by amendatory legislation exempting independent natural-gas producers from federal regulation have repeatedly failed,[14] and we refuse to achieve the same result by a strained interpretation of the existing statutory language.

The judgment is

*Affirmed.*

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

MR. JUSTICE FRANKFURTER, concurring.

While I join the opinion of the Court, one consideration leading to the Court's conclusion is for me so decisive that I deem it appropriate to give it emphasis.

Section 1 (b) is not to be construed on its face. It comes to us with an authoritative gloss. We must construe it as though Congress had, in words, added to

[14] Among the bills introduced in recent Congresses to restrict the existing jurisdiction of the Federal Power Commission over natural-gas producers are: H. R. 4051, 80th Cong., 1st Sess.; H. R. 4099, 80th Cong., 1st Sess.; H. R. 1758, 81st Cong., 1st Sess.; and S. 1498, 81st Cong., 1st Sess.

the present text of § 1 (b) some such language as the following:

> "However, since sales for resale, or so-called 'wholesale sales,' in interstate commerce are not local in character and are constitutionally not subject to State regulation, see *Missouri* v. *Kansas Gas Co.*, 265 U. S. 298, and *Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 U. S. 83, the basic purpose of the legislation is to occupy this field in which the States may not act."

The section must be read with such an interpolation because the Committees of Congress which were responsible for the legislation said specifically that the Natural Gas Act was designed to cover the situations which the two cited cases held to be outside the competence of State regulation. H. R. Rep. No. 709, 75th Cong., 1st Sess. 1–2; S. Rep. No. 1162, 75th Cong., 1st Sess. 1–2.*

To be sure, the *Kansas Gas* case excluded the business of piping gas by a supply company in one State to dis-

*"The States have, of course, for many years regulated sales of natural gas to consumers in intrastate transactions. The States have also been able to regulate sales to consumers even though such sales are in interstate commerce, such sales being considered local in character and in the absence of congressional prohibition subject to State regulation. (See *Pennsylvania Gas Co.* v. *Public Service Commission* (1920), 252 U. S. 23.) There is no intention in enacting the present legislation to disturb the States in their exercise of such jurisdiction. However, in the case of sales for resale, or so-called wholesale sales, in interstate commerce (for example, sales by producing companies to distributing companies) the legal situation is different. Such transactions have been considered to be not local in character and, even in the absence of Congressional action, not subject to State regulation. (See *Missouri* v. *Kansas Gas Co.* (1924), 265 U. S. 298, and *Public Service Commission* v. *Attleboro Steam & Electric Co.* (1927) 273 U. S. 83.) The basic purpose of the present legislation is to occupy this field in which the Supreme Court has held that the States may not act." H. R. Rep. No. 709, 75th Cong., 1st Sess. 1–2.

tributing companies in another; and the *Attleboro* case involved the transmission of electric current by a producing company which took it from one State to the boundary of another State and there sold it to a distributing company for resale in the other State. In this case, the sale by Phillips was made in Texas to interstate pipeline transmission companies which transported the gas for resale to distributing companies and consumers in other States. But this fact—that Phillips itself did not pipe the gas to the State boundary or directly into another State—does not in the slightest alter the constitutional applicability of the *Attleboro* doctrine to the situation before us. The fact that the continuous transmission is not by facilities of Phillips but by the facilities of Phillips connecting with pipelines transmitting gas into other States does not change the interstate character of the transaction. For that reason, the decision in *Attleboro,* 273 U. S., at 86, relying on *Peoples Gas Co.* v. *Public Service Commission,* 270 U. S. 550, barred State regulation.

It may well be that if the problem in the *Attleboro* case came before the Court today, the constitutional doctrine there laid down would not be found compelling. This is immaterial. Congress did not leave it to the determination of this Court whether an *Attleboro* situation is subject to State regulation. It wrote the doctrine of the *Attleboro* case into the Natural Gas Act and said in effect that an *Attleboro* situation was to be taken over by federal regulation and was not to be left to the fluctuation of adjudications under the Commerce Clause.

MR. JUSTICE DOUGLAS, dissenting.

The question is whether sales of natural gas by an *independent producer* at the mouth of an interstate pipeline are subject to regulation by the Federal Power Commission under the Natural Gas Act of 1938. This is

a question the Court has never decided. It is indeed one on which we expressly reserved decision in *Interstate Natural Gas Co.* v. *Federal Power Commission,* 331 U. S. 682, 690, n. 18.

There is much to be said from the national point of view for regulating sales at both ends of these interstate pipelines. The power of Congress to do so is unquestioned. Whether it did so by the Natural Gas Act of 1938 is a political and legal controversy that has raged in the Commission and in the Congress for some years. The question is not free from doubts. For while § 1 (b) of the Act makes the regulatory provisions applicable "to the sale in interstate commerce of natural gas for resale for ultimate public consumption," it also makes them inapplicable "to the production or gathering of natural gas."

The sale by this independent producer is a "sale in interstate commerce . . . for resale." It is also an integral part of "the production or gathering of natural gas," as MR. JUSTICE CLARK makes clear in his opinion, for it is the end phase of the producing and gathering process. So we must make a choice; and the choice is not an easy one.

The legislative history is not helpful. Congress was concerned with interstate pipelines, not with *independent producers,* as the thoughtful Comment in 59 Yale L. J. 1468 points out. If one can judge by the reports of the Federal Trade Commission that preceded the Act (S. Doc. No. 92, Pt. 84–A, 70th Cong., 1st Sess.), and the hearings and debates in Congress on the bills that evolved into the Act, little or no consideration was given to the need of regulating the sales by *independent producers* to the pipelines. The gap to be filled was that existing before the pipelines were brought under regulation—sales to distributors along the pipelines, as the opinion of MR. JUSTICE CLARK demonstrates.

That was the view of the Commission in a decision that followed on the heels of the Act. *Columbian Fuel Corp.*, 2 F. P. C. 200, 207. That decision exempted from regulation an independent producer to whom Phillips is in all material respects comparable. It was a decision made by men intimately familiar with the background and history of the Act—Leland Olds, Basil Manly, Claude L. Draper, and Clyde L. Seavey. One Commissioner, John W. Scott, dissented. That construction of the Act by the Commission has persisted from that time (see *Billings Gas Co.*, 2 F. P. C. 288; *The Fin-Ker Oil & Gas Production Co.*, 6 F. P. C. 92; *Tennessee Gas & Transmission Co.*, 6 F. P. C. 98) down to its decision in the present case. 10 F. P. C. 246.

That construction by the Commission, especially since it was contemporaneous (*United States* v. *American Trucking Assns.*, 310 U. S. 534, 539) and long continued (*Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U. S. 498, 513), is entitled to great weight. Other obtuse questions no less legal in character than the terms "production or gathering" of gas have been entrusted to the administrative agency charged with the regulation. See *Shields* v. *Utah Idaho Central R. Co.*, 305 U. S. 177; *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381; *Gray* v. *Powell*, 314 U. S. 402.

There are practical considerations which buttress that position and lead me to conclude that we should not reverse the Commission in the present case. If Phillips' sales can be regulated, then the Commission can set a rate base for Phillips. A rate base for Phillips must of necessity include all of Phillips' producing and gathering properties; and supervision over its operating expenses necessarily includes supervision over its producing and gathering expenses. We held in *Colorado Interstate Gas Co.* v. *Federal Power Commission*, 324 U. S. 581, that the Commission's control extended that far in the case of an

interstate pipeline company which owned producing and gathering properties. And so it had to be, if regulation of the pipelines that owned their own gas supplies was to be effective. But an understanding of what regulation entails should lead to a different result in this case. The fastening of rate regulation on this *independent producer* brings "the production or gathering of natural gas" under effective federal control, in spite of the fact that Congress has made that phase of the natural gas business exempt from regulation. The effect is certain to be profound. The price at which the *independent producer* can sell his gas determines the price he is able or willing to pay for it (if he buys from other wells). The sales price determines his profits. And his profits and the profits of all the other gatherers, whose gas moves into the interstate pipelines, have profound effects on the rate of production, the methods of production, the old wells that are continued in production, the new ones explored, etc. Regulating the price at which the *independent producer* can sell his gas regulates his business in the most vital way any business can be regulated. That regulation largely nullifies the exemption granted by Congress.

There is much to be said in terms of policy for the position of Commissioner Scott, who dissented the first time the Commission ruled it had no jurisdiction over these sales. But the history and language of the Act are against it. If that ground is to be taken, the battle should be won in Congress, not here. Regulation of the business of producing and gathering natural gas involves considerations of which we know little and with which we are not competent to deal.

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

Perhaps Congress should have included control over the production and gathering of natural gas among the powers

it gave the Federal Power Commission in the Natural Gas Act, but this Congress did not do. On the contrary, Congress provided that the Act "shall not apply . . . to the production or gathering of natural gas." Language could not express a clearer command, but the majority renders this language almost entirely nugatory by holding that the rates charged by a wholly independent producer and gatherer may be regulated by the Federal Power Commission. Nor does the Court stop there, for in the sweep of the opinion "the rates of *all wholesales* of natural gas in interstate commerce, whether by a pipeline company or not and whether occuring before, during, or after transmission by an interstate pipeline company" are covered under the Act. *Ante,* p. 682. (Emphasis supplied.) On its face, this language brings every gas operator, from the smallest producer to the largest pipeline, under federal regulatory control. In so doing, the Court acts contrary to the intention of the Congress, the understanding of the states, and that of the Federal Power Commission itself. The Federal Power Commission is thereby thrust into the regulatory domain traditionally reserved to the states.

The natural gas industry, like ancient Gaul, is divided into three parts. These parts are production and gathering, interstate transmission by pipeline, and distribution to consumers by local distribution companies. A business unit may perform more than one of these functions—typically, production and gathering in addition to interstate transmission. But Phillips' natural gas operations are confined exclusively to the first part—production and gathering. It has no interstate transmission or high-pressure trunk lines and does not sell to distribution companies; and it does not, of course, distribute to the ultimate consumer. Its nine gathering systems merely bring the gas from its own and other producers' wells to its central plants in the producing fields so it can be rendered usable as fuel. Since there are no facilities for storage,

the amount of gas, other than casinghead,* produced and gathered each day depends on the day-to-day demands of the interstate pipelines, which in turn depend on weather and other conditions in consuming areas. Gas wells are cut on and off as the market demand for the gas requires. Gathering takes place by well pressure forcing the gas through numerous small pipes connecting each well with the central gathering plant or processing station. It is there that the gas first comes to a common "header" and is processed for use as fuel. The processing of the gas at this central gathering plant is necessary to remove hydrocarbons, hydrogen sulphide and other foreign elements in order to permit its use as fuel. The plant operates only while the wells are producing. All of Phillips' operations, including the acreage from which the wells produce the gas, the wells themselves, the lines that connect with each of them and run to the central plant, form a closely knit unit that is entirely local to the field involved. After processing, the gas is immediately delivered to the interstate pipelines under long-term sales contracts.

The Commission found that "[t]hough technically consummated in interstate commerce, these sales [by Phillips to the pipelines] are made 'during the course of production and gathering,' " and that the sales "are so closely connected with the local incidents of [production and gathering] as to render rate regulation by this Commission inconsistent or a substantial interference with

*Casinghead gas is produced with oil and furnishes the pressure under which the latter is brought to the surface. The gas cannot be shut off without closing down the oil production and it therefore is produced, regardless of demand, since the primary recovery is oil. If there are no available purchasers the gas is flared (burned). In some fields as much as one-third of the casinghead gas is still flared since no market is immediately available. Sound conservation practice dictates that, whenever possible, casinghead gas be used to satisfy demand before natural gas wells are turned on.

the exercise by the affected states of their regulatory functions." 10 F. P. C., at 278. We believe that this finding is correct and that it should be approved by the Court.

If there be any doubt that Congress thought the "production and gathering" exemption saved Phillips' sales from Federal Power Commission regulation, the Act's legislative history removes it. The Solicitor of the Commission, Mr. Dozier DeVane, at hearings in connection with a predecessor of the bill that finally became the Natural Gas Act, testified that the Federal Power Commission would have no jurisdiction over the rates for natural gas "that are paid in the gathering field." Hearings before Subcommittee of the House Committee on Interstate and Foreign Commerce on H. R. 11662, 74th Cong., 2d Sess., p. 28 (1936). The bill, he said, "does not attempt to regulate the gathering rates or the gathering business." *Id.*, 34. See also, *id.*, 42–43. The bill about which Mr. DeVane testified has been described as "substantially similar to the Natural Gas Act," and his views have been treated as authoritative by this Court. *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U. S. 498, 505, n. 7 (1949). See also *Federal Power Commission* v. *East Ohio Gas Co.*, 338 U. S. 464, 472, n. 12 (1950). In the face of this as well as the Federal Power Commission's adherence to the DeVane views ever since its first cases on the subject, *Columbian Fuel Corp.*, 2 F. P. C. 200 (1940), *Billings Gas Co.*, 2 F. P. C. 288 (1940), and in the absence of any specific matter in the Act's legislative history refuting the DeVane views, the Court today erroneously finds that DeVane's "testimony has little relevance here." *Ante*, p. 682, n. 9.

There is no dispute that Congress intended the Natural Gas Act to close the "gap" created by decisions of this Court barring state regulation of certain interstate gas sales. The legislative history of the Act refers to two

decisions: *Missouri* v. *Kansas Natural Gas Co.*, 265 U. S. 298 (1924); *Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 U. S. 83 (1927). See H. R. Rep. No. 709, 75th Cong., 1st Sess., pp. 1–2 (1937). But these cases had nothing to do with sales to interstate pipelines by wholly independent, unintegrated, and unaffiliated producers and gatherers, such as Phillips. Neither of the companies involved in those cases was engaged exclusively in production and gathering; both were producing and transportation companies, Kansas of natural gas, Attleboro of electricity; both Kansas and Attleboro sold to distributing companies in the course of interstate transmission. Thus, when the House Report, *id.*, 1–2, expressed the Act's aim to regulate wholesales such as "sales by producing companies to distributing companies," and immediately thereafter cited the *Kansas* and *Attleboro* cases, the Report's unmistakable reference was to sales by an integrated "producer-pipeline" to the local distributor. It could not refer to an independent producer and gatherer because, first, such an independent never sells to local distributors and, secondly, the two cited cases do not support a reference to such independents. That Congress aimed at abuses resulting in the "gap" at the end of the transmission process by integrated and unintegrated pipelines and not at abuses prior to transmission is clear from the final report of the Federal Trade Commission to the Senate on malpractices in the natural gas industry. S. Doc. No. 92, 70th Cong., 1st Sess. (1935). This report was the stimulus for federal intervention in the industry. The Federal Trade Commission outlined the abuses in the industry which the "gap" made the states powerless to prevent; the abuses were by monopolistically situated pipelines which gouged the consumer by charging local distribution companies unreasonable rates. The Federal Trade Commission did not find abusive pricing by independent producers and gatherers;

if anything, the independents at the producing end of the pipelines were likewise the victims of monopolistic practices by the pipelines.

And our decisions have certainly indicated that the "gap" was at the distribution end of the transmission process. Thus, in *Federal Power Commission* v. *Hope Natural Gas Co.,* 320 U. S. 591 (1944), the Court observed that "the Federal Power Commission was given *no authority* over 'the production or gathering of natural gas' " and that the producing states had the power "to protect the interests of those who sell their gas to the interstate operator." *Id.,* at 612–613, 614. (Emphasis supplied.) Five years later, in *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co., supra,* the Court said its approval of the Commission's inclusion of the cost of production and gathering facilities of an interstate pipeline in the latter's rate base "is not a precedent for regulation of any part of production or *marketing.*" 337 U. S., at 506. (Emphasis supplied.)

By today's decision, the Court restricts the phrase "production and gathering" to "the physical activities, facilities, and properties" used in production and gathering. Such a gloss strips the words of their substance. If the Congress so intended, then it left for state regulation only a mass of empty pipe, vacant processing plants and thousands of hollow wells with scarecrow derricks, monuments to this new extension of federal power. It was not so understood. The states have been for over 35 years and are now enforcing regulatory laws covering production and gathering, including *pricing,* proration of gas, ratable taking, unitization of fields, processing of casinghead gas including priority over other gases, well spacing, repressuring, abandonment of wells, marginal area development, and other devices. Everyone is fully aware of the direct relationship of price and conservation. *Federal Power Commission* v. *Panhandle*

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*Eastern Pipe Line Co., supra,* at 507. And the power of the states to regulate the producers' and gatherers' prices has been upheld in this Court. *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.,* 340 U. S. 179 (1950); *Phillips Petroleum Co.* v. *Oklahoma,* 340 U. S. 190 (1950). There can be no doubt, as the Commission has found, that federal regulation of production and gathering will collide and substantially interfere with and hinder the enforcement of these state regulatory measures. We cannot square this result with the House Report on this Act which states that the subsequently enacted bill "is so drawn as to complement and in no manner usurp State regulatory authority." H. R. Rep. No. 709, *supra,* at 2.

The majority rely heavily on *Interstate Natural Gas Co.* v. *Federal Power Commission,* 331 U. S. 682 (1947), to support their position. To be sure, there is language in that case which on its face seems to govern the present case. *Id.,* at 692–693. But that case involved a materially different fact situation. The Interstate Gas Company was already subject to Federal Power Commission jurisdiction because of its interstate pipeline operations; and the company was affiliated with one of the pipelines to which it sold. In addition, the Court emphasized the fact that in *Interstate* no claim to state regulatory authority was made. Indeed, the Interstate Company had successfully resisted state attempts to regulate. Hence there was no possibility of conflict in that case; either the Federal Power Commission moved in or Interstate would have remained unregulated. But perhaps a more significant factual distinction in terms of the Court's reasoning in that case rests in the fact that of the total volume of gas Interstate sold, roughly 42% had been purchased from others who had produced *and gathered* it. This 42% was almost enough to supply all the needs of the three interstate pipelines to which Interstate sold. And the 42%,

already gathered and processed, moved into and through Interstate's branch, trunk, and main trunk lines. In short, Interstate was the equivalent of a middleman between gatherers and the pipelines for almost all the gas it sold to the pipelines and performed the function of transporting the gas it purchased from other gatherers through its branch, trunk, and main trunk lines. Phillips performs no such middleman or transmission function. In addition, the late Chief Justice Vinson in that case specifically stated that: "We express no opinion as to the validity of the jurisdictional tests employed by the Commission in these cases [*Columbian* and *Billings, supra*]." 331 U. S., at 690–691, n. 18. Since it was in those cases that the Federal Power Commission established the policy of declining jurisdiction over the rates charged by wholly independent producers and gatherers, it is difficult to see how *Interstate* can control the present case.

If we look to *Interstate* for guidance, we would do better to focus on the following words of the late Chief Justice:

> "Clearly, among the powers thus reserved to the States is the power to regulate the physical production and gathering of natural gas in the interests of conservation or of any other consideration of legitimate local concern. It was the intention of Congress to give the States full freedom in these matters. Thus, where sales, though technically consummated in interstate commerce, are made during the course of production and gathering and are so closely connected with the local incidents of that process as to render rate regulation by the Federal Power Commission inconsistent or a substantial interference with the exercise by the State of its regulatory functions, the jurisdiction of the Federal Power Commission does not attach." 331 U. S., at 690.

Even a cursory examination of Phillips' operations reveals how completely local they are and how incidental to them are its sales to the pipelines. Moreover, federal regulation of these sales means an inevitable clash with a complex of state regulatory action, including minimum pricing. These were matters found by the Federal Power Commission in language obviously patterned after the above quotation. The clear import of the cited words is that Federal Power Commission jurisdiction "does not attach" in such a situation.

In the words of MR. JUSTICE JACKSON, we believe "that observance of good faith with the states requires that we interpret this Act as it was represented at the time they urged its enactment, as its terms read, and as we have, until today, declared it, *viz.*, to supplement but not to supplant state regulation." *Federal Power Commission* v. *East Ohio Gas Co., supra,* at 490.

REPORTER'S NOTE.

The next page is purposely numbered 901. The numbers between 698 and 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 FEBRUARY 1, 1954, THROUGH JUNE 7, 1954.

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## FEBRUARY 1, 1954.

*Decisions Per Curiam.*

No. 468. JOST *v.* UNITED STATES. On petition for writ of certiorari to the District Court of Appeal of California, Fourth Appellate District. *Per Curiam:* The petition for writ of certiorari is granted. The judgment of the District Court of Appeal is reversed and the cause is remanded with instructions to proceed not inconsistent with the findings of fact and conclusions of law and recommendations of the Commissioner of Immigration and Naturalization, on confession of error by the Government. *Dean Acheson, W. Graham Claytor, Jr., Charles A. Horsky, A. L. Wirin* and *Fred Okrand* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Olney, Robert S. Erdahl* and *Beatrice Rosenberg* filed a memorandum for the United States, confessing error. Reported below: 117 Cal. App. 2d 379, 256 P. 2d 71.

No. 505. GOVERNMENT AND CIVIC EMPLOYEES ORGANIZING COMMITTEE, CIO, ET AL. *v.* WINDSOR ET AL. Appeal from the United States District Court for the Northern District of Alabama. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. MR. JUSTICE BLACK took no part in the consideration or decision of this case. *Arthur J. Goldberg* and *Thomas E. Harris* for appellants. *Si Garrett,* Attorney General of Alabama, *M. Roland Nachman, Jr.,* Assistant Attorney General, and *Jesse M. Williams* for appellees. Reported below: 116 F. Supp. 354.

*Miscellaneous Orders.*

No. 225, Misc. ANSELMI *v.* ATTORNEY GENERAL OF THE UNITED STATES ET AL. C. A. 3d Cir. Certiorari denied. Motion for leave to file petition for writ of habeas corpus also denied. Petitioner *pro se*. *Acting Solicitor General Stern, Assistant Attorney General Olney, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States et al., respondents. Reported below: 207 F. 2d 312.

No. 334, Misc. HOLLOWAY *v.* RAGEN, WARDEN. Supreme Court of Illinois. Certiorari denied. Motion for leave to file petition for writ of habeas corpus also denied.

No. 289, Misc. WHELEHON *v.* EIDSON, WARDEN;
No. 315, Misc. DOHRMAN *v.* STEELE;
No. 316, Misc. BURKHOLDER *v.* UNITED STATES;
No. 325, Misc. GREEN *v.* MISSOURI;
No. 327, Misc. BAYLESS *v.* EIDSON, WARDEN; and
No. 337, Misc. SHOLTER *v.* MARONEY, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied.

No. 295, Misc. COLLINS *v.* WEBB, WARDEN. Motion for leave to file petition for writ of certiorari denied.

No. 322, Misc. EX PARTE LINCOLN ELECTRIC CO. Motion for leave to file petition for writ of mandamus denied. *Casper W. Ooms, Edward A. Haight, Dugald S. McDougall, John F. Oberlin, Thomas V. Koykka* and *James R. Stewart* for petitioner. *John T. Cahill, James A. Fowler, Jr., Richard R. Wolfe* and *Loftus E. Becker* for the Union Carbide & Carbon Corporation.

*Probable Jurisdiction Noted.*

No. 480. SECRETARY OF AGRICULTURE *v.* UNITED STATES ET AL.; and

No. 481. FLORIDA CITRUS COMMISSION ET AL. *v.* UNITED STATES ET AL. Appeals from the United States

District Court for the Southern District of Florida. Probable jurisdiction noted. *Karl D. Loos* and *Neil Brooks* for the Secretary of Agriculture. *M. W. Wells* for the Florida Citrus Commission et al., *John F. Donelan* for the California Citrus League et al., *Sidney Goldstein, Francis A. Mulhern, Wilbur LaRoe, Jr., Arthur L. Winn, Jr.* and *Samuel H. Moerman* for the Port of New York Authority, *Denis M. Hurley, James J. Thornton* and *G. Gary Sousa* for the City of New York, *Earl Jay Gratz* for the Philadelphia Terminals Marketing Association et al., and *Wilmer A. Hill* for the United Fresh Fruit & Vegetable Association et al., appellants in No. 481. *Edward M. Reidy* and *Leo H. Pou* for the Interstate Commerce Commission; and *Francis L. Brown, A. P. Donadio* and *J. F. Eshelman* for the Baltimore & Ohio Railroad Co. et al., appellees. Reported below: 114 F. Supp. 420.

*Certiorari Granted.* (*See No. 468, supra.*)

*Certiorari Denied.* (*See also Misc. Nos. 225, 295 and 334, supra.*)

No. 484. City National Bank of Fairmont *v.* Fidelity Mutual Life Insurance Co. C. A. 4th Cir. Certiorari denied. *John D. Amos* and *William P. Lehman* for petitioner. *Russell L. Furbee* and *C. H. Hardesty, Jr.* for respondent. Reported below: 206 F. 2d 531.

No. 492. Sullivan *v.* New Jersey. Supreme Court of New Jersey. Certiorari denied. *Harry A. Walsh* for petitioner. *Mario H. Volpe* and *Frank H. Lawton* for respondent. Reported below: 13 N. J. 289, 99 A. 2d 450.

No. 493. Codray *v.* Brownell, Attorney General and Successor to the Alien Property Custodian. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *David Cobb* for petitioner. *Acting Solicitor General Stern, Assistant*

*Attorney General Townsend, James D. Hill* and *George B. Searls* for respondent. Reported below: —— U. S. App. D. C. ——, 207 F. 2d 610.

No. 494. WILLIAMS *v.* LINDSEY, ADMINISTRATOR. Supreme Court of Missouri. Certiorari denied. *Donald N. Clausen, Herbert W. Hirsh, Norman A. Miller* and *Frank C. Mann* for petitioner. *Jean Paul Bradshaw* and *Flavius B. Freeman* for respondent. Reported below: 260 S. W. 2d 472.

No. 516. CHEMICAL BANK & TRUST CO. *v.* PRUDENCE-BONDS CORPORATION (NEW CORPORATION) ET AL. C. A. 2d Cir. Certiorari denied. *John Lord O'Brian, Philip A. Carroll* and *John A. Wilson* for petitioner. *Charles M. McCarty* for Prudence-Bonds Corporation; *Geo. C. Wildermuth* for Castellano; *Samuel Silbiger* for Eddy; and *Aaron Schwartz* for Samson et al., respondents. Reported below: 207 F. 2d 67.

No. 497. SOBELL *v.* UNITED STATES. C. A. 2d Cir. Motion for leave to file brief of Dr. Harold C. Urey et al., as *amici curiae,* denied. Certiorari denied. *Howard N. Meyer* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Olney, Beatrice Rosenberg* and *John R. Wilkins* for the United States.

No. 498. WELCH *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied. *James H. Martin* for petitioner. *John Ben Shepperd,* Attorney General of Texas, and *Sam C. Ratliff* and *Rudy G. Rice,* Assistant Attorneys General, for respondent. Reported below: —— Tex. Cr. R. ——, 264 S. W. 2d 100.

No. 508. DOUGALL *v.* SPOKANE, PORTLAND & SEATTLE RAILWAY CO. C. A. 9th Cir. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the

opinion certiorari should be granted. *Elton Watkins* for petitioner. *Charles A. Hart, Hugh L. Biggs* and *Cleveland C. Cory* for respondent. Reported below: 207 F. 2d 843.

No. 179, Misc. SHAW *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *De Long Harris, B. Dabney Fox* and *William Beasley Harris* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Olney, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: —— U. S. App. D. C. ——, 209 F. 2d 298.

No. 243, Misc. BROWN *v.* JENSEN. Supreme Court of California. Certiorari denied. Reported below: 41 Cal. 2d 193, 259 P. 2d 425.

No. 255, Misc. SMALL *v.* HANN. Supreme Court of Nebraska. Certiorari denied. Petitioner *pro se*. *Clarence S. Beck,* Attorney General of Nebraska, and *Dean G. Kratz,* Assistant Attorney General, for respondent.

No. 266, Misc. WELDON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 207 F. 2d 263.

No. 273, Misc. STAFFORD *v.* SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES. Petition for writ of certiorari to the Superior Court of California, in and for the County of Los Angeles, denied.

No. 278, Misc. MEDLIN ET AL. *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *James J. Laughlin* for petitioners. *Acting Solicitor General Stern, Assistant*

*Attorney General Olney* and *Beatrice Rosenberg* for the United States. Reported below: —— U. S. App. D. C. ——, 207 F. 2d 33.

No. 285, Misc. GIARRATANO *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 292, Misc. SHAWVER *v.* SKEEN, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 293, Misc. PETERS *v.* NEW YORK. Supreme Court of New York, Appellate Division, Third Judicial Department. Certiorari denied.

No. 300, Misc. WILLIAMS *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 301, Misc. IVERS *v.* NEW YORK. County Court of Otsego County, New York. Certiorari denied.

No. 302, Misc. NORRIS *v.* SMYTH, SUPERINTENDENT OF VIRGINIA STATE PENITENTIARY. Supreme Court of Appeals of Virginia. Certiorari denied.

No. 304, Misc. ALLEN *v.* SMYTH, SUPERINTENDENT OF VIRGINIA STATE PENITENTIARY. Supreme Court of Appeals of Virginia. Certiorari denied.

No. 305, Misc. GANTT ET AL. *v.* SOUTH CAROLINA. Supreme Court of South Carolina. Certiorari denied. *J. Ralph Gasque* for petitioners. Reported below: 223 S. C. 431, 76 S. E. 2d 674.

No. 306, Misc. MEYERS *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 308, Misc. WEAKLY *v.* BAXTER ET AL. Supreme Court of Illinois. Certiorari denied.

No. 310, Misc. LONGLEY *v.* TEETS, WARDEN. Supreme Court of California. Certiorari denied.

No. 311, Misc. WOODSON *v.* IOWA. Supreme Court of Iowa. Certiorari denied. Reported below: 244 Iowa 1262, 59 N. W. 2d 556.

No. 313, Misc. MAHLER *v.* BANNAN, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 318, Misc. VRANIAK *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 319, Misc. JABLONSKI *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 323, Misc. DAY *v.* RAGEN, WARDEN. Circuit Court of Peoria County, Illinois. Certiorari denied.

No. 324, Misc. LEWIS *v.* SMYTH, SUPERINTENDENT OF VIRGINIA STATE PENITENTIARY. Supreme Court of Appeals of Virginia. Certiorari denied.

No. 326, Misc. LINDSEY *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 328, Misc. RICHARDSON *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 331, Misc. BRITTON *v.* RAGEN, WARDEN. Circuit Court of Shelby County, Illinois. Certiorari denied.

No. 332, Misc. NEGRON ET AL. *v.* NEW YORK. Supreme Court of New York, Appellate Division, First Judicial Department. Certiorari denied.

No. 333, Misc. FRAZIER *v.* INDIANA ET AL. Circuit Court of Allen County, Indiana. Certiorari denied.

No. 335, Misc. BRADLEY *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied.

No. 339, Misc. CUNNINGHAM *v.* MCNEILL, SUPERINTENDENT OF MATTEAWAN STATE HOSPITAL. Court of Appeals of New York. Certiorari denied. Reported below: 306 N. Y. 645, 116 N. E. 2d 246.

No. 340, Misc. LOVEDAHL *v.* NORTH CAROLINA. Supreme Court of North Carolina. Certiorari denied.

*Rehearing Denied.*

No. 344. ARBULICH *v.* ARBULICH, 346 U. S. 897. Motion for leave to file petition for rehearing denied.

No. 409. BALTIMORE TRANSFER CO. ET AL. *v.* INTERSTATE COMMERCE COMMISSION ET AL., 346 U. S. 890;

Nos. 433 and 434. RINES, ADMINISTRATOR, *v.* JUSTICES OF THE SUPERIOR COURT, 346 U. S. 919;

No. 465. VILES *v.* SCOFIELD ET AL., 346 U. S. 925; and

No. 467. WEISS *v.* UNITED STATES, 346 U. S. 924. Petitions for rehearing denied.

No. 239, Misc. CHESSMAN *v.* CALIFORNIA ET AL., 346 U. S. 916. Rehearing denied. THE CHIEF JUSTICE took no part in the consideration or decision of this application.

No. 334, Misc., October Term, 1952. MAUGHS *v.* ROYSTER, SUPERINTENDENT OF STATE PRISON FARM, 345 U. S. 912. Second petition for rehearing denied. THE CHIEF JUSTICE took no part in the consideration or decision of this application.

## FEBRUARY 8, 1954.

*Decisions Per Curiam.*

No. 335. GENERAL ELECTRIC CO. ET AL. *v.* WASHINGTON. Appeal from the Supreme Court of Washington. Argued February 2, 1954. Decided February 8, 1954. *Per Curiam:* The judgment is reversed. *Carson* v. *Roane-Anderson Co.,* 342 U. S. 232. *Max Isenbergh* argued the cause for appellants. With him on the brief were *Acting Solicitor General Stern, Assistant Attorney General Holland* and *F. Gerald Toye. Jennings P. Felix,* Assistant Attorney General of Washington, argued the cause for appellee. With him on the brief were *Don Eastvold,* Attorney General, and *E. P. Donnelly.* Reported below: 42 Wash. 2d 411, 256 P. 2d 265.

No. 404. JACOBSON, ADMINISTRATRIX, *v.* NEW YORK, NEW HAVEN & HARTFORD RAILROAD CO. Certiorari, 346 U. S. 895, to the United States Court of Appeals for the First Circuit. Argued February 3, 1954. Decided February 8, 1954. *Per Curiam:* The judgment is affirmed. *Patch* v. *Wabash R. Co.,* 207 U. S. 277; *Memphis & Charleston R. Co.* v. *Alabama,* 107 U. S. 581; *Seavey* v. *Boston & Maine R. Co.,* 197 F. 2d 485. *George P. Lordan* argued the cause for petitioner. With him on the brief was *Herbert E. Tucker, Jr. Edward R. Brumley* argued the cause for respondent. With him on the brief were *R. M. Peet* and *N. W. Deering.* Reported below: 206 F. 2d 153.

No. 318. GORDON ET AL. *v.* UNITED STATES. Certiorari, 346 U. S. 871, to the United States Court of Appeals for the Tenth Circuit. Argued January 11, 1954. Decided February 8, 1954. *Per Curiam:* Petitioners are business partners in the sale of appliances. They were convicted under § 603 of the Defense Production Act of 1950, 64 Stat. 814, which provides that "Any person who

*willfully* violates" regulations promulgated under the Act shall be guilty of crime. The jury was instructed that the knowledge of petitioners' employees was chargeable to petitioners in determining petitioners' wilfulness. Because of the instruction, the Government has confessed error. We agree, and accordingly reverse the judgment and remand the case to the District Court for retrial. *John S. Boyden* argued the cause for petitioners. With him on the brief was *Allen H. Tibbals*. *John R. Benney* argued the cause for the United States. With him on the brief were *Acting Solicitor General Stern, Assistant Attorney General Olney* and *Beatrice Rosenberg*. Reported below: See 203 F. 2d 248.

No. 501. WHITE ET AL. *v.* HOWARD ET AL. Appeal from the United States District Court for the Southern District of Mississippi. *Per Curiam:* The judgment is vacated and the cause is remanded to the District Court with instructions to dismiss the complaint. MR. JUSTICE BLACK, MR. JUSTICE REED, and MR. JUSTICE DOUGLAS dissent. They would postpone the question of jurisdiction to the merits. THE CHIEF JUSTICE took no part in the consideration or disposition of this case. *Lester E. Wills* for appellants. *Perry W. Howard, Sr.* for appellees. Reported below: 116 F. Supp. 783.

No. 539. LATTAVO BROTHERS, INC. *v.* HUDOCK. Appeal from the United States District Court for the Western District of Pennsylvania. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. *Ernie Adamson* for appellant. *Frank F. Truscott,* Attorney General of Pennsylvania, and *Harry F. Stambaugh* for appellee. Reported below: 119 F. Supp. 587.

No. 540. AMERE GAS UTILITIES CO. *v.* PUBLIC SERVICE COMMISSION OF WEST VIRGINIA. Appeal from the Supreme Court of Appeals of West Virginia. *Per Curiam:*

The motion to dismiss is granted and the appeal is dismissed for the want of a substantial federal question. *Charles C. Wise, Jr.* and *Edward S. Pinney* for appellant. *John G. Fox,* Attorney General of West Virginia, for appellee. Reported below: 138 W. Va. ——.

*Miscellaneous Orders.*

No. 184. GENERAL PROTECTIVE COMMITTEE FOR THE HOLDERS OF OPTION WARRANTS OF THE UNITED CORPORATION *v.* SECURITIES AND EXCHANGE COMMISSION ET AL., 346 U. S. 521; and

No. 154. DOWNING ET AL. *v.* SECURITIES AND EXCHANGE COMMISSION ET AL., 346 U. S. 930. The applications to stay the mandate in No. 184 and for leave to file petitions for rehearing out of time in Nos. 154 and 184 are denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of these applications.

No. 427. FRANKLIN NATIONAL BANK OF FRANKLIN SQUARE *v.* NEW YORK. Appeal from the Court of Appeals of New York. The application of the Solicitor General on behalf of the Government for leave to appear and present oral argument, as *amicus curiae,* is granted.

No. 346, Misc. EX PARTE LUSTIG. Motion for leave to file petition for writ of habeas corpus denied.

*Certiorari Granted.*

No. 531. ALTON *v.* ALTON. C. A. 3d Cir. Certiorari granted. *Abe Fortas* and *Milton V. Freeman* for petitioner. *Hyman Smollar* for respondent. Reported below: 207 F. 2d 667.

*Certiorari Denied.*

No. 182. METALLIC BUILDING CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. *Fritz L. Lyne* for petitioner. *Acting Solicitor General*

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*Stern, George J. Bott, David P. Findling, Dominick L. Manoli* and *Frederick U. Reel* for respondent. Reported below: 204 F. 2d 826.

No. 210. EPSTEIN ET AL., DOING BUSINESS AS TOP MODE MANUFACTURING CO., *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 3d Cir. Certiorari denied. *Samuel A. Schreckengaust, Jr.* for petitioners. *Acting Solicitor General Stern, George J. Bott, David P. Findling, Dominick L. Manoli* and *Harvey B. Diamond* for respondent. Reported below: 203 F. 2d 482.

No. 483. UNITED STATES GYPSUM CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. *Charles M. Price* for petitioner. *Acting Solicitor General Stern, George J. Bott, David P. Findling* and *Dominick L. Manoli* for respondent. Reported below: 206 F. 2d 410.

No. 490. P. DOUGHERTY CO. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Christopher E. Heckman* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Burger, Leavenworth Colby* and *Hubert H. Margolies* for the United States. Reported below: 207 F. 2d 626.

No. 502. AMERICAN FIRE & CASUALTY CO. *v.* FINN. C. A. 5th Cir. Certiorari denied. *Austin Y. Bryan, Jr.* and *David Bland* for petitioner. Reported below: 207 F. 2d 113.

No. 504. SWITZER BROTHERS, INC. ET AL. *v.* LOCKLIN ET AL., DOING BUSINESS AS RADIANT COLOR CO. C. A. 7th Cir. Certiorari denied. *Albert L. Ely, Jr.* for petitioners. *Stephen S. Townsend* and *Carl Hoppe* for respondents. Reported below: 207 F. 2d 483.

No. 507. CINCINNATI BUTCHERS' SUPPLY CO. ET AL. *v.* PFEIFER ET AL. C. A. 6th Cir. Certiorari denied. *Sol Goodman* for petitioners. *James L. Magrish* for respondents.

No. 509. PARMELEE TRANSPORTATION CO. *v.* GRIVAS. C. A. 7th Cir. Certiorari denied. *William C. Wines* for petitioner. *Bernard W. Mages* and *Jack L. Sachs* for respondent. Reported below: 207 F. 2d 334.

No. 512. MILWAUKEE ELECTRIC TOOL CORP. *v.* JOHANN. Supreme Court of Wisconsin. Certiorari denied. *Suel O. Arnold* for petitioner. *Carl Flom* for respondent. Reported below: 264 Wis. 447, 59 N. W. 2d 637.

No. 515. PICHITINO *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied. *Alfonso A. Magnotta* and *Roger H. Nielsen* for petitioner. *Frank G. Millard,* Attorney General of Michigan, *Edmund E. Shepherd,* Solicitor General, and *Daniel J. O'Hara,* Assistant Attorney General, for respondent. Reported below: 337 Mich. 90, 59 N. W. 2d 100.

No. 518. PANEBIANCO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Henry G. Singer* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Olney, Beatrice Rosenberg* and *Edward Szukelewicz* for the United States. Reported below: 208 F. 2d 238.

No. 506. REMINGTON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE CLARK took no part in the consideration or decision of this application. *Joseph L. Rauh, Jr.* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States. Reported below: 208 F. 2d 567.

No. 268, Misc. DUKES *v.* HANNA, WARDEN. Supreme Court of New Jersey. Certiorari denied. *Jack Greenberg, Thurgood Marshall* and *Mendon P. Morrill* for petitioner. *Theodore D. Parsons,* Attorney General of New Jersey, for respondent. Reported below: 13 N. J. 293, 99 A. 2d 452.

No. 287, Misc. LOWRY *v.* PENNSYLVANIA. Supreme Court of Pennsylvania, Eastern District. Certiorari denied. Reported below: 374 Pa. 594, 98 A. 2d 733.

No. 291, Misc. POLLACK *v.* ASPBURY ET AL. C. A. 2d Cir. Certiorari denied. Petitioner *pro se. Acting Solicitor General Stern, Assistant Attorney General Burger* and *Samuel D. Slade* for Harper, respondent.

No. 312, Misc. ADAMS *v.* SMYTH, SUPERINTENDENT OF VIRGINIA STATE PENITENTIARY. Supreme Court of Appeals of Virginia. Certiorari denied.

No. 341, Misc. LOMAX *v.* ILLINOIS. Circuit Court of Will County, Illinois. Certiorari denied.

No. 344, Misc. HENDERSON *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

*Rehearing Denied.* (*See also Nos. 154 and 184, supra.*)

No. 475. L. RONNEY & SONS FURNITURE MANUFACTURING CO. *v.* NATIONAL LABOR RELATIONS BOARD, 346 U. S. 937;

No. 65, Misc. HOLLAND *v.* SAFEWAY STORES, INC., 346 U. S. 868; and

No. 238, Misc. IRVIN *v.* FLORIDA, 346 U. S. 927. Petitions for rehearing denied.

## MARCH 8, 1954.

*Miscellaneous Orders.*

No. 438. FOREST LAWN MEMORIAL-PARK ASSOCIATION, INC. *v.* NATIONAL LABOR RELATIONS BOARD; and

No. 479. PIERCE BROTHERS *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Motion to defer consideration denied. Certiorari denied. *Dana Latham, Paul R. Watkins* and *Richard W. Lund* for petitioners. *Ugene U. Blalock* also for petitioner in No. 438. *Acting Solicitor General Stern, George J. Bott, David P. Findling* and *Dominick L. Manoli* for respondent. Briefs of *amici curiae* supporting petitioners were filed by *James R. Clark* and *Burton E. Robinson* for the National Funeral Directors Association of the United States, Inc.; and by *John C. Slade* for the National Selected Morticians, Inc. in No. 479. Reported below: 206 F. 2d 569.

No. 351, Misc. CROSS *v.* SUPREME COURT OF CALIFORNIA; and

No. 392, Misc. HENDRICKSON *v.* PENNSYLVANIA. Motions for leave to file petitions for writs of mandamus denied.

No. 354, Misc. DODD *v.* STEELE, WARDEN;

No. 364, Misc. SCHELL *v.* EIDSON, WARDEN;

No. 366, Misc. FRAZIER *v.* UNITED STATES;

No. 371, Misc. EX PARTE HINKLE; and

No. 374, Misc. WOODS *v.* LOONEY, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied.

*Probable Jurisdiction Noted.*

No. 550. MORRIS *v.* PARKER ET AL. Appeal from the United States District Court for the District of Columbia. Probable jurisdiction noted. *James C. Toomey, Joseph H. Schneider* and *Albert Ginsberg* for appellant. *Acting*

*Solicitor General Stern* filed a memorandum for the District of Columbia Redevelopment Land Agency and the National Capital Planning Commission, appellees, stating that probable jurisdiction should be noted and this case heard upon the merits. Reported below: 117 F. Supp. 705.

*Certiorari Granted.*

No. 529. National Union of Marine Cooks and Stewards *v.* Arnold et al. Supreme Court of Washington. Certiorari granted. *Norman Leonard* for petitioner. *Samuel B. Bassett* for respondents.

No. 536. Brooks *v.* National Labor Relations Board. C. A. 9th Cir. Certiorari granted. *Frederick A. Potruch* and *Erwin Lerten* for petitioner. *Acting Solicitor General Stern* and *George J. Bott* filed a memorandum for respondent urging that the writ be granted. Reported below: 204 F. 2d 899.

*Certiorari Denied.* (*See also Nos. 438 and 479, supra.*)

No. 454. Lehman et al. *v.* Civil Aeronautics Board et al. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Whitney North Seymour* and *George G. Gallantz* for petitioners. *Acting Solicitor General Stern, Assistant Attorney General Barnes, Daniel M. Friedman* and *Emory T. Nunneley, Jr.* for the Civil Aeronautics Board, respondent. Reported below: —— U. S. App. D. C. ——, 209 F. 2d 289.

No. 499. Vaughan *v.* Warfield et al. C. A. 8th Cir. Certiorari denied. Reported below: 207 F. 2d 350.

No. 510. Friedberg *v.* United States. C. A. 6th Cir. Certiorari denied. *Robert N. Gorman* and *Stanley A. Silversteen* for petitioner. *Acting Solicitor General Stern,*

*Assistant Attorney General Holland* and *Ellis N. Slack* for the United States. Reported below: 207 F. 2d 777.

No. 511. MARTIN ET AL., DOING BUSINESS AS NEMEC COMBUSTION ENGINEERS, *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. *R. D. Sweeney* and *J. E. Simpson* for petitioners. *Acting Solicitor General Stern, George J. Bott, David P. Findling* and *Dominick L. Manoli* for respondent. Reported below: 207 F. 2d 655.

No. 522. LYNCH *v.* HERSHEY, DIRECTOR OF SELECTIVE SERVICE. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Carl L. Shipley* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Olney, Beatrice Rosenberg* and *Robert G. Maysack* for respondent. Reported below: 93 U. S. App. D. C. —, 208 F. 2d 523.

No. 523. SWIDLER ET AL. *v.* KNOCKLONG CORP. ET AL. Appellate Division of the Supreme Court of New York, Second Judicial Department. Certiorari denied. *Jacob Krisel* and *George Lessall* for petitioners. *Charles E. Lapp, Jr.* for the Knocklong Corporation; *Edward M. O. Pratt* and *E. Robert Pratt* for the Gresa Realty Co., Inc.; and *Paul J. Leach* for Connolly, respondents. Reported below: 305 N. Y. 527, 306 N. Y. 600, 114 N. E. 2d 25, 115 N. E. 2d 828.

No. 524. CAROLINA SCENIC STAGES *v.* STEVENS, RECEIVER, ET AL. C. A. 4th Cir. Certiorari denied. *Edgar A. Brown* and *Thomas A. Wofford* for petitioner. Reported below: 208 F. 2d 332.

No. 525. PARNACHER ET AL. *v.* MOUNT. C. A. 10th Cir. Certiorari denied. *James W. Bounds* for petitioners. *John Blaine Gilbreath* for respondent. Reported below: 207 F. 2d 788.

No. 526. WASHINGTON NATIONAL INSURANCE CO. *v.* STURM, ADMINISTRATOR. C. A. 8th Cir. Certiorari denied. *Lon Hocker* for petitioner. Reported below: 208 F. 2d 97.

No. 528. OXMAN *v.* PENNSYLVANIA. Supreme Court of Pennsylvania, Eastern District. Certiorari denied. Petitioner *pro se*. *Richardson Dilworth* for respondent.

No. 530. COMMISSIONER OF INTERNAL REVENUE *v.* CHAMBERLIN ET AL. C. A. 6th Cir. Certiorari denied. *Acting Solicitor General Stern* for petitioner. *Randolph E. Paul* and *Louis Eisenstein* for respondents. Reported below: 207 F. 2d 462.

No. 532. SMITH *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. *Sol Goodman* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Holland, Ellis N. Slack* and *Melva M. Graney* for respondent.

No. 535. ROCHELLE, TRUSTEE IN BANKRUPTCY, *v.* SHIDELER. C. A. 5th Cir. Certiorari denied. *Irving L. Goldberg* for petitioner. *Michael E. Culligan, Jr.* and *Carl Sturzenacker* for respondent. Reported below: 207 F. 2d 95.

No. 538. KELLER ET AL., TRADING AS HOWARD MANUFACTURING CO., *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Oscar H. Brinkman* and *Charles E. Swanson* for petitioners. *Acting Solicitor General Stern, Assistant Attorney General Burger, Melvin Richter* and *Benjamin Forman* for the United States. Reported below: —— U. S. App. D. C. ——, 207 F. 2d 610.

No. 541. STOLLER, DOING BUSINESS AS RICHLAND LAUNDRY & DRY CLEANERS, *v.* NATIONAL LABOR RELATIONS BOARD; and

No. 542. LAUNDRY & DRY CLEANERS UNION, LOCAL 197, *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. *Richard S. Munter* for petitioner in No. 541. *George E. Flood* and *Samuel B. Bassett* for petitioner in No. 542. *Acting Solicitor General Stern, George J. Bott, David P. Findling, Dominick L. Manoli* and *Margaret M. Farmer* for respondent. Reported below: 207 F. 2d 305.

No. 544. SWARTZ ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Hyman M. Greenstein* for petitioners. Reported below: 207 F. 2d 727.

No. 547. C-O-TWO FIRE EQUIPMENT CO. *v.* SPECIALTIES DEVELOPMENT CORP. C. A. 3d Cir. Certiorari denied. *R. Morton Adams* for petitioner. *Floyd H. Crews* for respondent. Reported below: 207 F. 2d 753.

No. 549. CLARK *v.* BRYSON, SHERIFF. Court of Criminal Appeals of Texas. Certiorari denied. *John D. Cofer* for petitioner. *John Ben Shepperd,* Attorney General of Texas, and *Rudy G. Rice* and *Horace Wimberly, Jr.,* Assistant Attorneys General, for respondent.

No. 551. HART *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Leffel Gentry* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Holland, Ellis N. Slack* and *Robert N. Anderson* for the United States. Reported below: 207 F. 2d 813.

No. 556. HICKEY ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *James M. Marsh, Stanley Folz* and *J. Harry LaBrum* for petitioners. *Acting Solicitor*

*General Stern, Assistant Attorney General Morton, Roger P. Marquis* and *S. Billingsley Hill* for the United States. Reported below: 208 F. 2d 269.

No. 567. UNITED STATES *v.* DOUGLAS. C. A. 9th Cir. Certiorari denied. *Acting Solicitor General Stern* for the United States. *Dale D. Drain* for respondent. Reported below: 207 F. 2d 381.

No. 581. SIMPLEX CLOTH CUTTING MACHINE CO., INC. *v.* HOLTZOFF, UNITED STATES DISTRICT JUDGE, ET AL. C. A. 2d Cir. Certiorari denied. *Samuel J. Stoll* for petitioner. *Victor D. Borst* for respondents.

No. 519. JEOFFROY MFG., INC. ET AL. *v.* GRAHAM ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion certiorari should be granted. *W. W. Gibson* for petitioners. *Claude A. Fishburn* and *Orville O. Gold* for respondents. Reported below: 206 F. 2d 772.

No. 533. SUEHIRO ET AL. *v.* BROWNELL, ATTORNEY GENERAL, SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN. C. A. 9th Cir. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion certiorari should be granted. *Roger E. Brooks* and *John Ward Cutler* for petitioners. *Acting Solicitor General Stern, Assistant Attorney General Townsend, James D. Hill, George B. Searls* and *Irwin A. Seibel* for respondent. Reported below: 206 F. 2d 892.

No. 545. DAYLESS MANUFACTURING CO., INC. ET AL. *v.* ARTMOORE COMPANY ET AL. C. A. 7th Cir. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion certiorari should be granted. *Robert I. Dennison* for petitioners. *Eugene C. Knoblock* for respondents. Reported below: 208 F. 2d 1.

No. 546. JONES ET UX. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE JACKSON took no part in the consideration or decision of this application. *Roy St. Lewis* and *Carl L. Shipley* for petitioners. *Acting Solicitor General Stern, Assistant Attorney General Burger, Paul A. Sweeney* and *Lester S. Jayson* for the United States. Reported below: 207 F. 2d 563.

No. 145, Misc. SMITH *v.* HEINZE, WARDEN. Supreme Court of California. Certiorari denied. Petitioner *pro se*. *Edmund G. Brown,* Attorney General of California, and *Doris H. Maier,* Deputy Attorney General, for respondent.

No. 164, Misc. BRAWER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Petitioner *pro se*. *Acting Solicitor General Stern, Assistant Attorney General Olney, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 205 F. 2d 153.

No. 216, Misc. BERMAN *v.* GILLROY, COMMISSIONER, DEPARTMENT OF HOUSING AND BUILDINGS OF THE CITY OF NEW YORK, ET AL. Court of Appeals of New York. Certiorari denied. Petitioner *pro se*. *Denis M. Hurley* and *Seymour B. Quel* for respondents. Reported below: 305 N. Y. 688, 112 N. E. 2d 771.

No. 309, Misc. TOELLE *v.* COLORADO SEMINARY ET AL. Supreme Court of Colorado. Certiorari denied. *Albert Ellis Radkinsky* for petitioner.

No. 321, Misc. JONES *v.* FLORIDA. Supreme Court of Florida. Certiorari denied. *Zachariah Hicklin Douglas* for petitioner. Reported below: 67 So. 2d 207.

No. 347, Misc. AYCOCK *v.* NORTH CAROLINA. Supreme Court of North Carolina. Certiorari denied.

No. 348, Misc. CASH *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied.

No. 350, Misc. CLEMENTI *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied.

No. 352, Misc. HAINES *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 353, Misc. SEVERA *v.* PENNSYLVANIA. Superior Court of Pennsylvania. Certiorari denied.

No. 358, Misc. FORTOLONI *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 359, Misc. MARCO *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 360, Misc. LANDGRAVER *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 361, Misc. ROLLINS *v.* RAGEN, WARDEN, ET AL. Circuit Court of Will County, Illinois. Certiorari denied.

No. 362, Misc. NORDELL *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 414 Ill. 375, 111 N. E. 2d 555.

No. 363, Misc. BARNETT *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied.

No. 365, Misc. DELEVAY *v.* KENEIPP ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied.

No. 367, Misc. COLE *v.* HEINZE, WARDEN. Supreme Court of California. Certiorari denied.

No. 368, Misc. SHAW *v.* RANDOLPH, WARDEN. Circuit Court of Randolph County, Illinois. Certiorari denied.

No. 370, Misc. DUNLAP *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied.

No. 372, Misc. MARSH *v.* INDIANA. Superior Court of Indiana, La Porte County. Certiorari denied.

No. 375, Misc. BOOTH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 209 F. 2d 183.

No. 376, Misc. JOHNSON *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 377, Misc. WELLS *v.* RAGEN, WARDEN, ET AL. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 378, Misc. SEVERA *v.* MALPASS, PAROLE OFFICER. C. A. 2d Cir. Certiorari denied.

No. 381, Misc. THOMAS *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 383, Misc. NORDELL *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied.

No. 387, Misc. ZUCCO *v.* RAGEN, WARDEN. Circuit Court of Lake County, Illinois. Certiorari denied.

No. 393, Misc. HALL *v.* SKEEN, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 395, Misc. MALEK *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 396, Misc. WARD *v.* ELLIS, GENERAL MANAGER OF STATE PENITENTIARY. Supreme Court of Texas. Certiorari denied.

*Rehearing Denied.*

No. 81. NATIONAL LABOR RELATIONS BOARD *v.* BILL DANIELS, INC. ET AL., 346 U. S. 918;

No. 209. CHICAGO, ROCK ISLAND & PACIFIC RAILROAD CO. *v.* STUDE ET AL., 346 U. S. 574;

No. 224. CIVIL AERONAUTICS BOARD *v.* SUMMERFIELD, POSTMASTER GENERAL, ET AL., *ante*, p. 67;

No. 225. WESTERN AIR LINES, INC. *v.* CIVIL AERONAUTICS BOARD ET AL., *ante*, p. 67;

No. 435. NORTH *v.* FLORIDA, 346 U. S. 932;

No. 473. ALKER ET AL. *v.* BUTCHER & SHERRERD ET AL., 346 U. S. 925; and

No. 474. COLBERT ET AL. *v.* BROTHERHOOD OF RAILROAD TRAINMEN ET AL., 346 U. S. 931. Petitions for rehearing denied.

No. 128. COUNTY BOARD OF ARLINGTON COUNTY ET AL. *v.* STATE MILK COMMISSION, 346 U. S. 932. Motion for leave to file petition for rehearing denied.

No. 308, October Term, 1952. DALEHITE ET AL. *v.* UNITED STATES, 346 U. S. 15. Motion for leave to file a second petition for rehearing on behalf of certain petitioners denied. THE CHIEF JUSTICE, MR. JUSTICE DOUGLAS, and MR. JUSTICE CLARK took no part in the consideration or decision of this motion.

No. 131, Misc. TATE *v.* CALIFORNIA, 346 U. S. 879. Second petition for rehearing denied.

No. 288, Misc. CURLEY *v.* WISCONSIN, 346 U. S. 939; and

No. 304, Misc. ALLEN *v.* SMYTH, SUPERINTENDENT OF VIRGINIA STATE PENITENTIARY, *ante,* p. 906. Petitions for rehearing denied.

MARCH 15, 1954.

*Decisions Per Curiam.*

No. 423. BENTSEN ET AL. *v.* BLACKWELL ET AL. Certiorari, 346 U. S. 908, to the United States Court of Appeals for the Fifth Circuit. Argued March 9, 1954. Decided March 15, 1954. *Per Curiam:* The argument having developed the undesirability of deciding the questions in this case on the pleadings, the writ of certiorari is dismissed. *Paul A. Porter* and *Milton V. Freeman* argued the cause for petitioners. With them on the brief was *Jackson Littleton. Edward Holland McIlheran* argued the cause for respondents. With him on the brief was *Garland F. Smith.* By special leave of Court, *John F. Davis* argued the cause for the Securities and Exchange Commission, as *amicus curiae,* urging affirmance. With him on the brief were *Solicitor General Sobeloff, William H. Timbers, Alexander Cohen* and *Henry L. Stern.* Reported below: 203 F. 2d 690.

No. 601. TOWERY *v.* NORTH CAROLINA. Appeal from the Supreme Court of North Carolina. *Per Curiam:* The appeal is dismissed for the want of a substantial federal question. *Arch K. Schoch* for appellant. Reported below: 239 N. C. 274, 79 S. E. 2d 513.

*Miscellaneous Orders.*

No. 9, Original. TEXAS *v.* NEW MEXICO ET AL. The report of the Special Master is received and ordered filed. Exceptions, if any, to the report of the Special Master may be filed by the parties within 60 days.

No. 390, Misc. WATSON *v.* BANNAN, WARDEN. Motion for leave to file petition for writ of habeas corpus denied.

No. 407, Misc. DE VITA *v.* MCCORKLE, ACTING WARDEN, ET AL. Motion for leave to file petition for writ of habeas corpus denied. *Harry Kay* for petitioner. *Charles V. Webb, Jr.* and *C. William Caruso* for respondents.

No. 444, Misc. EX PARTE LONG. Motion for leave to file petition for writ of prohibition denied. *William G. Grant* and *Benicio Sanchez Castano* for petitioner.

*Certiorari Granted.*

No. 534. ELLIS *v.* DIXON ET AL., MEMBERS OF THE BOARD OF EDUCATION OF THE CITY OF YONKERS. Appellate Division of the Supreme Court of New York, Second Department. Certiorari granted. *Emanuel Redfield* for petitioner. *John Preston Phillips* for respondents. Reported below: 281 App. Div. 987, 120 N. Y. S. 2d 854.

No. 385, Misc. LEYRA *v.* DENNO, WARDEN. C. A. 2d Cir. Certiorari granted. *Osmond K. Fraenkel* and *Frederick W. Scholem* for petitioner. *Nathaniel L. Goldstein,* Attorney General of New York, *Wendell P. Brown,* Solicitor General, *Samuel A. Hirshowitz,* Assistant Attorney General, and *William I. Siegel* for respondent. Reported below: 208 F. 2d 605.

*Certiorari Denied.*

No. 78. BINGHAMTON CONSTRUCTION CO., INC. *v.* UNITED STATES. Court of Claims. Certiorari denied. *Jerome Beaudrias* and *Malcolm R. MacIntyre* for peti-

tioner. *Acting Solicitor General Stern* for the United States. Reported below: 123 Ct. Cl. 804, 107 F. Supp. 712.

No. 414. McFee *v.* United States. C. A. 9th Cir. Certiorari denied. *Elden McFarland* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Holland, Ellis N. Slack* and *Joseph M. Howard* for the United States. Reported below: 206 F. 2d 872.

No. 503. Herrera *v.* United States. C. A. 9th Cir. Certiorari denied. *John C. Stevenson* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States. Reported below: 208 F. 2d 215.

No. 517. Florentine *v.* Landon, District Director of Immigration and Naturalization. C. A. 9th Cir. Certiorari denied. *Dolly Lee Butler* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Olney, Beatrice Rosenberg* and *Robert G. Maysack* for respondent. Reported below: 206 F. 2d 870.

No. 520. Ricker et al., doing business as Edw. M. Ricker & Co., *v.* United States. Court of Claims. Certiorari denied. *Harold C. Faulkner* for petitioners. *Acting Solicitor General Stern, Assistant Attorney General Burger* and *Samuel D. Slade* for the United States. Reported below: 126 Ct. Cl. 460, 115 F. Supp. 193.

No. 543. Clay *v.* United States. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Byron N. Scott* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Burger* and *Melvin Richter* for the United States. Reported below: 93 U. S. App. D. C. —— 210 F. 2d 686.

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No. 555. WILSON *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. *Frank A. McDonnell* for petitioner. Reported below: 1 Ill. 2d 178, 115 N. E. 2d 250.

No. 559. JOHNSON ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *John J. Duff* for petitioners. *Acting Solicitor General Stern, Assistant Attorney General Olney, Beatrice Rosenberg* and *Edward S. Szukelewicz* for the United States. Reported below: 208 F. 2d 404.

No. 561. ADAMO *v.* MCCORKLE, ACTING PRINCIPAL KEEPER OF STATE PRISON. Supreme Court of New Jersey. Certiorari denied. *Dominick F. Pachella* for petitioner. *Grover C. Richman, Jr.,* Attorney General of New Jersey, and *Harold Kolovski* and *C. William Caruso,* Deputy Attorneys General, for respondent. Reported below: 13 N. J. 561, 100 A. 2d 674.

No. 565. WILLIAMS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Geoffrey Creyke, Jr.* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *John R. Wilkins* for the United States. Reported below: 208 F. 2d 447.

No. 572. MEADOWS *v.* WESTERN RESERVE LIFE INSURANCE CO. Supreme Court of Texas. Certiorari denied. *John M. Scott* for petitioner. *Webster Atwell* for respondent. Reported below: 152 Tex. ——, 261 S. W. 2d 554.

No. 576. UNITED STATES *v.* TAFFS. C. A. 8th Cir. Certiorari denied. *Acting Solicitor General Stern* for the United States. *Hayden C. Covington* for respondent. Reported below: 208 F. 2d 329.

No. 472. United Railroad Operating Crafts et al. *v.* Wyer, Trustee, et al. C. A. 2d Cir. Certiorari denied. Mr. Justice Reed and Mr. Justice Jackson are of the opinion certiorari should be granted. *Edward J. Fruchtman* and *Richard F. Watt* for petitioners. *William J. O'Brien* for Wyer; *Edward R. Brumley* for the New York, New Haven & Hartford Railroad Co.; *Shad Polier, Millard L. Midonick, Clifford D. O'Brien* and *Ruth Weyand* for the Brotherhood of Locomotive Engineers, and *Mr. Polier, Mr. Midonick, Harold C. Heiss* and *Russell B. Day* for the Brotherhood of Locomotive Firemen and Enginemen; and *Bernard L. Alderman* for the Brotherhood of Railroad Trainmen, respondents. Reported below: 205 F. 2d 153.

No. 513. United Railroad Operating Crafts et al. *v.* Northern Pacific Railway Co. et al. C. A. 9th Cir. Certiorari denied. Mr. Justice Reed and Mr. Justice Jackson are of the opinion certiorari should be granted. *Clifford Hoof* for petitioners. *M. L. Countryman, Jr.* for the Northern Pacific Railway Co.; and *DeWitt Williams* for the Brotherhood of Railroad Trainmen, respondents. Reported below: 208 F. 2d 135.

No. 548. United Railroad Operating Crafts et al. *v.* Pennsylvania Railroad Co. et al. C. A. 7th Cir. Certiorari denied. Mr. Justice Reed and Mr. Justice Jackson are of the opinion certiorari should be granted. *Edward J. Fruchtman* and *Richard F. Watt* for petitioners. *Melvin L. Griffith* and *Edward B. Henslee* for the Brotherhood of Railroad Trainmen, respondent.

No. 108, Misc. Farro *v.* United States. C. A. 2d Cir. Certiorari denied. *Peter L. F. Sabbatino* for petitioner. *Acting Solicitor General Stern, Assistant Attor-*

*ney General Olney, Beatrice Rosenberg* and *Robert G. Maysack* for the United States.

No. 210, Misc. JOHNSON *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Petitioner *pro se. Latham Castle,* Attorney General of Illinois, and *William C. Wines,* Assistant Attorney General, for respondent.

No. 272, Misc. VALYKEO *v.* WEST VIRGINIA ET AL. Supreme Court of Appeals of West Virginia. Certiorari denied. Petitioner *pro se. John G. Fox,* Attorney General of West Virginia, and *T. D. Kauffelt,* Assistant Attorney General, for respondents.

No. 317, Misc. PENNSYLVANIA EX REL. HAINES *v.* BURKE, WARDEN. Supreme Court of Pennsylvania, Eastern District. Certiorari denied. *Conrad G. Moffett* for petitioner.

No. 329, Misc. REED *v.* CRANOR, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit and the United States District Court for the Eastern District of Washington denied.

No. 379, Misc. WOOLFORD *v.* WARDEN, MARYLAND HOUSE OF CORRECTION. Supreme Bench of Baltimore City, Maryland. Certiorari denied.

No. 401, Misc. TRIPP *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 403, Misc. KLINEDINST *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied. Reported below: —— Tex. Cr. R. ——, 265 S. W. 2d 593.

No. 417, Misc. WILLIAMS *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 418, Misc. PATSKIN *v.* PENNSYLVANIA. Supreme Court of Pennsylvania, Eastern District. Certiorari denied. *John Harrison Boyles* and *Milton I. Baldinger* for petitioner. Reported below: 375 Pa. 368, 100 A. 2d 472.

No. 320, Misc. HAEUSSLER *v.* CALIFORNIA. Supreme Court of California. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion certiorari should be granted. *A. L. Wirin* and *Fred Okrand* for petitioner. Reported below: 41 Cal. 2d 252, 260 P. 2d 8.

*Rehearing Denied.*

No. 12. IRVINE *v.* CALIFORNIA, *ante*, p. 128;

No. 198. MICHIGAN-WISCONSIN PIPE LINE CO. *v.* CALVERT, COMPTROLLER OF PUBLIC ACCOUNTS, ET AL., *ante*, p. 157; and

No. 200. PANHANDLE EASTERN PIPE LINE CO. *v.* CALVERT, COMPTROLLER OF PUBLIC ACCOUNTS, ET AL., *ante*, p. 157. Petitions for rehearing denied.

No. 17. PARTMAR CORPORATION ET AL. *v.* PARAMOUNT PICTURES THEATRES CORP. ET AL., *ante*, p. 89. Rehearing denied. MR. JUSTICE JACKSON and MR. JUSTICE CLARK took no part in the consideration or decision of this application.

No. 501. WHITE ET AL. *v.* HOWARD ET AL., *ante*, p. 910. Rehearing denied. THE CHIEF JUSTICE took no part in the consideration or decision of this application.

APRIL 5, 1954.*

*Certiorari Granted.*

No. 566. MCALLISTER *v.* UNITED STATES. C. A. 2d Cir. Certiorari granted. *Jacob Rassner* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Burger* and *Leavenworth Colby* for the United States. Reported below: 207 F. 2d 952.

No. 587. MEACHAM CORPORATION ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari granted. *Thomas B. Gay* and *H. Merrill Pasco* for petitioners. *Solicitor General Sobeloff, Assistant Attorney General Burger, Melvin Richter* and *Cornelius J. Peck* for the United States. Reported below: 207 F. 2d 535.

No. 589. OFFUTT *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. *Warren E. Magee* and *Charlotte Maskey* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *John R. Wilkins* for the United States. Reported below: —— U. S. App. D. C. ——, 208 F. 2d 842.

No. 574. COMMISSIONER OF INTERNAL REVENUE *v.* ESTATE OF STERNBERGER, CHASE NATIONAL BANK OF NEW YORK, EXECUTOR. C. A. 2d Cir. Certiorari granted. *Robert L. Stern*, then Acting Solicitor General, filed the petition for the Commissioner. *Solicitor General Sobeloff* filed a reply to the brief in opposition. *Edward S. Greenbaum* for respondent. Reported below: 207 F. 2d 600.

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*MR. JUSTICE JACKSON took no part in the consideration or decision of the cases in which orders are this day announced, except as noted in case No. 552, *post*, p. 937.

No. 161, Misc. CHANDLER *v.* WARDEN FRETAG. Supreme Court of Tennessee. Certiorari granted. *James P. Brown, Carl A. Cowan* and *Phillip M. O'Hara* for petitioner. *Roy H. Beeler,* Attorney General of Tennessee, and *Nat Tipton* and *Knox Bigham,* Assistant Attorneys General, for respondent.

*Certiorari Denied.*

No. 495. GILLASPIE *v.* DEPARTMENT OF PUBLIC SAFETY OF TEXAS. Supreme Court of Texas. Certiorari denied. *Emmett J. Rahm* for petitioner. *John Ben Shepperd,* Attorney General of Texas, and *Rudy G. Rice,* Assistant Attorney General, for respondent. Reported below: 152 Tex. —, 259 S. W. 2d 177.

No. 527. MOSELY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *J. Tom Watson* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Edward S. Szukelewicz* for the United States. Reported below: 207 F. 2d 908.

No. 554. STEPP, ADMINISTRATOR, *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Louis B. Fine* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Burger* and *Paul A. Sweeney* for the United States. Reported below: 207 F. 2d 909.

No. 562. BUMSTED ET AL. *v.* MARKHAM, ALIEN PROPERTY CUSTODIAN. C. A. 3d Cir. Certiorari denied. *Joseph B. Keenan* for petitioners. *Solicitor General Sobeloff, Assistant Attorney General Townsend, James D. Hill, George B. Searls* and *David Schwartz* for respondent. Reported below: 207 F. 2d 503.

No. 563. HOGAN *v.* RICKETTS, EXECUTOR. C. A. 6th Cir. Certiorari denied. *George S. Hawke* for petitioner. Reported below: 207 F. 2d 780.

No. 564. Eller et al. *v.* United States. C. A. 4th Cir. Certiorari denied. *Raymond Kyle Hayes* for petitioners. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 208 F. 2d 716.

No. 568. United States *v.* Praylou et al. C. A. 4th Cir. Certiorari denied. *Robert L. Stern,* then Acting Solicitor General, filed the petition for the United States. *Solicitor General Sobeloff* filed a memorandum for the United States in reply to the brief in opposition. *Shepard K. Nash* for respondents. Reported below: 208 F. 2d 291.

No. 570. Kaskel *v.* Impellitteri, Mayor of New York, et al. Court of Appeals of New York. Certiorari denied. *Harold L. Herzstein* for petitioner. *Harry E. O'Donnell, Seymour B. Quel* and *Benjamin Offner* for Impellitteri et al.; and *Samuel I. Rosenman* and *Max Freund* for the Triborough Bridge & Tunnel Authority, respondents. Reported below: 306 N. Y. 73, 115 N. E. 2d 659.

No. 573. Edward Valves, Inc. *v.* United States. C. A. 7th Cir. Certiorari denied. *Charles D. Hamel* and *John Enrietto* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Burger* and *Melvin Richter* for the United States. Reported below: 207 F. 2d 329.

No. 575. United Biscuit Co., Union Biscuit Division, *v.* National Labor Relations Board. C. A. 8th Cir. Certiorari denied. *Walter R. Mayne* for petitioner. *Solicitor General Sobeloff, George J. Bott, David P. Findling* and *Dominick L. Manoli* for respondent. Reported below: 208 F. 2d 52.

No. 578. DUFFY THEATRES, INC. *v.* GRIFFITH CONSOLIDATED THEATRES, INC. C. A. 10th Cir. Certiorari denied. *Glen D. Johnson* for petitioner. Reported below: 208 F. 2d 316.

No. 579. YOUNG ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 4th Cir. Certiorari denied. *William E. Davis, Kendall A. Young* and *T. Barton Harrington* for petitioners. *Solicitor General Sobeloff, Assistant Attorney General Holland, Ellis N. Slack* and *John J. Kelley, Jr.* for respondent. Reported below: 208 F. 2d 795.

No. 580. CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD CO. *v.* WOODROW. Supreme Court of Minnesota. Certiorari denied. *A. C. Erdall, M. L. Bluhm* and *C. L. Taylor* for petitioner. *Harry H. Peterson* for respondent. Reported below: 240 Minn. ——, 61 N. W. 2d 240.

No. 582. INDUSTRIAL COTTON MILLS (DIVISION OF J. P. STEVENS & CO., INC.) *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 4th Cir. Certiorari denied. *Whiteford S. Blakeney* for petitioner. *Solicitor General Sobeloff, George J. Bott, David P. Findling, Dominick L. Manoli* and *Bernard Dunau* for respondent. Reported below: 208 F. 2d 87.

No. 585. Q-TIPS, INC. *v.* JOHNSON & JOHNSON. C. A. 3d Cir. Certiorari denied. *W. Brown Morton* for petitioner. *Arnold S. Worfolk* and *Norman St. Landau* for respondent. Reported below: 207 F. 2d 509.

No. 586. SKALLY ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Charles Dana Snewind* for petitioners. *Solicitor General Sobeloff, Assistant Attorney*

*General Olney, Robert S. Erdahl* and *Robert G. Maysack* for the United States. Reported below: 210 F. 2d 69.

No. 588. D. O. Norton & Son et al. *v.* Industrial Accident Commission of California et al. Supreme Court of California. Certiorari denied. *H. Mason Welch* and *J. Joseph Barse* for petitioners. *Everett A. Corten* for the Industrial Accident Commission of California, respondent.

No. 590. Hickok et al. *v.* Toledo Society for Crippled Children et al. Supreme Court of Texas. Certiorari denied. *Frank A. Harrington* and *Henry W. Seney* for petitioners. *Charles L. Black, Virgil T. Seaberry, Bert P. Hebenstreit, Wayne E. Stichter* and *LeRoy E. Eastman* for respondents. Reported below: 152 Tex. ——, 261 S. W. 2d 692.

No. 594. Humble Oil & Refining Co. *v.* Shepperd, Attorney General. Court of Civil Appeals of Texas, Ninth Supreme Judicial District. Certiorari denied. *Felix A. Raymer* and *Rex G. Baker* for petitioner. *John Ben Shepperd,* Attorney General of Texas, and *Phillip Robinson,* Assistant Attorney General, for respondent. Reported below: 259 S. W. 2d 580.

No. 600. Dorris, County Chairman of Democratic Party of Luzerne County, *v.* Lloyd et al., County Commissioners of Luzerne County. Supreme Court of Pennsylvania, Eastern District. Certiorari denied. *Daniel J. Flood* and *James Lenahan Brown* for petitioner. Reported below: 375 Pa. 474, 100 A. 2d 924.

No. 514. Washington Department of Game et al. *v.* Federal Power Commission et al. C. A. 9th Cir. Certiorari denied. Mr. Justice Douglas is of the opinion certiorari should be granted. *Don Eastvold,* Attor-

ney General, and *William E. Hicks, Lee Olwell* and *Harold A. Pebbles,* Special Assistant Attorneys General, for the State of Washington, petitioner. *Robert L. Stern,* then Acting Solicitor General, *Assistant Attorney General Burger, Melvin Richter, Lester S. Jayson, Willard W. Gatchell, John C. Mason* and *Louis C. Kaplan* for the Federal Power Commission, and *Clarence M. Boyle* and *E. K. Murray* for the City of Tacoma, respondents. Reported below: 207 F. 2d 391.

No. 552. IDAHO *v.* ARTHUR. Supreme Court of Idaho. Certiorari denied. MR. JUSTICE REED and MR. JUSTICE JACKSON are of the opinion certiorari should be granted. *Robert E. Smylie,* Attorney General of Idaho, and *J. R. Smead,* Assistant Attorney General, for petitioner. *Theodore H. Little* for respondent. Reported below: 74 Idaho 251, 261 P. 2d 135.

No. 553. SWAN *v.* BOARD OF EDUCATION OF THE CITY OF LOS ANGELES. Supreme Court of California. Certiorari denied. *L. H. Phillips* for petitioner. *Harold W. Kennedy* and *Clarence H. Langstaff* for respondent. Reported below: 41 Cal. 2d 546, 261 P. 2d 261.

No. 560. SCHINO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this application. *Alfonso J. Zirpoli* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 209 F. 2d 67.

No. 211, Misc. REED ET AL. *v.* BLEVINS ET AL. Supreme Court of Arkansas. Certiorari denied. *P. L. Smith* and *Tilghman E. Dixon* for petitioners. *A. L. Barber* for respondents. Reported below: 222 Ark. 202, 258 S. W. 2d 564.

No. 247, Misc. JOHNSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Robert L. Stern*, then Acting Solicitor General, *Assistant Attorney General Olney, Beatrice Rosenberg* and *Edward S. Szukelewicz* for the United States. Reported below: 207 F. 2d 314.

No. 336, Misc. SCHINDLER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Robert L. Stern*, then Acting Solicitor General, *Assistant Attorney General Olney, Beatrice Rosenberg* and *Edward S. Szukelewicz* for the United States. Reported below: 208 F. 2d 289.

No. 373, Misc. BANNING *v.* LOONEY, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 382, Misc. GRAZIANO *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied.

No. 386, Misc. STEVENS *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 389, Misc. MUSKUS *v.* OHIO. Supreme Court of Ohio. Certiorari denied. *Ralph W. Ross* for petitioner. *John Rossetti* for respondent. Reported below: 160 Ohio St. 233, 115 N. E. 2d 585.

No. 391, Misc. COLLINS *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 397, Misc. THOMAS *v.* CALIFORNIA ET AL. Supreme Court of California. Certiorari denied.

No. 408, Misc. GRAMMER *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. *Joseph Sher-*

*bow* and *Theodore Sherbow* for petitioner. *Edward D. E. Rollins,* Attorney General of Maryland, *Ambrose T. Hartman,* Assistant Attorney General, and *Anselm Sodaro* for respondent. Reported below: 203 Md. 200, 100 A. 2d 257.

No. 413, Misc. PALANUK *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Claude L. Dawson* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Burger, Paul A. Sweeney* and *John R. Benney* for the United States. Reported below: 207 F. 2d 802.

No. 419, Misc. TABOR *v.* HIATT, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 422, Misc. BARRINGER *v.* CRANOR, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. Supreme Court of Washington. Certiorari denied.

No. 426, Misc. MERRIMAN *v.* ARIZONA. Supreme Court of Arizona. Certiorari denied.

No. 430, Misc. WADE *v.* CONNECTICUT. Supreme Court of Errors of Connecticut. Certiorari denied.

No. 434, Misc. SHEEHAN *v.* CRANOR, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. Supreme Court of Washington. Certiorari denied.

No. 439, Misc. LEEDY *v.* INDIANA. Supreme Court of Indiana. Certiorari denied. *James C. Cooper* for petitioner. Reported below: —— Ind. ——, 115 N. E. 2d 600.

No. 445, Misc. BECK *v.* CRANOR, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. Supreme Court of Washington. Certiorari denied.

No. 450, Misc. HOLLAND *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 451, Misc. OWENS *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 453, Misc. BEARD ET AL. *v.* RAGEN, WARDEN. Circuit Court of Lake County, Illinois. Certiorari denied.

No. 457, Misc. MOTLEY *v.* NORTH CAROLINA. Superior Court of Rockingham County, North Carolina. Certiorari denied.

No. 458, Misc. NEWTON *v.* CRANOR, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. Supreme Court of Washington. Certiorari denied.

*Rehearing Denied.*

No. 473. ALKER ET AL. *v.* BUTCHER & SHERRERD ET AL., 346 U. S. 925. Second petition for rehearing denied.

No. 65. UNITED STATES *v.* BINGHAMTON CONSTRUCTION CO., INC., *ante*, p. 171;

No. 519. JEOFFROY MFG., INC. ET AL. *v.* GRAHAM ET AL., *ante*, p. 920;

No. 525. PARNACHER ET AL. *v.* MOUNT, *ante*, p. 917;

No. 546. JONES ET UX. *v.* UNITED STATES, *ante*, p. 921;

No. 225, Misc. ANSELMI *v.* ATTORNEY GENERAL OF THE UNITED STATES ET AL., *ante*, p. 902;

No. 332, Misc. NEGRON ET AL. *v.* NEW YORK, *ante*, p. 907;

No. 346, Misc. EX PARTE LUSTIG, *ante*, p. 911; and

No. 352, Misc. HAINES *v.* ILLINOIS, *ante*, p. 922. Petitions for rehearing denied.

## April 12, 1954.*

*Decisions Per Curiam.*

No. 606. Interstate Motor Freight System, Inc. *v.* Messner, Secretary of the Department of Revenue, et al.; and

No. 615. Shirks Motor Express Corp. *v.* Messner, Secretary of the Department of Revenue, et al. Appeals from the Supreme Court of Pennsylvania, Middle District. *Per Curiam:* The motions to dismiss are granted and the appeals are dismissed for the want of a substantial federal question. *Frank A. Sinon* for appellants. *John R. Norris* was also for appellant in No. 615. *Frank F. Truscott,* Attorney General of Pennsylvania, and *Harry F. Stambaugh* for appellees. Reported below: 375 Pa. 450, 100 A. 2d 913.

*Miscellaneous Orders.*

No. 5, Original, October Term, 1950. New Jersey *v.* New York et al. The motion of the State of Delaware for leave to intervene and to file an answer to the amended petition of the City of New York for modification of the decree is granted and the answer is referred to the Special Master. *H. Albert Young,* Attorney General, and *Vincent A. Theisen,* Chief Deputy Attorney General, for the State of Delaware.

No. 431, Misc. Breeding *v.* Swenson, Warden. Petition for writ of certiorari to the Supreme Court of Minnesota denied. Motion for leave to file petition for writ of habeas corpus also denied. Reported below: 241 Minn. ——, 62 N. W. 2d 488.

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*Mr. Justice Jackson took no part in the consideration or decision of the cases in which orders are this day announced.

No. 380, Misc. Ex parte Allen. Motion for leave to file petition for writ of mandamus denied.

No. 398, Misc. Smith *v.* Overlade, Warden. Motion for leave to file petition for writ of certiorari denied.

No. 404, Misc. Ex parte Ritchey; and

No. 467, Misc. In re Marsh. Motions for leave to file petitions for writs of habeas corpus denied.

*Certiorari Granted.*

No. 591. Rice *v.* Sioux City Memorial Park Cemetery, Inc. et al. Supreme Court of Iowa. Certiorari granted. *Neil R. McCluhan* and *Lowell C. Kindig* for petitioner. *Jesse E. Marshall* and *H. C. Harper* for respondents. Reported below: 245 Iowa 147, 60 N. W. 2d 110.

No. 626. Baltimore Contractors, Inc. *v.* Bodinger. C. A. 2d Cir. Certiorari granted. *Morris Rosenberg* and *George Brussel, Jr.* for petitioner. *Charles Wilson* for respondent.

*Certiorari Denied.* (*See also Misc. Nos. 398 and 431, supra.*)

No. 537. Moore *v.* Commissioner of Internal Revenue; and

No. 596. Commissioner of Internal Revenue *v.* Moore. C. A. 9th Cir. Certiorari denied. *Melvin D. Wilson* and *Elmo H. Conley* for Moore. *Robert L. Stern,* then Acting Solicitor General, *Assistant Attorney General Holland, Ellis N. Slack, Lee A. Jackson* and *Joseph F. Goetten* for the Commissioner. Reported below: 207 F. 2d 265.

No. 584. NITTERHOUSE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Henry D. O'Connor* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Holland, Ellis N. Slack* and *Robert B. Ross* for the United States. Reported below: 207 F. 2d 618.

No. 597. FARMER, CHAIRMAN OF THE NATIONAL LABOR RELATIONS BOARD, ET AL. *v.* UNITED ELECTRICAL, RADIO & MACHINE WORKERS OF AMERICA (UE) ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Robert L. Stern,* then Acting Solicitor General, and *George J. Bott* for the National Labor Relations Board, petitioner. *David Scribner* for the United Electrical, Radio & Machine Workers; *Victor Rabinowitz* for the American Communications Association; and *Harold I. Cammer* for the International Fur & Leather Workers Union, respondents. Reported below: —— U. S. App. D. C. ——, 211 F. 2d 36.

No. 598. FARMER, CHAIRMAN OF THE NATIONAL LABOR RELATIONS BOARD, ET AL. *v.* INTERNATIONAL FUR & LEATHER WORKERS UNION OF UNITED STATES AND CANADA. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Robert L. Stern,* then Acting Solicitor General, and *George J. Bott* filed the petition for the National Labor Relations Board, petitioner. *Solicitor General Sobeloff* and *Mr. Bott* filed a memorandum in reply to the brief in opposition. *Harold I. Cammer* and *David Rein* for respondent. Reported below: —— U. S. App. D. C. ——, 211 F. 2d 36.

No. 603. BALTIMORE & OHIO RAILROAD CO. *v.* JOHNSON, ADMINISTRATRIX. C. A. 3d Cir. Certiorari denied. *Edwin H. Burgess* and *Kenneth H. Ekin* for petitioner. Reported below: 208 F. 2d 633.

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No. 604. BAYARD ET AL. *v.* MARTIN. Supreme Court of Delaware. Certiorari denied. *Gerard P. Kavanaugh* for petitioners. *Daniel O. Hastings* and *William D. Donnelly* for respondent. Reported below: —— Del. ——, 101 A. 2d 329.

No. 605. PIERCE *v.* AMERICAN COMMUNICATIONS CO., INC. C. A. 1st Cir. Certiorari denied. *David Rines* for petitioner. *Paul Kolisch* and *Robert L. Thompson* for respondent. Reported below: 208 F. 2d 763.

No. 607. PIGOTT ET AL. *v.* DETROIT, TOLEDO & IRONTON RAILROAD CO. ET AL. C. A. 6th Cir. Certiorari denied. *Edward J. Fruchtman* and *Richard F. Watt* for petitioners. *Wayland K. Sullivan* for the Brotherhood of Railroad Trainmen, respondent.

No. 610. LEIDMAN *v.* BINGHAM ET AL., CONSTITUTING THE BOARD OF TRANSPORTATION OF THE CITY OF NEW YORK, ET AL. Court of Appeals of New York. Certiorari denied. *Irving Lemov* for petitioner. *Seymour B. Quel* for respondents. Reported below: 306 N. Y. 663, 116 N. E. 2d 496.

No. 627. COLLINS, TRUSTEE, ET AL. *v.* O'BRIEN ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *William B. Collins* for petitioners. *Al. Philip Kane, Charles V. Koons* and *William A. Kehoe, Jr.* for respondents. Reported below: —— U. S. App. D. C. ——, 208 F. 2d 44.

No. 251, Misc. SHERIDAN *v.* ELLIS, GENERAL MANAGER, TEXAS PRISON SYSTEM. Court of Criminal Appeals of Texas. Certiorari denied. Petitioner *pro se. John Ben Shepperd,* Attorney General of Texas, and *Rudy G. Rice* and *A. M. LeCroix,* Assistant Attorneys General, for respondent.

No. 330, Misc. CALARCO *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Edward S. Szukelewicz* for the United States. Reported below: 207 F. 2d 958.

No. 355, Misc. HERMAN ET AL. *v.* HERMAN ET AL. Court of Appeals of New York. Certiorari denied. *Bernard H. Sandler, David Schenker* and *Benjamin Schenker* for M. Edward Herman, petitioner. *John C. Marbach* for Helen Herman, respondent. Reported below: 306 N. Y. 566, 115 N. E. 2d 679.

No. 356, Misc. FONTANO *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied. Reported below: 14 N. J. 173, 101 A. 2d 559.

No. 357, Misc. GIBSON *v.* LAINSON, WARDEN. Supreme Court of Iowa. Certiorari denied. Reported below: 244 Iowa 1396, 60 N. W. 2d 797.

No. 394, Misc. CHANDLER *v.* SKEEN, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 399, Misc. BRADFORD *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 405, Misc. RZEPPA *v.* MICHIGAN ET AL. Supreme Court of Michigan. Certiorari denied.

No. 406, Misc. GREENE *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 1 Ill. 2d 235, 115 N. E. 2d 265.

No. 409, Misc. HORTON *v.* SKEEN, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 411, Misc. COLLINS *v.* SUPREME COURT OF CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 416, Misc. KAUMEYER *v.* STEELE, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 420, Misc. FURLONG *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied.

No. 421, Misc. BROADBENT *v.* BROADBENT. Appellate Court of Illinois, First District. Certiorari denied. Petitioner *pro se*. *Leon N. Miller* for respondent. Reported below: 351 Ill. App. 192, 114 N. E. 2d 425.

No. 423, Misc. MCGEE *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 424, Misc. GERMANY *v.* HUDSPETH, WARDEN. C. A. 10th Cir. Certiorari denied. *Elisha Scott* for petitioner. *Harold R. Fatzer*, Attorney General of Kansas, and *Paul E. Wilson*, Assistant Attorney General, for respondent. Reported below: 209 F. 2d 15.

No. 425, Misc. SCHUCH *v.* PENNSYLVANIA ET AL. Supreme Court of Pennsylvania, Eastern District. Certiorari denied.

No. 428, Misc. LEVITAS *v.* ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK. Court of Appeals of New York and the Appellate Division of the Supreme Court of New York, First Department. Certiorari denied. Petitioner *pro se*. *Frank H. Gordon* for respondent. Reported below: 306 N. Y. 632, 116 N. E. 2d 242.

No. 429, Misc. YOUNG *v.* EIDSON, WARDEN. Supreme Court of Missouri. Certiorari denied.

No. 433, Misc. MACK *v.* ELLIS, GENERAL MANAGER, TEXAS PRISON SYSTEM. Court of Criminal Appeals of Texas. Certiorari denied.

No. 436, Misc. BECKER *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 437, Misc. GOLDSMITH *v.* WASHINGTON. Supreme Court of Washington. Certiorari denied.

No. 438, Misc. WALTER *v.* BAUMAN ET AL. Supreme Court of Ohio. Certiorari denied. Reported below: 160 Ohio St. 273, 116 N. E. 2d 435.

No. 440, Misc. BANNING *v.* IOWA ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 209 F. 2d 262.

No. 441, Misc. SHAILER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 443, Misc. MACK *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied.

No. 448, Misc. COLE *v.* RANDOLPH, WARDEN. Circuit Court of Macoupin County, Illinois. Certiorari denied.

No. 449, Misc. GATES *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 452, Misc. COLEMON *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 454, Misc. PENNENGA *v.* NEW YORK. Appellate Division of the Supreme Court of New York, Third Judicial Department. Certiorari denied.

No. 455, Misc. ROLESON *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied. Reported below: 14 N. J. 403, 102 A. 2d 606.

No. 460, Misc. TUMBIOLO *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied. Reported below: 14 N. J. 495, 103 A. 2d 182.

No. 461, Misc. HOWARD *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 463, Misc. MILAM *v.* WEST VIRGINIA. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 464, Misc. CARROLL *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied.

No. 465, Misc. FARLEY *v.* SKEEN, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 469, Misc. LUNDBERG *v.* JACQUES, WARDEN. Supreme Court of Michigan. Certiorari denied.

No. 471, Misc. BROWNING *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 210 F. 2d 654.

No. 473, Misc. SMITH *v.* ROVER ET AL. United States District Court for the District of Columbia. Certiorari denied.

No. 474, Misc. DAVIS *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied.

No. 478, Misc. GASTON *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 486, Misc. SMITH *v.* BANNAN, WARDEN. Supreme Court of Michigan. Certiorari denied.

No. 492, Misc. BEECHER *v.* LEAVENWORTH STATE BANK ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 211 F. 2d 158.

No. 447, Misc. VANDERWYDE *v.* DENNO, WARDEN. C. A. 2d Cir. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion certiorari should be granted. *Rudolph Stand* for petitioner. *Nathaniel L. Goldstein,* Attorney General of New York, *Wendell P. Brown,* Solicitor General, *Samuel A. Hirshowitz* and *Theodore P. Halperin,* Assistant Attorneys General, and *Frank S. Hogan* for respondent. Reported below: 210 F. 2d 105.

*Rehearing Denied.*

No. 228. MAZER ET AL., DOING BUSINESS AS JUNE LAMP MANUFACTURING CO., *v.* STEIN ET AL., DOING BUSINESS AS REGLOR OF CALIFORNIA, *ante,* p. 201; and

No. 351, Misc. CROSS *v.* SUPREME COURT OF CALIFORNIA, *ante,* p. 915. Petitions for rehearing denied.

APRIL 26, 1954.*

*Decisions Per Curiam.*

No. 644. VISSERING MERCANTILE CO. ET AL. *v.* ANNUNZIO, DIRECTOR OF LABOR, ET AL. Appeal from the Supreme Court of Illinois. *Per Curiam:* The appeal is dismissed for the want of a substantial federal question. *Preston C. King, Jr.* and *Preston B. Kavanagh* for appellants. Reported below: 1 Ill. 2d 108, 115 N. E. 2d 306.

No. 652. ARENS ET AL. *v.* VILLAGE OF ROGERS. Appeal from the Supreme Court of Minnesota. *Per Curiam:* The appeal is dismissed for the want of a substantial

*MR. JUSTICE JACKSON took no part in the consideration or decision of the cases in which orders are this day announced.

federal question. *William B. Lockhart* and *David W. Louisell* for appellants. Reported below: —— Minn. ——, 61 N. W. 2d 508.

*Miscellaneous Orders.*

Pursuant to the provisions of Title 28, U. S. C., § 42, It is ordered that MR. JUSTICE REED be, and he is hereby, temporarily assigned to the Second Circuit as Circuit Justice.

No. —, Original. ALABAMA *v.* TEXAS ET AL.; and

No. —, Original. RHODE ISLAND *v.* LOUISIANA ET AL., *ante*, p. 272. Petitions for rehearing denied. Motion for clarification of the decision also denied. THE CHIEF JUSTICE took no part in the consideration or decision of these applications.

No. 494, Misc. BYRNE *v.* HOOPER, U. S. DISTRICT JUDGE. Motion for leave to file petition for writ of mandamus denied.

*Probable Jurisdiction Noted.*

No. 647. UNITED STATES *v.* SHUBERT ET AL. Appeal from the United States District Court for the Southern District of New York. Probable jurisdiction noted. *Robert L. Stern*, then Acting Solicitor General, filed a Statement as to Jurisdiction for the United States, appellant. *Alfred McCormack* and *William Klein* for appellees. Reported below: 120 F. Supp. 15.

*Certiorari Granted.*

No. 47. WILBURN BOAT CO. ET AL. *v.* FIREMAN'S FUND INSURANCE CO. C. A. 5th Cir. Certiorari granted. *Hobert Price* and *Alexander Gullett* for petitioners. *Edward B. Hayes* for respondent. Reported below: 201 F. 2d 833.

No. 612. National City Bank of New York *v.* Republic of China et al. C. A. 2d Cir. Certiorari granted. *Chauncey B. Garver* and *Wm. Harvey Reeves* for petitioner. *Cletus Keating, Robert E. Kline, Jr.* and *Louis J. Gusmano* for the Republic of China, respondent. Reported below: 208 F. 2d 627.

No. 654. United States *v.* Brown. C. A. 2d Cir. Certiorari granted. *Solicitor General Sobeloff* for the United States. *Lee S. Kreindler* filed a memorandum stating that respondent does not oppose the petition. Reported below: 209 F. 2d 463.

*Certiorari Denied.*

No. 130. Sorensen et al. *v.* City of New York. C. A. 2d Cir. Certiorari denied. *William L. Standard* and *Louis R. Harolds* for petitioners. *Denis M. Hurley* and *Seymour B. Quel* for respondent. Reported below: 202 F. 2d 857.

No. 592. Witte *v.* New Jersey. Supreme Court of New Jersey. Certiorari denied. *Joseph Sitnick* for petitioner. *Grover C. Richman, Jr.*, Attorney General of New Jersey, and *John G. Thevos*, Deputy Attorney General, for respondent. Reported below: 13 N. J. 598, 100 A. 2d 754.

No. 599. General Electric Co. *v.* Porter. C. A. 9th Cir. Certiorari denied. *F. D. Metzger* for petitioner. *Ivan Merrick, Jr.* and *Florence Mayne Merrick* for respondent. Reported below: 208 F. 2d 805.

No. 602. Theobald Industries, Inc. *v.* United States. Court of Claims. Certiorari denied. *Josephus C. Trimble* and *Joseph P. McCarthy* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General*

*Burger, Melvin Richter* and *Morton Hollander* for the United States. Reported below: 126 Ct. Cl. 517, 115 F. Supp. 699.

No. 608. Louis Pizitz Dry Goods Co., Inc. *v.* Deal et al., Executors. C. A. 5th Cir. Certiorari denied. *William S. Pritchard* and *Winston B. McCall* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Holland, Ellis N. Slack* and *Lee A. Jackson* for respondents. Reported below: 208 F. 2d 724.

No. 613. Shannon *v.* United States. C. A. 5th Cir. Certiorari denied. *E. T. Miller* and *James O. Cade* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 209 F. 2d 835.

No. 614. Accardo *v.* United States. C. A. 3d Cir. Certiorari denied. *Jack Wasserman* and *Anthony A. Calandra* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States. Reported below: 208 F. 2d 632.

No. 616. Interstate Commerce Commission *v.* Taylor. C. A. 9th Cir. Certiorari denied. *Edward M. Reidy* and *James A. Murray* for petitioner. Reported below: 209 F. 2d 353.

No. 618. Savage Truck Line, Inc. *v.* United States. C. A. 4th Cir. Certiorari denied. *Collins Denny, Jr.* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Burger, Paul A. Sweeney* and *Cornelius J. Peck* for the United States. Reported below: 209 F. 2d 442.

No. 619. Caprio *v.* New Jersey. Supreme Court of New Jersey. Certiorari denied. *Ralph G. Mesce* for

petitioner. *Charles V. Webb, Jr.* and *C. William Caruso* for respondent. Reported below: 14 N. J. 64, 101 A. 2d 9.

No. 620. UNITED STATES *v.* HOOLEY. C. A. 1st Cir. Certiorari denied. *Solicitor General Sobeloff* for the United States. Reported below: 209 F. 2d 219.

No. 621. UNITED STATES *v.* O'KEEFE. C. A. 1st Cir. Certiorari denied. *Solicitor General Sobeloff* for the United States. Reported below: 209 F. 2d 223.

No. 623. FERROLINE CORPORATION *v.* GENERAL ANILINE & FILM CORP. C. A. 7th Cir. Certiorari denied. *George I. Haight* and *Carl Hoppe* for petitioner. *Edward R. Johnston* and *James A. Sprowl* for respondent. Reported below: 207 F. 2d 912.

No. 624. PECHEUR LOZENGE CO., INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 2d Cir. Certiorari denied. *Walter Gordon Merritt, Alfred J. L'Heureux* and *Henry Clifton, Jr.* for petitioner. *Solicitor General Sobeloff, George J. Bott, David P. Findling, Dominick L. Manoli* and *Frederick U. Reel* for respondent. Reported below: 209 F. 2d 393.

No. 636. SUPREME GRAND LODGE, MODERN FREE AND ACCEPTED COLORED MASONS OF THE WORLD, *v.* MOST WORSHIPFUL PRINCE HALL GRAND LODGE, FREE AND ACCEPTED MASONS, JURISDICTION OF GEORGIA. C. A. 5th Cir. Certiorari denied. *W. Edward Swinson* for petitioner. *Thurgood Marshall* and *Amos T. Hall* for respondent. Reported below: 209 F. 2d 156.

No. 638. SALSBURY MOTORS, INC., WHOSE NAME HAS BEEN CHANGED TO WAYNE MANUFACTURING CO., *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. *George R. Maury* for petitioner. *Solicitor General Sobe-*

*loff, Assistant Attorney General Holland, Ellis N. Slack, Hilbert P. Zarky* and *Walter Akerman, Jr.* for the United States, respondent. Reported below: 210 F. 2d 171.

No. 640. HEMPHILL, EXECUTOR, *v.* WABASH RAILROAD CO. C. A. 7th Cir. Certiorari denied. *Thomas Sweeney* and *Omer Poos* for petitioner. *Lee William Ensel* for respondent. Reported below: 209 F. 2d 768.

No. 646. HAMME ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 4th Cir. Certiorari denied. *Stanley Worth, Edward S. Smith, J. Gilmer Körner, Jr., Richard S. Doyle, Monte Appel* and *Jules G. Körner, III,* for petitioners. *Solicitor General Sobeloff, Assistant Attorney General Holland, Ellis N. Slack* and *Elmer J. Kelsey* for respondent. Reported below: 209 F. 2d 29.

No. 677. WILSON, EXECUTOR, ET AL. *v.* SIMLER. C. A. 10th Cir. Certiorari denied. *Fred E. Suits* and *John B. Dudley* for petitioners. *Leslie L. Conner* and *Charles W. Conner* for respondent. Reported below: 210 F. 2d 99.

No. 571. BLOEDORN, EXECUTRIX, *v.* UNITED STATES. Petition for writ of certiorari to the Court of Claims denied for the reason that application therefor was not made within the time provided by law. *Edgar J. Goodrich, Lipman Redman* and *George S. Elmore* for petitioner. *Solicitor General Sobeloff* for the United States. Reported below: 126 Ct. Cl. 591, 116 F. Supp. 133.

No. 617. APPLEWHITE ET AL. *v.* JONES ET AL. C. A. 7th Cir. Certiorari denied. *Edmund Hatfield* for petitioners. Reported below: 207 F. 2d 701.

No. 629. SUMTER ET UX. *v.* SHEFFIELD ET AL. C. A. 5th Cir. Certiorari denied. Petitioners *pro se. W. Carloss Morris, Jr.* for Morris et al., respondents. Reported below: 207 F. 2d 958.

No. 630. CHAPLIN *v.* CLANCY, U. S. DISTRICT JUDGE, ET AL. C. A. 2d Cir. Motion of respondent to supplement the record denied. Certiorari denied. *Myles J. Lane* for petitioner. *Jay Leo Rothschild* for Kravetz, respondent. Reported below: 209 F. 2d 958.

No. 656. MALLONEE ET AL., SHAREHOLDERS' PROTECTIVE COMMITTEE, ET AL. *v.* FAHEY ET AL.; and

No. 659. UTLEY, RECEIVER, *v.* FAHEY ET AL. C. A. 9th Cir. Certiorari denied. MR. JUSTICE CLARK took no part in the consideration or decision of these applications. *Wyckoff Westover* for Mallonee et al., and *Charles K. Chapman* for the Long Beach Federal Savings and Loan Association, petitioners in No. 656. *W. I. Gilbert, Jr.* for petitioner in No. 659. *Solicitor General Sobeloff, Assistant Attorney General Burger, Samuel D. Slade* and *Herman Marcuse* for Fahey et al., and *Sylvester Hoffmann* for the Federal Home Loan Bank of San Francisco, respondents. Reported below: 208 F. 2d 197.

No. 264, Misc. JOHNSON *v.* ILLINOIS. Supreme Court of Illinois and Criminal Court of Cook County, Illinois. Certiorari denied. Petitioner *pro se. Latham Castle,* Attorney General of Illinois, and *William C. Wines,* Assistant Attorney General, for respondent.

No. 342, Misc. MESSAMORE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 209 F. 2d 258.

No. 369, Misc. RICE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Edward S. Szukelewicz* for the United States. Reported below: 207 F. 2d 771.

No. 388, Misc. JONES *v.* ILLINOIS TERMINAL RAILROAD CO. Supreme Court of Missouri. Certiorari denied. *Myron D. Mills* for petitioner. *Richard Wayne Ely* for respondent. Reported below: 260 S. W. 2d 487.

No. 400, Misc. BELL *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *James J. Laughlin* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States. Reported below: —— U. S. App. D. C. ——, 210 F. 2d 711.

No. 412, Misc. HENLEY *v.* MOORE, WARDEN. Court of Criminal Appeals of Texas. Certiorari denied.

No. 466, Misc. JONES *v.* BALKCOM, WARDEN. Supreme Court of Georgia. Certiorari denied. *Thurgood Marshall, Jack Greenberg, Robert L. Carter* and *A. T. Walden* for petitioner. *Eugene Cook,* Attorney General of Georgia, *Lamar W. Sizemore, Robert H. Hall* and *W. Dan Greer,* Assistant Attorneys General, and *J. T. Grice,* Deputy Assistant Attorney General, for respondent. Reported below: 210 Ga. 262, 79 S. E. 2d 1.

No. 470, Misc. PALAKIKO ET AL. *v.* HARPER, WARDEN. C. A. 9th Cir. Certiorari denied. *Harriet Bouslog* for petitioners. *Edward N. Sylva,* Attorney General of Hawaii, and *Frank D. Gibson, Jr.* and *Rhoda V. Lewis,* Deputy Attorneys General, for respondent. Reported below: 209 F. 2d 75.

No. 476, Misc. JENKINS *v.* ARKANSAS. Supreme Court of Arkansas. Certiorari denied. *Q. Byrum Hurst* for

petitioner. *Tom Gentry,* Attorney General of Arkansas, and *Thorp Thomas* and *James L. Sloan,* Assistant Attorneys General, for respondent. Reported below: —— Ark. ——, 265 S. W. 2d 512.

No. 477, Misc. PULT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Edward S. Szukelewicz* for the United States. Reported below: 209 F. 2d 346.

No. 479, Misc. SIMPSON *v.* WASHINGTON. Supreme Court of Washington. Certiorari denied.

No. 480, Misc. BARR *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 483, Misc. REED *v.* KENTUCKY. Court of Appeals of Kentucky. Certiorari denied. Reported below: 261 S. W. 2d 9.

No. 484, Misc. SELFRIDGE *v.* CRANOR, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. Supreme Court of Washington. Certiorari denied.

No. 485, Misc. COOPER *v.* CRANOR, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. Supreme Court of Washington. Certiorari denied.

No. 489, Misc. CHAPMAN *v.* OHIO DEPARTMENT OF PUBLIC WELFARE. C. A. 6th Cir. Certiorari denied.

No. 497, Misc. GOSS *v.* INDIANA. Circuit Court of Putnam County, Indiana. Certiorari denied.

No. 505, Misc. HERTZ *v.* ALVIS, WARDEN. Supreme Court of Ohio. Certiorari denied. Reported below: 161 Ohio St. 70, 117 N. E. 2d 925.

No. 506, Misc. DAYTON *v.* BENNETT. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied.

No. 511, Misc. PERSONS *v.* WASHINGTON. Supreme Court of Washington. Certiorari denied.

No. 526, Misc. STAMPS *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied.

*Rehearing Denied.* (*See also Alabama v. Texas et al. and Rhode Island v. Louisiana et al., ante, p. 950.*)

No. 78. BINGHAMTON CONSTRUCTION CO., INC. *v.* UNITED STATES, *ante*, p. 926;

No. 541. STOLLER, DOING BUSINESS AS RICHLAND LAUNDRY & DRY CLEANERS, *v.* NATIONAL LABOR RELATIONS BOARD; and

No. 542. LAUNDRY & DRY CLEANERS UNION, LOCAL 197, *v.* NATIONAL LABOR RELATIONS BOARD, *ante*, p. 919. Petitions for rehearing denied.

MAY 3, 1954.*

*Miscellaneous Orders.*

No. 29. WATSON ET UX. *v.* EMPLOYERS LIABILITY ASSURANCE CORP., LTD. ET AL. Appeal from and petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit. Further consideration of the question of the jurisdiction of this Court in this case on appeal is postponed to the hearing of the case on the merits. The petition for writ of certiorari is granted. *Val Irion* for appellants-petitioners. *Charles D. Egan* for appellees-respondents. Reported below: 202 F. 2d 407.

*MR. JUSTICE JACKSON took no part in the consideration or decision of the cases in which orders are this day announced.

No. 507, Misc. CRANDALL *v.* CRANOR, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. Petition for writ of certiorari to the Supreme Court of Washington denied. Motion for leave to file petition for writ of habeas corpus also denied. Reported below: 44 Wash. 2d 156, 266 P. 2d 344.

No. 487, Misc. EX PARTE MARSHALL. Motion for leave to file petition for writ of mandamus denied.

No. 508, Misc. WATSON *v.* BANNAN, WARDEN. Motion for leave to file petition for writ of habeas corpus denied.

No. 519, Misc. BROWN *v.* UNITED STATES. Motion for leave to file petition for writ of certiorari denied.

*Certiorari Granted.* (*See No. 29, supra.*)

*Certiorari Denied.* (*See also Misc. Nos. 507 and 519, supra.*)

No. 521. CALIFRO ET AL. *v.* CALIFORNIA. District Court of Appeal of California, First Appellate District. Certiorari denied. *James C. Purcell* for petitioners. Reported below: 120 Cal. App. 2d 504, 261 P. 2d 332.

No. 569. BORING *v.* OHIO. Supreme Court of Ohio. Certiorari denied. *Harold Leventhal* for petitioner. *Clarence A. Graham* for respondent. Reported below: 160 Ohio St. 188, 115 N. E. 2d 3.

No. 593. BRAND ET AL. *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 415 Ill. 329, 114 N. E. 2d 370.

No. 611. COLLIN COUNTY LEVEE IMPROVEMENT DISTRICT No. 1 ET AL. *v.* UNITED STATES ET AL. C. A. 5th

Cir. Certiorari denied. *Roland Boyd* and *Donald L. Case* for the Collin County Levee Improvement District No. 1, petitioner. *Solicitor General Sobeloff, Assistant Attorney General Morton* and *Roger P. Marquis* for the United States and the Reconstruction Finance Corporation, respondents. Reported below: 208 F. 2d 396.

No. 631. Northwest Steel Rolling Mills, Inc. et al. *v.* Kendall, Assistant Administrator, Economic Stabilization Agency. United States Emergency Court of Appeals. Certiorari denied. *De Witt Williams* for petitioners. *Solicitor General Sobeloff, Assistant Attorney General Burger, Samuel D. Slade* and *Morton Hollander* for respondent. Reported below: 210 F. 2d 283.

No. 632. Pennsylvania Water & Power Co. *v.* Consolidated Gas Electric Light & Power Co. of Baltimore. C. A. 4th Cir. Certiorari denied. *Wilkie Bushby, Everett I. Willis, James Piper* and *R. Dorsey Watkins* for petitioner. *Alfred P. Ramsey, Harry N. Baetjer* and *Inzer B. Wyatt* for respondent. Reported below: 209 F. 2d 131.

No. 633. Cincotta *v.* United States. C. A. 2d Cir. Certiorari denied. *W. Marcus Crahan* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Holland, Ellis N. Slack* and *A. F. Prescott* for the United States. Reported below: 209 F. 2d 122.

No. 653. Klock *v.* United States. C. A. 2d Cir. Certiorari denied. *William W. Barron* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *John R. Wilkins* for the United States. Reported below: 210 F. 2d 215.

No. 281, Misc. Cannon *v.* Ellis, General Manager of the Texas Prison System. Court of Criminal Ap-

peals of Texas. Certiorari denied. Petitioner *pro se*. *John Ben Shepperd,* Attorney General of Texas, and *James N. Castleberry, Jr.,* Assistant Attorney General, for respondent.

No. 338, Misc. CLOKEY *v.* LOONEY, WARDEN. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Carl H. Imlay* for respondent.

No. 384, Misc. CRABTREE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Edward S. Szukelewicz* for the United States. Reported below: 209 F. 2d 164.

No. 402, Misc. POWELL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Melvin Edward Schaengold* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 208 F. 2d 618.

No. 432, Misc. GRAYSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 209 F. 2d 259.

No. 435, Misc. SPRADING *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Edward S. Szukelewicz* for the United States. Reported below: —— U. S. App. D. C. ——, 209 F. 2d 302.

No. 442, Misc. LIPSCOMB *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 209 F. 2d 831.

No. 446, Misc. IN RE FLETCHER. C. A. 4th Cir. Certiorari denied.

No. 475, Misc. MASSE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *J. F. Bishop* for the United States. Reported below: 210 F. 2d 418.

No. 482, Misc. BLOUNT *v.* OREGON. Supreme Court of Oregon. Certiorari denied. Reported below: 200 Ore. 35, 264 P. 2d 419.

No. 488, Misc. FOXALL *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 490, Misc. ANDERSON *v.* ROOD, SUPERINTENDENT, MENDOCINO STATE HOSPITAL. C. A. 9th Cir. Certiorari denied.

No. 491, Misc. PETRABORG *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 493, Misc. ALTIZER *v.* SMYTH, SUPERINTENDENT, VIRGINIA STATE PENITENTIARY. Supreme Court of Appeals of Virginia. Certiorari denied.

No. 495, Misc. WILLIAMS *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 496, Misc. BIRD *v.* MURPHY, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 499, Misc. WYATT *v.* SMYTH, SUPERINTENDENT, VIRGINIA STATE PENITENTIARY. Supreme Court of Appeals of Virginia. Certiorari denied.

No. 500, Misc. KOALSKA *v.* SWENSON, WARDEN. Supreme Court of Minnesota. Certiorari denied. Reported below: —— Minn. ——, 62 N. W. 2d 842.

No. 501, Misc. HOLZAPPLE *v.* RAGEN, WARDEN. Supreme Court of Illinois. Certiorari denied. Reported below: 2 Ill. 2d 124, 117 N. E. 2d 390.

No. 502, Misc. PUFF *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Eugene H. Nickerson* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 211 F. 2d 171.

No. 503, Misc. NEAL *v.* UTAH. Supreme Court of Utah. Certiorari denied. Reported below: —— Utah ——, 254 P. 2d 1053, 262 P. 2d 756.

No. 504, Misc. RIZZI *v.* NEW YORK, BY JACKSON, WARDEN. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Nathaniel L. Goldstein,* Attorney General of New York, *Wendell P. Brown,* Solicitor General, and *Samuel A. Hirshowitz* and *Theodore P. Halperin,* Assistant Attorneys General, for respondent.

No. 512, Misc. ROLLO ET AL. *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 514, Misc. JONES *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 515, Misc. SELL *v.* PENNSYLVANIA ET AL. Supreme Court of Pennsylvania, Eastern District. Certiorari denied.

No. 516, Misc. ROBERTSON *v.* SKEEN, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

*Rehearing Denied.*

No. 160. MILLER BROTHERS CO. *v.* MARYLAND, *ante*, p. 340; and

No. 492, Misc. BEECHER *v.* LEAVENWORTH STATE BANK ET AL., *ante*, p. 949. The petitions for rehearing are denied.

MAY 17, 1954.*

*Decisions Per Curiam.*

No. 625. JOHNS *v.* BALTIMORE & OHIO RAILROAD CO. ET AL. Appeal from the United States District Court for the Northern District of Illinois. *Per Curiam:* The judgment of the three-judge court is affirmed. *Edward J. Fruchtman* and *Richard F. Watt* for appellant. *Edwin H. Burgess* and *Sydney R. Prince, Jr.* for the Baltimore & Ohio Railroad Co.; *Burke Williamson, Harold C. Heiss* and *Russell B. Day* for the Brotherhood of Locomotive Firemen & Enginemen; and *Clifford D. O'Brien* and *Ruth Weyand* for the Brotherhood of Locomotive Engineers, appellees. Reported below: 118 F. Supp. 317.

*Miscellaneous Orders.*

No. ——. BUTLER *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN BERNARDINO. The petition for a temporary restraining order, referred to the Court by MR. JUSTICE DOUGLAS, is denied.

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*MR. JUSTICE JACKSON took no part in the consideration or decision of the cases in which orders are this day announced.

No. 531. ALTON *v.* ALTON. Certiorari, 347 U. S. 911, to the United States Court of Appeals for the Third Circuit. Argued April 7, 1954. A rule is ordered to issue, returnable within ten days, requiring the parties to show cause why the judgments should not be vacated and the case dismissed by the trial court as moot. MR. JUSTICE DOUGLAS and MR. JUSTICE JACKSON took no part in the consideration or decision of this question.

No. 117. FEDERAL COMMUNICATIONS COMMISSION *v.* AMERICAN BROADCASTING CO., INC., *ante,* p. 284;

No. 118. FEDERAL COMMUNICATIONS COMMISSION *v.* NATIONAL BROADCASTING CO., INC., *ante,* p. 284; and

No. 119. FEDERAL COMMUNICATIONS COMMISSION *v.* COLUMBIA BROADCASTING SYSTEM, INC., *ante,* p. 284. The motion of Francis Emmett Williams for leave to intervene as *amicus curiae* and to file a petition for rehearing is denied.

No. 539, Misc. JOHNSON *v.* UTAH. Application denied.

No. 547, Misc. DAUGHARTY *v.* GLADDEN, WARDEN. Motion for leave to file petition for writ of habeas corpus denied.

*Certiorari Granted.*

No. 120. LUMBERMEN'S MUTUAL CASUALTY CO. *v.* ELBERT. C. A. 5th Cir. Certiorari granted. *Joseph H. Jackson* for petitioner. Reported below: 201 F. 2d 500.

No. 609. UNITED STATES *v.* KOPPERS COMPANY, INC. Court of Claims. Certiorari granted. *Solicitor General Sobeloff* for the United States. *David W. Richmond, Robert N. Miller, Frederick O. Graves, E. S. Ruffin, Jr.* and *C. M. Crick* for respondent. Reported below: 126 Ct. Cl. 847, 117 F. Supp. 181.

*Certiorari Denied.*

No. 637. VALENTINE *v.* LAMONT ET AL. Supreme Court of New Jersey. Certiorari denied. *Louis G. Morten* for petitioner. *Theodore Rabinowitz* for Lester Lamont et ux.; *Robert H. Doherty* for the Board of Education of Jersey City, New Jersey; and *Edmund S. Johnson* for Anthony J. Lamont, respondents. Reported below: 13 N. J. 569, 100 A. 2d 668.

No. 645. SYRACUSE COLOR PRESS, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 2d Cir. Certiorari denied. *James P. Burns, Jr.* for petitioner. *Solicitor General Sobeloff, George J. Bott, David P. Findling, Dominick L. Manoli* and *Frederick U. Reel* for respondent. Reported below: 209 F. 2d 596

No. 649. RICH *v.* PENNSYLVANIA. Supreme Court of Pennsylvania, Eastern District. Certiorari denied. *John B. O'Brien* for petitioner.

No. 657. DUKE ET AL. *v.* RECONSTRUCTION FINANCE CORPORATION ET AL. C. A. 4th Cir. Certiorari denied. *Wilson K. Barnes* for Duke, *William Hoffenberg* for Kemper, and *Joseph Loeffler* for Mahle, petitioners. *Solicitor General Sobeloff, Assistant Attorney General Burger* and *Samuel D. Slade* for the Reconstruction Finance Corporation, respondent. Reported below: 209 F. 2d 204.

No. 658. WHEATLAND ELECTRIC COOPERATIVE, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 10th Cir. Certiorari denied. *David P. Strickler* for petitioner. *Solicitor General Sobeloff, George J. Bott, David P. Findling* and *Dominick L. Manoli* for respondent. Reported below: 208 F. 2d 878.

No. 660. NATIONAL MANUFACTURING CO. ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Clay C. Rogers* and *Byron Spencer* for petitioners. *Solicitor General Sobeloff, Assistant Attorney General Burger, Paul A. Sweeney* and *Morton Hollander* for the United States. Reported below: 210 F. 2d 263.

No. 661. SPECTOR MOTOR SERVICE, INC. *v.* MESSNER, SECRETARY OF REVENUE, ET AL. Supreme Court of Pennsylvania, Middle District. Certiorari denied. *James M. Marsh* and *J. Harry LaBrum* for petitioner. *Frank F. Truscott,* Attorney General of Pennsylvania, and *Harry F. Stambaugh* for respondents. Reported below: 375 Pa. 473, 100 A. 2d 924.

No. 663. UNITED STATES EX REL. MATRANGA *v.* MACKEY, COMMISSIONER OF IMMIGRATION AND NATURALIZATION, ET AL. C. A. 2d Cir. Certiorari denied. *Alfred E. Santangelo* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Edward S. Szukelewicz* for respondents. Reported below: 210 F. 2d 160.

No. 665. KANN ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. *F. T. Weil* for petitioners. *Robert L. Stern,* then Acting Solicitor General, *Assistant Attorney General Holland, Ellis N. Slack* and *Hilbert P. Zarky* for respondent. Reported below: 210 F. 2d 247.

No. 669. MONARCH MACHINE TOOL CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. *John C. Gall* for petitioner. *Solicitor General Sobeloff, George J. Bott, David P. Findling* and *Dominick L. Manoli* for respondent. Reported below: 210 F. 2d 183.

No. 670. AEROVOX CORPORATION *v.* NATIONAL LABOR RELATIONS BOARD. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Harold D. Cohen* and *Michael Waris, Jr.* for petitioner. *Solicitor General Sobeloff* and *George J. Bott* for respondent. Reported below: —— U. S. App. D. C. ——, 211 F. 2d 640.

No. 672. FRAVER *v.* STUDEBAKER CORPORATION. C. A. 3d Cir. Certiorari denied. *William J. Ruano* for petitioner. *William H. Eckert, William H. Webb, John A. Dienner* and *Edward C. Grelle* for respondent. Reported below: 208 F. 2d 794.

No. 708. COPPER TAN, INC. *v.* DOUGLAS LABORATORIES CORP. C. A. 2d Cir. Certiorari denied. *John S. Finn* for petitioner. *Leslie D. Taggart* for respondent. Reported below: 210 F. 2d 453.

No. 230. STOUT *v.* PATE. Supreme Court of Georgia. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this application. *J. C. Murphy* for petitioner. *A. Walton Nall* for respondent. Reported below: 209 Ga. 786, 75 S. E. 2d 748.

No. 634. PATE *v.* STOUT. Supreme Court of California. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this application. *A. Walton Nall* for petitioner. *Hudson P. Hibbard* for respondent. Reported below: 120 Cal. App. 2d 699, 261 P. 2d 788.

No. 648. BRAND ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. Petitioners *pro se*. *Solicitor General Sobeloff, Assistant Attorney General Holland* and *Ellis N. Slack* for respondent. Reported below: 209 F. 2d 255.

No. 462, Misc. DUSSELDORF *v.* TEETS, WARDEN. C. A. 9th Cir. Certiorari denied. *Victor E. Cappa* for petitioner. Reported below: 209 F. 2d 754.

No. 510, Misc. THOMAS *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *John J. Dwyer* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: —— U. S. App. D. C. ——, 211 F. 2d 45.

No. 518, Misc. WILLIAMS *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 520, Misc. BINDRIN *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 521, Misc. NATION *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 524, Misc. CLARK *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 535, Misc. MORAN *v.* DONALDSON ET AL. Court of Claims. Certiorari denied. Reported below: 127 Ct. Cl. 825.

No. 536, Misc. MANCINI *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 540, Misc. MARVICH *v.* CALIFORNIA. District Court of Appeal of California, Third Appellate District. Certiorari denied. Reported below: 121 Cal. App. 2d 548, 263 P. 2d 460.

No. 546, Misc. ALLEN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 209 F. 2d 353.

No. 549, Misc. CALDWELL *v.* BANNAN, WARDEN. Supreme Court of Michigan. Certiorari denied.

No. 561, Misc. BRAGG *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

*Rehearing Denied.*

No. 563. HOGAN *v.* RICKETTS, EXECUTOR, *ante*, p. 933;

No. 584. NITTERHOUSE *v.* UNITED STATES, *ante*, p. 943;

No. 605. PIERCE *v.* AMERICAN COMMUNICATIONS CO., INC., *ante*, p. 944;

No. 606. INTERSTATE MOTOR FREIGHT SYSTEM, INC. *v.* MESSNER, SECRETARY OF THE DEPARTMENT OF REVENUE, ET AL., *ante*, p. 941;

No. 615. SHIRKS MOTOR EXPRESS CORP. *v.* MESSNER, SECRETARY OF THE DEPARTMENT OF REVENUE, ET AL., *ante*, p. 941; and

No. 627. COLLINS, TRUSTEE, ET AL. *v.* O'BRIEN ET AL., *ante*, p. 944. Petitions for rehearing denied.

No. 401. BROWNELL, ATTORNEY GENERAL, SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, *v.* SINGER, *ante*, p. 403;

No. 402. SUPERINTENDENT OF BANKS OF THE STATE OF NEW YORK, LIQUIDATOR, *v.* SINGER, *ante*, p. 403; and

No. 78, Misc. BARTHOLOMEW *v.* ILLINOIS, 346 U. S. 841. Petitions for rehearing denied. THE CHIEF JUSTICE took no part in the consideration or decision of these applications.

No. 397, Misc. THOMAS *v.* CALIFORNIA ET AL., *ante*, p. 938;

No. 398, Misc. SMITH *v.* OVERLADE, WARDEN, *ante*, p. 942;

No. 447, Misc. VANDERWYDE *v.* DENNO, WARDEN, *ante*, p. 949; and

No. 483, Misc. REED *v.* KENTUCKY, *ante*, p. 957. Petitions for rehearing denied.

MAY 24, 1954.*

*Decisions Per Curiam.*

No. 9. FLORIDA EX REL. HAWKINS ET AL. *v.* BOARD OF CONTROL OF FLORIDA ET AL. On petition for writ of certiorari to the Supreme Court of Florida;

No. 85. MUIR *v.* LOUISVILLE PARK THEATRICAL ASSOCIATION. On petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit; and

No. 595. TUREAUD *v.* BOARD OF SUPERVISORS OF LOUISIANA STATE UNIVERSITY AND AGRICULTURAL AND MECHANICAL COLLEGE ET AL. On petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit. *Per Curiam:* The petitions for writs of certiorari are granted. The judgments are vacated and the cases are remanded for consideration in the light of the Segregation Cases decided May 17, 1954, *Brown* v. *Board of Education, ante*, p. 483, and conditions that now prevail.

*Robert L. Carter* and *Thurgood Marshall* for petitioners. *Ulysses S. Tate* and *Alexander P. Tureaud* were also with them in No. 595. *Richard W. Ervin*, Attorney General of Florida, and *Frank J. Heintz, Ralph M. McLane* and *Howard S. Bailey*, Assistant Attorneys General,

*MR. JUSTICE JACKSON took no part in the consideration or decision of cases in which orders are this day announced.

for respondents in No. 9. *James W. Stites* and *Donald Q. Taylor* for respondent in No. 85. *Fred S. LeBlanc,* Attorney General of Louisiana, *W. C. Perrault,* First Assistant Attorney General, *C. Clyde Pearce,* Assistant Attorney General, *J. H. Tucker, Jr., Fred Blanche, Arthur O'Quin, Victor A. Sachse, W. Scott Wilkinson, Leander H. Perez, L. W. Brooks, C. V. Porter, Grove Stafford, Oliver Stockwell* and *Wood Thompson* for respondents in No. 595. Reported below: No. 9, 60 So. 2d 162, 166; No. 85, 202 F. 2d 275; No. 595, 207 F. 2d 807.

No. 655. TURNER ET AL. *v.* CALIFORNIA. Appeal from the Superior Court of California, Appellate Department, County of Los Angeles. *Per Curiam:* The appeal is dismissed for the want of a substantial federal question. MR. JUSTICE BLACK and MR. JUSTICE REED are of the opinion probable jurisdiction should be noted. *James C. Ingebretsen* for appellants. *Roger Arnebergh* and *Philip E. Grey* for appellee. Reported below: 121 Cal. App. 2d 861, 263 P. 2d 685.

No. 666. OHIO EX REL. HAWKE *v.* BROWN, SECRETARY OF STATE OF OHIO. Appeal from the United States District Court for the Southern District of Ohio. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. *George S. Hawke* for appellant. *C. William O'Neil,* Attorney General of Ohio, and *Joseph S. Gill,* First Assistant Attorney General, for appellee. Reported below: 122 F. Supp. 149.

*Miscellaneous Orders.*

No. ——. PINO *v.* NICOLLS, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. The application for bail, referred to the Court by MR. JUSTICE FRANKFURTER, is dismissed for the reason that the question is

moot, petitioner having been admitted to bail. *Jacob Spiegel* for petitioner. *Solicitor General Sobeloff* for respondent.

No. 677. WILSON, EXECUTOR, ET AL. *v.* SIMLER, *ante*, p. 954. Petition for rehearing denied. Motion to stay proceedings also denied.

No. 410, Misc. BOLESTA *v.* MADIGAN, WARDEN, ET AL. Motion for leave to file petition for writ of mandamus denied. Petitioner *pro se*. *Solicitor General Sobeloff* for respondents.

No. 552, Misc. BRANDON *v.* CALIFORNIA. Application denied.

No. 569, Misc. GRAHAM *v.* NEW JERSEY. Motion for leave to file petition for writ of habeas corpus denied.

*Probable Jurisdiction Noted.*

No. 729. UNITED STATES *v.* INTERNATIONAL BOXING CLUB OF NEW YORK, INC. ET AL. Appeal from the United States District Court for the Southern District of New York. Probable jurisdiction noted. *Solicitor General Sobeloff* for the United States. *Whitney North Seymour* and *Charles H. Watson* for appellees.

*Certiorari Granted.* (*See also Nos. 9, 85 and 595, supra.*)

No. 641. UNITED STATES *v.* ACRI ET AL. C. A. 6th Cir. Certiorari granted. *Solicitor General Sobeloff* for the United States. *Francis B. Kavanagh* and *Israel Freeman* for Oravitz, respondent. Reported below: 209 F. 2d 258.

No. 642. UNITED STATES *v.* LIVERPOOL & LONDON & GLOBE INSURANCE CO., LTD. ET AL. C. A. 5th Cir. Certiorari granted. *Solicitor General Sobeloff* for the United

States. *Searcy L. Johnson* for the Liverpool & London & Globe Insurance Co., Ltd.; and *Arthur S. Goldberg* for the Sunnyland Wholesale Furniture Co., respondents. Reported below: 209 F. 2d 684.

No. 643. UNITED STATES *v.* SCOVIL ET AL. Supreme Court of South Carolina. Certiorari granted. *Solicitor General Sobeloff* for the United States. *Thomas A. Wofford* for respondents. Reported below: 224 S. C. 233, 78 S. E. 2d 277.

*Certiorari Denied.*

No. 3. HOLCOMBE, MAYOR OF HOUSTON, ET AL. *v.* BEAL ET AL. C. A. 5th Cir. Certiorari denied. *Douglas W. McGregor* for petitioners. Reported below: 193 F. 2d 384.

No. 156. WICHITA FALLS JUNIOR COLLEGE DISTRICT ET AL. *v.* BATTLE ET AL. C. A. 5th Cir. Certiorari denied. *Guy Rogers* and *C. C. McDonald* for petitioners. Reported below: 204 F. 2d 632.

No. 583. HOUSING AUTHORITY OF THE CITY AND COUNTY OF SAN FRANCISCO ET AL. *v.* BANKS ET AL. District Court of Appeal of California, First Appellate District. Certiorari denied. *George O. Bahrs* and *Henry C. Clausen* for petitioners. *Loren Miller* for respondents. Reported below: 120 Cal. App. 2d 1, 260 P. 2d 668.

No. 662. SANZO *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Sobeloff, Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States. Reported below: 210 F. 2d 49.

No. 667. BENATAR ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Leo R. Friedman* for peti-

tioners. *Solicitor General Sobeloff, Assistant Attorney General Holland, Ellis N. Slack, David L. Luce* and *Joseph M. Howard* for the United States. Reported below: 209 F. 2d 734.

No. 671. MITCHELL *v.* INDIANA. Supreme Court of Indiana. Certiorari denied. *Tyrah Ernest Maholm* for petitioner. *Edwin K. Steers,* Attorney General of Indiana, and *Owen S. Boling,* Deputy Attorney General, for respondent. Reported below: —— Ind. ——, 115 N. E. 2d 595.

No. 675. FLORIDA EX REL. SHROPSHIRE *v.* MAYO, COMMISSIONER OF AGRICULTURE OF FLORIDA AND CUSTODIAN OF STATE PRISONERS. Supreme Court of Florida. Certiorari denied. *Joseph M. Glickstein, Jr.* for petitioner. Reported below: 68 So. 2d 393.

No. 676. ACORD ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Loyd Benefield* for the Chicago, Rock Island & Pacific Railroad Co., petitioner. *Solicitor General Sobeloff, Assistant Attorney General Burger, Samuel D. Slade* and *Herman S. Greitzer* for the United States. Reported below: 209 F. 2d 709.

No. 678. PURITAN CHURCH—THE CHURCH OF AMERICA ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Reginald B. Jackson* for petitioners. *Solicitor General Sobeloff, Assistant Attorney General Holland, Ellis N. Slack, Hilbert P. Zarky* and *Davis W. Morton, Jr.* for respondent. Reported below: —— U. S. App. D. C. ——, 209 F. 2d 306.

No. 682. PORTER *v.* GENERAL ELECTRIC CO. C. A. 9th Cir. Certiorari denied. *Ivan Merrick, Jr.* and *Florence Mayne Merrick* for petitioner. Reported below: 208 F. 2d 805.

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No. 683. SOUTHERN SILK MILLS, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. *Thomas G. McConnell* and *Robert Kemmer* for petitioner. *Solicitor General Sobeloff, George J. Bott, David P. Findling, Dominick L. Manoli* and *Frederick U. Reel* for respondent. Reported below: 209 F. 2d 155, 210 F. 2d 824.

No. 684. L. B. HOSIERY CO., INC. ET AL., DOING BUSINESS AS MYERSTOWN HOSIERY MILLS, *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 3d Cir. Certiorari denied. *M. Stuart Goldin* for petitioners. *Solicitor General Sobeloff, George J. Bott, David P. Findling, Dominick L. Manoli* and *William J. Avrutis* for respondent.

No. 693. LOEW'S INCORPORATED ET AL. *v.* CINEMA AMUSEMENTS, INC.; and

No. 694. RKO RADIO PICTURES, INC. *v.* CINEMA AMUSEMENTS, INC. C. A. 10th Cir. Certiorari denied. *Frederick W. R. Pride, C. Stanley Thompson* and *Albert J. Gould* for petitioners in No. 693. *James V. Hayes* for petitioner in No. 694. *Thurman Arnold* and *Norman Diamond* for respondent. Reported below: 210 F. 2d 86.

No. 715. PALMER SHIPPING CORP. *v.* LUTH. C. A. 3d Cir. Certiorari denied. *Joseph W. Henderson* and *J. Welles Henderson* for petitioner. *Paul M. Goldstein* and *Herman Moskowitz* for respondent. Reported below: 210 F. 2d 224.

No. 668. QUATTRONE *v.* NICOLLS, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION. C. A. 1st Cir. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion certiorari should be granted.

*Allan R. Rosenberg* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *John R. Wilkins* for respondent. Reported below: 210 F. 2d 513.

No. 303, Misc. HINDERHAN *v.* RANDOLPH, WARDEN. Circuit Court of Randolph County, Illinois. Certiorari denied. Petitioner *pro se. Latham Castle,* Attorney General of Illinois, and *William C. Wines,* Assistant Attorney General, for respondent.

No. 349, Misc. STIDHAM *v.* EIDSON, WARDEN. Supreme Court of Missouri. Certiorari denied. Petitioner *pro se. John M. Dalton,* Attorney General of Missouri, and *Samuel M. Watson,* Assistant Attorney General, for respondent.

No. 522, Misc. LEDBETTER *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Henry Lincoln Johnson, Jr.* and *Frank D. Reeves* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: —— U. S. App. D. C. ——, 211 F. 2d 628.

No. 529, Misc. ROUSSEAU *v.* MOORE, WARDEN. Court of Criminal Appeals of Texas. Certiorari denied.

No. 531, Misc. BURKHOLDER *v.* UNITED STATES MARITIME COMMISSION ET AL. Court of Claims. Certiorari denied. Petitioner *pro se. Solicitor General Sobeloff* for the United States and the United States Maritime Commission, respondents. Reported below: 128 Ct. Cl. ——, 119 F. Supp. 743.

No. 533, Misc. WILES *v.* WASHINGTON. Supreme Court of Washington. Certiorari denied.

No. 537, Misc. PETRO *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Sobeloff, Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States. Reported below: 210 F. 2d 49.

No. 543, Misc. MOORE *v.* OKLAHOMA. Criminal Court of Appeals of Oklahoma. Certiorari denied. Reported below: —— Okla. Cr. ——, 260 P. 2d 410.

No. 550, Misc. GEHRING *v.* BANNAN, WARDEN. Supreme Court of Michigan. Certiorari denied.

No. 551, Misc. TUCKER *v.* INDIANA. Supreme Court of Indiana. Certiorari denied. Reported below: —— Ind. ——, 116 N. E. 2d 295.

No. 553, Misc. MOORE *v.* HEINZE, WARDEN, ET AL. Supreme Court of California. Certiorari denied.

No. 555, Misc. HARDING *v.* CAVANAUGH ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 208 F. 2d 632.

No. 557, Misc. HARRIS *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. Reported below: 203 Md. 678, 102 A. 2d 567.

No. 560, Misc. FISHER *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied.

No. 563, Misc. MULLINS *v.* CRANOR, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. Supreme Court of Washington. Certiorari denied.

No. 564, Misc. THOMAS *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 566, Misc. SAM *v.* CRANOR, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. Supreme Court of Washington. Certiorari denied.

No. 567, Misc. SCHILACI *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 571, Misc. MCGEE *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 572, Misc. RICHTER *v.* SWENSON, WARDEN. Supreme Court of Minnesota. Certiorari denied. Reported below: —— Minn. ——, 63 N. W. 2d 265.

No. 576, Misc. KARAFA *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied.

No. 591, Misc. ESTEP *v.* SKEEN, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 597, Misc. EDWARDS *v.* SWYGERT, U. S. DISTRICT JUDGE, ET AL. C. A. 7th Cir. Certiorari denied.

*Rehearing Denied.* (*See also No. 677, ante, p. 973.*)

No. 613. SHANNON *v.* UNITED STATES, *ante,* p. 952;

No. 623. FERROLINE CORPORATION *v.* GENERAL ANILINE & FILM CORP., *ante,* p. 953;

No. 353, Misc. SEVERA *v.* PENNSYLVANIA, *ante,* p. 922;

No. 378, Misc. SEVERA *v.* MALPASS, PAROLE OFFICER, *ante,* p. 923;

No. 402, Misc. POWELL *v.* UNITED STATES, *ante,* p. 961; and

No. 470, Misc. PALAKIKO ET AL. *v.* HARPER, WARDEN, *ante,* p. 956. Petitions for rehearing denied.

No. 24. ST. JOE PAPER CO. ET AL. *v.* ATLANTIC COAST LINE RAILROAD CO., *ante,* p. 298;

No. 33. LYNCH ET AL. *v.* ATLANTIC COAST LINE RAILROAD CO., *ante,* p. 298;

No. 36. AIRD ET AL., TRUSTEES, *v.* ATLANTIC COAST LINE RAILROAD CO., *ante,* p. 298; and

No. 37. WELBON ET AL. *v.* ATLANTIC COAST LINE RAILROAD CO., *ante,* p. 298. Petitions for rehearing denied. MR. JUSTICE BLACK, MR. JUSTICE JACKSON, and MR. JUSTICE CLARK took no part in the consideration or decision of these applications. Memorandum filed by MR. JUSTICE DOUGLAS.

MR. JUSTICE DOUGLAS.

As I was in dissent when these cases were decided on the merits, I am not entitled to vote for a rehearing, unless one of the four Brethren who joined in the opinion of the Court first votes to grant it. Hence I do not urge reconsideration of the decision of the Court that mergers of railroads under § 77 of the Bankruptcy Act cannot be initiated by the Interstate Commerce Commission but must be "proposed by the merging carriers."

There is, however, a phase of the case which was not considered by the Court and which, if meritorious, will change the result of the decision.

The plan of reorganization approved by the Commission (see 282 I. C. C. 195, 213) provides that the assets of the debtor, Florida East Coast R. Co., shall be vested in the Atlantic Coast Line in one of three ways:

(1) "by merger of the debtor" into Atlantic Coast Line;

(2) by "consolidation of the debtor with" Atlantic Coast Line; or

(3) "if the court shall approve, by transfer and conveyance" of the property of the debtor by the trustees to Atlantic Coast Line.

Mergers and consolidations in corporation law are statutory procedures. They are devices whereby two corporations can become one entity, either by the absorption of one corporation by the other or by the creation of a new corporation out of the two old ones. The statutory procedures vary from state to state. But, all problems of bankruptcy reorganization aside, they are always effectuated by a consensual agreement between the corporations being merged or consolidated. The issue discussed in the opinion of the Court of April 5, 1954, pertained to the question as to what constitutes the necessary consensual agreement for a merger or consolidation when one of the corporations is a railroad company being reorganized under § 77 of the Bankruptcy Act. Someone's consent is obviously necessary. The majority held that it was necessary to get consent from "those who in the absence of § 77 would wield the corporate merger powers . . . ." 347 U. S. 298, 309, n. 12. The minority maintained that those who under § 77 had the power to approve a plan of reorganization had the power to give consent to a merger or consolidation.

That issue is not present on the phase of the case now tendered for decision. Even though the reorganization may not be consummated under the merger and consolidation provisions of the plan, it may be consummated under the provision of the plan which allows the transfer and conveyance, with the approval of the reorganization court, of the property of the debtor to Atlantic Coast Line. Trustees in bankruptcy have traditionally had the right to dispose of the bankrupt's assets under the supervision of the bankruptcy court. That power is as ancient as bankruptcy itself.

Why may not the trustees of Florida East Coast sell its property to Atlantic Coast Line, if the reorganization court approves?

Section 5 (2) of the Interstate Commerce Act must, of course, be complied with whether there be a merger, a consolidation, or a purchase of property. But note what § 5 (2)(a) says when a *purchase* of property is involved:

> "It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) of this section—
>
> "(i) . . . for any carrier . . . to purchase . . . the properties . . . of another . . . ." 49 U. S. C. § 5 (2)(a).

We learn from the decisions of the Commission that when a *purchase* of assets is involved, only the purchaser need make application for the unification. There are at least eight cases which illustrate the procedure.

Of these eight, five involve intracorporate transactions, *e. g.*, purchases of the property of a subsidiary by a parent. See *Erie R. Co. Purchase,* 254 I. C. C. 486; *Chesapeake & O. R. Co. Purchase,* 261 I. C. C. 239; *Southern R. Co. Purchase,* 275 I. C. C. 724; *Seaboard R. Co. Acquisition,* 257 I. C. C. 584 (purchase of former subsidiary by reorganized parent). Cf. *Wheeling & L. E. R. Co. Control,* 254 I. C. C. 632 (stock acquisition). Three of the eight cases involve transactions which have all the elements of arm's-length bargaining. See *Gulf, M. & O. R. Co. Purchase,* 261 I. C. C. 623 (purchase of a former jointly-owned subsidiary at a foreclosure sale); *Cambria & I. R. Co. Control,* 275 I. C. C. 360 (stock acquisition by noncarrier); *Gulf, M. & O. R. Co. Purchase, Securities,* 261 I. C. C. 405, approving purchase contemplated by the plan of reorganization in *Alton R. Co. Reorganization,* 261 I. C. C. 343. The latter case involved an arm's-length transaction in which the purchase was worked out in a § 77 reorganization, but approved under § 5 (2) on the application of the purchaser alone. The reorganization plan was confirmed

by the reorganization court and the purchase consummated. See *In re Alton R. Co.*, 159 F. 2d 200.

It, therefore, seems that a sale of assets may be approved under § 5 (2) on the application of the purchaser alone. In the *Erie* case, *supra,* the Commission specifically held that the vendors were not necessary parties to an application under § 5 (2). There the application had been made jointly by the vendee-parent and the vendor-subsidiaries, and the Commission dismissed the application of the vendors.

In the present cases, Atlantic Coast Line has received the permission of the Commission under § 5 (2) to purchase the assets of Florida East Coast, subject to the conditions of § 77 of the Bankruptcy Act. No attempt is made to challenge the adequacy of the findings of the Commission under § 5. If the substantive provisions of § 5 are satisfied, and if only the purchaser need apply under § 5, why do the bankruptcy trustees lack authority to dispose of this property to Atlantic Coast Line, once the requirements of § 77 are satisfied?

It is not apparent why that authority is lacking. Bankruptcy trustees from the beginning have had the power of sale, subject to control by the bankruptcy court.

I, therefore, thought it appropriate that these cases be put down for a rehearing limited to the following question:

It being decided that the debtor may not on this record merge or consolidate with Atlantic Coast Line, may the bankruptcy court nevertheless authorize the transfer of the property of the debtor to Atlantic Coast Line, if all the requirements of § 77 are satisfied?

This point is a substantial one which has not been ruled upon by any court. Since the Court now denies these petitions, the question will be open on remand of the cases.

JUNE 1, 1954.

*Decisions Per Curiam.*

No. 471. ROGERS *v.* UNITED STATES LINES. 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 and the judgment is reversed. MR. JUSTICE FRANKFURTER, MR. JUSTICE JACKSON, and MR. JUSTICE BURTON dissent, adhering to the views expressed in their dissent in *Alaska Steamship Co.* v. *Petterson,* 347 U. S. 396. *Abraham E. Freedman, Charles Lakatos* and *William M. Alper* for petitioner. *Thomas E. Byrne, Jr.* and *Mark D. Alspach* for respondent. Reported below: 205 F. 2d 57.

No. 685. LUCKENBACH STEAMSHIP CO., INC. *v.* UNITED STATES ET AL. Appeal from the United States District Court for the Southern District of New York. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. *Roscoe H. Hupper, Odell Kominers, Henry G. Fischer* and *Mark P. Schlefer* for appellant. *Solicitor General Sobeloff* and *Edward M. Reidy* for the United States and the Interstate Commerce Commission; *John J. O'Connor, William L. McGovern* and *Norman Diamond* for the Isbrandtsen Co., Inc.; *Robert L. Wright* for the New Haven Chamber of Commerce; and *E. Curtis Rouse* for the Richmond Terminal Co., appellees. Reported below: —— F. Supp. ——.

No. 714. GEO. F. ALGER CO. ET AL. *v.* PECK, FORMERLY TAX COMMISSIONER OF OHIO, ET AL. Appeal from the United States District Court for the Southern District of Ohio. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. MR. JUSTICE DOUGLAS is of the opinion probable jurisdiction should be noted and the case set for argument. *Joseph B. Keenan, Alvin O. West,*

*Edmund M. Brady, Taylor C. Burneson* and *Joseph L. Nellis* for appellants. *C. William O'Neill,* Attorney General of Ohio, and *Joseph S. Gill,* First Assistant Attorney General, for appellees. Reported below: 119 F. Supp. 812.

No. 741. BEYERBACH *v.* JUNO OIL CO. ET AL. Appeal from the Supreme Court of California. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of a substantial federal question. *A. P. G. Steffes* and *George H. Zeutzius* for appellant. *Harry E. Templeton* for appellees. Reported below: 42 Cal. 2d 11, 265 P. 2d 1.

*Miscellaneous Orders.*

No. 10, Original. ARIZONA *v.* CALIFORNIA ET AL. The motion of the State of Nevada for leave to intervene is granted. THE CHIEF JUSTICE took no part in the consideration or decision of this motion. *W. T. Mathews,* Attorney General, *Alan Bible* and *William J. Kane,* Special Assistant Attorneys General, and *Geo. P. Annand, William N. Dunseath* and *John W. Barrett,* Deputy Attorneys General, for the State of Nevada, intervener. *Ross F. Jones,* Attorney General, *Howard F. Thompson,* Special Assistant Attorney General, *John H. Moeur, Burr Sutter* and *Perry M. Ling* for the State of Arizona, complainant. *Edmund G. Brown,* Attorney General, *Northcutt Ely, Robert L. McCarty* and *Prentiss Moore,* Assistant Attorneys General, and *Gilbert F. Nelson, Irving Jaffe* and *Robert Sterling Wolf,* Deputy Attorneys General, for the State of California, *Francis E. Jenney* for the Palo Verde Irrigation District, *Harry W. Horton* and *R. L. Knox, Jr.* for the Imperial Irrigation District, *Earl Redwine* for the Coachella Valley County Water District, *James H. Howard, Charles C. Cooper, Jr., Donald M. Keith, Alan Patten* and *Frank P. Doherty* for the Metropolitan Water District

of Southern California, *Roger Arnebergh* for the City of Los Angeles, and *T. B. Cosgrove* for the City of San Diego, defendants.

No. 10, Original. ARIZONA *v.* CALIFORNIA ET AL.

IT IS ORDERED that George I. Haight, Esquire, of Chicago, Illinois, be, and he is hereby, appointed special master in this cause, with authority to summon witnesses, issue subpoenas, and take such evidence as may be introduced and such as he may deem it necessary to call for. The master is directed to find the facts specially and state separately his conclusions of law thereon, and to submit the same to this Court with all convenient speed, together with a draft of the decree recommended by him. The findings, conclusions, and recommended decree of the master shall be subject to consideration, revision, or approval by the Court. The master shall be allowed his actual expenses and a reasonable compensation for his services to be fixed hereafter by the Court. The allowances to him, the compensation paid to his stenographic and clerical assistants, and the cost of printing his report shall be charged against and be borne by the parties in such proportion as the Court hereafter may direct. If the appointment herein made of a master is not accepted, or if the place becomes vacant during the recess of the Court, the Senior Associate Justice shall have authority to make a new designation which shall have the same effect as if originally made by the Court herein.

THE CHIEF JUSTICE took no part in the consideration or decision of this order.

*Ross F. Jones,* Attorney General of Arizona, *Howard F. Thompson,* Special Assistant to the Attorney General, *John H. Moeur, Burr Sutter* and *Perry M. Ling* for complainant. *Edmund G. Brown,* Attorney General, *Northcutt Ely, Robert L. McCarty* and *Prentiss Moore,*

Assistant Attorneys General, and *Gilbert F. Nelson, George M. Treister, Irving Jaffe* and *Robert Sterling Wolf,* Deputy Attorneys General, for the State of California, *Francis E. Jenney* for the Palo Verde Irrigation District, *Harry W. Horton* and *R. L. Knox, Jr.* for the Imperial Irrigation District, *Earl Redwine* for the Coachella Valley County Water District, *James H. Howard, Charles C. Cooper, Jr., Donald M. Keith, Alan Patten* and *Frank P. Doherty* for the Metropolitan Water District of Southern California, *Roger Arnebergh* for the City of Los Angeles, and *T. B. Cosgrove* for the City of San Diego, defendants. *Attorney General Brownell* for the United States, and *W. T. Mathews,* Attorney General, *Alan Bible* and *William J. Kane,* Special Assistant Attorneys General, and *Geo. P. Annand, William N. Dunseath* and *John W. Barrett,* Deputy Attorneys General, for the State of Nevada, interveners.

No. 534, Misc. Howell *v.* Delehant, U. S. District Judge, et al. The motion for leave to file petition for writ of certiorari is denied.

No. 582, Misc. Steele *v.* U. S. Immigration and Naturalization Service;

No. 586, Misc. Sgro *v.* Skaff, Acting Superintendent, Central State Hospital of Wisconsin, et al.; and

No. 594, Misc. Holzworth *v.* Pettis, Superintendent, Western State Hospital of Virginia. Motions for leave to file petitions for writs of habeas corpus denied.

*Certiorari Granted.* (*See also No. 471, supra.*)

No. 692. Premier Oil Refining Co. *v.* United States. The petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted

limited to the question presented by the petition for the writ which reads as follows:

"Where a deficiency in excess profits tax, based on the income and credits as shown in the taxpayer's return, would have existed except for the subsequent application of Section 722 of the Internal Revenue Code, is the taxpayer liable for interest on the amount of such deficiency (hereinafter called the 'potential deficiency') which would have existed had it not been extinguished by the application of Section 722?"

*W. A. Sutherland* and *Mac Asbill, Jr.* for petitioner. *Solicitor General Sobeloff* for the United States. Reported below: 209 F. 2d 692.

*Certiorari Denied.* (*See also No. 534, Misc., supra.*)

No. 628. SOLOMON, ADMINISTRATOR, *v.* BEATTY. Supreme Court of Florida. Certiorari denied. *Barnet Lieberman* for petitioner. *J. Willison Smith, Jr.* for respondent. Reported below: 68 So. 2d 881.

No. 674. NG YIP YEE *v.* BARBER, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari denied. *Alfonso J. Zirpoli* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Robert G. Maysack* for respondent. Reported below: 210 F. 2d 613.

No. 679. WILLIAMS *v.* KYGER ET AL. Supreme Court of Ohio. Certiorari denied. Petitioner *pro se. Gwynne B. Myers* for respondents. Reported below: 160 Ohio St. 407, 116 N. E. 2d 425.

No. 680. STACY ET AL. *v.* GREENBERG ET AL. Supreme Court of New Jersey. Certiorari denied. *Edward R. McGlynn* for petitioners. *Reynier J. Wortendyke, Jr.* for respondents. Reported below: 14 N. J. 262, 102 A. 2d 48.

No. 686. West Coast Exploration Co. *v.* McKay, Secretary of the Interior. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Edward D. Neuhoff* and *Ray L. Jenkins* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Morton, Roger P. Marquis* and *Fred W. Smith* for respondent. Reported below: —— U. S. App. D. C. ——, 213 F. 2d 582.

No. 687. Seven-Up Washington, Inc. et al. *v.* District of Columbia. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *William E. Furey* and *Stephen G. Ingham* for petitioners. *Vernon E. West, Chester H. Gray* and *George C. Updegraff* for respondent. Reported below: —— U. S. App. D. C. ——, —— F. 2d ——.

No. 688. O'Keefe et al. *v.* New York. County Court of Broome County, New York. Certiorari denied. *Louis R. Frumer* for petitioners. Reported below: 306 N. Y. 619, 116 N. E. 2d 80.

No. 689. Fort Pitt Brewing Co. *v.* Commissioner of Internal Revenue. C. A. 3d Cir. Certiorari denied. *Sidney B. Gambill* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Holland* and *Ellis N. Slack* for respondent. Reported below: 210 F. 2d 6.

No. 698. Hillgren *v.* Kwikset Locks, Inc. et al. C. A. 9th Cir. Certiorari denied. *Hamer H. Jamieson* for petitioner. *Fred H. Miller* for respondents. Reported below: 210 F. 2d 483.

No. 705. Switchmen's Union of North America et al. *v.* Ogden Union Railway & Depot Co. et al. C. A. 10th Cir. Certiorari denied. *Solomon Sachs* and

*S. Walter Shine* for petitioners. *Bryan P. Leverich* for the Ogden Union Railway & Depot Co.; and *Calvin W. Rawlings* for the Brotherhood of Railroad Trainmen, respondents. Reported below: 209 F. 2d 419.

No. 759. UNITED SUPPLY & MANUFACTURING CO. *v.* TUCKER, BRONSON & MARTIN. C. A. 5th Cir. Certiorari denied. *James J. Morrison* and *W. C. Perrault* for petitioner. Reported below: 210 F. 2d 415.

No. 700. JAPAN-ATLANTIC & GULF CONFERENCE ET AL. *v.* UNITED STATES ET AL.; and

No. 703. FEDERAL MARITIME BOARD *v.* UNITED STATES ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *James M. Landis, Herman Goldman* and *Elkan Turk* for petitioners in No. 700. *Allen C. Dawson* for petitioner in No. 703. *Solicitor General Sobeloff, Assistant Attorney General Barnes* and *Ralph S. Spritzer* for the United States; *Neil Brooks* for the Secretary of Agriculture; and *John J. O'Connor* and *William L. McGovern* for the Isbrandtsen Co., Inc., respondents. Reported below: —— U. S. App. D. C. ——, 211 F. 2d 51.

No. 727. SHELLHAMMER, GENERAL ADMINISTRATRIX, *v.* LEHIGH VALLEY RAILROAD CO. Supreme Court of New Jersey. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion certiorari should be granted. *Jacob Rassner* for petitioner. *James J. Langan* for respondent. Reported below: 14 N. J. 341, 102 A. 2d 602.

No. 728. NOWINSKI *v.* RANDALL H. HAGNER & CO. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Milton W. King, Bernard I. Nordlinger, Wallace Luchs, Jr.* and *Robert B. Frank* for respondent.

No. 194, Misc. BRADEN *v.* MISSOURI. Circuit Court of Cole County, Missouri. Certiorari denied. Petitioner *pro se*. *John M. Dalton,* Attorney General of Missouri, and *Samuel M. Watson,* Assistant Attorney General, for respondent.

No. 527, Misc. CONNELLY *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 530, Misc. GORDY *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied. Petitioner *pro se*. *John Ben Shepperd,* Attorney General of Texas, and *Rudy G. Rice* and *Robert O. Fagg,* Assistant Attorneys General, for respondent. Reported below: —— Tex. Cr. R. ——, 268 S. W. 2d 126.

No. 532, Misc. MITMAN *v.* CALIFORNIA. District Court of Appeal of California, Fourth Appellate District. Certiorari denied. Reported below: 122 Cal. App. 2d 490, 265 P. 2d 105.

No. 538, Misc. SIGLAR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 208 F. 2d 865.

No. 548, Misc. AINGS *v.* EIDSON, WARDEN. Supreme Court of Missouri. Certiorari denied.

No. 554, Misc. WRIGHT *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 556, Misc. LEAR *v.* NEW JERSEY ET AL. Supreme Court of New Jersey. Certiorari denied.

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No. 558, Misc. SCHRADER *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 2 Ill. 2d 212, 117 N. E. 2d 786.

No. 559, Misc. NOR WOODS *v.* TEETS, WARDEN, ET AL. Supreme Court of California. Certiorari denied.

No. 562, Misc. MCKENNA *v.* NEBRASKA. Supreme Court of Nebraska. Certiorari denied.

No. 565, Misc. JOHNSON *v.* MAYO, PRISON CUSTODIAN. Supreme Court of Florida. Certiorari denied. *Frank D. Reeves* for petitioner. Reported below: 61 So. 2d 179, 69 So. 2d 307.

No. 568, Misc. WILLIAMS *v.* RAGEN, WARDEN. Supreme Court of Illinois. Certiorari denied.

No. 570, Misc. WINKLER *v.* CLAUDY, WARDEN. Supreme Court of Pennsylvania, Western District. Certiorari denied.

No. 574, Misc. HOBSON *v.* CRANOR, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. Supreme Court of Washington. Certiorari denied.

No. 578, Misc. NICHOLSON *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 579, Misc. DUNLAP *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied. Reported below: —— Tex. Cr. R. ——, 263 S. W. 2d 266.

No. 580, Misc. CIRAOLO *v.* PENNSYLVANIA ET AL. C. A. 3d Cir. Certiorari denied.

No. 581, Misc. CRESS *v.* CRANOR, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. Supreme Court of Washington. Certiorari denied.

No. 583, Misc. TOKARCHIK *v.* CLAUDY, WARDEN. Supreme Court of Pennsylvania, Western District. Certiorari denied.

No. 584, Misc. STUBBS *v.* BANNAN, WARDEN. Supreme Court of Michigan. Certiorari denied.

No. 585, Misc. BROOKMAN *v.* BLALOCK, SUPERINTENDENT, SOUTHWESTERN STATE HOSPITAL OF VIRGINIA. Supreme Court of Appeals of Virginia. Certiorari denied.

No. 587, Misc. WOODS *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 588, Misc. HICKOX *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 590, Misc. HOWARD *v.* CLAUDY, WARDEN. Supreme Court of Pennsylvania, Western District. Certiorari denied.

No. 593, Misc. SCHRADER *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 595, Misc. CONNORS *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 596, Misc. NEAL *v.* RANDOLPH, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 598, Misc. WEITZ *v.* CALIFORNIA. Supreme Court of California. Certiorari denied. Reported below: 42 Cal. 2d 338, 267 P. 2d 295.

No. 599, Misc. TAYLOR *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 600, Misc. HICKS *v.* ILLINOIS STATE AUTHORITIES ET AL. Supreme Court of Illinois. Certiorari denied.

No. 601, Misc. JACKSON *v.* RAGEN, WARDEN. Supreme Court of Illinois. Certiorari denied.

No. 603, Misc. PIKES *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 604, Misc. FURMANSKI *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 605, Misc. DUNBAR *v.* CRANOR, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. Supreme Court of Washington. Certiorari denied.

*Rehearing Denied.*

No. 287. ALASKA STEAMSHIP CO., INC. *v.* PETTERSON, *ante*, p. 396;

No. 557. LINEHAN ET AL. *v.* WATERFRONT COMMISSION OF NEW YORK HARBOR ET AL., *ante*, p. 439;

No. 558. STATEN ISLAND LOADERS, INC. ET AL. *v.* WATERFRONT COMMISSION OF NEW YORK HARBOR ET AL., *ante*, p. 439; and

No. 592. WITTE *v.* NEW JERSEY, *ante*, p. 951. Petitions for rehearing denied.

JUNE 7, 1954.

*Decisions Per Curiam.*

No. 706. HAYES FREIGHT LINES, INC. *v.* CASTLE, ATTORNEY GENERAL, ET AL. Appeal from the Supreme Court of Illinois. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of a

substantial federal question. *David Axelrod* for appellant. *Latham Castle,* Attorney General of Illinois, for appellees. Reported below: 2 Ill. 2d 58, 117 N. E. 2d 106.

No. 716. NATIONAL SURETY CORP. *v.* McDOWELL. Appeal from the Court of Appeal of Louisiana, First Circuit. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of a substantial federal question. *Ralph M. Kelton* for appellant. *Jack P. F. Gremillion* for appellee. Reported below: 68 So. 2d 189.

No. 771. CAVALIER VENDING CORP. ET AL. *v.* STATE BOARD OF PHARMACY ET AL. Appeal from the Supreme Court of Appeals of Virginia. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of a substantial federal question. *Edward P. Simpkins, Jr.* and *Walter E. Rogers* for appellants. *J. Lindsay Almond, Jr.,* Attorney General of Virginia, and *Frederick T. Gray,* Assistant Attorney General, for appellees. Reported below: 195 Va. 626, 79 S. E. 2d 636.

*Amended Decree.*

No. 5, Original, October Term, 1950. NEW JERSEY *v.* NEW YORK ET AL.

The Court, having considered the amended petition of the City of New York, joined by the State of New York, to which is appended the consent of the State of New Jersey, the answer filed by the State of New Jersey seeking affirmative relief and the answers filed by the Commonwealth of Pennsylvania and the State of Delaware, the evidence and exhibits adduced by the parties, the report of Kurt F. Pantzer, Esquire, Special Master, and statements from all the parties addressed to the Court

expressing the intention of the parties not to file exceptions or objections to the report, and being fully advised in the premises, now enters the following order:

I. Report of Special Master Approved. The "Report of the Special Master Recommending Amended Decree," filed May 27, 1954, is in all respects approved and confirmed.

II. 1931 Decree Superseded. The decree of this Court entered May 25, 1931 (283 U. S. 805) is modified and amended as hereinafter provided and, upon the entry of this amended decree, the provisions of the decree of May 25, 1931, shall be of no further force and effect.

III. Diversions by the City of New York Enjoined Except as Herein Authorized. The State and City of New York are enjoined from diverting water from the Delaware River or its tributaries except to the extent herein authorized and upon the terms and conditions herein provided.

A. *Authorized Diversions.*

1. *440 M. G. D.* The City of New York may divert from the Delaware River watershed to its water supply system the equivalent of 440 million gallons daily (m. g. d.) until the City completes and places in operation its reservoir presently under construction on the East Branch of the Delaware River.

2. *490 M. G. D.* After the completion and commencement of operation of the East Branch reservoir, the City may divert the equivalent of 490 m. g. d. until the completion of its proposed dam and reservoir at Cannonsville on the West Branch of the Delaware River, provided, however, that in the event of an abnormal or unforeseeable interruption of its facilities, the City may divert in excess of the equivalent of 490 m. g. d. to meet its emergency requirements, but in no event shall such diversion impair the obligation of the City to make the releases hereinafter specified.

3. *800 M. G. D.* After the completion of the Cannonsville reservoir, the City may divert the equivalent of 800 m. g. d.

4. *Computation of Diversion.* At no time during any twelve-month period, commencing June 1, shall the aggregate total quantity diverted, divided by the number of days elapsed since the preceding May 31, exceed the applicable permitted rate of diversion.

B. *Conditions and Obligations Imposed in Connection With Diversions and Releases by City.* The diversions and releases by the City of New York from the Delaware River shall be made under the supervision and direction of the River Master, hereinafter appointed, and shall be subject to the following conditions and obligations:

1. *Compensating Releases—The Montague Formula.* The City shall release water from its reservoirs as follows:

(a) Until the East Branch reservoir is completed and placed in operation, on the day following each day in which the average flow in the Delaware River falls short of 0.50 cubic feet per second per square mile (c. s. m.), either at Montague, New Jersey (below the mouth of the Neversink River), or at Trenton, New Jersey (0.50 c. s. m. being equivalent to a flow of 1740 cubic feet per second (c. f. s.) at Montague and 3400 c. f. s. at Trenton), the City shall release water from the Neversink reservoir at an average of 0.66 c. s. m. or 61.38 c. f. s.

(b) Upon the completion and placing in operation of the Neversink and East Branch reservoirs, the City shall release water from one or more of its storage reservoirs in the upper Delaware watershed. Such releases shall be in quantities designed to maintain a minimum basic rate of flow at the gaging station of the United States Geological Survey (U. S. G. S.) at Montague of 1525 c. f. s. (985.6 m. g. d.) until the Cannonsville project is completed and its reservoir first filled to the extent that

50 billion gallons above the lowest outlet are available for diversion and release, and of 1750 c. f. s. (1131.1 m. g. d.) thereafter. Compliance by the City with directions of the River Master with respect to such releases shall be considered full compliance with the requirements of this subsection (b).

(c) At the commencement of the calendar year following the completion and placing in operation of the Neversink and East Branch reservoirs and of each calendar year thereafter, the City of New York shall estimate and report to the River Master the anticipated consumption of water during such year to be provided for by the City from all its sources of supply. The City shall, as hereinafter provided, release in the aggregate from all its storage reservoirs in the upper Delaware watershed, in addition to the quantity of water required to be released for the purpose of maintaining the then applicable minimum basic rate of flow as hereinabove provided, a quantity of water equal to 83 per cent of the amount by which the estimated consumption during such year is less than the City's estimate of the continuous safe yield during such year of all its sources obtainable without pumping. In any such year the City's estimate of anticipated consumption shall not exceed by more than 7¼ billion gallons the actual consumption in any previous calendar year; and its safe yield in any such year, obtainable without pumping, shall be estimated at not less than 1355 m. g. d. after the Neversink and East Branch reservoirs are put into operation; and at not less than 1665 m. g. d. after the Cannonsville reservoir is put into operation. If, at any time after the completion of the Cannonsville reservoir and prior to the year 1993, the continuous net safe yield for water supply of all of the City's sources of water supply, obtainable without pumping, is increased by the development of additional sources, such

greater safe yield shall be used in determining the excess releases.

(d) The City of New York shall release the excess quantity provided for in subsection (c) at rates designed to release the entire quantity in 120 days. Commencing with the fifteenth day of June each year, the excess releases shall continue for as long a period, but not later than the following March 15, as such additional quantity will permit. Such period is hereinafter referred to as the "seasonal period." The excess quantity required to be released in any seasonal period shall in no event exceed 70 billion gallons. In releasing the excess quantity specified for any seasonal period, the City shall not be required to maintain a flow at Montague greater than the applicable minimum basic rate plus the excess quantity divided by 120 days, or in any event greater than 2650 c. f. s., nor to release at rates exceeding the capacity of its release works. The City shall in each seasonal period continue its excess releases until March 15 or until the aggregate quantity of the flow at Montague in excess of the basic rate or in excess of such higher rates as are not the result of the City's prior releases, is equal to the total specified excess quantity.

(e) The terms and conditions provided in subsections (b), (c) and (d) hereof shall continue to be applicable in all respects in the event that the U. S. G. S. gaging station at Montague shall be relocated at a point below the confluence of the Neversink River with the Delaware River.

2. *Minimum Capacity of Release Works at Reservoirs of City.* In constructing the Cannonsville reservoir, the City shall install release works of such capacity as will provide a minimum aggregate release capacity from all its reservoirs in the Delaware River watershed of not less than 1600 c. f. s. under conditions of maximum reservoir depletion.

3. *Releases to be Continued in Spite of Interference.* In the event that any works hereafter constructed by public or private interests in the watershed of the Delaware River outside of the State of New York shall prevent the proper operation of the U. S. G. S. gaging station at Montague or interfere with the effective operation of the above release requirements by diverting water past the station or by intercepting the natural flow and storing it in reservoirs with an aggregate storage capacity in excess of 25 billion gallons, the City of New York shall continue to make the releases above specified which would be required in the absence of such interference, and appropriate gaging stations shall be established for that purpose.

4. *Inspection Permitted.* The States of New Jersey and Delaware and the Commonwealth of Pennsylvania, through accredited representatives, and the River Master, shall at all reasonable times have the right to inspect the dams, reservoirs and other works constructed by the City of New York, to inspect the diversion areas and the inflow, outflow and diverted flow of such areas, to inspect the meters and other apparatus installed by the City of New York and to inspect all records pertaining to inflow, outflow and diverted flow.

IV. Treatment of Port Jervis Sewage. The effluent from the sewage treatment plant at the City of Port Jervis, New York, shall be treated so as to effect a reduction of 85 per cent in the organic impurities and shall be treated with a chemical germicide, or otherwise, so that the B. coli originally present in the sewage shall be reduced by 90 per cent. Untreated industrial waste from plants in the City of Port Jervis shall not be allowed to enter the Delaware and Neversink Rivers. The treatment of such industrial wastes shall be such as to render the effluent practically free from suspended matter and

nonputrescent. The treatment of both sewage and industrial waste shall be maintained so long as any diversion is made from the Delaware River or its tributaries.

V. Diversions by New Jersey Authorized Under Specified Conditions.

A. *Authorized Diversions.* The State of New Jersey may divert outside the Delaware River watershed, from the Delaware River or its tributaries in New Jersey, without compensating releases, the equivalent of 100 m. g. d., if the State shall not, prior to July 1, 1955, repeal Chapter 443 of the New Jersey Laws of 1953, and if, when the Commonwealth of Pennsylvania accepts the conditions as specified in Section 19 of that Chapter, the State of New Jersey shall join with the Commonwealth of Pennsylvania in requesting the consent of Congress to the agreement embodied in Chapter 443 of the New Jersey Laws of 1953 and an Act of the Commonwealth of Pennsylvania accepting the conditions of such New Jersey Act.

B. *Conditions and Obligations Imposed in Connection with Diversions by New Jersey.* The diversions by New Jersey from the Delaware River shall be made under the supervision of the River Master and shall be subject to the following conditions and obligations:

1. Until the State of New Jersey builds and utilizes one or more reservoirs to store waters of the Delaware River or its tributaries for the purpose of diverting the same to another watershed, the State may divert not to exceed 100 m. g. d. as a monthly average, with the diversion on any day not to exceed 120 million gallons.

2. If and when the State of New Jersey has built and is utilizing one or more reservoirs to store waters of the Delaware River or its tributaries for the purpose of diversion to another watershed, it may withdraw water from the Delaware River or its tributaries into such impound-

ing reservoirs without limitation except during the months of July, August, September and October of any year, when not more than 100 m. g. d. as a monthly average and not more than 120 million gallons in any day shall be withdrawn.

3. Regardless of whether the State of New Jersey builds and utilizes storage reservoirs for diversion, its total diversion for use outside of the Delaware River watershed without compensating releases shall not exceed an average of 100 m. g. d. during any calendar year.

VI. Existing Uses not Affected by Amended Decree. The parties to this proceeding shall have the right to continue all existing uses of the waters of the Delaware River and its tributaries, not involving a diversion outside the Delaware River watershed, in the manner and at the locations presently exercised by municipalities or other governmental agencies, industries or persons in the Delaware River watershed in the States of New York, New Jersey and Delaware and the Commonwealth of Pennsylvania.

VII. River Master.

A. *Designation.* Subject to the concurrence of the Director of the U. S. Geological Survey, the Chief Hydraulic Engineer of the U. S. Geological Survey, or such other engineer of the U. S. Geological Survey as shall at any time be designated by the Chief Hydraulic Engineer, is hereby designated as River Master.

B. *Duties.* The River Master shall either in person or through his assistants possess, exercise and perform the following duties and functions:

1. *General Duties.*

(a) Administer the provisions of this decree relating to yields, diversions and releases so as to have the provisions of this decree carried out with the greatest possible accuracy;

(b) Conserve the waters in the river, its tributaries and in any reservoirs maintained in the Delaware River watershed by the City of New York or any which may hereafter be developed by any of the other parties hereto;

(c) Compile and correlate all available data on the water needs of the parties hereto;

(d) Check and correlate the pertinent stream flow gagings on the Delaware River and its tributaries;

(e) Observe, record and study the effect of developments on the Delaware River and its tributaries upon water supply and other necessary, proper and desirable uses; and

(f) Make periodic reports to this Court, not less frequently than annually, and send copies thereof to the Governors of Delaware, New Jersey, New York and Pennsylvania, and to the Mayor of the City of New York.

2. *Specific Duties with Respect to the Montague Release Formula.* In connection with the releases of water which the City of New York is required to make under Par. III–B–1 (b) of this decree, the River Master, in co-operation with the City of New York, shall, by appropriate observation and estimates, perform the following duties:

(a) Determine the average times of transit of the flow between the release works of the several reservoirs of the City and Montague and between the release works of other storage reservoirs in the watershed and Montague;

(b) Make a daily computation of what the average flow observed on the previous day at Montague would have been, except for that portion previously contributed by releases of the City or as affected by the contributing or withholding of water at other storage reservoirs, for the purpose of computing the volume of water that would have had to be released in order to have maintained precisely the basic rate on that day;

(c) Take account of all changes that can be anticipated in the flow from that portion of the watershed above Montague not under the City's control and allow for the same by making an appropriate adjustment in the computed volume of the daily release; and

(d) After taking into consideration (a), (b) and (c), direct the making of adjusted daily releases designed to maintain the flow at Montague at the applicable minimum basic rate.

C. *Distribution of Costs.* The compensation of, and the costs and expenses incurred by, the River Master shall be borne equally by the State of Delaware, State of New Jersey, Commonwealth of Pennsylvania, and the City of New York.

D. *Replacement.* In the event that for any reason the Chief Hydraulic Engineer of the U. S. G. S. or his designee cannot act as River Master, this Court will, on motion of any party, appoint a River Master and fix his compensation.

VIII. No Prior Appropriation nor Apportionment. No diversion herein allowed shall constitute a prior appropriation of the waters of the Delaware River or confer any superiority of right upon any party hereto in respect of the use of those waters. Nothing contained in this decree shall be deemed to constitute an apportionment of the waters of the Delaware River among the parties hereto.

IX. Decree Without Prejudice to the United States. This decree is without prejudice to the United States. It is subject to the paramount authority of Congress in respect to commerce on navigable waters of the United States; and it is subject to the powers of the Secretary of the Army and Chief of Engineers of the United States Army in respect to commerce on navigable waters of the United States.

X. Retention of Jurisdiction; No Estoppel. Any of the parties hereto, complainant, defendants or intervenors, may apply at the foot of this decree for other or further action or relief, and this Court retains jurisdiction of the suit for the purpose of any order or direction or modification of this decree, or any supplemental decree that it may deem at any time to be proper in relation to the subject matter in controversy. The fact that a party to this cause has not filed exceptions to the report of the Special Master or to the provisions of this decree shall not estop such party at any time in the future from applying for a modification of the provisions of this decree, notwithstanding any action taken by any party under the terms of this decree.

XI. Costs of this Proceeding. The costs of this proceeding shall be paid by the parties in the following proportions: State of New Jersey, 26⅔ per cent, City of New York, 26⅔ per cent, State of New York, 10 per cent, Commonwealth of Pennsylvania, 26⅔ per cent, and State of Delaware, 10 per cent.

*Theodore D. Parsons,* Attorney General of New Jersey, *Robert Peacock,* Deputy Attorney General, and *Kenneth H. Murray* for complainant.

*Nathaniel L. Goldstein,* Attorney General, *Wendell P. Brown,* Solicitor General, and *Edward L. Ryan,* Assistant Attorney General, for the State of New York; and *Denis M. Hurley, John P. McGrath, Jeremiah M. Evarts, James J. Thornton, Richard H. Burke* and *John Suglia* for the City of New York, defendants.

*Frank F. Truscott,* Attorney General, *George G. Chandler, Bernard G. Segal, Wm. A. Schnader* and *Harry F. Stambaugh* for the State of Pennsylvania; and *H. Albert Young,* Attorney General, and *Vincent A. Theisen,* Chief Deputy Attorney General, for the State of Delaware, intervenors.

*Miscellaneous Orders.*

No. ——. IRWIN *v.* RAILROAD COMMISSION OF TEXAS ET AL. The application for a stay, referred to the Court by MR. JUSTICE BLACK, is denied. *D. Worth Clark, Philip W. Amram, Cyril J. Smith* and *Ralph W. Yarborough* for petitioner. *John Ben Shepperd,* Attorney General of Texas, and *Phillip Robinson,* Assistant Attorney General, for the Railroad Commission of Texas, respondent.

No. 550. MORRIS *v.* PARKER ET AL. Samuel Berman and Solomon H. Feldman, executors of the estate of Max R. Morris, deceased, substituted as parties appellant.

No. 510. FRIEDBERG *v.* UNITED STATES. Petition for rehearing granted. The order denying certiorari, *ante,* p. 916, is vacated and petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit granted. *Robert N. Gorman* and *Stanley A. Silversteen* for petitioner. *Robert L. Stern,* then Acting Solicitor General, *Assistant Attorney General Holland, Ellis N. Slack* and *David L. Luce* for the United States. Reported below: 207 F. 2d 777.

No. 67. EMSPAK *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted, except as to question No. 4 presented by the petition for the writ, 346 U. S. 809. Argued January 12–13, 1954. This case is ordered restored to the docket for reargument. *David Scribner, Frank J. Donner, Arthur Kinoy* and *Allan R. Rosenberg* for petitioner. *Robert L. Stern,* then Acting Solicitor General, *Assistant Attorney General Olney, Beatrice Rosenberg, Carl H. Imlay* and *John R. Wilkins* for the United States. *Ernest Angell, Osmond K. Fraenkel, Arthur Garfield*

*Hays* and *Herbert Monte Levy* filed a brief for the American Civil Liberties Union, as *amicus curiae,* urging reversal. Reported below: 91 U. S. App. D. C. 378, 203 F. 2d 54.

No. 164. GOLDBAUM ET AL. *v.* UNITED STATES. On petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit. The order denying certiorari in this case, 346 U. S. 831, is vacated and the case is restored to the docket. *Irvin Goldstein* for petitioners. *Robert L. Stern,* then Acting Solicitor General, *Assistant Attorney General Holland, Ellis N. Slack, Meyer Rothwacks* and *Joseph M. Howard* for the United States. Reported below: 204 F. 2d 74.

No. 259. BANKS *v.* UNITED STATES. On petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit. The order denying certiorari in this case, 346 U. S. 857, is vacated and the case is restored to the docket. *Joseph B. Keenan, Alvin O. West* and *John W. Graff* for petitioner. *Robert L. Stern,* then Acting Solicitor General, *Assistant Attorney General Holland, Ellis N. Slack* and *Murray L. Schwartz* for the United States. Reported below: 204 F. 2d 666.

No. 414. MCFEE *v.* UNITED STATES. On petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit. The order denying certiorari in this case, *ante,* p. 927, is vacated and the case is restored to the docket. *Elden McFarland* for petitioner. *Robert L. Stern,* then Acting Solicitor General, *Assistant Attorney General Holland, Ellis N. Slack, David L. Luce* and *Joseph M. Howard* for the United States. Reported below: 206 F. 2d 872.

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No. 314, Misc. WHEATLEY *v.* IGOE, U. S. DISTRICT JUDGE. Motion for leave to file petition for writ of mandamus denied without prejudice to petitioner to apply to the United States Court of Appeals for a writ of mandamus.

No. 620, Misc. JOHNSON *v.* HANNAY, U. S. DISTRICT JUDGE. Motion for leave to file petition for writ of mandamus denied.

No. 573, Misc. FRAZIER *v.* WARDEN, LEWISBURG PENITENTIARY; and

No. 621, Misc. EX PARTE HERZ. Motions for leave to file petitions for writs of habeas corpus denied.

No. 610, Misc. HURST *v.* LOONEY, WARDEN. Motion for leave to file petition for writ of certiorari denied.

*Certiorari Granted.* (*See also No. 510, ante, p. 1006.*)

No. 66. QUINN *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. *David Scribner, Frank J. Donner, Arthur Kinoy* and *Allan R. Rosenberg* for petitioner. *Robert L. Stern,* then Acting Solicitor General, *Assistant Attorney General Olney, Beatrice Rosenberg* and *Carl H. Imlay* for the United States. Reported below: 91 U. S. App. D. C. 344, 203 F. 2d 20.

No. 577. UNITED STATES *v.* CALDERON. C. A. 9th Cir. Certiorari granted. *Robert L. Stern,* then Acting Solicitor General, for the United States. *Joseph W. Burns* for respondent. Reported below: 207 F. 2d 377.

No. 650. HOLLAND ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari granted. *Peyton Ford* and *Sumner M. Redstone* for petitioners. *Solicitor General Sobeloff,*

*Assistant Attorney General Holland, Ellis N. Slack, David L. Luce* and *Joseph M. Howard* for the United States. Reported below: 209 F. 2d 516.

No. 691. Cox et al., Administrators, et al. *v.* Roth, Administrator. C. A. 5th Cir. Certiorari granted. *Douglas D. Batchelor* and *David W. Dyer* for petitioners. *Jacob Rassner* for respondent. Reported below: 210 F. 2d 76.

No. 696. Tee-Hit-Ton Indians *v.* United States. Court of Claims. Certiorari granted. *James Craig Peacock, Martin W. Meyer, William L. Paul, Jr., John E. Skilling* and *John H. Myers* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Morton, Roger P. Marquis* and *John C. Harrington* for the United States. Reported below: 128 Ct. Cl. 82, 120 F. Supp. 202.

No. 697. Castle, Attorney General, et al. *v.* Hayes Freight Lines, Inc. Supreme Court of Illinois. Certiorari granted. *Latham Castle,* Attorney General of Illinois, *John L. Davidson, Jr.,* First Assistant Attorney General, *Mark O. Roberts,* Special Assistant Attorney General, and *William C. Wines* and *Lee D. Martin,* Assistant Attorneys General, for petitioners. Reported below: 2 Ill. 2d 58, 117 N. E. 2d 106.

No. 710. Federal Power Commission *v.* Colorado Interstate Gas Co. C. A. 10th Cir. Certiorari granted. *Solicitor General Sobeloff* and *Willard W. Gatchell* for petitioner. *James Lawrence White, William A. Dougherty, John P. Akolt, Sr., John R. Turnquist, Charles E. McGee* and *Lewis M. Poe* for respondent. Reported below: 209 F. 2d 717.

No. 725. ASSOCIATION OF WESTINGHOUSE SALARIED EMPLOYEES *v.* WESTINGHOUSE ELECTRIC CORP. C. A. 3d Cir. Certiorari granted. *Arthur J. Goldberg* for petitioner. *Mahlon E. Lewis* and *Robert D. Blasier* for respondent. Reported below: 210 F. 2d 623.

No. 726. SMITH *v.* UNITED STATES. C. A. 1st Cir. Certiorari granted. *Richard Maguire* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Holland, Ellis N. Slack, David L. Luce, Joseph M. Howard* and *Dickinson Thatcher* for the United States. Reported below: 210 F. 2d 496.

No. 747. SULLIVAN *v.* UNITED STATES. C. A. 10th Cir. Certiorari granted. *Llewellyn A. Luce* and *Walter H. Maloney* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Holland, Ellis N. Slack, David L. Luce* and *Joseph M. Howard* for the United States. Reported below: 212 F. 2d 125.

No. 730. REGAN *v.* NEW YORK. Court of Appeals of New York. Certiorari granted. *Elaine F. Friedman* for petitioner. *Edward S. Silver* and *Aaron E. Koota* for respondent. Reported below: 306 N. Y. 747, 117 N. E. 2d 921.

No. 719. OPPER *v.* UNITED STATES. Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit granted limited to questions 3, 4, and 5 presented by the petition for the writ which read as follows:

"3. Whether, where an admission is made to law enforcement officers after the date of the acts charged as crimes, it is to be so far treated as a confession that, in the absence of corroboration, it is inadmissible.

"4. Whether a conviction can be sustained where there is, apart from an admission made to law enforcement officers after the date of the acts charged as crimes, no proof of the *corpus delicti.*

"5. Whether, in convicting petitioner the jury, and in sustaining his conviction the court below, in fact admitted, as against him, statements of his co-defendant which, as a matter of law, were not competent evidence against him."

*John M. Kelley, Jr.* and *Frederick Bernays Wiener* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 211 F. 2d 719.

No. 5, Misc. BART *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. *James T. Wright* for petitioner. *Robert L. Stern,* then Acting Solicitor General, *Assistant Attorney General Olney, Beatrice Rosenberg* and *John R. Wilkins* for the United States. Reported below: 91 U. S. App. D. C. 370, 203 F. 2d 45.

No. 279, Misc. GARCIA *v.* LANDON, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari granted. *Harry Wolpin* and *A. L. Wirin* for petitioner. *Robert L. Stern,* then Acting Solicitor General, *Assistant Attorney General Olney* and *Beatrice Rosenberg* for respondent. Reported below: 207 F. 2d 693.

No. 290, Misc. MASSEY *v.* MOORE, WARDEN. C. A. 5th Cir. Certiorari granted. *Dean Acheson* for petitioner. *John Ben Shepperd,* Attorney General of Texas, and *James N. Castleberry, Jr.* and *Rudy G. Rice,* Assistant Attorneys General, for respondent. Reported below: 205 F. 2d 665.

No. 481, Misc. REEVES *v.* ALABAMA. Supreme Court of Alabama. Certiorari granted. *Thurgood Marshall, Robert L. Carter* and *Jack Greenberg* for petitioner. *Si Garrett,* Attorney General of Alabama, and *L. E. Barton,* Assistant Attorney General, for respondent. Reported below: 260 Ala. ——, 68 So. 2d 14.

No. 545, Misc. MOORE *v.* MEAD'S FINE BREAD CO. C. A. 10th Cir. Certiorari granted. *Dee C. Blythe* for petitioner. *Edward W. Napier* and *Howard F. Houk* for respondent. Reported below: 208 F. 2d 777.

*Certiorari Denied.* (*See also No. 610, Misc., ante, p. 1008.*)

No. 622. MITCHELL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Temple W. Seay* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Holland, Ellis N. Slack, David L. Luce* and *Joseph M. Howard* for the United States. Reported below: 208 F. 2d 854.

No. 651. DEARYAN *v.* BUTLER, MAYOR, ET AL. District Court of Appeal of California, Fourth Appellate District. Certiorari denied. Reported below: 119 Cal. App. 2d 674, 260 P. 2d 98.

No. 690. WOLFE *v.* TASKA. C. A. 4th Cir. Certiorari denied. *George E. Allen* for petitioner. *Preston P. Taylor* for respondent. Reported below: 208 F. 2d 705.

No. 702. NEBRASKA SEED CO. ET AL. *v.* UNITED STATES. Court of Claims. Certiorari denied. *O. L. Dykstra* for petitioners. *Solicitor General Sobeloff, Assistant Attorney General Holland, Ellis N. Slack, Hilbert P. Zarky* and *Carolyn R. Just* for the United States. Reported below: 127 Ct. Cl. 133, 116 F. Supp. 740.

No. 704. SHAY ET AL. *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Cir-

cuit. Certiorari denied. *De Long Harris* for petitioners. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 93 U. S. App. D. C. —, 212 F. 2d 809.

No. 707. MAXWELL ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 4th Cir. Certiorari denied. *Robert Ash* for petitioners. *Solicitor General Sobeloff, Assistant Attorney General Holland, Ellis N. Slack* and *Robert N. Anderson* for respondent. Reported below: 208 F. 2d 542.

No. 709. STEWART-JORDAN DISTRIBUTING CO., INC. *v.* MITCHELL, SECRETARY OF LABOR. C. A. 5th Cir. Certiorari denied. *Marshall A. Pipin* for petitioner. *Solicitor General Sobeloff, Bessie Margolin* and *Sylvia S. Ellison* for respondent. Reported below: 210 F. 2d 427.

No. 711. LEMKE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Hubert A. Gilbert* for petitioner. *Solicitor General Sobeloff* for the United States. Reported below: 211 F. 2d 73.

No. 721. PILGRIM HOLINESS CHURCH CORPORATION *v.* MITCHELL, SECRETARY OF LABOR. C. A. 7th Cir. Certiorari denied. *Carl Seet* and *Burke G. Slaymaker* for petitioner. *Solicitor General Sobeloff, Bessie Margolin* and *Joseph M. Stone* for respondent. Reported below: 210 F. 2d 879.

No. 722. CAIN ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Norman B. Gillis, Jr.* and *William Saunders Henley* for petitioners. *Solicitor General Sobeloff, Assistant Attorney General Holland, Ellis N. Slack* and *Hilbert P. Zarky* for the United States. Reported below: 211 F. 2d 375.

No. 723. FISHER *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. *Benjamin E. Jaffe* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Holland, Ellis N. Slack, Hilbert P. Zarky* and *Meyer Rothwacks* for respondent. Reported below: 209 F. 2d 513.

No. 724. BRESLIN *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. *Thomas J. Mackell* for petitioner. *Edward S. Silver* and *Aaron E. Koota* for respondent. Reported below: 306 N. Y. 294, 118 N. E. 2d 108.

No. 737. MARYLAND JOCKEY CLUB OF BALTIMORE CITY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Llewellyn A. Luce* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Holland, Ellis N. Slack, Robert N. Anderson* and *Homer R. Miller* for the United States. Reported below: 210 F. 2d 367.

No. 739. EMPLOYERS' LIABILITY ASSURANCE CORP., LTD. *v.* MITCHELL ET AL. C. A. 5th Cir. Certiorari denied. *R. Emmett Kerrigan* for petitioner. Reported below: 211 F. 2d 441.

No. 743. BOYT ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 8th Cir. Certiorari denied. *Thomas B. Roberts* and *Joseph I. Brody* for petitioners. *Solicitor General Sobeloff, Assistant Attorney General Holland, Ellis N. Slack* and *L. W. Post* for respondent. Reported below: 209 F. 2d 839.

No. 744. VANDYKE *v.* BLUEFIELD GAS CO. C. A. 4th Cir. Certiorari denied. *Frederick T. Kingdon* for petitioner. *LeRoy Katz* for respondent. Reported below: 210 F. 2d 620.

No. 746. BEKINS ET AL. *v.* BEKINS VAN & STORAGE CO. ET AL. C. A. 5th Cir. Certiorari denied. *Charles Romick* for petitioners. *Paul Carrington* for respondents. Reported below: 210 F. 2d 338.

No. 748. YOUNG *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *James F. Reilly* and *Harry A. Calevas* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Robert S. Erdahl* and *John R. Wilkins* for the United States. Reported below: —— U. S. App. D. C. ——, 212 F. 2d 236.

No. 756. SENS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Llewellyn A. Luce* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Holland, Ellis N. Slack, David L. Luce, Joseph M. Howard* and *Dickinson Thatcher* for the United States. Reported below: 212 F. 2d 795.

No. 758. WILLIS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Virgil D. Willis* and *W. S. Walker* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Morton, Roger P. Marquis* and *S. Billingsley Hill* for the United States. Reported below: 211 F. 2d 1.

No. 770. DIXIE TERMINAL CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. *John B. Hollister* for petitioner. *Solicitor General Sobeloff, George J. Bott, David P. Findling* and *Dominick L. Manoli* for respondent. Reported below: 210 F. 2d 538.

No. 772. LAKE ONTARIO LAND DEVELOPMENT & BEACH PROTECTION ASSOCIATION, INC. *v.* FEDERAL POWER COMMISSION ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Clay-*

*ton L. Burwell* and *Walter S. Forsyth* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Burger, Robert L. Stern, Herman Marcuse* and *Willard W. Gatchell* for the Federal Power Commission, *Charles M. Goetz, Orrin G. Judd* and *Earle K. Moore* for the Power Authority of the State of New York, and *Murray Preston* for the Great Lakes-St. Lawrence Association, respondents. Reported below: —— U. S. App. D. C. ——, 212 F. 2d 227.

No. 773. LOMBARDI ET AL., TRADING AS JOSEPH LOMBARDI & SONS, *v.* KEEFER ET AL. Supreme Court of Pennsylvania, Eastern District. Certiorari denied. *Horace N. Lombardi* and *John Martin Doyle* for petitioners. *M. Stuart Goldin* for respondents. Reported below: 376 Pa. 367, 102 A. 2d 695.

No. 779. MISSION CORPORATION *v.* BLAU ET AL. C. A. 2d Cir. Certiorari denied. *Barnabas B. Hadfield* and *C. Lansing Hays, Jr.* for petitioner. *Morris J. Levy* for Blau, respondent. Reported below: 212 F. 2d 77.

No. 664. CELLA *v.* UNITED STATES ET AL.; and

No. 782. MEYER *v.* UNITED STATES ET AL. C. A. 7th Cir. Certiorari denied. *George F. Callaghan* for petitioner in No. 664. *John J. Kelly, Jr.* for petitioner in No. 782. *Solicitor General Sobeloff, Assistant Attorney General Barnes, Ralph S. Spritzer, Robert L. Farrington* and *Neil Brooks* for respondents. Reported below: No. 664, 208 F. 2d 783; No. 782, 211 F. 2d 406.

No. 681. CALIFORNIA *v.* UNITED STATES. Court of Claims. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this application. *Edmund G. Brown,* Attorney General of California, *Phil D. Swing, Howard C. Ellis, Robert F. Klepinger* and *Wil-*

*liam W. Barron* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Burger, Paul A. Sweeney* and *Benjamin Forman* for the United States. Reported below: 127 Ct. Cl. 624, 119 F. Supp. 174.

No. 699. WAGNER *v.* WASHINGTON. Supreme Court of Washington. Certiorari denied. Petitioner *pro se. Cyrus A. Dimmick,* Assistant Attorney General of Washington, for respondent.

No. 736. MCRAE *v.* WOODS, ACTING HOUSING EXPEDITER. C. A. 10th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Sobeloff* for respondent. Reported below: 209 F. 2d 263.

No. 797. MILLER *v.* THORN ET UX. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Charles William Freeman* for petitioner. *Ernest F. Henry* for respondents.

No. 701. BOWMAN, ADMINISTRATRIX, *v.* BOWMAN. Supreme Court of Georgia. Certiorari denied. *James L. Moore* for petitioner. *Margaret Hills Fairleigh* for respondent. Reported below: 210 Ga. 259, 78 S. E. 2d 801.

No. 718. DANIELS ET AL. *v.* THOMAS. Supreme Court of Colorado. Certiorari denied. *Bentley M. McMullin* for petitioners. *William V. Hodges* for respondent. Reported below: —— Colo. ——, 265 P. 2d 702.

No. 115, Misc. GALLOWAY *v.* DOWD, WARDEN. C. A. 7th Cir. Certiorari denied without prejudice to petitioner to initiate a new proceeding alleging refusal to allow an appeal. *James C. Cooper* for petitioner. *Edwin K. Steers,* Attorney General of Indiana, and *Carl M. Franceschini* and *Frank E. Spencer,* Deputy Attorneys General, for respondent. Reported below: 204 F. 2d 524.

No. 284, Misc. CORPOLONGO *v.* LAGAY, SUPERINTENDENT, NEW JERSEY STATE PRISON FARM. Supreme Court of New Jersey. Certiorari denied. Petitioner *pro se.* *Grover C. Richman, Jr.*, Attorney General of New Jersey, and *Eugene T. Urbaniak*, Deputy Attorney General, for respondent. Reported below: 28 N. J. Super. 239, 100 A. 2d 503.

No. 297, Misc. SLECHTA *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Petitioner *pro se.* *Latham Castle*, Attorney General of Illinois, and *William C. Wines*, Assistant Attorney General, for respondent.

No. 343, Misc. RICHARDSON *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *James A. Cobb, George E. C. Hayes, David Rein* and *Joseph Forer* for petitioner. *Robert L. Stern*, then Acting Solicitor General, *Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States. Reported below: —— U. S. App. D. C. ——, 208 F. 2d 41.

No. 345, Misc. BROUSSARD *v.* CRANOR, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. C. A. 9th Cir. Certiorari denied.

No. 414, Misc. WILLIAMS *v.* UNITED STATES; and

No. 415, Misc. ATKINS ET AL. *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *John J. Dwyer* for petitioner in No. 414. *James J. Laughlin* and *Albert J. Ahern, Jr.* for petitioners in No. 415. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Carl H. Imlay* for the United States. Reported below: —— U. S. App. D. C. ——, 210 F. 2d 712.

No. 456, Misc. FREDERICKS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion certiorari should be granted. *Bernard A. Golding* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 208 F. 2d 712.

No. 468, Misc. BRINGAZI *v.* EIDSON, WARDEN. Supreme Court of Missouri. Certiorari denied. Petitioner *pro se. John M. Dalton,* Attorney General of Missouri, and *Samuel M. Watson,* Assistant Attorney General, for respondent.

No. 472, Misc. SEYMOUR *v.* NEW YORK. Appellate Division of the Supreme Court of New York, Third Judicial Department. Certiorari denied. Reported below: 282 App. Div. 982, 125 N. Y. S. 2d 759.

No. 509, Misc. WHEELER *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Claire O. Ducker, Sr.* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Robert S. Erdahl* and *J. F. Bishop* for the United States. Reported below: —— U. S. App. D. C. ——, 211 F. 2d 19.

No. 523, Misc. JACOBS ET AL. *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion certiorari should be granted. *Nancy Carley* for petitioners. *George Tilzer* for respondent. Reported below: 306 N. Y. 717, 117 N. E. 2d 904.

No. 541, Misc. ALLEN *v.* RAGEN, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 542, Misc. MANFREDONIA ET AL. *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Joseph J. Lyman* for petitioners. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Carl H. Imlay* for the United States. Reported below: —— U. S. App. D. C. ——, 210 F. 2d 712.

No. 544, Misc. RUSSELL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Sobeloff, Assistant Attorney General Olney, Robert S. Erdahl* and *Joseph A. Barry* for the United States. Reported below: 212 F. 2d 87.

No. 575, Misc. HUGHES *v.* HEINZE, WARDEN. Supreme Court of California. Certiorari denied.

No. 577, Misc. TATE *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 589, Misc. NEIGUT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Sobeloff, Assistant Attorney General Olney, Robert S. Erdahl* and *John R. Wilkins* for the United States. Reported below: 212 F. 2d 588.

No. 592, Misc. GORE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Sobeloff, Assistant Attorney General Olney, Robert S. Erdahl* and *Robert G. Maysack* for the United States. Reported below: 209 F. 2d 345.

No. 606, Misc. SANDERS *v.* SWOPE, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 607, Misc. MILLER *v.* RANDOLPH, WARDEN. Supreme Court of Illinois. Certiorari denied.

No. 608, Misc. GLOVER ET AL. *v.* NORTH CAROLINA. Supreme Court of North Carolina. Certiorari denied.

No. 611, Misc. JEROME *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Reported below: 306 N. Y. 777, 118 N. E. 2d 599.

No. 612, Misc. JACKSON *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *T. Emmett McKenzie* for petitioner. Reported below: —— U. S. App. D. C. ——, —— F. 2d ——.

No. 613, Misc. WRIGHT *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 614, Misc. JOHNSON *v.* ELLIS, GENERAL MANAGER OF THE TEXAS STATE PENITENTIARY. Court of Criminal Appeals of Texas. Certiorari denied.

No. 615, Misc. FERRE *v.* RANDOLPH, WARDEN. Supreme Court of Illinois. Certiorari denied.

No. 616, Misc. WILLIAMS *v.* ILLINOIS. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 618, Misc. FIESTER *v.* RAGEN, WARDEN. Circuit Court of Iroquois County, Illinois. Certiorari denied.

*Rehearing Granted.* (*See No. 510, ante, p. 1006.*)

*Rehearing Denied.*

No. 112, October Term, 1952. SOBELL *v.* UNITED STATES, 344 U. S. 838. Motion for leave to file a second petition for rehearing denied. THE CHIEF JUSTICE took no part in the consideration or decision of this application.

No. 381. STATE CORPORATION COMMISSION OF KANSAS *v.* FEDERAL POWER COMMISSION ET AL., 346 U. S. 92[illegible];

No. 382. NORTHERN NATURAL GAS CO. *v.* FEDERAL POWER COMMISSION ET AL., 346 U. S. 922;

No. 648. BRAND ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE, *ante*, p. 968;

No. 264, Misc. JOHNSON *v.* ILLINOIS, *ante*, p. 955;

No. 442, Misc. LIPSCOMB *v.* UNITED STATES, *ante*, p. 962;

No. 502, Misc. PUFF *v.* UNITED STATES, *ante*, p. 963; and

No. 535, Misc. MORAN *v.* DONALDSON ET AL., *ante*, p. 969. Petitions for rehearing denied.

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# STATEMENT SHOWING THE NUMBER OF CASES FILED, DISPOSED OF, AND REMAINING ON DOCKETS, AT CONCLUSION OF OCTOBER TERMS—1951, 1952, AND 1953

| | ORIGINAL | | | APPELLATE | | | MISCELLANEOUS | | | TOTALS | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Terms | 1951 | 1952 | 1953 | 1951 | 1952 | 1953 | 1951 | 1952 | 1953 | 1951 | 1952 | 1953 |
| Number of cases on dockets | 9 | 11 | 11 | 827 | 863 | 815 | 532 | 563 | 637 | 1,368 | 1,437 | 1,463 |
| Number disposed of during terms | 0 | 0 | 0 | 714 | 742 | 694 | 508 | 544 | 609 | 1,222 | 1,286 | 1,303 |
| Number remaining on dockets | 9 | 11 | 11 | 113 | 121 | 121 | 24 | 19 | 28 | 146 | 151 | 160 |

| | TERMS | | |
|---|---|---|---|
| | 1951 | 1952 | 1953 |
| Distribution of cases disposed of during terms: | | | |
| Original cases | 0 | 0 | 0 |
| Appellate cases on merits | 196 | 201 | 172 |
| Petitions for certiorari | 518 | 541 | 522 |
| Miscellaneous docket applications | 508 | 544 | 609 |

| | TERMS | | |
|---|---|---|---|
| | 1951 | 1952 | 1953 |
| Distribution of cases remaining on dockets: | | | |
| Original cases | 9 | 11 | 11 |
| Appellate cases on merits | 57 | 55 | 52 |
| Petitions for certiorari | 56 | 66 | 69 |
| Miscellaneous docket applications | 24 | 19 | 28 |

JUNE 8, 1954.

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